

LÍGIA ESPOLAOR VERONESE

**DESAFIOS E SOLUÇÕES PARA A HARMONIZAÇÃO DO DIREITO
CONTRATUAL NOS PAÍSES DOS BRICS**

INVALIDIDADE DOS CONTRATOS E *HARDSHIP*

**CHALLENGES AND SOLUTIONS FOR THE HARMONISATION
OF CONTRACT LAW WITHIN THE BRICS COUNTRIES**

INVALIDITY OF CONTRACTS AND *HARDSHIP*

Tese de Doutorado

Orientador: Professor Titular Umberto Celli Junior

**UNIVERSIDADE DE SÃO PAULO
FACULDADE DE DIREITO
SÃO PAULO -SP
2021**

LÍGIA ESPOLAOR VERONESE

**DESAFIOS E SOLUÇÕES PARA A HARMONIZAÇÃO DO DIREITO
CONTRATUAL NOS PAÍSES DOS BRICS**

INVALIDIDADE DOS CONTRATOS E *HARDSHIP*

**CHALLENGES AND SOLUTIONS FOR THE HARMONISATION
OF CONTRACT LAW WITHIN THE BRICS COUNTRIES**

INVALIDITY OF CONTRACTS AND *HARDSHIP*

Tese apresentada a Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção de título de Doutora em Direito, na área de concentração Direito Internacional, sob a orientação do Professor Titular Dr. Umberto Celli Junior.

**UNIVERSIDADE DE SÃO PAULO
FACULDADE DE DIREITO
SÃO PAULO -SP
2021**

Catálogo da Publicação
Serviço de Biblioteca e Documentação
Faculdade de Direito da Universidade de São Paulo

ESPOLAOR VERONESE, LÍGIA

Challenges and solutions for the harmonisation of contract law within the BRICS countries. Invalidity of contracts and hardship ; LÍGIA ESPOLAOR VERONESE ; orientador UMBERTO CELLI JUNIOR -- São Paulo, 2021.

310

Tese (Doutorado - Programa de Pós-Graduação em Direito Internacional) - Faculdade de Direito, Universidade de São Paulo, 2021.

1. BRICS . 2. CONTRACT LAW. 3. COMPARATIVE LAW.
4. INVALIDITY OF CONTRACTS. 5. HARDSHIP. I. CELLI JUNIOR, UMBERTO , orient. II. Título.

To my mother, Lia A. Espolaor, for the unconditional support, love, sacrifices and inspiration that gave me fuel to surpass all difficulties and achieve my goals.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	3
ABSTRACT.....	6
INTRODUCTION	8
PART I: BRICS NATIONAL REPORTS: CONTRACT LAW AND ISSUES TO BE HARMONISED	13
CHAPTER 1: GENERAL OVERVIEW OF BRICS COUNTRIES' CONTRACT LAW.....	15
1. Brazil.....	15
1.1. Background and important legal instruments	15
1.2. General principles of contract law	17
2. Russia	25
2.1. Background and important legal instruments	25
2.2. General principles of contract law	30
3. India	36
3.1. Background and important legal instruments	36
3.2. General principles of contract law	39
4. China.....	44
4.1. Background and important legal instruments	44
4.2. General principles of contract law	51
5. South Africa.....	56
5.1. Background and important legal instruments	57
5.2. General principles of contract law	59
CHAPTER 2: VALIDITY AND INVALIDITY OF CONTRACTS.....	63
1. Brazil.....	63
2. Russia.....	77
3. India	91
4. China.....	105
5. South Africa	118
CHAPTER 3: HARDSHIP	128
1. Brazil.....	128
2. Russia.....	135
3. India	140
4. China.....	144
5. South Africa	151

PART II: COMPARISON AND HARMONISATION OF CONTRACT LAW	155
CHAPTER 1: IDENTIFYING SIMILARITIES AND DIVERGENCES	160
1. Similarities and divergences among BRICS countries.....	161
1.1. General principles of contract law	161
1.2. Invalidity of contracts.....	165
1.3. Hardship	173
2. Necessary cut-off.....	178
CHAPTER 2: HARMONISATION INITIATIVES – COMMON LAW AND CIVIL LAW DIVERGENCES.....	187
1. Mechanism of avoidance	193
2. Consequences of avoidance – unwinding contracts and restitution	197
2.1. Invalidity in general.....	198
2.2. Illegality	209
3. Hardship.....	219
CHAPTER 3: HARMONISATION AND CONTRIBUTION OF CONTRACT LAW AMONG BRICS COUNTRIES.....	230
1. Mechanism of avoidance – judicial vs. self-help remedy	233
2. Consequences of avoidance – unwinding contracts and restitution	242
2.1. Inability to restore	244
2.2. Shared guilt and/or parties <i>in pari delicto</i>	252
3. Hardship.....	263
CLOSING REMARKS.....	278
REFERENCES.....	282

ACKNOWLEDGEMENTS

Drafting a PhD thesis is always a difficult task. Long hours of daily dedication and little time for leisure, family and friends. Drafting a PhD thesis during one of the most drastic episodes of human history – the COVID-19 pandemic – makes this task even more challenging, particularly for Brazilian researchers, who have had to manage the pressure of the academic workload with the mourning of thousands of daily deaths, in addition to travel bans from all over the world, the complete closure of libraries and various other important restrictions.

Considering such an adverse scenario, the conclusion of this thesis would never become a reality if were not for the invaluable support I received from many people and institutions in the academic, personal and professional spheres, to whom I would like to thank.

In the academic sphere, my sincerest acknowledgement and gratitude to Professor Umberto Celli Junior for all the supervision, advice, dedication and for always trusting my potential to deliver this work, especially during some of the most difficult moments, when I even questioned myself about whether I could deliver this project. My thanks also to Professors Cristiano de Sousa Zanetti and Alberto do Amaral Junior for the invaluable support, recommendations, decisive advice and criticism to my PhD project during the qualification stage.

Given the nature of my research, a comparative work of five different legal systems, its completion would not be possible if I did not have the opportunity to visit the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany, where I spent time as a scholarship recipient in 2021. The Institute's Library provided me with the necessary tools to develop my research, something I am grateful for as it gave me the opportunity to be in the best possible place to embark on this challenge. Therefore, I would like to thank the Institute for giving me the chance to be there, even with the radical travel bans imposed on Brazilians entering Germany.

At the Max Planck Institute, I would like to personally thank Professors Reinhard Zimmermann and Knut Benjamin Pißler for the enriching meetings, discussions and support with respect to my research, which were decisive for its development. Additionally, my deepest gratitude to Mrs. Elke Halsen-Haffel and Mrs. Barbara Schröder, for the warm welcoming and patience during my stay in such difficult times. Not specifically

at the Institute, but intrinsically related to my stay there, my sincerest thanks to Mrs. Anna-Maria Karl, Mrs. Meike Frank and Mrs. Sonja Lorenzen from the Gästehaus der Universität Hamburg, for providing me with a real home in Hamburg, and for doing everything within their control to make my stay at the Institute possible despite all the restrictions imposed to those coming from Brazil.

In the personal sphere, I could not achieve this goal without the help, trust, love and friendship I received from several people to whom I want to thank. My mother, Lia Aparecida Espolaor, for being my biggest inspiration in life, for her unbelievable strength in hard times and for always believing in me and showing me the best way to handle things, from the most basic to the most challenging situations. My boyfriend, Victor Hugo Callejón Avallone, for being my true hero during these tough times, giving me everyday support, strength and love, even during the period where we were at a long distance and also whilst facing some of the most difficult moments of his life. My sister, Lívia Espolaor Veronese, for being my precious company during my most lonely mornings and days in Europe, for making everything possible to be personally with me when I needed the most, and for always stimulating me to achieve my goals. My sister, Lara Espolaor Veronese, for the support, love and for taking care of our mother and house when I was away. My father, Amauri Veronese, for all the love and support even with the distance. My grandmother Ariadne Simões Espolaor, who, at the age of 87 years old, could have time and patience to send me a warming message every single day when I was outside Brazil. My parents-in-law Hugo Walter Bormioli Avallone and Claudia de Lourdes Abduch Callejón Avallone, thank you for being my second family and sending me strength and confidence to carry out this enterprise.

I am also grateful to several friends that followed me during this long and tough journey. My dearest friends Jessica de Assis Silva, Vanessa Costa and Amanda Federico Lopes Fernandes, who accompanied me during my achievements, joys and also sorrows, and who gave me the attention and motivation to keep moving towards my goals. Special thanks to my true friends I made during the post-graduation period at the University of São Paulo, Vivian Rocha, Ana Carolina Beneti, Viviane Limongi and many others from the *La Résistance* group, for making me laugh during the whole doctorate period and making this challenge much lighter. Finally, all my lifelong friends from the ISAC family, who since 2009 have filled my world with true friendship and care, I love you all.

Last, but not least, in the professional sphere, I could not end these acknowledgements without thanking the MAMG Advogados law firm and all its collaborators, who worked hard during my absence in order to allow me the opportunity to dedicate the necessary time required in order to fully embark on the thesis. Individually, I express my deepest gratitude to Mariana Cattel Alves and Bruno Panarella, who are much more than office colleagues, but real friends and replaced me in all my roles in the law firm during my absence, and who I am sure I can always count on for anything. Also, thanks to those who are not only my partners, but also inspirations and mentors with regards to my career, Rafael Francisco Alves, Fernando Marcondes and Silvia Bueno de Miranda. Special thanks also to my other dear partners Alberto Sogayar, Paulo Macedo Garcia and Mariana Capela Lombardi Moreto.

Still at the MAMG Advogados, I would like to thank Stefânia Françoso Giosa, who is my right-hand woman, my true friend, and someone I can always trust when I am away from the office. Also special thanks to Deise da Silva Oliveira and Maria Juliana Candal Poli who brilliantly assumed important additional responsibilities in order to allow my full dedication to the thesis. Finally, I am truly grateful to all the other members of the MAMG's team who I cannot name individually, but with special mention to Fernanda Otollia, Juliana Ruiz Costa, Caiã Lopes Caramori, Carolina Allodi Matos de Andrade, Thabata Silva Rodrigues and Patrícia Albuquerque Pimentel.

To the above and all the other people who could not be named here but participated with me in this enterprise, thank you very much.

ABSTRACT

VERONESE, Lígia Espolaor, *Challenges and solutions for the harmonisation of contract law within the BRICS countries. Invalidity of contracts and hardship*, 2021, 310 pages, Doctorate, Faculty of Law, University of São Paulo, São Paulo, September 24th, 2021.

The present thesis is concerned with a comparative study of contract law applicable in the BRICS countries – Brazil, Russia, India, China and South Africa – with a strong focus on the issues of invalidity of contracts and hardship. The purpose is to identify commonalities and divergences in these systems with different legal backgrounds, particularly the influence of civil law tradition in Brazil, Russia and China as opposed to common law in India, and the mixed system in South Africa. Among the identified divergences and challenges, the thesis purports to demonstrate that the obstacles are not insuperable and that there are rooms for the harmonisation and compatibility within the BRICS context with respect to the two selected topics of contract law. Even when full harmony is not reached, the research also purports to demonstrate that some countries may benefit from others' divergent experiences. Detecting mutual contribution is of particular relevance to this group of countries, since they share the characteristic of being evolving systems which have undergone recent reforms in their legislation on contract law and may be more open to assess and incorporate more efficient contract practices.

Key words: BRICS – contract law – comparative law – harmonisation – contribution – validity of contracts – invalidity of contracts – hardship – common law vs. civil law.

RESUMO

VERONESE, Lígia Espolaor, *Desafios e soluções para a harmonização do direito contratual nos países dos BRICS invalidez dos contratos e hardship*, 2021, 310 páginas, Doutorado, Faculdade de Direito, Universidade de São Paulo, São Paulo, 24 de setembro de 2021.

A presente tese compreende um estudo comparado de direito contratual aplicável nos países que compõem os BRICS – Brasil, Rússia, Índia, China e África do Sul – com foco nos temas de invalidez dos contratos e *hardship* (onerosidade excessiva/mudança substancial das circunstâncias). Seu objetivo é a identificação de semelhanças e divergências nestes sistemas com diferentes formações jurídicas, particularmente a partir da influência da tradição de *civil law* no Brasil, Rússia e China, em oposição à *common law* na Índia, e ao sistema misto na África do Sul. Dentre as divergências e desafios identificados, a tese se propõe a demonstrar que os obstáculos não são insuperáveis e que há espaço para harmonização e compatibilidades no contexto dos BRICS a respeito dos dois tópicos de direito contratual selecionados. Mesmo que uma harmonia plena não seja alcançada, a pesquisa também se propõe a demonstrar que alguns países podem se beneficiar das experiências de outros. A descoberta de contribuições mútuas é de particular relevância para esse grupo de países, na medida em que possuem a característica comum de serem sistemas em evolução, tendo passado por recentes reformas legislativas em direito contratual, e podem estar abertos a avaliar e incorporar práticas contratuais mais eficientes.

Palavras-chave: BRICS – direito contratual – direito comparado – harmonização – contribuição – validade dos contratos – invalidez dos contratos – *hardship* – *common law* vs. *civil law*.

INTRODUCTION

Even before the creation of a “group” for the economic and geopolitical cooperation among Brazil, Russia, India, China and South Africa, the acronym ‘BRICs’ already existed in the literature. In 2001, the economist Jim O’NEILL formulated the expression BRICs¹ in order to qualify four countries that, according to his view, were at the same economic stage and had high potential for development (emergent countries)².

Notwithstanding the fast dissemination of the “BRICs” acronym since 2001, the group was formally instituted only in 2006, when the first international affairs ministerial meeting was held during the 61st United Nations General Assembly, with the participation of the ministers of the four countries. Since then, twelve summit meetings have followed and, in the third summit meeting, held on April 14th, 2011, South Africa was integrated into the group, definitively modifying the acronym to BRICS³.

Given the economic relevance of the five countries in the world scenario⁴, several initiatives were developed within the BRICS, mainly between 2010 and 2014, with the objective of strengthening the economic position of its members⁵. More recently, the pandemic of COVID-19 reinserted some BRICS members into the spotlight of the world’s attention and demonstrated how worldwide, the nations are extremely dependent on both Chinese and Indian economies and exports (of manufactured products and now vaccines)⁶.

Despite such strategic relevance and the individual economic increase of some member countries of BRICS, notably China and India, it was not possible to reach a deeper economic and commercial integration among the countries, and the group has generally

¹ In the acronym created by Jim O’NEILL, the letter “s” meant the plural of “BRIC”, since the author did not consider in his studies South Africa as part of this group of emergent countries.

² *Building Better Global Economic BRICs*, in Global Economics Paper No: 66, Goldman Sachs, 2011, available at: <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf> (accessed on 15 August 2021).

³ For more information about the BRICS activities and meetings, see gateway: <http://infobrics.org/>.

⁴ The member countries of BRICS represent, together, approximately 23% of the world GDP and comprise 42% of the world population, according to the information of the Brazilian Ministry of International Affairs (<http://brics2019.itamaraty.gov.br/sobre-o-brics/o-que-e-o-brics>: last access on 15 August 2021).

⁵ For instance, with the creation of the New Development Bank, the Export Credit Agencies, the BRICS Interbank Cooperation Mechanism, in addition to Cooperation Agreements in the fields of agriculture, innovation, culture, among other initiatives.

⁶ Noteworthy is the role of Russia in vaccine development and exports too. The importance of these BRICS economies (especially China and India) came recently to light also with the episode of the blockage of the Suez Canal during seven days (from 23 until 29 March 2021), which represented losses of around US\$ 9 billion a day in global trade (news at: <https://nypost.com/2021/03/29/giant-ship-blocking-suez-canal-freed-but-economic-impact-looms>/<https://nypost.com/2021/03/29/giant-ship-blocking-suez-canal-freed-but-economic-impact-looms/>).

more visibility and influence within multilateral financial institutions as well as at the G-20⁷. There are several causes for this difficulty in integration: different political systems, different economic and commercial policies⁸, geographical distance, as well as different cultural and religious contexts, being the stage of economic development (emerging markets) and the previous background of drastic economic and political changes (previous colonisation for Brazil, India and South Africa and change of economic regime in Russia and China) all the converging points among the countries that compose BRICS.

However, another aspect frequently overlooked refers to the differences and similarities among the countries' legal systems with respect to private law, particularly contract law⁹, which may have impacts on the economic integration of the BRICS.

For instance, while Brazil, Russia and China are countries that belong to the civil law tradition, India follows the common law tradition, and South Africa pursues a mixed system, which conjugates the binding nature of case law precedents from common law with some codified legislation and concepts from the Roman-Dutch civil law¹⁰.

When analysing international instruments of uniformisation of contract law, it is also possible to identify discrepancies. While Brazil, China and Russia ratified the United Nations Convention on Contracts for the International Sales of Goods ('CISG')¹¹, and had members in the Working Group for the drafting of the UNIDROIT Principles of International Commercial Contracts ('PICC')¹², India and South Africa did not ratify the CISG and,

⁷ DUGGAN, Niall, *BRICS and the Evolution of a New Agenda within Global Governance*, in REWIZORSKI, Marek (ed.), *The European Union and the BRICS. Complex Relations in the Era of Global Governance*, Springer, 2015, pp. 11-25.

⁸ For a comparative study of the economic and commercial policies of the BRICS countries, see THORSTENSEN, Vera Helena - OLIVEIRA, Ivan Thiago Machado (Eds.), *BRICS in the world trade organization: Comparative trade policies Brazil, Russia, India, China and South Africa*, Institute for Applied Economic Research (IPEA), Brasilia, 2014, available at https://saiia.org.za/wp-content/uploads/2014/07/BRICS-in-the-WTO-Comparative-Trade-20140621_web-version.pdf, accessed on 15 August 2021.

⁹ For instance, in all volumes of the BRICS Law Journal since 2014 (available at: <https://www.bricslawjournal.com/jour>) there is only one single and recent paper on contract law in India, comparing it to other European laws (and not to other BRICS countries' laws).

¹⁰ FORSYTH, Christopher, *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*, 5th ed., Juta, 2012, pp. 327-336; ZIMMERMANN, Reinhard – VISSER, Daniel, *South African Law as a Mixed System*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996, pp. 2-6.

¹¹ Pursuant to the information available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status, accessed on 15 August 2021.

¹² Pursuant to the information available at: <http://www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/779-working-group-for-the-preparation-of-the-unidroit-principles-of-international-commercial-contracts-2010> (accessed on 15 August 2021).

despite being members of the UNIDROIT and represented in its Governing Council¹³, did not participate in the conception of the PICC, which, together with the CISG, is considered a relevant instrument for the harmonisation and unification of contract law.

The existence of different legal traditions of contract law in a group of only five countries hampers, at first, the uniform integration among its members and conclusion of new transactions, in addition to, at second, the performance of these transactions, as well as the possible dispute resolution related thereto. Furthermore, the equivalence of contract law among certain countries tends to approximate them and encourage the conclusion of transactions, to the detriment of the other countries within the group.

Challenges like these are the reason why contract law, in general, is the core subject of comparative works over the years¹⁴, and the BRICS' context should not be an exception to that, as has been the case to date. Therefore, the comparative analysis of rules of contract law in force in the BRICS countries becomes relevant in order to identify room for convergences and to propose harmonising solutions for the existing divergences.

For such an enterprise, it was adopted a microcomparison methodology, that is, a comparison on specific legal institutions and rules used to solve actual problems and/or particular conflicts or interests¹⁵, as opposed to a wide and general comparison of the countries' legal frameworks (macrocomparison). As will be detailed throughout this study, the specific institutions and rules selected for comparison refer to the invalidity of contracts and hardship (modification or termination of contracts due to supervening unpredictable and substantial change of circumstances).

The choice was inspired by the importance of those issues for the creation and effectiveness of contractual relationships, as well as for their subsequent performance (or non-performance). Moreover, both issues still reveal obscurity and vagueness in some countries – being also challenging topics in previous comparative and harmonisation initiatives, as will be seen –, and the comparison may serve as a tool for contribution and for the better understanding of the applicable rules.

¹³ The approval by all members of the UNIDROIT and Governing Council is only necessary for binding conventions, which does not apply to the case of the PICC, a soft law instrument (see VOGENAUER, Stefan, *The UNIDROIT Principles of International Commercial Contracts at Twenty: Experiences to Date, the 2010 Edition, and Future Prospects*, in *Uniform Law Review*, vol. 19, No. 4, 2014, p. 483).

¹⁴ FARNSWORTH, E. Allan, *Comparative Contract Law*, in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017, pp. 4-5.

¹⁵ About the methodologies of microcomparison vs. macrocomparison, see ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction to Comparative Law*, 3rd ed., transl. WEIR, Tony, Oxford, Oxford University Press, 1998, p. 5.

The comparative analysis aims, therefore, to demonstrate the existence of solutions capable of diminishing the obstacles and indirect costs related to the identified legislative conflicts on the issues of invalidity of contracts and hardship, in order to bring transparency and legal certainty to the decision makers (not only businessmen and public managers, but also lawyers, judges, arbitrators and researchers in general), as a way to encourage and boost contractual transactions among the BRICS members.

As just mentioned, the research adopts the classic methodology of microcomparison and is divided in two parts. Part I comprises what comparativists call “national reports”, which is a preliminary step proven to be a useful way for constructing works on comparative law¹⁶. In the BRICS contexts, such a step is welcome, since it provides the reader with the knowledge of distant legal experiences (with different ways of thinking, literature style and case law) comprehended into one single research work, avoiding the need to resort to different sets of bibliography to “find” the applicable rules – as was done for the preparation of his thesis.

In this sense, Part I brings a description of the five BRICS systems’ legal background (focused on contract law) and general principles of contract law (Chapter 1), followed by the specific treatment conferred to the topics to be compared, namely, invalidity of contracts (Chapter 2) and hardship (Chapter 3). Each chapter is subdivided by country in the order of the BRICS acronym.

Part I purports to give a comprehensive portrayal of each country’s legal solutions to the problems related to the invalidity of contracts and hardship and facilitate analysis. However, the national reports alone are not sufficient for the comparison, which must also comprise specific comparative reflections on the problems to which the work is devoted. And this stage is the most difficult part in comparative law, since it involves the adoption of an external point of view in order to address the divergences encountered¹⁷. This stage of comparative work is comprised by Part II.

Considering the wide range of information furnished in Part I, Part II begins with its systematic organisation in the “boxes” of commonalities and divergences, so that the comparison may move forward with only the selected divergences that entails concerns in international contract practice (Chapter 1). Based on such selection (thematic “cut-off”), the

¹⁶ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 43.

¹⁷ *Idem, ibidem*, pp. 6 and 43.

following chapters address the essential comparative reflection. Firstly, a resort to previous comparative and harmonising initiatives is undertaken in order to bring insights to such reflection (Chapter 2). Secondly, and finally, the study turns its focus to the BRICS' experience in order to provide possible solutions for harmonisation, compatibility, as well as contributions deriving from the divergences among the systems (Chapter 3).

Therefore, Part II covers the objective of the comparative work, whose essence is the alignment of similarities and differences among the selected issues and also uses these measurements to better understand the content of such issues¹⁸. Particularly, the study's quest is to compare and demonstrate that the possible divergent "black-letter rules" established by the BRICS legal systems are not insuperable, but instead can be harmonised or at least function as a source of mutual contributions with especial focus on the international commercial relationships inside BRICS.

As will be observed, the five legal systems are relatively recent and still being developed, especially on contract law field (recent codifications, legislative reforms and evolving case law). On the one hand, this characteristic may bring possible permeability to recent legal developments and foreign contributions. On the other hand, such a "living nature" entails shortage of robust literature and case law on some topics, which acts as a limitation to the present study. Another limitation to be pointed out is the author's linguistic limitations with respect to Chinese and Russian languages, which forces the resort to English written material and, therefore, narrows the coverage of the research.

Another pertinent disclaimer is to inform that this is a study of international comparative law and not of pure private law. Therefore, even though it comprises research on contract law topics, the deepening on those topics will be carried out to the extent necessary to enable comparison and extract the solutions for harmonisation and contributions.

Finally, the research will focus on legislation, case law and literature of the involved systems, without regard to geopolitical aspects. In spite of its importance for the multilateral scenario, for the comparative research on contract law, these aspects have little to aggregate (and more to disaggregate) to the project.

¹⁸ EBERLE, Edward J., *Comparative Law*, in *Annual Survey of International & Comparative Law*, vol. 13, Issue 1, Article 5, 2007, p. 93.

PART I: BRICS NATIONAL REPORTS: CONTRACT LAW AND ISSUES TO BE HARMONISED

In a study focused on the harmonisation of contract law among different countries, prior to the analysis of the specific issues to be addressed herein (invalidity of contracts and hardship), it is important to understand the main features and particularities of the different legal systems on contract law in general within each BRICS country.

The comparative work is exotic and was already compared to the work of an archaeologist, by which a comparativist “*mine the mass of data from a foreign source in search of uncovering patterns of thought*”¹⁹. Translated into an international legal experience, to compare is to study different legal cultures in order to assess what rules apply, how they function, how effective they are and how they influence and form culture and legal tradition. The first step of this exotic work is carried out in Part I.

As indicated in the introduction, the BRICS members follow different legal traditions and are inspired by different general principles. Such differences may, on the one hand, group some of the systems together through similarities and facilitate their harmonisation, whilst, on the other hand, isolate others.

Therefore, Chapter 1 is relevant to understand the essence of each legal system with respect to contract law, by providing brief historical backgrounds of the most important legal instruments, their integration into international law and the general principles of contract law.

After this brief and introductory analysis, a first thematic ‘cut-off’ is necessary for the development of the present study. The five legal systems provide for multiple controversial issues of contract law, whose analysis would require several specific studies to cover all of them. As previously mentioned, the objective of this work is to tackle two of these controversial issues in order to achieve legal harmonisation.

The first issue is addressed in Chapter 2 and refers to the grounds for validity and invalidity of contracts, as well as the consequences deriving from such invalidity. Since validity is a requirement for a contract to regularly enter the legal world and produce effects,

¹⁹ EBERLE, Edward J., *Comparative Law*, cit., p. 95.

the issue is hereby considered of central importance to contract law²⁰, and especially for the harmonisation of contract law in order to avoid situations in which a contract is valid in Brazil, but void in China for example. Or, even if the contract is void in both countries, it is important to assess which consequences will derive from such invalidity and if they can be harmonised.

Additionally, given its relationship with internal public order and other national values, the issue of invalidity is usually not provided for in international treaties or conventions related to contract law. For instance, the CISG does not address rules on validity of contracts pursuant to its Article 4²¹.

The second issue to be analysed, addressed in Chapter 3, is the modification or termination of the contract due to hardship. Not all the BRICS legal systems recognise the application of hardship, and, even among those that do recognise the doctrine, different criteria and effects are stipulated, which creates the need for a comprehensive analysis and the quest for harmonisation and contribution.

As will be detailed, freedom of contract and binding force of contracts are commonly recognised principles by the five legal systems, whereas hardship applies exceptionally as a limitation to those principles. The application of hardship will thus differ from country to country in accordance with the prevalence attributed to those principles.

Based on the analysis of these two specific issues and in light of the general principles addressed in Chapter 1, it will be possible to achieve the harmonisation objective of this thesis, explored in Part II.

²⁰ As pointed out by Maris KÖPCKE in a study dedicated to the historical background of validity and invalidity: *“Legal validity and invalidity are central categories of legal thought. Many important matters in legal practice, and therefore in the lives of many persons, turn on whether something is legally valid”* (KÖPCKE, Maris, *A Short History of Legal Validity and Invalidity. Foundations of Private and Public Law*, Cambridge, Intersentia, 2019, p. 1).

²¹ CISG Article 4: *“This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage”*

CHAPTER 1: GENERAL OVERVIEW OF BRICS COUNTRIES' CONTRACT LAW

1. Brazil

1.1. Background and important legal instruments

The Brazilian legal system follows the civil law tradition, also called “Roman-Germanic system” or “continental law”. As such, the Brazilian general rules and principles of contract law are influenced by other traditional civil law regulations, particularly the German, Italian and French legal systems.

The material rules currently applicable to contracts are the ones codified in positive laws, while scholarly work and case law play a secondary role as a source of contract law.

For the interest of the present study, the provisions of (i) the Brazilian Civil Code (Law No 10,406 of January 10th, 2002)²² and (ii) the Introductory Law to the Norms of Brazilian Law (Decree Law No 4,657 of September 4th, 1942, hereinafter referred to as ‘Introductory Law’), play an important role in the understanding of Brazilian contract law.

As for a brief background on the civil codification, after many attempts for the codification of Brazilian civil law, the first Brazilian Civil Code was enacted as Law No 3,071, on January 1st, 1916. Its provisions were highly influenced by the liberalism of the French Civil Code (Napoleonic Code) and, with regards to contract law, the Code already provided for the freedom of parties to contract.

The Code of 1916 suffered several amendments over the years and, following an international trend of reformulation of civil law, the new, and current Brazilian Civil Code was enacted in 2002 and entirely replaced the Code of 1916. In addition to the adoption of new values of the Brazilian Republic Federation – which derived from the Federal Constitution of 1988 with substantial changes in family and consumer law – the Civil Code of 2002 was strongly influenced by other civil law codes, such as the German *Bürgerliches Gesetzbuch* (“BGB”) and the Italian *Codice Civile*.

²² The provisions of the Brazilian Civil Code in English language are freely translated and the references will be followed by the expression “free translation”.

Despite its considerable recent enactment, the Brazilian Civil Code is criticised for having some contradictory provisions and, with respect to contract law, for not providing rules on electronic contracting and other crystallised contractual usages, such as provisions on warranties and indemnifications. The reason for such absence is probably due to the long period in which the project of the Brazilian Civil Code was discussed. It was presented in 1975 and only enacted in 2002²³.

The drafters of the Brazilian Civil Code justified their decision not to address the above issues by arguing that the existing regulations governing contracts were sufficient for those purposes. As a result, Brazilian case law and literature were forced to adapt to the peculiarities of these new issues, in order to fill the gaps left by the Code.

Another important codified norm related to contracts is the Decree Law No 8,327 of October 16th, 2014, which promulgated the CISG, whose application is restricted to international sales contracts. However, the Convention does not address either of the two issues to be discussed in this study. The CISG does not contain any specific provision on hardship (a debatable issue) and, as regards the validity of contracts, the Convention expressly provides for its non-application, pursuant to its Article 4(a) transcribed above. Therefore, references to the CISG will be made sporadically and will not serve as the basis for this analysis.

The Code for the Consumer's Defence (Law No 8,078 of September 11th, 1990 or just 'Brazilian Consumer Code') also plays a relevant role in the regulation of contracts. However, the Consumer Code, similar to the CISG, does have a restricted application and, in this case, to consumer relationships which are marked by the imbalance between the parties and, as a consequence, its rules envisage the protection of the weaker parties (consumers).

Finally, Brazil has neither ratified the United Nations Convention on the Use of Electronic Communications in International Contracts, nor the UNCITRAL Model Law on Electronic Commerce, and its legal system only provides for specific (domestic) law on electronic contracting on the field of consumer law.²⁴

²³ For the legislative procedure, see: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=15675>, accessed on 15 August 2021.

²⁴ Decree No 7,962 of March 15th, 2013.

1.2. General principles of contract law

Regarding the principles of contract law, Articles 421 and 422 of the Brazilian Civil Code provides, respectively, for the freedom of contract and the good faith²⁵.

The freedom of contract comprises the concept of ‘party autonomy’ in relation to the contract and refers to the powers granted to individuals of self-management of their interests, free discussion of contractual conditions, choice of the contractual relationship convenient to their willingness²⁶ and choice of the individual with whom the party will contract.²⁷

However, such a principle, as in other legal systems, cannot be unlimitedly applied. The exercise of the parties’ autonomy is limited, firstly, by public order and usage. Although not codified in Article 421, those limitations apply automatically to all legal acts under Brazilian civil law, and, in general terms, refer to the essential interests and practices of the State and society, which may not be surpassed by the free will of private individuals²⁸.

Article 421 introduces the controversial principle of ‘social function of the contract’, which is considered as a limitation to the parties’ autonomy. The principle, despite being expressly codified in Law (inserted in the Brazilian legal system in 2002), is a limitation whose applicability has raised practical concern and discussions in literature, especially within the scope of private and business relationships.

Literature distinguishes the social function of the contract in its internal and external aspects of effectiveness. The internal effectiveness refers to the performance of what the parties have agreed, the preservation of the contract itself and its balance in order

²⁵ Article 421: “*The freedom to contract shall be exercised by virtue, and within the limits, of the social function of contracts*” (without the amendment of Provisory Act n° 881); Article 422: “*The contracting parties are bound to observe the principles of probity and good faith, both in entering into the contract and its performance*”.

²⁶ Article 425 of the Brazilian Civil Code allows contracting parties to agree on atypical contracts (“*It is licit for parties to enter into atypical contracts, subject to the general rules established in this Code*”)

²⁷ PEREIRA, Caio Mário da Silva, *Instituições de Direito Civil, Contratos. Declaração unilateral de vontade. Responsabilidade Civil*, vol. III, 11^a ed., at. FICHTNER, Regis, Rio de Janeiro, Forense, 2004, pp. 22-24; GOMES, Orlando, *Contratos*, 26th ed., at. AZEVEDO, Antônio Junqueira de – MARINO, Francisco P. de Crescenzo, Rio de Janeiro, Forense, 2008, p. 26; ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários ao Código Civil. Direito Privado Contemporâneo*, São Paulo, Saraiva, 2019, pp. 697-698.

²⁸ GOMES, Orlando, *Contratos*, cit., p. 28; ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 698.

to allow the parties to reach their objectives²⁹. The aspect was recognised by the approval of Statement 22 of the I Journey of Civil Law³⁰. On the other hand, the external effectiveness refers to the relationship of the contracting parties, as well as third parties affected by the transaction directly or indirectly (the function towards the community)³¹, which was also accepted by means of Statement's 21 approval in the same Journey of Civil Law³².

From these two aspects, two different scholar approaches arise when interpreting the scope and extension of the social function of the contract: those which defend a broader and ampliative scope against those who defend a stricter interpretation.

From a broad point of view, the 'social function of the contract' is a declared rule of public order³³, which can be summarised by the promotion of the common economic welfare and social justice and, in the event of a conflict, the social function will prevail over a party's individual interest in a given agreement.³⁴ By this limitation, the parties, as well as the judges when interpreting and judging contracts, would have to consider the effects of that contract to the society and the social interests involved and, hence, the parties' willingness might be relativized when confronted with such values³⁵.

²⁹ ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 698; FONSECA, Rodrigo Garcia, *A função social do contrato e o alcance do artigo 421 do Código Civil*, Rio de Janeiro, Renovar, 2007, p. 56, where the author indicates the possible termination of the contract due to hardship as an example of the internal function of the contract.

³⁰ Statement 22: "*The social function of the contract, set forth in article 421 of the new Civil Code, constitutes a general clause that reinforces the principle of preservation of the contract, ensuring useful and fair exchanges.*" (free translation). The Statements issued during the Journeys of Civil Law in Brazil do not have binding or mandatory nature. However, since they reflect the majority understanding of literature, these Statements are generally considered for the interpretation and scope of Brazilian legal provisions and institutes.

³¹ ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 699; FONSECA, Rodrigo Garcia, *A função social*, cit., p. 39; GODOY, Claudio Luiz Bueno de, *Função social do contrato. Os novos princípios contratuais*. 2ª ed., São Paulo, Saraiva, 2007, p. 123

³² Statement 21: "*The social function of the contract, provided for in article 421 of the new Civil Code, constitutes a general clause imposing a revision of the principle of relativity of the effects of the contract in relation to third parties, implying the external protection of the credit.*" (free translation)

³³ Pursuant to Article 2,035, sole paragraph of the Brazilian Civil Code: "*The validity of transactions and other juristic acts made prior to the entry into force of this Code is governed by the provisions of the earlier legislation referred to in Article 2,045, but the effects they produce after this Code is in force shall be subject to the rules contained herein, unless the parties have provided for a certain form of performance. Sole paragraph: No agreement shall prevail if it is contrary to rules of public order, such as those established by this Code to ensure the social function of property and contracts.*"

³⁴ AMARAL NETO, Francisco de Santos, *A Autonomia Privada como Princípio Fundamental da Ordem Jurídica - Perspectivas Estrutural e Funcional*. in *Doutrinas Essenciais de Direito Civil*. vol 2, 2010, pp. 579-606; MARQUES, Cláudia Lima, *Contratos no Código de Defesa do Consumidor*, 4ª ed., São Paulo, Revista dos Tribunais, 2002, p. 175; PEREIRA, Caio Mário da Silva, *Instituições* cit., p. 13.

³⁵ LIMA, Clarissa Costa de, *Reflexões sobre a resolução do contrato na nova teoria contratual*, in, MARQUES, Cláudia Lima, *A Nova Crise do Contrato, Estudos sobre a Nova Teoria Contratual*, São Paulo, Revista dos Tribunais, 2007, p. 514; GOMES, Orlando, *A função Social do Contrato*, in *Novos temas de direito civil*, Rio de Janeiro, Forense, 1983, p. 109; FONSECA, Rodrigo Garcia, *A função social*, cit., p. 210.

According to this broad understanding, the inclusion of Article 421 would remove from the contract the strong individualism provided for in the former Civil Code of 1916, and privileges the common interest and the requirement for attendance of new values of the society, in order for a contract to be effective. Some authors defend the social function of the contract as an authorisation for the State to intervene in private relationships in order to guarantee the fair balance and distributive justice to concrete cases³⁶. The wording of the approved Statements 23 and 431 of the I and V Journey of Civil Law reflects this broad approach:

“Statement 23: The social function of the contract, provided for in Article 421 of the new Civil Code, does not eliminate the principle of contractual autonomy, but attenuates or reduces the reach of such principle when metaindividual interests or individual interests related to the dignity of the human being are present.

Statement 431: A breach of Art. 421 leads to the invalidity or ineffectiveness of the contract or contractual clauses.” (free translation)

Conversely, defenders of the stricter interpretation strongly criticise Article 421 provision and the attempt to give it a broader perspective, due to the limitation and legal uncertainty brought to private relationships (more State intervention), which are mostly oriented by the ‘economic function of the contract’ to the contracting parties. Differently from public contracts, there would be no requirement for private contracts to pursue the public interests or to be ‘socially’ useful and this could not be a parameter for measuring effectiveness or validity of contracts. Therefore, in accordance with this understanding, the social function of the contract should never prevail over the mandatory character of the contracts and neither could represent any ‘innovation’ of the Civil Code.³⁷

³⁶ GODOY, Claudio Luiz Bueno de, *Função social*, cit., pp. 122-124; FONSECA, Rodrigo Garcia, *A função social*, cit., pp. 209-210, which mentions some defending authors of the broad approach.

³⁷ ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 698-699; MARTINS, Ives Gandra as Silva, *A função social do contrato*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003, pp. 330-341; VILLELA, João Baptista, *Equilíbrio do Contrato: os números e a vontade*, RT, 2010 (85-122); BOULOS, Daniel Martins, *A autonomia privada, a função social do contrato e o novo Código Civil*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003, pp. 126-127; Rodrigo Garcia da FONSECA also mentions other authors with the same critics in *Função social*, p. 217.

Between the two approaches there is some middle ground where solutions can also be defended. The social function of the contract shall not be construed in too broad or too strict a manner. It cannot be too broad to the extent that it harms the mandatory and economic character of the contracts. On the other hand, its interpretation cannot remove any effects of the express legal provision³⁸.

The concept must be construed in a way to integrate the contracts into a harmonic social order, meaning that private contracts must be protected and preserved and, at the same time, preserve third parties' rights, whose broad or strict scope will depend on the nature of the contract³⁹. For instance, there are contracts with more social and external aspects than others (such as contracts related to environmental damage, mass contracts, contracts for health insurance), where the limitation of the social function of the contract might be stronger. This balance must be sought and is generally reached by case law⁴⁰.

As a result of the criticism and limited application to essentially private contracts, the wording of Article 421 was amended by Law No 13,874/2019, of September 2019⁴¹, which provides for the 'Declaration of the Rights on Economic Freedom'. After this amendment, Article 421 excluded the wording "by reason of", stating solely that the freedom of contract will be exercised within the "limits" of the social function of the contract. Additionally, the provision incorporated a sole paragraph and Article 421-A, with the following wording:

"Sole Paragraph. In private contractual relationships, the principle of the minimal intervention and the exceptionality of contract revision shall prevail."

"421-A. Civil and business contracts are presumed to be parity and symmetrical until the presence of concrete elements that justify

³⁸ FONSECA, Rodrigo Garcia, *A função social*, cit., p. 215.

³⁹ AZEVEDO, Antônio Junqueira de, *Princípios do atual direito contratual e a desregulamentação do mercado. Direito de exclusividade nas relações contratuais de fornecimento. Função social do contrato e responsabilidade aquiliana do terceiro que contribui para inadimplemento contratual*, in Estudos e Pareceres de Direito Privado, São Paulo, Saraiva, 2004, pp. 141-142; SALOMÃO FILHO, Calixto, *Função social do contrato: primeiras anotações*, in Revista de Direito Mercantil, Industrial, Econômico e Financeiro, vol. 132, a. XLII, 2003, p. 22.

⁴⁰ BOULOS, Daniel Martins, *A autonomia privada*, cit., p. 135; Claudio Luiz Bueno de GODOY presents a whole chapter with practical analysis of the application of the social function of the contract in GODOY, Claudio Luiz Bueno de, *Função social*, cit., chapter 6.

⁴¹ Following the conversion of the Provisory Measure No 881 of April 30th, 2019 into Law.

overturning such presumption, with the exception of legal regimes provided for in special laws, also guaranteeing that:

I - the negotiating parties may establish objective parameters for the interpretation of the negotiation clauses and the assumptions for their revision or termination;

II - the allocation of risks defined by the parties must be respected and observed;

III - the contractual revision shall only occur in an exceptional and limited manner.” (free translation)

The amendments above demonstrate the strong trend to give privilege to parties' autonomy in private relationships and the minimum intervention of the State, while also reflect the reality that is searched by business parties and applied in case law⁴².

Therefore, the social function of the contract is a clear innovation of the Civil Code of 2002 and, despite the amendments, is still considered as another autonomous principle of contract law which redefined the relativity of the contracts in accordance with their nature and context⁴³. However, it must be applied from now on with the caution provided for Law No 13,874/2019.

Another discussed limitation on the parties' freedom to contract (which, differently from the social function, is not regarded as a principle of contract law) refers to the provisions of the Introductory Law on the law applicable to the contracts. According to its Article 9, the applicable law to an obligation is that of the country where it is constituted and, in case of contracts, paragraph 2 of Article 9 provides that the applicable law shall be the law of the country where the offeror (proposing party) is domiciled.

This provision gave rise to heated debate among Brazilian scholars since the rule effectively curtails the freedom of parties to choose the law that will govern their contract. Such interpretation goes in a totally opposite direction of the international and national patterns of private contract law. Contrary to the provision of the Article 9 (dating from 1942), new regulation has been enacted endorsing the principle of party autonomy and freedom of

⁴² FERNANDES, Micaela Barros Barcelos, *Impactos da lei 13.874/2019 no princípio da função social do contrato: a liberdade econômica em foco*, Revista dos Tribunais, vol. 1010, 2019 (149 – 179).

⁴³ AZEVEDO, Antônio Junqueira de, *Princípios*, cit., pp. 141-142; FONSECA, Rodrigo Garcia, *A função social*, cit., pp. 220 and 223.

contract, such as Article 421 of the Brazilian Civil Code - especially after Law No 13,874/2009 - and Brazilian Arbitration Law (Law No 9,307/1996)⁴⁴.

As a consequence, literature and case law adopt the position that the rule established by Article 9 of the Introductory Law solely regulates the objective criteria of the *lex loci celebrationis* (where the obligation is constituted) which shall not affect or restrict the subjective criteria related to the intent of the contracting parties, which must be respected⁴⁵.

Such interpretation is reinforced by Article 3, V of the new Law No 13,874/2019⁴⁶, with the confirmation of the autonomy of the parties except when the law states the contrary. Since Introductory Law does not prohibit the free choice of the parties, but merely provides for objective criteria, the former must be respected. The application of the law chosen by the parties must be subject, however, to the limits imposed by public order and good faith⁴⁷.

Good faith – along with freedom to contract and social function – is the other pillar of Brazilian contract law which was also introduced by the 2002 amendment of the Civil Code and reinforced by Law No 13,874/2009⁴⁸.

⁴⁴ Article 2, §1 of Brazilian Arbitration Act provides that the parties may freely choose the substantive rules applicable to arbitration, provided that it does not violate the public order and good usages.

⁴⁵ VIEIRA, Iacyr Aguilar, *Plaidoyer por uma aplicação da Convenção de Viena de 1980 relativa à compra e venda internacional de mercadorias no Brasil*. In: VIEIRA, IA (org) *Estudos de Direito Comparado e de Direito Internacional Privado*, Curitiba, Juruá, 2011, p. 446; RECHSTEINER, Beat Walter, *Direito Internacional Privado. Teoria e Prática*. 15th ed., São Paulo, Saraiva, 2012, p. 161. The issue was recently discussed in case law: Superior Court of Justice, REsp 1343290-SP, Rel. Min. Luis Felipe Salomão, j. 16/04/2019; Superior Court of Justice, AgInt no REsp 1343290-SP, Rel. Min. Luis Felipe Salomão, j. 20/08/2019; Superior Court of Justice, REsp 1280218-MG, Rel. Ministro Paulo de Tarso Sanseverino, Rel. p/ Acórdão Ministro Marco Aurélio Bellizze, j. 21/06/2016; State Court of São Paulo, Appeal nº 1121451-73.2017.8.26.0100, Rel. Des. Maurício Pessoa, j. 21/07/2020.

⁴⁶ Article 3, V: “*The rights of every person, natural or legal, essential for the economic development and growth of the country, observing the provisions of the sole paragraph of art. 170 of the Federal Constitution, are: (...) V - enjoy a presumption of good faith in acts performed in the exercise of economic activity, for which questions of interpretation of civil, business, economic and urbanistic law shall be solved so as to preserve private autonomy, except if there is express legal provision to the contrary;*” (free translation)

⁴⁷ BARALDO, Fabio Pimentel Franceschi, *A lei da liberdade econômica como um instrumento para a renovação do direito internacional privado no brasil*, in *Revista de Direito Constitucional e Internacional*, vol. 118, 2020 (93 – 103). The case law above mentioned also confirms the limitation by public order.

⁴⁸ Pursuant to its Articles 1, § 2^a (“*All rules of public order on private economic activities are interpreted in favour of economic freedom, good faith and respect for contracts, investments and property*”) and 2, II (“*The principles that guide the provisions of this Law are: (...) II - the good faith of the private parties with regard to the public authority*”) – free translation.

According to Article 422, the parties shall observe good faith (and probity⁴⁹) during negotiation and performance of the contracts. This principle guides Brazilian civil law in its entirety since it is also provided in Article 113 as a general rule of interpretation of any legal act⁵⁰, and in Article 187 as a limit for the legality/validity of legal acts⁵¹. The principle comprises the ‘objective’ good faith (objective standard of conduct), and not the mental subjective state of the contracting parties⁵².

Therefore, under Brazilian Civil Code, the principle of good faith has three primary functions. The first is the ‘interpretative’ function, pursuant to which a contract shall be interpreted in accordance with good faith, where the interpreter must seek for the objective and reasonable criteria to fill the gaps of contract provisions (Article 113). The second is the ‘controlling’ or ‘restrictive’ function, which defines abusive acts as those which exceed the limits imposed by good faith (Article 187). Third, good faith has the ‘supplemental’ function to create duties for parties in a contractual relationship, which is provided by Article 422, such as the duties of cooperation, loyalty, transparency, guarantee, certainty, avoidance of harm, prohibition of contradictory conducts, among other duties related to honesty and reasonability⁵³.

Although Article 422 only mentions the application of this principle during the negotiations and performance of the contracts, giving a sense of incompleteness of the provision⁵⁴, it is widely recognised that parties shall observe this principle both in the pre-contractual phase (preliminary negotiations, where one party can be held liable to compensate the other party for acting in bad faith) and post-contractual phase (for instance,

⁴⁹ Related to good faith, *probity* results from the confront of the conduct of the contracting party with the standard conduct of the loyal and honest man (PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 21). It does not have an autonomous concept, but rather reinforces good faith (ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 700).

⁵⁰ “*Juridical transactions shall be interpreted in conformity with good faith and the practice of the place in which they are made.*”

⁵¹ “*The holder of a right also commits an illicit act if, in exercising it, he manifestly exceeds the limits imposed by its economic or social purpose, by good Faith or good conduct.*”

⁵² ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 700.

⁵³ GOMES, Orlando, *Contratos*, cit., pp. 44-45; AZEVEDO, Antônio Junqueira de, *Insuficiências, deficiências e desatualização do projeto de Código Civil na questão da boa-fé objetiva nos contratos*, in *Revista Trimestral de Direito Civil*, Rio de Janeiro, v. 1, 2000 (3-12); ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 700. For a more comprehensive analysis of the supplemental function of the good faith and attached duties, see see MARTINS-COSTA, Judith, *A boa-fé no Direito Privado, critérios para a sua aplicação*, São Paulo, Marcial Pons, 2015, §20 and PENTEADO, Luciano de Camargo, *Figuras parcelares da boa-fé objetiva e venire contra factum proprium*, in *Revista de Direito Privado*, vol. 27, 2006 (252 – 278).

⁵⁴ The insufficiency of the Article 422 text was criticized by Antônio Junqueira de AZEVEDO in a specific article published when the new Civil Code text was still under approval process (AZEVEDO, Antônio Junqueira de, *Insuficiências*, cit.).

the obligation of the injured party to mitigate its loss)⁵⁵. The approval of Statements 25 and 170 of the I and III Journeys of Civil Law reinforces this pacific understanding⁵⁶.

Brazilian contract law also recognises the principles of consent (subjective agreement of the parties) and the obligatory force of the contracts (*pacta sunt servanda*). Under the principle of consent, contracts in Brazil are formed by the mere agreement between the parties and no other formal requirement is necessary for its validity⁵⁷ (except for some solemn contracts, for instance, for the transfer of real estate, which requires the due registry with a competent notary public to be valid and enforceable before third parties⁵⁸).

The principle of the obligatory nature of the contract (*pacta sunt servanda*) refers to the rule that the contract, if valid and effective, is “law to the parties” and must be performed with no right of regret, unless there is a new agreement between the parties to change or extinguish its provisions. The contract means a “voluntary restriction” to the parties’ autonomy, since, upon conclusion, the parties cannot resign from its provisions⁵⁹.

Despite such “restriction”, this principle is in fact a result of party autonomy since the contract must be performed in accordance with the parties’ willingness and cannot suffer interference or revision by judges or arbitrators. As a consequence, the principle plays a crucial role in providing certainty to contractual practice⁶⁰ and that was further reinforced with aforementioned Law No 13,874/2019, which, as Article 421 amendments transcribed above, mitigates the revision and intervention on contract⁶¹.

⁵⁵ PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 20; GOMES, Orlando, *Contratos*, cit., p. 45; LÔBO, Paulo, *Direito Civil, Contratos*, São Paulo, Saraiva, 2011, pp. 74-75; ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 700-701; AZEVEDO, Antônio Junqueira de, *Insuficiências*, cit. For a comprehensive analysis of the application of good faith under Brazilian Law to the phases of the contract, see MARTINS-COSTA, Judith, *A boa-fé*, cit., chapter 5.

⁵⁶ Statement 25: “Article 422 of the Civil Code does not prevent the judge from applying the principle of good faith in the pre-contractual and post-contractual phases”; “Objective good faith must be observed by the parties at the preliminary negotiation stage and after the execution of the contract, when such requirement arises from the nature of the contract.” (free translation).

⁵⁷ PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 19.

⁵⁸ Pursuant to Articles 108 and 1,245 of the Brazilian Civil Code. Article 108: “If the law does not otherwise provide, a public writing is essential to the validity of a juridical transaction that are intended to constitute, transfer, modify or waive real rights in immovable property having a value that is greater than thirty times the minimum salary then in effect in Brazil”; Article 1,245: “Ownership is transferred between living persons by registration of the instrument of transfer in the immovable Property Register”.

⁵⁹ PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 15.

⁶⁰ GOMES, Orlando, *Contratos*, cit., p. 38.

⁶¹ Additionally, Article 3, VIII of the Law No 13.874 reinforces the principle: “The rights of every person, natural or legal, essential for the economic development and growth of the country, with due regard for the provisions of the sole paragraph of article 170 of the Federal Constitution, are: (...) VIII - have the guarantee that the parity business contracts will be subject to free stipulation of the parties to the agreement, in order to apply all the rules of corporate law only in a subsidiary manner to what has been agreed upon, except for rules of public order;” (free translation).

However, since there is no freedom without liability, Brazilian contract law recognises exceptional circumstances in which the contract provisions can be modified, mitigated or even removed, especially in contracts of continued performance in respect of the principles of good faith and social function of the contract previously discussed.⁶²

Finally, it is important to mention, that Brazilian contract law is also guided by material equivalence between the parties and the relativity of the contract's effects. Although not regarded as a "principle", the material equivalence refers to the balance and reciprocity of the contractual obligations⁶³ and recently became a legal presumption⁶⁴. The very exceptional cases for overturning such presumption are expressly set forth in provisions that invalidate or permit the contract modification/rescission in case of imbalance⁶⁵.

The relativity of the contract's effects means that the contract produces effects only to the parties thereto and to its object. Therefore, a contract does not create obligations to third parties (a party becomes debtor or creditor by its own willingness)⁶⁶. The existence of the contract is opposed to third parties and other objects, but not its effects. This rule also contains exceptions, such as in the cases of stipulation in favour to third parties or in cases of succession.

Based on the above, guidance to Brazilian contract law, especially after recent legal amendments, follows a 'route' starting from freedom of contract until the obligatory force of the contracts (*pacta sunt servanda*), with very limited intervention and exceptions, while good faith and social function run throughout such route.

2. Russia

2.1. Background and important legal instruments

For instance, the situation of hardship is recognized by Brazilian law and is discussed with more detail in the following chapters. ⁶² ZANETTI, Cristiano de Sousa, *O Risco Contratual*, in: LOPEZ, Teresa Ancona, LEMOS, Patrícia Faga Iglecias; RODRIGUES JUNIOR, Otavio Luiz (coord.), *Sociedade de Risco e Direito Privado. Desafios normativos, consumeristas e ambientais*, São Paulo, Atlas, São Paulo, 2013, p. 457.

⁶³ GOMES, Orlando, *Contratos*, cit., p. 48; LÔBO, Paulo, *Direito Civil*, cit., pp. 70-71.

⁶⁴ Pursuant to Article 421-A, *caput*, transcribed above and included by Law No 13,874/2019.

⁶⁵ For instance, Article 157 related to the lesion or gross disparity and Article 478 related to hardship, which will be further analysed in this study.

⁶⁶ GOMES, Orlando, *Contratos*, cit., pp. 46-47.

The legal system of the Russian Federation also belongs to the civil law tradition and, therefore, the main rules are provided in codified instruments. The most important instrument applicable to contract law is the Civil Code of the Russian Federation (hereinafter referred to as ‘Russian Civil Code’⁶⁷).

Although Russia does not share the characteristic of other BRICS members of being a previously colonised country, its private and contract law regulation is also very recent and is still in a transitional phase. The Russian Civil Code was enacted in separate parts: Part One (general provisions) in 1994, Part Two (law of obligations) in 1996, Part Three (succession law) in 2001, and Part Four (intellectual activity) in 2006⁶⁸. Very recently, in 2013 and 2015, the Code was amended with the introduction of a new set of norms on contract law⁶⁹.

The Code, particularly Part One, introduced the rules of private law into the Russian Legislation, which was before marked by the national economy model (state planning) of the Union of the Soviet Socialist Republics (USSR). In this former model, civil law was governed by the Russian Civil Code of 1964 and private persons could not engage in contracts (either national or international).⁷⁰

The former Civil Code of 1964 was gradually repealed by parts of the new Civil Code that was enacted after the collapse of USSR, which has the very different purpose to offer a system of stable rules for trade and commerce in the conditions of a market economy. In fact, the drafting of a new Civil Code was greatly expedited in order to allow a quick transition between the two economic models⁷¹. There was no conceptual foundation for the

⁶⁷ For this study, all references to the provisions of the Russian Civil Code in English language were extracted from the publication: *Civil Code of the Russian Federation*, transl. and ed., by BUTLER, William E., London, Wildy, Simmonds & Hill, 2016 or from the English version available at: <https://gss.unicreditgroup.eu/sites/default/files/markets/documents/Civil%20Code%20of%20the%20Russian%20Federation.pdf>, (accessed on 15 August 2021) both containing the amendments until 2016.

⁶⁸ KOMAROV, Alexander, *The UNIDROIT Principles of International Commercial Contracts and the Developments of Contract Law in Mordern Russia*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016, p. 1495; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law in Russia*, Oxford and Portland, Hart, 2014, p. 14; KURZYNSKY-SINGER, Eugenia, *Russian Civil Code*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012, p. 1491. The four parts entered into force in 1995, 1996, 2002 and 2008 respectively.

⁶⁹ The last amendment to the Civil Code was adopted in 2016, but none of the provisions discussed in this study was affected.

⁷⁰ KOMAROV, Alexander, *Legal Framework for Business Contracts in the Russian Federation*, in LEIN, Eva – SKALA, Josef – URSCHER, Lukas Heckendorn (eds.), *Business Law in Transition. A Comparative Perspective on Eastern Europe*, Reports of the ISDC Colloquium, Basel, Schulthess, 2010, pp. 56-57.

⁷¹ MAKOVSKII, Alexander L., *The Russian Civil Code and its Impact upon Commercial Transactions*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*,

drafting (given the long years under the Soviet system) and the Code had to foresee many economic and social developments. In other words, a codification for a market economy was built even before such a market economy effectively existed⁷². However, some provisions remind the formalism and intervention of the Soviet era, especially validity requirements of form and some confiscation rules⁷³.

Highly influenced by the German model, the Russian Civil Code currently in force provides for other sources of civil law that were not present in the past legislation, such as the reference to trade usages and analogy⁷⁴.

Likewise, there is no separate commercial code since the Civil Code govern all civil relationships either held by ordinary citizens or by commercial parties⁷⁵. Notwithstanding the single Civil Code, there is a duality within it, given the existence of several rules expressly applicable to business relationships (entrepreneur/commercial parties) and others specifically to non-business parties, which are generally stricter in order to protect ordinary parties and prevent abuses⁷⁶.

After the entering into force of the four parts of the Civil Code in 2008, a working group was formed in 2009 with a mission to analyse its provisions with the aim to adapt them to the concrete reality of a market economy and to the country's economic development

Leiden, Nijhoff, 2009, p. 1; KOMAROV, Alexander, *The UNIDROIT*, cit., pp. 1493-1494; KOZLOV, Victor, *The new Russian Civil Code of 1994*, in Saggi, Conferenze e Seminari, vol. 21, Roma, Centro di Studi e ricerche di diritto comparato e straniero, 1996, p. 1; KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1491.

⁷² KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1491.

⁷³ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 14; KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1494.

⁷⁴ RASSKAZOVA, Natalya, *Russian Law of Obligations: Structure, Positioning and Connection with Supranational Law*, in SCHULZE, Reiner – ZOLL, Fryderyk, *The Law of Obligations in Europe. A New Wave of Codifications*, Munich, Sellier, 2013, p. 139; KOMAROV, Alexander, *The UNIDROIT*, cit., p. 1493; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 32. See Articles 5 and 6 of the Russian Civil Code: Article 5. “As a custom shall be deemed a rule of behaviour which has taken shape and is widely applied in some sphere of business or other kind of activities, and which has not been stipulated by legislation, regardless of whether it has or has not been fixed in any document. 2. The customs, contradicting to the provisions of legislation or to the agreement, obligatory for the participant in the given relationship, shall not be applied”; Article 6. “Application of the Civil Legislation by Analogy In cases when the relations, stipulated in Items 1 and 2 of Article 2 of the present Code are not directly regulated by legislation or by an agreement between the parties, while the custom that would be applicable to them does not exist, and if this is not in contradiction with their substance, the civil legislation shall be applied, which regulates similar relations (the analogy of the law). 2. If it is impossible to apply the similar law, the rights and duties of the parties shall be defined, proceeding from the general principles and the meaning of the civil legislation (the analogy of the right), and also from the requirements of good faith, reasonableness and justice.”.

⁷⁵ KOZLOV, Victor, *The new Russian*, cit., p. 6; RASSKAZOVA, Natalya, *Russian Law*, cit., p. 140; DOZHDEV, Dmitry, *Russian Private Law and European Legal Transplants*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007, p. 221.

⁷⁶ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 42; KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1491.

since the end of the USSR. This work was based on the judicial applied law and considered influences of Western countries' legislations⁷⁷. This resulted in several amendments that relaxed some strict and formalist rules (Soviet heritage).

Another recent legislation which is also applicable to contracts is the Federal Law on Protection of Consumer Rights of 1993 (amended in 2008). This law regulates the contractual relationship between suppliers and natural persons that acquire goods or services for its own use or consumption, providing strict and mandatory rules for the protection of the latter (final consumers)⁷⁸.

Given this recent nature of contract law in Russia, case law is still not consistently developed and, following the civil law tradition, is not consolidated as an authoritative source of law. The Russian Judiciary system attributes exclusive jurisdiction to special courts (the *arbitrazh* courts) to judge commercial issues as opposed to the courts of general jurisdiction which deal with other civil and criminal matters. These courts only judge matters involving economic agents (if one of the parties is not an entrepreneur, the matter is subject to general jurisdiction) and play an important role in the practical application and uniform interpretation to the “new” Civil Code⁷⁹.

Until 2014, the Russian judicial system comprehended the Supreme Commercial Court as a separate body from the Supreme Court of the Russian Federation and whose decisions used to have different functions. While the *opredelenie* (ruling or decision) refers to a mere answer to a concrete question, the *postanovlenie* (resolution) contains an authoritative or even binding opinion of the court⁸⁰. However, after a reform in 2014, the two Supreme Courts were merged into a new Supreme Court of the Russian Federation, which is the highest court for civil cases⁸¹.

The integration of Russia into private law was also accompanied by the adoption of several treaties and conventions related to international contract law. For instance, Russia

⁷⁷ KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1495.

⁷⁸ RASSKAZOVA, Natalya, *Russian Law*, cit., pp. 143-144.

⁷⁹ KOMAROV, Alexander, *Legal Framework*, cit., p. 60; IAKOVLEV, Veniamin, *The arbitrazh courts and the new Russian Civil Code*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009, p. 99; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 20.

⁸⁰ SHIRVINDT, Andrey, *Russian Contract Law for Foreigners*, in *Russian Law Journal*, vol. III, issue 1, 2015, p. 171; KURZYNSKY-SINGER, Eugenia, *Russian Civil*, cit., p. 1494.

⁸¹ Information available at: http://www.supcourt.ru/en/judicial_system/overview/. Accessed on 15 August 2021. Literature received this change in the judicial structure with surprise, given the important role of the former Supreme Commercial Court (YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 20-21).

has ratified the CISG, the United Nations Convention on the Use of Electronic Communications in International Contracts, the UNIDROIT Convention on International Financial Leasing and the UNIDROIT Convention on International Factoring.⁸² According to Article 7 of the Civil Code, the international treaties and conventions integrate the Russian legal system and shall apply directly except when the treaty/convention establishes the necessity of a domestic act of promulgation⁸³.

International law has also influenced some provisions of the Russian Civil Code, as well as support business relationships in the country⁸⁴. For instance, the rules of hardship set forth in the PICC inspired the provisions related to change of circumstances under the Code, as well as the rules on force majeure raised by Russian case law⁸⁵. Furthermore, chapter 30 of the Civil Code mostly reproduces the CISG text for the treatment of sales contracts⁸⁶.

Therefore, literature considers the Russian legal system as a field “*open to transplantations*” and a promising field for comparative law research⁸⁷, a feature that can be observed by the number of recent amendments, all of them directed to complete and adequate the contract law to international common standards⁸⁸.

⁸² Information available in the respective websites of each convention: (i) CISG https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status; (ii) Electronic Commerce https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=X-18&chapter=10; (iii) UNIDROIT Leasing <https://www.unidroit.org/status-leasing-conv-1988> and (iv) UNIDROIT Factoring <https://www.unidroit.org/status-1988-factoring>. All accessed on 15 August 2021.

⁸³ Article 7: “*The Civil Legislation and the Norms of International Law 1. The generally recognized principles and norms of international law and the international treaties of the Russian Federation, shall be, in conformity with the Constitution of the Russian Federation, a component part of the legal system of the Russian Federation. 2. The international treaties of the Russian Federation shall be directly applied toward the relations, indicated in Items 1 and 2 of Article 2 of the present Code, with the exception of the cases, when it follows from the international treaty that for it to be applied, a special intra-state act shall be issued. If the rules, laid down in the international treaty of the Russian Federation, differ from those stipulated by the civil legislation, the rules of the international treaty shall be applied.*”

⁸⁴ DOZHDEV, Dmitry, *Russian Private*, cit., p. 212.

⁸⁵ KOMAROV, Alexander, *Legal Framework*, cit., p. 71; MAKOVSKII, Alexander L., *The Russian*, cit., p. 5; RASSKAZOVA, Natalya, *Russian Law*, cit., p. 150 mentions court decisions applying Article 7.1.7 of the UNIDROIT Principles (Resolution of the Supreme Arbitration Court of the Russian Federation on 03/05/2012 N BAC-3352; Decision of the Federal Arbitration Court of the Volga-Vyatka district on 10/12/2010 N A82-1979/2010 and Decision of the Federal Arbitration Court of the East-Siberian region on 27/06/2003 N A33-10697/02).

⁸⁶ DOZHDEV, Dmitry, *Russian Private*, cit., p. 217.

⁸⁷ *Idem*, *ibidem*, p. 221.

⁸⁸ The “*harmonisation of the Civil Code with European law and using positive recent European experience of modernisation of civil legislation*” was, in fact, one of the goals of the reform task force initiated in 2008 (YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 14).

2.2. General principles of contract law

The general rules and principles provided in the Russian Civil Code applicable to obligations also apply to contracts, according to Article 420⁸⁹. Although not literally expressed in any provision, it is also possible to affirm that the general principles of Russian civil law set forth in Article 1(1) of the Code equally apply to contracts:

“Civil legislation shall be based on recognition of the equality of the participants of the relations regulated by it, the inviolability of ownership, the freedom of contract, the inadmissibility of arbitrary interference by anyone in private matters, the necessity for the unobstructed exercise of civil rights, the guarantee of reinstatement of civil rights in case of their violation, and their protection in court.”

Among the above principles, the cornerstone related to contract law is the freedom of contract. This principle has been recognised as being fundamental to contract relationships only with the enactment of the current Civil Code, and as a milestone in Russian history, since during the Soviet period it was applied to a very limited extent given the state planned regime⁹⁰.

Differently from what was observed in the Brazilian case, the principle of freedom of contract is exhaustively addressed by a specific provision in the Russian Civil Code, as follows:

“Article 421. The Freedom of the Contract

1. The citizens and the legal entities shall be free to conclude contracts.

Compulsion to conclude contracts shall be inadmissible, with the

⁸⁹ *“The Concept of the Contract 1. The contract shall be recognized as the agreement, concluded by two or by several persons on the institution, modification or termination of the civil rights and duties. 2. Toward the contracts shall be applied the rules on bilateral and multilateral deals, stipulated by Chapter 9 of the present Code. 3. Toward the obligations, arising from the contract, shall be applied the general provisions on obligations (Articles 307-419), unless otherwise stipulated by the rules of the present Chapter and the rules on the individual kinds of contracts, contained in the present Code. 4. Toward the contracts, concluded by more than two parties, the general provisions on the contract shall be applied, unless this contradicts the multilateral nature of such contracts.”*

⁹⁰ KOMAROV, Alexander, *Legal Framework*, cit., p. 62; KOZLOV, Victor, *The new Russian*, cit. pp. 5-6; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 43.

exception of the cases, when the duty to conclude the contract has been stipulated by the present Code, by the law or by a voluntarily assumed obligation.

2. The parties shall have the right to conclude a contract, both stipulated and unstipulated by the law or by the other juristic acts. The rules in respect of individual kinds of contracts provided for by law or other legal acts shall not apply to a contract which is not stipulated by law or other juristic acts in the absence of the features cited in Item 3 of this Article, this not excluding the possibility of applying the rules concerning analogy by law (Item 1 of Article 6) in respect of individual relations of the parties to a contract.

3. The parties shall have the right to conclude a contract, in which are contained the elements of different contracts, stipulated by the law or by the other juristic acts (the mixed contract). Toward the relationships between the parties in the mixed contract shall be applied in the corresponding parts the rules on the contracts, whose elements are contained in the mixed contract, unless otherwise following from the agreement between the parties or from the substance of the mixed contract.

4. The contract terms (provisions) shall be defined at the discretion of the parties, with the exception of the cases, when the content of the corresponding term (provision) has been stipulated by the law or by the other juristic acts (Article 422). In the cases, when the contract provision has been stipulated by the norm, applied so far as it has not been otherwise stipulated by the agreement between the parties (the dispositive norm), the parties may by their own agreement exclude its application, or may introduce the provision, distinct from that, which has been stipulated by it. In the absence of such an agreement, the contract provision shall be defined by the dispositive norm.

5. Unless the contract provision has been defined by the parties or by the dispositive norm, the corresponding provisions shall be defined by the customs, applicable to the relationships between the parties.”

The freedom to contract is applicable to natural persons and legal entities and the prohibition of coercion/compulsion is important to ensure freedom, except for the circumstances provided in item (1).

The principle is provided in a wide form, granting the parties the ‘power’ to agree on typical or atypical contracts, as well as on mixed contracts. In other words, parties are free to choose the contracting parties and the content of their agreements (items 2, 3 and 4 above). However, such discretionary power of the parties is subject to limitations, for instance, when a provision of that contract is already prescribed by an existing norm. In the absence of a specific norm on the contractual provision, such provision shall be interpreted according to the usages of business applicable to the parties’ relationship.

This exhaustive approach of Article 421, aligned with the extensive regulation on contract types specified in the Civil Code, is presented (and often criticised) by literature as a limitation to the principle of freedom and autonomy of the parties. For instance, even though parties are free to choose their contract and respective content, courts generally force analysed contracts into one type set forth in the Code, imposing the application of the corresponding norms, regardless the parties’ original intention⁹¹.

Freedom of contract also relates to the right of the parties to freely choose the applicable law to contracts. Such right is provided by Article 1,210 of the Russian Civil Code, which permits the parties to adopt the applicable law upon the conclusion of the contract or even afterwards (in this case, the chosen law will apply retrospectively without prejudice to third parties’ rights). Also, the provision allows the parties to choose the applicable law to the contract either as a whole or for specific parts thereof, something that seems very innovative compared to other various legislations, such as the Brazilian one. However, if a contract happens to be connected only with a law of another country (that is different from the parties’ intent), the mandatory norms of this country will apply to the relationship⁹².

⁹¹ SHIRVINDT, Andrey, *Russian Contract*, cit., p. 177; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 43-44.

⁹² Article 1210: Selection of Law by the Parties to a Contract “1. When they enter into a contract or later on the parties thereto may select by agreement between them the law that will govern their rights and duties under the contract. 2. An agreement of parties as to the selection of law to be applicable shall be expressly stated or shall clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case. 3. Selection of applicable law made by parties after the conclusion of a contract shall have retroactive effect and it shall be deemed valid, without prejudice to the rights of third persons and the validity of a transaction from the point of the requirements for the form thereof, beginning from the time when the contract was

Good faith – a very important cornerstone under Brazilian contract law – was not originally provided by the Russian Civil Code in Part Two (applicable to obligations) as a standard of conduct to contracting parties, despite the paramount importance conceded to the duty of cooperation under Russian tradition⁹³. The same occurred in relation to provisions on fairness or fair dealing.

In fact, good faith is a new concept introduced into Russian civil law by the Civil Code current in force for the first time in Russian history and was inspired by the UNIDROIT PICC⁹⁴. During the Soviet period, this principle (and standards deriving therefrom) was considered extremely vague and misleading. Therefore, it is still an unfamiliar concept to Russian judges in the context of business and contract activities, currently under transition⁹⁵.

The principle is provided in the opening Article of the Civil Code, whose Article 1(3) states that “*when establishing, exercising and protecting civil rights and when discharging civil duties, participants in civil law relations shall act with good faith*”. Therefore, it is meant to serve as a legal mechanism for judicial law-making, as the principle of good faith does in other continental legal systems⁹⁶.

Good faith is also referred to as a limit and a presumed standard of conduct applicable to all participants of civil relationships, pursuant to Article 10. By the former wording of this legal provision, it was possible to infer that the good faith principle was not automatically applicable (presumed) to every relationship, but solely on those civil relationships where the law attributed this standard. However, the amendment of 2013 broadened the good faith scope, and it became a standard presumed in all civil relationships,

*concluded. 4. The parties to a contract may select applicable law both for the contract as a whole and for specific parts thereof. 5. If at the time of selection by the parties to a contract of the law to be applied by the parties to a contract all the circumstances concerning the essence of the parties relations are only connected with a single country, the selection by the parties of the law of another country may not concern the operation of the imperative norms of law of the country with which all the circumstances concerning the essence of the parties' relations are connected. 6. Unless otherwise results from law or the essence of relations, the provisions of Items 1-3 and 5 of this Article shall accordingly apply to the selection of the law as agreed by parties to be applied to the relations which are not based upon an agreement where such choice is allowed by law.”. See also BASEDOW, Jurgen *et al*, *Encyclopedia of Private International Law*, vol. 4, Cheltenham, Edward Elgar, 2017, pp. 3677-3688.*

⁹³DOUDKO, Alexei G., *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, in *Uniform Law Review*, vol. 5, No 3, 2000, p. 489

⁹⁴KOMAROV, Alexander, *The UNIDROIT*, cit., p. 1497; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 46.

⁹⁵KOMAROV, Alexander, *Legal Framework*, cit., p. 59; DOUDKO, Alexei G., *Hardship*, cit., p. 489.

⁹⁶YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 47.

which shifts the burden of proof of bad faith behaviour to the party alleging it, or even to the court when applying the consequences of bad faith behaviour⁹⁷.

Even before the 2013 amendment introducing expressly the observance to good faith, literature demonstrates that Russian courts have implied the principle at least for the last fifteen years, deciding cases as if it was already in the Civil Code⁹⁸.

Additionally, good faith and reasonableness are conceived by the Russian Civil Code as parameters to fill the existing gaps in legislation, taking place when express law or analogy, fail to address the given act or relationship (pursuant to Article 6(2) transcribed before). Given its nature of ‘default rule’, the Russian courts shall apply the concept of good faith more restrictively.⁹⁹

Upon recent reform in 2015, new provisions related to obligations were introduced with express reference to good faith¹⁰⁰. For instance, reference is made to Article 307(3)¹⁰¹, which states that parties shall observe good faith during the performance and termination of obligations, as well as to Article 432(3)¹⁰², which deals with general rules applicable to the formation of the contract.

⁹⁷ Article 10: “*The Limits of Exercising Civil Rights* 1. As not admissible shall be deemed the exercise of civil rights solely for the purpose of inflicting harm upon another person, actions in circumvention of the law for attaining an unlawful aim, as well as any other wittingly unfair exercise of civil rights (the abuse of rights). Seen as inadmissible shall be the use of civil rights for the purpose of restricting competition, as well as the abuse of a dominating position in the market. 2. In case of failure to satisfy the requirements stipulated in Item 1 of this article, a court of law, arbitration court or arbitration tribunal shall reject a person's claim for the protection of the right held by such in full or in part, subject to the nature and consequences of the abuse made, and shall take other measures provided for by law. 3. Where an abuse of a right manifests itself in carrying out actions in circumvention of the law with an unlawful aim, the effects provided for by Item 2 of this article shall apply insofar as the other effects of such actions are not established by this Code. 4. If an abuse of a right has entailed a violation of another person's right, such person is entitled to claim for repair of the damage caused by it. 5. The fairness of participants in civil law relations and wisdom of their actions shall be presumed.”. YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 48.

⁹⁸ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 48.

⁹⁹ SNIJDERS, W, *The Civil Codes of the Russian Federation and the Netherlands: Similarities and Contrasts*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009, p. 20.

¹⁰⁰ KOMAROV, Alexander, *The UNIDROIT*, cit., p. 1498; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 15.

¹⁰¹ Article 307(3): “*When establishing or discharging an obligation and after its termination, the parties are bound to act in good faith taking into account the rights and legitimate interests of each other and mutually rendering necessary assistance to attaining the purpose of the obligation, as well as providing the necessary information to each other.*”

¹⁰² Article 432(3): “*The party that has accepted the full or partial execution under a contract from the other party or in some other way has proved the validity of a contract is not entitled to demand that this contract be recognised as not having been made, if making such a claim, subject to the specific circumstances, contradicts the principle of fairness*”

The 2015 amendment also introduced the principle of good faith in relation to pre-contractual negotiations, imposing liability on bad faith negotiations and specifying the conducts that lead to such liability, which are clearly influenced by Article 2.1.15 of the PICC¹⁰³. The express provisions regarding good faith are more complete than as seen in Brazilian cases, where the case law and literature broadened the scope of the principle to incorporate pre and post contractual phases.

The relevance attributed to good faith is also important to be analysed in its converse effect, *i.e.*, in order to repress bad faith behaviour of the parties which also enlarged the application of the concept of abuse of rights. The literature warns, however, about the risk that the unrestricted application of good faith may cause to the former principle of freedom of contract, leading courts to sometimes ignore or change contractual provisions on behalf of correcting bad faith behaviour¹⁰⁴.

Another principle applied to contracts in Russian which is not expressly provided in the Civil Code, but rather inferred by its provisions, is the so-called principle of actual performance of the contract. The principle refers to the duty of the parties to perform exactly the obligations undertaken according to a contract, and as a general rule, they are not allowed to change it unilaterally¹⁰⁵. This principle is inferred from provisions protecting the creditor's right to ask for specific performance and those granting the application of penalties in case of breach of contract¹⁰⁶.

The principle seems to be equivalent to the *pacta sunt servanda* principle present in civil law tradition and the sanctity of contracts of common law tradition. Regarding the latter, there is a slight difference, as seen in the Indian chapter below, since the sanctity of contracts is more related to proper performance precisely as provided in the contract with regard to method, place and time¹⁰⁷.

¹⁰³ Pursuant to new Article 434.1(2) of the amended Russian Civil Code: “When entering into the talks on making a contract, in the course of them and upon their completion the parties are bound to act in good faith, in particular not to enter into the talks about making the contract or to continue them, if it is clear that the other party has no intention of reaching an agreement. The following shall be deemed unfair actions in holding talks: 1) provision by either party of incomplete or unreliable information, in particular non-disclosure of the circumstances, which by virtue of the nature of a contract, must be brought to the knowledge of the other party; 2) abrupt and unjustified termination of talks on making a contract under the circumstances when the other party to the talks has no reasonable grounds to expect it.”

¹⁰⁴ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 47.

¹⁰⁵ *Idem, ibidem*, pp.48-49.

¹⁰⁶ For instance, Article 396(1) of the Civil Code: “The payment of a penalty and compensation of losses in the event of the improper performance of an obligation shall not relieve the debtor from performance of the obligation in kind unless provided otherwise by a law or by contract”.

¹⁰⁷ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp.44-45.

Finally, although not provided or inferred by law, the Russian Supreme Commercial Court has developed the presumption (not properly a principle) of the *equivalence of the parties' mutual obligations* under a contract. This is especially important when analysing cases of invalidity of contracts, in which the courts must decide on the restitution of performance and often look for applying equal weight to the restitution¹⁰⁸.

The protection of equivalence is closely related to the presumption of compensation in all contracts. Differently from common law tradition (as seen below), Article 423 of the Russian Civil Code provides for the presumption of the existence of compensation in all contracts (counter-giving) but validates contracts without compensation (gratuitous contracts), with exception to business transactions¹⁰⁹.

With this final remark we pass to a brief introduction of a substantially different legal system from those analysed until now.

3. India

3.1. Background and important legal instruments

After a brief analysis of two systems of the civil law family, it is necessary to shift to a very distinguished legal system of common law, which governs contracts in India. As a former colonised country, Indian law in general is strongly influenced by English law, which ruled the country for almost 200 years.

Even nowadays, English statutes and especially case law are used in Indian legal practice as important gap filling tools in case of absence of specific treatment by Indian law

¹⁰⁸ Resolution of Plenum of the Supreme Court No 13 and Plenum of the Supreme Commercial Court No 14 of 08/10/1998 '*On the practice of application of provisions of the Civil Code of the Russian Federation concerning the interest for the use of another's monetary means*' § 27, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 46.

¹⁰⁹ Article 423: "*Article 423. The Pecuniary and the Gratuitous Contracts 1. The contract, by which the party shall receive a pay or a different kind of the regress remuneration for the discharge of its duties, shall be a pecuniary one. 2. The contract shall be recognised as gratuitous, if by it one party assumes an obligation to provide something to the other party without receiving from it a pay or another kind of the regress remuneration. 3. The contract shall be supposed to be a pecuniary one, unless otherwise following from the law, from the other legal acts, or from the content or the substance of the contract.*". Also see YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 45.

or case law, as well as pursues a persuasive and rhetorical character used by lawyers and are commonly used by Indian courts¹¹⁰.

As a country of common law tradition, the laws and principles governing contracts are those provided in codified statutes and precedents. Different from what is seen in Brazilian and Russian cases, the doctrine of *stare decisis* applies in India and, as a consequence, the precedents/decisions issued by the Supreme Court and by the 24 High Courts located in State capitals have binding character to be followed by the lower courts and individuals¹¹¹.

The relevance attributed to precedents marks Indian common law as a very procedural system, where other cornerstones are the independent and crucial position of judges, the adversary system/principle in procedures and the importance of procedure in obtaining legal remedies¹¹².

With respect to contract law, the most important instrument is the Indian Contract Act of 1872 (hereinafter referred to as “Contract Act”¹¹³). The Contract Act applies to all types of contracts and states the general principles applicable to them regarding formation of agreement, rules of offer and acceptance, conditions of validity, performance of promises, discharge of contracts and the remedy of compensation. It also contains special provisions for specific contracts of indemnity, guarantee, bailment, pledge and agency.

The Contract Act was drafted during the decade of 1860 when India was still a territory under British domain. The project of law (Bill) for the conception of the Act was drafted in England and the Indian Commission responsible for its drafting incorporated provisions not only from English law, but also from the New York Code of 1862¹¹⁴. Even after India’s independence, the Contract Act continued to be in force by virtue of Article

¹¹⁰ BHADBHADE, Nilima, *Contract Law in India*, 3rd Ed., Alphen aan den Rijn, Kluwer Law International, 2016, p. 70; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 226.

¹¹¹ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 228; BHADBHADE, Nilima, *Contract*, cit., p. 35.

¹¹² BHADBHADE, Nilima, *Contract*, cit., p. 35.

¹¹³ For the present study, all references to the provisions of the Contract Act were extracted from the online version available at: <https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf>. Accessed on 15 August 2021.

¹¹⁴ BHADBHADE, Nilima, *Contract*, cit., p. 46; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian Contract & Specific Relief Acts*, vol. I, 15th ed., Haryana, Lexis Nexis, 2017, p. 8.

372(1) of the Constitution of India, which maintained validity of acts enacted before the Constitution (of 1950)¹¹⁵.

The Contract Act does not cover all issues of contract law and, therefore, it is complemented by separate legislation and specific Acts. For instance, reference is made to the Sale of Goods Act of 1930 (specific rules on sales contracts)¹¹⁶, Limitation Act of 1963 (rules on limitation periods applicable to contracts)¹¹⁷; Evidence Act of 1872 (rules on evidence production and important for interpretation of contracts)¹¹⁸; Specific Relief Act of 1963 (rules applicable to contractual specific performance reliefs)¹¹⁹ and the Consumer Protection Act 1986 (specific rules on consumer contracts)¹²⁰, among several others.

Pursuant to Section 1 of the Contract Act, its provisions shall not affect the provisions of the above-mentioned Acts, as well as those deriving from any Statutes and trade usages, provided that they are not inconsistent with the Contract Act¹²¹. Therefore, in the judgment and interpretation practice, judges shall refer to the Contract Act, to other specific Act's provisions and applicable trade usages, giving prevalence to the first. However, literature interprets the expression "not inconsistent" as not applicable to particular usages (but only to general abstract usages), which remains unaffected by the Contract Act.¹²²

In case of absence of particular treatment in any Act, usage or in the Contract Act, the principles of justice, equity and good conscience shall apply¹²³, as a heritage of the

¹¹⁵ Article 372. (1): "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.". Available at: https://legislative.gov.in/sites/default/files/COI_1.pdf. Accessed on 15 August 2021.

¹¹⁶ English text available at: <https://www.indiacode.nic.in/bitstream/123456789/2390/1/193003.pdf>. Accessed on 15 August 2021.

¹¹⁷ English text available at: https://www.indiacode.nic.in/bitstream/123456789/1565/1/AAA1963_36.pdf. Accessed on 15 August 2021.

¹¹⁸ English text available at: https://www.indiacode.nic.in/bitstream/123456789/6819/1/indian_evidence_act_1872.pdf. Accessed on 15 August 2021.

¹¹⁹ English text available at: <https://www.indiacode.nic.in/bitstream/123456789/1583/2/A196347.pdf>. Accessed on 15 August 2021.

¹²⁰ English text available at: <https://www.indiacode.nic.in/bitstream/123456789/1868/1/A1986-68.pdf>. Accessed on 15 August 2021.

¹²¹ "Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act".

¹²² POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 16; NAIR, M. Krishnan, *The Law of Contracts*, 4th ed., Madras, Orient Longman, 1978, p. 2.

¹²³ Pursuant to the precedents *Gurunath vs. Kamalabai* AIR 1955 SC, 206 and *Harinagar Sugar Mills Ltd vs. Shyam Sundar Jhunjhunwala* AIR 1961 SC 1669, *apud* BHADBHADE, Nilima, *Contract*, cit., p. 71.

English common law, as decided in the case *Waghela Rajsanji vs. Shekh Masludin*: “the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances”¹²⁴.

Despite the elevated number of specific Acts, when it comes to international contract law, India is a highly restricted country. For instance, it did not ratify the CISG (which directs India to the opposite side of international trends, since the CISG has a widespread acceptance and is strongly influenced by common law tradition¹²⁵), the Convention on the Use of Electronic Communications in International Contracts (rules on electronic commerce are provided for in the Information Technology Act of 2000¹²⁶) or the Convention on the Limitation Period in the International Sale of Goods (rules on limitation shall be governed by the Limitation Act of 1963 mentioned above).

This characteristic of the Indian legal systems in regard to international law initiatives brings more challenges to the present study, which envisages the harmonisation of contract law on particular issues within the BRICS members.

3.2. General principles of contract law

Since the Contract Act provides for general principles applicable to contracts, all sections provided in its first part, which means from Section 1 until Section 75, are deemed to be general principles of Indian contract law. Given the short space herein, some of the main important principles can be drawn from the seventy-five sections, more specifically from Section 10, which establishes the criteria for the existence and validity of a contract:

“What agreements are contracts. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

¹²⁴ *Waghela Rajsanji vs. Shekh Masludin* 1887 LR 14 I 89, 96, *apud* ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 226.

¹²⁵ It is curious to note that India and England are the most important world economies which have not ratified the CISG.

¹²⁶ Despite the non-ratification of the international convention, the Information Technology Act follows the UNCITRAL Model law on Electronic Commerce. The English text of the Act is available at: <https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>. Accessed on 15 August 2021.

From the legal provision above, the Contract Act provides for five criteria for the existence and validity of a contract: (i) competent parties; (ii) existence of consent; (iii) the consent must be free; (iv) consideration and (v) legality. From these criteria, it is possible to infer that Indian contract law is mainly based on free consent, freedom of contract, consideration and legality. The last criteria will be analysed in more detail in the subsequent chapters, where the objective is to outline a harmonised interpretation for contract law on the issues of validity, invalidity and their consequences within the BRICS.

Similar to the Brazilian and Russian systems, India also prescribes the principles of freedom of contract. Under this principle, parties are free to settle the terms of the contracts pursuant to their convenience and shall not be affected by undue influence, misrepresentation or coercion. The freedom to contract encompasses the parties' ability to choose both the contract's content and counterparts¹²⁷.

Within the international law sphere, the principle of freedom of contract is also expressed in the parties' ability to choose the law applicable to the contract (proper law). Such freedom does not apply to purely domestic contract, since, if both parties are Indian, they will be necessarily bound by the provisions of Indian substantive law and cannot freely choose another applicable law¹²⁸.

Indian statutory law provides for several limitations and exceptions to the freedom of the parties, either by prohibiting some contracts to be concluded or by compelling individuals to enter into contracts¹²⁹. Due to such limitations, it is also defended that the freedom of contract cannot be deemed a general principle in India anymore¹³⁰.

The consent requirement/principle cannot be dissociated from the freedom of contract, since Section 10 provides for "free consent" and means that, for the formation of a contract, the parties must agree upon the same thing, and in the same sense, on all aspects of their transaction¹³¹. Consent waives formalities (unless formalities are prescribed by other

¹²⁷ NAIR, M. Krishnan, *The Law*, cit., p. 8; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 243; BHADBHADE, Nilima, *Contract*, cit., p. 116.

¹²⁸ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 21.

¹²⁹ *Idem, ibidem*, p. 244.

¹³⁰ NAIR, M. Krishnan, *The Law*, cit., p. 10.

¹³¹ Pursuant to Section 13 of the Contract Act: "*Consent defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.*"

laws) and also implies that nobody should have any contractual liability without consent thereto¹³².

Section 10 of the Contract Act also establishes the doctrine of consideration, which is a very particular feature of common law systems incorporated by India. Consideration is defined by Section 2(d) as: “*when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something such act or abstinence or promise is called consideration for the promise.*” In other words, consideration is an act, forbearance or promise made or given at the request of the promisor by the promisee¹³³.

In order to understand this cornerstone of Indian contract law, the concept of promise must firstly be clarified. A promise exists when a proposal made by the offeror is accepted and, therefore, upon acceptance, the offeror becomes promisor and the acceptor becomes the promisee¹³⁴.

Hence, consideration is the act that supports the promise, the reasonable equivalent passed from the promisor to the promisee, meaning that contracts in India must always have an onerous character and gratuitous contracts are generally not valid¹³⁵. The doctrine of consideration thus imposes limits to the freedom of contract.

Another principle that emerges from the requirements analysed above, especially from the consideration requirement, is the privity of the contracts. Similar to the relativity of the contract’s effects saw in the Brazilian case, this principle means that a contract cannot confer rights or impose obligations arising under it on any person except the parties thereto¹³⁶.

This principle was deemed as fundamental for Indian contract law by the leading case *Dunlop Tyre Co vs. Selfridge & Co*, where it was decided “*one is that only a person*

¹³² POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 243; NAIR, M. Krishnan, *The Law*, cit., pp. 15-16.

¹³³ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 243.

¹³⁴ Pursuant to Section 2 (b) and (c) of the Contract Act: “(b) *When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise; (c) The person making the proposal is called the “promisor”, and the person accepting the proposal is called the ‘promisee’*”.

¹³⁵ BHADBHADE, Nilima, *Contract*, cit., p. 83; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 54.

¹³⁶ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 85.

*who is a party to a contract can sue on it; our law knows nothing of a jus quaestium tertio arising by way of contract*¹³⁷.

The privity principle has two aspects. The first is that only the contracting parties, and no one else, are entitled under it, even though it is possible for the parties to confer rights to third parties. However, such third parties may not sue the contracting parties or rely on such rights based on the contract. In the same sense, the second aspect is that contracting parties may not impose obligation and liabilities to third parties¹³⁸.

Not specified in the Contract Act, but also inferred from its provisions and from the influence of common law is the principle of sanctity of contract (similar concept to *pacta sunt servanda*). Every contract consists of reciprocal promises exchanged by the parties and, therefore, each party is bound by its respective promise, pursuant to Section 37 of the Indian Contract Act¹³⁹.

Before moving onto the next topic, it is important to make reference to the treatment conferred by Indian contract law to the principle of observing good faith in contractual relationships, notably due to the emphasis attributed to this principle by Brazilian and Russian law, as well as by Chinese law discussed in the next topic.

Following common law tradition, the Contract Act does not impose any obligation to observe the principle of good faith either during contract negotiation or performance. Therefore, the right of the parties to revoke offers, withdraw from negotiations, as well as to terminate the contract is presumed unrestricted, unless the parties have agreed otherwise¹⁴⁰. Common law has a much narrower conception of good faith compared to other systems. The parties are not allowed to deceive each other, but there is also no duty to supply

¹³⁷ *Dunlop Tyre Co vs. Selfridge & Co*, 1915, AC 847, *apud* NAIR, M. Krishnan, *The Law*, cit., pp.59-60.

¹³⁸ BHADBHADE, Nilima, *Contract*, cit., p. 157; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 85.

¹³⁹ Section 37: “*Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.*”. BANGIA, R. K., *The Indian Contract Act*, rev. KUMAR, Narender, Haryana, Allahabad, 2009, p. 211; KHANDERIA, Saloni, *Transnational Contracts and Their Performance during the COVID-19 Crisis: Reflections from India*, in BRICS Law Journal, vol. 7, no. 3, 2020, p. 53.

¹⁴⁰ BHADBHADE, Nilima, *Contract*, cit., pp. 63-64.

unrequested information or adopt collaboration gestures not contained in the contract instrument¹⁴¹.

Parties will be only subject to observe good faith if such conduct is set forth in the contract or in the terms of negotiation. It follows from this orientation that, unless agreed otherwise, a party may not request from the other party compensation for the expenses incurred with negotiations if that other party withdraws. The underlying reason is that, pursuant to Indian contract law, the negotiating parties are seen as adversaries, acting at their own risks, and the State or the law shall not intervene¹⁴².

Perhaps this was one of the reasons India has not ratified the CISG, considering the express reference to good faith for the interpretation of contracts¹⁴³ and the express requirements of reasonableness in several provisions of the Convention, about which commentators usually approximate to the good faith principle¹⁴⁴.

Interestingly, despite the absence of a written provision imposing good faith as a principle to be observed by the parties and by the courts, Indian contract law recognises other conducts which in fact have the good faith and reasonableness as a background. For instance, the duty to mitigate loss (or, the restriction to recover damages) attributed to the injured party is undoubtedly an example of the application of the principle of good faith and fair dealing¹⁴⁵. Similarly, it is recognised that a party cannot arbitrarily terminate the contract and a previous notice is recommended¹⁴⁶.

Furthermore, even though good faith is not expressly provided, it derives from the contract's nature. In other words, it is implied from the subjective and moral duty of a party to fulfil the promise he or she has obliged him or herself to, no matter how hard this

¹⁴¹ NICHOLAS, Barry, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* in Saggi, *Conferenze e Seminari*, vol. 9, Roma, Centro di Studi e ricerche di diritto comparato e straniero, 1993, p. 6.

¹⁴² BHADBHADE, Nilima, *Contract*, cit., p. 63.

¹⁴³ Pursuant to Article 7(1): "*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*"

¹⁴⁴ SCHLECHTRIEM, Peter, – SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods*, 3^a ed., München, Beck, 2010, p. 63; LOOKOFSKY, Joseph – BERNSTEIN, Herbert L., *Understanding the CISG in Europe, A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, The Hague, Kluwer Law International, 1997, p. 37.

¹⁴⁵ The duty or restriction is implied by the explanation of Section 73 of the Contract Act: "*In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account*". BANGIA, R. K., *The Indian Contract*, cit., p. 299.

¹⁴⁶ *Gujarat State Financial Corpn v Lotus Hotels Pvt Ltd* AIR 1983 SC 848; BHADBHADE, Nilima, *Contract*, cit., p. 217; BANGIA, R. K., *The Indian Contract*, cit., pp. 299-300.

may be for him or her¹⁴⁷. Hence, this apparent conflict between principles provided by the different BRICS' legislations will play a relevant role for the purposes of the harmonisation sought in this study.

4. China

4.1. Background and important legal instruments

It is indisputable that China plays the most important commercial role among the five BRICS countries. The country represents one of the strongest economies in the world, with high levels of annual economic growth, as well as being the most relevant commercial partner to each of the BRICS countries individually¹⁴⁸. Therefore, understanding the general rules regarding this country's contract law is deemed essential towards the harmonisation objective and commercial integration.

As with Brazil and Russia, China follows the civil law tradition and as such, both civil and contract law derive from codified norms. However, despite the economic and commercial prominence, Chinese complete codification of norms applicable to contracts (whether national or international) took many years to be constructed and has very recently enacted a uniform Civil Code., which has been recognised as a milestone in the modernisation of the countries legal system¹⁴⁹.

In the history of People's Republic of China (PRC) there have been several attempts to codify the country's civil law since the 50s, but all of these were unsuccessful due to political turbulence¹⁵⁰. When the initiatives to a codified civil law were renewed, as

¹⁴⁷ NAIR, M. Krishnan, *The Law*, cit., p. 12.

¹⁴⁸ Brazil is the country in BRICS with higher share of its economy engaged with China. For instance, in 2020/2021, China represented more than 34% of the Brazil's exports and 21% of imports (data available at <https://www.gov.br/produktividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/estatisticas/balanca-comercial-brasileira-acumulado-do-ano>). Accessed on 15 August 2021.

¹⁴⁹ QIU, Xuemei, *Contract Law*, in GOLOTA, Lukasz et. Al., *Perspectives on Chinese Business and Law*, Cambridge, Intersentia, 2018, p. 154; ZOU, Mimi, *Chinese Contract Law and the 2020 Civil Code*, Hong Kong, LexisNexis, 2020, p. 1.

¹⁵⁰ For a more comprehensive historical analysis of Chinese law, see: MOCCIA, Luigi, *The idea of "law" in China: an overview*, in GOLOTA, Lukasz et. Al., *Perspectives on Chinese Business and Law*, Cambridge, Intersentia, 2018 (59-94); ZOU, Mimi, *Chinese Contract*, cit., p. 1; HAN, Shiyuan, *A snapshot of Chinese Contract Law from an historical and comparative perspective*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012, p. 237; WANG, Liming, *The systematization of the Chinese Civil Code*, in CHEN, Lei – RHEE, C.H. Remco (eds.),

a result of the opening up from the previously planned economic model from the 1970s, legislators decided to commence such drafting work in a gradual and segregated path¹⁵¹.

In 1986, the General Principles of Civil Law (GPCL)¹⁵² were issued as an attempt to codify fundamental principles of the PRC and was for many years the basic civil law in China¹⁵³. However, its norms were regarded as abstract and could not be deemed a Civil Code. Subsequently, specific rules were enacted from the 90s in order to give a shape to Chinese civil law, such as the Contract Law in 1999, Property Law in 2007 and, in 2010, Tort Liability Law and the Law on Conflict of Laws¹⁵⁴.

Among those set of rules, the provisions of Contract Law¹⁵⁵ were an important milestone in Chinese legal history, bringing more clarity and certainty to its civil law, especially because it was a result of a harmonisation process of all previous contract law regimes¹⁵⁶. It abolished the former distinction between civil and commercial contracts¹⁵⁷ and also between domestic and foreign contracts, in a clear alignment with other civil law codifications (as seen in Brazilian and Russian cases) combined with important inputs from common law systems, which characterise a so-called mixed or hybrid legal system¹⁵⁸.

In 2014, the creation of a consolidated body with enforceable civil law provisions became a priority for the Chinese government for entering a new era of “governing the country according to law”¹⁵⁹. This group of enforceable provisions would

Towards a Chinese Civil Code. Comparative and Historical Perspectives, Leiden, Nijhoff, 2012, p. 21; PISSLER, Knut B., *Chinese Law, Influence of European Private Law*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, p. 183.

¹⁵¹ DIMATTEO, Larry A. – CHEN, Lei, *History of Chinese Contract Law*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, pp. 4-5; BU, Yuanshi, *Chinese Civil Code, The General Part*, München, Beck, 2019, pp. 1-3.

¹⁵² English text available at: http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898337.htm. Accessed on 15 August 2021.

¹⁵³ QIU, Xuemei, *Contract* cit., p. 155 ; CHEN, Lei – RHEE, C.H. Remco, *Introduction*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012, p. 4; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 293.

¹⁵⁴ BU, Yuanshi, *Chinese*, cit., pp. 1-3; LENG, Jing – SHEN, Wei, *The evolution of Contract Law in China: Convergence in Law but Divergence in Enforcement?* in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017, p. 327.

¹⁵⁵ English text available at: <http://www.cmac.org.cn/wp-content/uploads/2018/08/Contract-Law-of-the-Peoples-Republic-of-China.pdf>. Accessed on 15 August 2021.

¹⁵⁶ DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., p. 6; HAN, Shiyuan, *A snapshot*, cit., 241; CHEN, Lei – RHEE, C.H. Remco, *Introduction*, cit., p. 5; PISSLER, Knut B., *Chinese Law*, cit., p. 183.

¹⁵⁷ The former existing contract law (the Economic Contract Law of 1982) was applicable solely to legal entities for commercial relationships and did not encompass all types of civil transactions (HAN, Shiyuan, *A snapshot*, cit., pp. 239-240)

¹⁵⁸ LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 329; ZOU, Mimi, *Chinese Contract.*, cit., pp. 9-10; HAN, Shiyuan, *A snapshot*, cit., pp. 246-247.

¹⁵⁹ ZOU, Mimi, *Chinese Contract.*, cit., p. 11.

reinforce the GPCL and prevail over the already existing but sparse civil laws, with the aim to achieve the “*four modernisations*”, namely modernisation of industry, agriculture, defence, science and technology¹⁶⁰.

As a result of an intense and rapid effort, the General Rules of Civil Law or General Provisions of Civil Law (hereinafter referred to as ‘GRCL’) were adopted on March 15th, 2017¹⁶¹. However, as the name suggests, the GRCL could not cover all the issues related to civil law, but solely the general part. It sets forth rules regarding to personality (which includes capacity rights and rules applicable to legal entities), civil rights, legal acts, representation, civil liability and limitation periods.

The GRCL followed the same structure of the GPCL but have incorporated several provisions existing in individual laws¹⁶². Specific subjects not addressed in the GRCL were governed by the individual civil law instruments, and in case of conflict between provisions of the GRCL and the given individual law, the latter used to prevail¹⁶³.

In parallel of the adoption of the GRCL, drafts of specific rules governing civil relations (specific statutes on specific contracts) were reviewed by the National People’s Congress Committee in order to, at a later time, be systematically combined and integrated to the GRCL and form the draft of the unified Civil Code¹⁶⁴. The existence of this fragmented and sparse rules of civil law have suffered many criticisms due to the overall confusion, overlaps and several unfilled gaps, claiming for the adoption of a uniform code¹⁶⁵.

Following the continued effort towards a unique set of civil rules, on May 28th, 2020, the People’s Republic of China finally adopted a single Civil Code, which entered into

¹⁶⁰ JONES, William, *Sources of Chinese Obligation Law*, in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017, p. 297.

¹⁶¹ English text available at: <http://www.npc.gov.cn/englishnpc/laws-of-the-prc/202001/c983fc8d3782438fa775a9d67d6e82d8.shtml>.

Accessed on 15 August 2021. Since it is very recent, there is still a shortage of comprehensive scholarly work and case law regarding the application of the GRCL.

¹⁶² For instance, for the Chapter VI, the GRCL incorporated many provisions of the Contract Law of 1999.

¹⁶³ Pursuant to Article 11 of the GRCL: “*Where there are special provisions set forth in other laws governing civil relationships, such provisions shall prevail.*”

¹⁶⁴ ZOU, Mimi, *Chinese Contract*, cit., p. 2; CHEN, Lei – RHEE, C.H. Remco, *Introduction*, cit., p. 4; WANG, Liming, *The systematization*, cit., p. 24.

¹⁶⁵ JONES, William, *Sources*, cit., p. 299; LING, Li, *China’s New Contract Law: Guarantee for Healthy Development of its Market Economy*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003, pp. 1-2; CHEN, Lei – RHEE, C.H. Remco, *Introduction*, cit., p. 3; SMITS, Jan M., *Codification in Europe and China: What Makes Contract Law Special?* in, CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012, pp. 259-260; HAN, Shiyuan, *A snapshot*, cit., 252.

force on January 1st, 2021¹⁶⁶. The Civil Code replaced and repealed many former existing norms in China, in particular, with regard to law applicable to contracts, the GPCL, the GRCL and the Contract law¹⁶⁷.

The Civil Code contains 1,260 articles separated in 84 chapters and seven parts. While there are some new introduced provisions, the Civil Code kept almost all of the key concepts, doctrines and rules of the former Contract Law and GRCL. The introduced provisions mainly reflect other related regulations and rules pacified by the judicial interpretation of the Supreme People's Court, providing a more complete and coherent body of law of contracts with the mitigation of former inconsistencies and overlaps¹⁶⁸.

The Civil Code, similarly to the former private rules of China (especially the GRCL), is strongly influenced by German law and academics, which was the basis of Chinese law before the Soviet era¹⁶⁹. During this period, the construction of a codified civil law, as mentioned above, failed for several times and, hence, the new codification which commenced in the 90s is viewed as a return to the German tradition, despite some structural and material differences, with the search for more certainty and proximity with Western countries (important trade partners)¹⁷⁰. The influence of German law over China is actually indirect since it initially came from the proximity China had to Japan, whose law was predominantly based on the pandect system¹⁷¹.

It must be stressed how difficult the task was for Chinese lawmakers in creating this new and modernised private legislation. After all, the German and Roman law traditions are focused on the individual, where all activity is governed by the decision of individuals. Such perspective substantially differs from the former principles and traditions of the

¹⁶⁶ English text available at: <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf>. Accessed on 15 August 2021. The shortage of available material (case law and literature) on the new Civil Code is even worse than seen with the GRCL. For a very recent and objective analysis of the Civil Code, see ZOU, Mimi, *Chinese Contract.*, cit., *passim*.

¹⁶⁷ Pursuant to its Article 1260: “*This Code shall come into force on January 1, 2021. The Marriage Law of the People’s Republic of China, the Succession Law of the People’s Republic of China, the General Principles of Civil Law of the People’s Republic of China, the Adoption Law of the People’s Republic of China, the Security Law of the People’s Republic of China, the Contract Law of the People’s Republic of China, the Real Right Law of the People’s Republic of China, the Tort Liability Law of the People’s Republic of China, and the General Provisions of Civil Law of the People’s Republic of China shall be repealed at the same time*”.

¹⁶⁸ ZOU, Mimi, *Chinese Contract.*, cit., pp. 2-3 and 12.

¹⁶⁹ German and other Western laws influenced the first comprehensive codification on contract law during the Qing Dynasty prior to the Chinese revolution (DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., p. 4; PISSLER, Knut B., *Chinese Law*, cit., p. 183-184).

¹⁷⁰ PISSLER, Knut B., *Chinese Law*, cit., p. 182.

¹⁷¹ BU, Yuanshi, *Chinese cit.*, pp. 11-12; HAN, Shiyuan, *A snapshot*, cit., p. 237.

Chinese society and the People's Republic of China", where decisions were based on the labouring masses. Therefore, the construction of the Civil Code (which started with the GPCL) was a real paradigm shift and caused a rupture with many important roots of Chinese law and usages in a compromise between the individualism and the preservation of the socialist principles of a communitarian society¹⁷².

The decision making in civil relationships was shifted from the planning authority to the individual will, and the basic legal instrument to be used is a contract, rather than an order from the government¹⁷³. All of this aligned with the necessity to meet the Chinese socialism characteristics and values, as set forth in Article 1 of the Civil Code¹⁷⁴.

Case law also plays a significant role in Chinese contract law, even though many private disputes in China are settled through negotiation and mediation (self-enforcement remedies inherited from the distant techniques of Confucianism), with recourse to court and arbitration viewed as an *ultima ratio* measure¹⁷⁵. The interpretations (named *jieshi*) issued by the Supreme People's Court – highest court in China – are considered authoritative and shall be followed by lower judges and arbitrators applying Chinese law¹⁷⁶. Therefore, along with the National People's Congress, the Court's practice of interpretation is indeed a supplementary law-making process, since they are made in an abstract and general mode (detached from specific dispute, as the other decisions issued by the court)¹⁷⁷. The Interpretations are particularly important from a research point of view, since the case law in China is not well systematised¹⁷⁸.

¹⁷² ZOU, Mimi, *Chinese Contract*, cit., p. 9; JONES, William, *Sources*, cit., pp. 295-296.

¹⁷³ ZHANG, Mo, *Chinese Contract Law. Theory and Practice*, Leiden, Martinus Nijhoff, 2006, p. 47; JONES, William, *Sources*, cit., p. 299.

¹⁷⁴ Article 9 of the Civil Code: "*This Law is formulated in accordance with the Constitution of the People's Republic of China for the purposes of protecting the lawful rights and interests of the persons of the civil law, regulating civil-law relations, maintaining social and economic order, meet the needs for developing socialism with Chinese characteristics, and carrying forward the core socialist values*".

¹⁷⁵ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 291; JONES, William, *Sources*, cit., p. 316; LENG, Jing – SHEN, Wei, *The evolution*, cit., pp. 350 and 353 (the authors mention the mandatory previous negotiation before any litigation, as set forth in the Chinese civil procedure law).

¹⁷⁶ QIU, Xuemei, *Contract* cit., p. 157; DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., pp. 6-7; LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 328; JIN, Zhendoo, *From a supplementary legislator to a legitimate judicial lawmaker – on the role of the Supreme People's Court in developing law in mainland China*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012, p. 43 (according to the author, the "force of law" of the Interpretations is based on the Court's Provisions of 1997 and 2007).

¹⁷⁷ JIN, Zhendoo, *From a supplementary*, cit., pp. 31 and 33. On p. 40, the author clarifies the different types of decisions of the Supreme People's Court: apart from the Interpretations (*jieshi*), there are the Provisions (*guiding*), the Reply (*pifu*) and Decision (*jueding*).

¹⁷⁸ Also, the content of the general decisions is not always precise on the provisions and rules applicable, since are strongly based on specific facts of the cases (see, for instance, the cases transcribed in ZOU, Mimi, *Chinese Contract*, cit.).

With respect to contract law, the Court issued the so-called ‘Interpretations on Certain Questions Concerning the Application of Contract Law’ in 1999 and 2009, which have the same effect and authority of law in practice. These Interpretations not only made the application of the former Contract law clearer, but also gave a positive response to the requirements of the transactions’ reality¹⁷⁹. Nevertheless, there has also been criticism since, perhaps due to the fragmented law existing in China until 2020, the Court could not perfectly succeed in its role of bringing a uniform statutory interpretation, but, at the same time, exercise a real legislative power (ruling in abstract) without the popular participation as made by the National People’s Congress¹⁸⁰.

As happened with the Contract Law, it is expected that the Supreme People’s Court will soon issue new Interpretations on the recently enacted Civil Code. One of the discussed projects for the Court is the issuance of the ‘Cleaning up Judicial Interpretations Related to the Civil Code’, comprising of amendments to the existing Interpretations that contain provisions that are overlapping and inconsistent with the Civil Code¹⁸¹.

According to Article 12 of the Civil Code (similar to the former GRCL), the laws of China shall apply to all civil activities within the territory of China, unless otherwise provided for in the law¹⁸². Such provision is very broad – as are many others that follow a minimalistic style¹⁸³ – and do not clarify what would be “within the territory of China”. In case of international contracts, for instance, would the conclusion of a contract be understood as “within the territory of China” and only Chinese law would be applicable?

The specification of this general rule in the case of international contracts is provided by Law of the Application of Law for Foreign-Related Civil Relations of 2010¹⁸⁴, which is still valid after the enactments of the Civil Code, despite some advocating for its integration into the referred code¹⁸⁵. Article 3 of this law provides for the parties’ autonomy and freedom of choice of applicable law to international contracts (generally called “foreign-related civil relation”)¹⁸⁶. The same rule was present in the repealed Contract law, whose

¹⁷⁹ HAN, Shiyuan, *A snapshot*, cit., pp. 249-250.

¹⁸⁰ JIN, Zhenduo, *From a supplementary*, cit., pp. 36 and 42-44.

¹⁸¹ ZOU, Mimi, *Chinese Contract*, cit., p. 16.

¹⁸² Article 12 of the GRCL: “All civil activities within the territory of the People’s Republic of China shall be governed by the laws of the People’s Republic of China, unless otherwise provided for in the law.”

¹⁸³ BU, Yuanshi, *Chinese cit.*, p. 12.

¹⁸⁴ English text available at: <https://wipolex.wipo.int/en/text/475464>. Accessed on 15 August 2021.

¹⁸⁵ WANG, Liming, *The systematization*, cit., p. 26.

¹⁸⁶ Article 3: “The parties may explicitly choose the law applicable to their foreign-related civil relation in accordance with the provisions of this law.”

Article 126 stated that parties can choose the applicable law to the disputes arising from an international contract¹⁸⁷. Such provision of the Contract Law was not incorporated by the Civil Code, but remains valid in accordance with the Law of the Application of Law for Foreign-Related Civil Relations.

However, there are limitations indicating that Chinese law will apply regardless of the choice of the parties. For instance, Chinese mandatory provisions shall apply directly and the law chosen by the parties must not be prejudicial to the social and public interest of China, otherwise Chinese law will apply¹⁸⁸. Furthermore, the Civil Code (incorporating a former Contract Law provision) also states that Chinese law shall directly apply to certain types of international contracts if they are performed within China's territory¹⁸⁹.

Despite such limitations, as an important player in the international trade scenario, China has ratified the most applied international legal instruments in this field, such as the CISG (since its entering into force) and the United Nations Convention on the Use of Electronic Communications in International Contracts¹⁹⁰, as well as taking part in the conception of the UNIDROIT PICC.

The openness to adopt international conventions and the influence of foreign civil and common law rules reflects the interest of the country in having its legislation harmonised with as many other countries as possible, so as to reduce transaction costs and improve efficiency in commercial transactions, which is primarily important for the largest trading nation of the world. The CISG, in particular, not only applies to international sales contracts, but also influenced many provisions of the former Contract Law (now incorporated by the Civil Code of 2020) and has been applied by the Chinese courts¹⁹¹.

¹⁸⁷ Article 126: “*The parties to a foreign-related contract may choose those laws applicable to the settlement of contract disputes, unless stipulated otherwise by law. If the parties to a foreign-related contract fail to make such choice, the State laws most closely related to the contract shall apply.*”

¹⁸⁸ Pursuant to Article 4 and 5 of the of the Application of Law for Foreign-Related Civil Relations: “*Article 4. Where a mandatory provision of the law of the People's Republic of China (“PRC”) exists with respect to a foreign-related civil relation, that mandatory provision shall be applied directly*”; “*Article 5. Where the application of a foreign law will be prejudicial to the social and public interest of the PRC, the PRC law shall be applied*”.

¹⁸⁹ Pursuant to the second part of Article 467 of the Civil Code: “*The laws of the People's Republic of China shall apply to the contracts of Sino-foreign equity joint venture, contracts of Sino-foreign contractual joint venture, or contracts of Sino-foreign cooperation in the exploration and exploitation of natural resources that to be performed within the territory of the People's Republic of China.*”

¹⁹⁰ Information available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status and https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=X-18&chapter=10. Accessed on 15 August 2021.

¹⁹¹ LENG, Jing – SHEN, Wei, *The evolution*, cit., pp. 330-331 and 357; HAN, Shiyuan, *A snapshot*, cit., p. 239; ZOU, Mimi, *Chinese Contract.*, cit., p. 10; PISSLER, Knut B., *Chinese Law*, cit., p. 184.

This feature of Chinese legislation and wide acceptance of rules and principles provided for these international instruments is also relevant for the harmonisation exercise sought in this study.

For the purposes of the present study and given the shortage of literature and case law on Chinese law in general and especially regarding the new provisions of the Civil Code - which imposes a higher degree of difficulty for any foreign researcher¹⁹² –, the comments on the general principles of contract law, as well as on the overview of the rules applicable to validity/invalidity of contracts and hardship (the core of the present study), will mainly consider scholarly work in English language issued before the adoption of the Civil Code, which analysed the provisions of the former Contract Law and GRCL.

4.2. General principles of contract law

Without complication, the general principles of Chinese contract law can be specifically drawn from Articles 2 to 9 of the Civil Code¹⁹³ and can be summarised as: (i) equality; (ii) freedom of contract or voluntariness; (iii) equity and fairness; (iv) good faith; (v) legality; (vi) binding nature and (vii) environmental protection or new *green principle*. The express enumeration of general principles is an expression of socialist countries.

Literature highlights that the principles of equality, freedom of contract, binding nature and good faith are fundamental and a counterpoint to the strong monitoring and supervision that was in place in China¹⁹⁴. Even though the Civil Code (as well as the former GRCL and Contract Law) do not make such differentiation, the remaining principles are deemed to have a supplementary function. Some principles seem to be in clear competition and contradiction amongst themselves, which reflects the mentioned feature of the mixed system of socialist and western free market influences, together with the common law and civil law influences on the legislation¹⁹⁵.

It is not clear, additionally, whether all the principles can be applied autonomously or solely as a default rule or even a persuasive argument in contractual

¹⁹² As previously observed by JONES, William, *Sources*, cit., pp. 313 and 316.

¹⁹³ Reflecting the former Articles 3 to 8 of the Contract Law and 4 to 8 of the GRCL.

¹⁹⁴ LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 328.

¹⁹⁵ ZOU, Mimi, *Chinese Contract*, cit., p. 27.

relationships¹⁹⁶. Since some have specific provisions in the legal instruments (such as good faith), the autonomous application is generally attributed just to those principles, while the others play a more gap-filling role to guide judging courts¹⁹⁷.

The principle of equality or “*equal status*” is set forth in Articles 2 and 4 of the Civil Code¹⁹⁸ (formerly Articles 3 of the Contract Law and 4 of the GRCL). The practical application of this principle to contractual relationships is to avoid a party imposing its willingness to the other party (no coercion in the process of contract formation)¹⁹⁹. In addition to status, this principle provides for equality of personality, treatment and legal relief within civil law relationships, regardless of whether the party is a natural person or an entity and whether it is a Chinese national or a foreign party²⁰⁰.

Freedom of contracts is also referred by Chinese law as “*private autonomy*” or “*voluntariness*” and is established by Article 5 of the Civil Code²⁰¹ (incorporating and replacing former Articles 4 of the Contract Law and Article 5 of the GRCL). The scope of this principle comprises not only the creation of a legal relationship, but also its change or termination. The express adoption of voluntariness, first introduced by the repealed Contract Law, was crucial and a milestone in Chinese change from the planned economy, where this principle had been abolished²⁰².

The principle was enhanced by the Supreme People’s Court Interpretations, which extended its application to the ability of the parties to choose the court for resolving

¹⁹⁶ BU, Yuanshi, *Chinese cit.*, p. 15; DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., p. 15; HAN, Shiyuan, *General Principles under the CCL*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, p. 29.

¹⁹⁷ For instance, good faith is specifically provided as an obligation under Articles 43 and 60 of the Contract Law: “Article 42 In the making of a contract, the party that falls under any of the following circumstances, causing thus loss to the other party, shall hold the liability for the loss. (...) (3) taking any other act contrary to the principle of good faith”; “Article 60 The parties shall fulfill fully their respective obligations as contracted. The parties shall observe the principle of good faith and fulfill the obligations of notification, assistance and confidentiality in accordance with the nature and aims of the contract and trade practices.”

¹⁹⁸ Article 2 of the Civil Code: “The civil law regulates personal and proprietary relationships among the persons of the civil law, namely, natural persons, legal persons, and unincorporated organizations that are equal in status”; Article 4 of the Civil Code: “All persons of the civil law are equal in legal status when conducting civil activities”.

¹⁹⁹ This intent was previously expressed in Article 3 of the former Contract Law (“Parties to a contract shall be of equal legal status, and neither party may impose its will on the other party”).

²⁰⁰ BU, Yuanshi, *Chinese cit.*, p. 16; TWIGG-FLESNER, Christian, *General Principles of Chinese Contract Law and English Common Law Perspective*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, p. 45; ZOU, Mimi, *Chinese Contract*, cit., p. 28.

²⁰¹ Article 5 of the Civil Code: “When conducting a civil activity, a person of the civil law shall, in compliance with the principle of voluntariness, create, alter, or terminate a civil juristic relationship according to his own will”.

²⁰² HAN, Shiyuan, *General Principles*, cit., p. 30; LING, Li, *China’s New Contract Law*, p. 2.

contractual disputes²⁰³. The purpose of the provision reinforced by the Civil Code is to give effect to the parties' real intention²⁰⁴.

Although widely recognised as fundamental, this principle may suffer limitations by State interference and by competition with other principles and guidelines, such as good faith, equality and public morality and interest, in order to prevent private contracts from being abusive²⁰⁵. Similar to what has been observed in Russian case, there is evidence of literature criticising the detailed codification of the Contract Law, which used to provide for a large number of mandatory provisions limiting the freedom of contract to what is permitted by law²⁰⁶.

This criticism may have been taken into account by the drafters of the new Civil Code, who changed some wordings from "*the contract shall include clauses*" to "*a contract generally contains clauses*", giving the parties a parameter and not an obligation to create relationships precisely as provided by the law. This change can be observed, for example, in the case of contracts for supply and consumption of electricity, water, gas and heating, whose wording of the former Article 177 of Contract Law was replaced by the new Article 649 of the Civil Code²⁰⁷.

Despite this important progress, there are still limiting provisions on the party autonomy, with mandatory requirements to contracts, as well as those permitting the parties to change or terminate the contract. Given the COVID-19 pandemic, which drastically affected private relationships, the Civil Code introduced Article 494 stating obligations for the parties to contract in a manner determined by the State in cases of emergency, expressly specifying the circumstance of "*pandemic prevention and control*"²⁰⁸.

²⁰³ DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., p. 8.

²⁰⁴ JONES, William, *Sources*, cit., p. 302.

QIU, Xuemei, *Contract* cit., p. 161; BU, Yuanshi, *Chinese* cit., p. 17; HAN, Shiyuan, *General Principles*, cit., p. 30; ²⁰⁵ LENG, Jing – SHEN, Wei, *The evolution*, cit., pp. 340-341 and 334-335.

²⁰⁶ JONES, William, *Sources*, cit., p. 305.

²⁰⁷ Article 177 of the Contract Law: "*A contract for the supply and consumption of electricity shall include clauses dealing with the methods, quality and time of electricity supply, the volume and nature of the electricity to be consumed and the address at which it is to be consumed, methods of calculation of the amount of electricity used, methods of account settlement in relation to electricity prices and electricity fees, responsibility for the repair of electricity supply facilities, etc.*"; Article 649 of the Civil Code: "*A contract for the supply and consumption of electricity generally contains clauses specifying the mode, quality and time of the supply, the volume, address, and nature of the consumption, the measuring method, the price, the settlement method of electricity fees, the responsibility for the maintenance of electricity supply and consumption facilities, and the like*".

²⁰⁸ Article 494 of the Civil Code: "*Where the State issues a State purchase order or a mandatory assignment in accordance with the needs such as emergency and disaster relief, pandemic prevention and control, or the*

The Civil Code (as the former Contract Law and the GRCL) provides for the principle of equity and fairness separately from the principle of good faith. This feature differentiates the Chinese legislation from others belonging to civil law tradition – including German law –, by which fairness is considered an aspect of good faith²⁰⁹. This principle is set forth in Article 6 of the Civil Code²¹⁰.

The principle of fairness and equity refers to the appropriate distribution of rights and duties among contracting parties and was indirectly incorporated in other instances, such as the doctrine of change of circumstances and prohibition of unfair enrichment. Therefore, it is hardly understood as a provision with autonomous application, but merely as a supplement for other protected situations under contractual relationships²¹¹.

As other principles, fairness also imposes limitation to freedom of contract, raising some criticism on the potential interventionism by courts in applying the principle broadly. According to defenders of the party autonomy, the application of fairness must be exceptional and the parties shall respect all contracts lawfully concluded²¹².

The good faith principle is provided for in Article 7 of the Civil Code²¹³ (replacing Articles 6 of the Contract Law and 7 of the GRCL). It is regarded as a paramount rule of Chinese civil law and a fundamental directive of the market economy²¹⁴. Different from fairness, good faith refers to the conduct of honesty and commitment that the parties must have when engaging contractual relationships. The parties shall act responsibly, avoid abusing their rights and harming the other party.

This standard of conduct is applicable to parties' rights and obligations and, like Russian express law and Brazilian practice and literature, must be followed during all

like, the persons of the civil law concerned shall conclude a contract in accordance with the rights and obligations provided by the relevant laws and administrative regulations. The party that has an obligation to make an offer in accordance with the provisions of laws and administrative regulations shall make a reasonable offer in a timely manner. The party that has an obligation to make an acceptance in accordance with the provisions of laws and administrative regulations shall not reject the reasonable request of the other party to conclude a contract”.

²⁰⁹ BU, Yuanshi, *Chinese cit.*, p. 17.

²¹⁰ Article 6 of the Civil Code: “When conducting a civil activity, a person of the civil law shall, in compliance with the principle of fairness, reasonably clarify the rights and obligations of each party”. Previously, the principle was set forth in Articles 5 of the Contract Law and 6 of the GRCL.

²¹¹ BU, Yuanshi, *Chinese cit.*, p. 17; ZOU, Mimi, *Chinese Contract.*, cit., p. 32.

²¹² ZOU, Mimi, *Chinese Contract.*, cit., pp. 33-34. The author quotes one case where the court decided for the rebalance of a contract's price due to lack of fairness.

²¹³ Article 7 of Civil Code: “When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments.”

²¹⁴ LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 338.

contractual phases²¹⁵, since the contractual negotiations (as provided in Article 500(3) of the Civil Code²¹⁶), performance (according to Article 509²¹⁷) and post-termination (according to Article 558²¹⁸).

In convergence to what was analysed in the Brazilian case, in addition to the conduct standard, this principle is also deemed to have the functions of interpretation (in cases of gap filling of laconic contracts), attached duties (such as the duty to notice, confidentiality, collaboration etc.) and restriction (in cases where the consequence of applying a rule or a conduct contradicts general social justice)²¹⁹.

Given the wide scope of this principle, scholars are generally worried about the risk of abusive demands and the judges must act carefully in applying it. Therefore, as mentioned above, good faith is generally provided in combination with other specific rules and not autonomously as a base of a claim²²⁰.

Legality is a principle which comprises not only the necessity that contracts shall be in conformity with Chinese law, but also the respect to public order and good morals (usages). The principle is provided for in Article 8 of the Civil Code (previously Articles 7 of the Contract Law and Article 8 of the GRCL)²²¹.

The Contract Law provision used to be more comprehensive in determining the respect of the law (laws and administrative regulations) social ethics, socio-economic order and public interest, while the GRCL was more vague in providing generally for public order and good morals, a model replicated in the Civil Code. However, these concepts are still valid in interpreting the Civil Code's provision, which should be more generic in order to achieve all civil relationships. In brief, this principle imposes limitations to the contractual

²¹⁵ BU, Yuanshi, *Chinese cit.*, p. 18; QIU, Xuemei, *Contract cit.*, p. 161; ZOU, Mimi, *Chinese Contract.*, cit., p. 35.

²¹⁶ Article 500(3) of the Civil Code: "During the course of concluding a contract, the party that falls under any of the following circumstances and causes loss to the other party shall bear the liability for compensation: (...) (3) conducting any other acts contrary to the principle of good faith."

²¹⁷ Article 509 of the Civil Code: "The parties shall comply with the principle of good faith, and perform such obligations as sending notices, rendering assistances, and keeping confidentiality in accordance with the nature and purpose of the contract and the course of dealing."

²¹⁸ Article 558 of the Civil Code: "After the parties' claims and obligations are terminated, the parties shall, in compliance with the principle of good faith and the like, perform such obligations as sending notification, rendering assistance, keeping confidentiality, and retrieving the used items according to the course of dealing".

²¹⁹ HAN, Shiyuan, *General Principles*, cit., pp. 36-37; LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 338; See BU, Yuanshi, *Chinese cit.*, p. 18; JINGCHUN, Shao, *Performance of Contracts under the Contract Law of P.R. China*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003, p. 115.

²²⁰ BU, Yuanshi, *Chinese cit.*, p. 18; ZOU, Mimi, *Chinese Contract.*, cit., p. 35.

²²¹ Article 8 of the Civil Code: "When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals".

freedom of the parties, who must observe the fundamental standards of public morals (for instance, family relations, sexual morals etc.), mandatory rules and social interest (such as human dignity) and, as such, demonstrates a certain level of control over the contracting process, since its violation may render the invalidity of the transaction²²².

The binding nature of the contracts differ from the former Article 8 of the Contract Law and is not included among the general principles of the Civil Code. The legislator preferred to follow the same model of the former GRCL, by providing this principle as a specific clause (under Article 119²²³) and, under that circumstance, it is autonomously applied. However, like other principles, this also contemplates several limitations and exceptions, such as the case of change of circumstances²²⁴, as will be analysed in more detail in Chapter 3 of this study.

Lastly, the environmental protection is a new incorporated principle under Article 9 of the Civil Code²²⁵ and is considered an important innovation brought before by the GRCL of 2017. This principle was neither provided in the GPCL, nor in the Contract Law. The goal of the principle is to construct an ecological civilisation, meaning that the parties shall seek and ensure the efficient utilisation of natural resources and protection of the environment in their relationship, with particular importance for interpretation and application of rules on tort liability²²⁶.

The inclusion of a specific Article on environmental protection shows a government and legislative concern about the rapid and strong expansion of consumer relations and has been suggested to be included in the individual laws in the future²²⁷. Since it is very recent, its application is yet to be verified in practice, as well as some other provisions of the 2020 Civil Code.

5. South Africa

²²² BU, Yuanshi, *Chinese cit.*, pp. 19-20; HAN, Shiyuan, *General Principles*, cit., p. 30; TWIGG-FLESNER, Christian, *General*, cit., p. 46; ZOU, Mimi, *Chinese Contract.*, cit., p. 36.

²²³ Article 119 of the Civil Code: “A contract formed in accordance with law is legally binding on the parties to the contract.”

²²⁴ HAN, Shiyuan, *General Principles*, cit., p. 40; ZOU, Mimi, *Chinese Contract.*, cit., p. 37.

²²⁵ Article 9 of the Civil Code: “When conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment”.

²²⁶ ZOU, Mimi, *Chinese Contract.*, cit., p. 38; BU, Yuanshi, *Chinese cit.*, p. 21.

²²⁷ BU, Yuanshi, *Chinese cit.*, p. 21.

5.1. Background and important legal instruments

The last legal system to be briefly analysed does not provide for any redundancy in relation to what has been discussed above. On the contrary, South Africa presents a very particular legal system which has been referred to as a ‘mixed system’, similar to some other countries which suffered from continental and British colonisation. South African law is the leading mixed system and has influenced other domestic laws in African countries²²⁸.

South Africa is considered to belong to the civil law tradition, strongly influenced by Roman-Dutch law, but also by English law (common law tradition) and indigenous law (especially with respect to customary law). It is a living and developing system of law and is regarded as an example of compatibility of civil and common law into one single system²²⁹. Therefore, the knowledge of this system is of considerable importance to the present study which seeks harmonisation of different legal traditions.

Compared to other civil law countries, South Africa has very little statutory codification, especially in the field of contract law, where legislation plays a relatively minor role. Prevalence is given rather to judicial precedents of the High Court, Supreme Court of Appeal and Constitutional Court, which, in addition to their persuasive value, are binding on lower and equal stand courts²³⁰. Such a precedential nature of the South African case law was established by the 1828 Charter of Justice, and the precedents are organised and published through private Law Reports (abbreviated as “SA”)²³¹.

This is a result of the initial influences of Roman-Dutch law since the seventeenth century and, from the beginning of the nineteenth century, the influence of English law and tradition. The reception of the English common law influence during this period is reflected not only in the adoption of the *stare decisis* doctrine, but also in the

²²⁸ ZIMMERMANN, Reinhard – VISSER, Daniel, *South African Law as a Mixed System*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996, pp. 2-6. The authors name other countries of mixed legal systems which has been influenced by South African law: Botswana, Lesotho, Swaziland, Namibia and Zimbabwe.

²²⁹ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law in South Africa*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2014, p. 26; ZIMMERMANN, Reinhard – VISSER, Daniel, *South African*, cit., pp. 4 and 8; ZIMMERMANN, Reinhard, *Roman Law and the Harmonization of Private Law in Europe*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011, p. 39; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 231-232 and 235.

²³⁰ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 26-29.

²³¹ ZIMMERMANN, Reinhard, *‘Double Cross’: Comparing Scots and South African Law*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004, pp. lxxvi-lxxvii.

academic formation of judges and lawyers in Great Britain, and the application of the English legal procedure, among others²³².

However, after the end of colonisation, the two traditions were merged to create the South African mixed legal system. For instance, the country adopts a more flexible approach of the *stare decisis* doctrine compared to Great Britain, meaning that courts are ready to depart from the precedents in case they are convinced that it is wrong for a particular case. In general, Roman-Dutch law and English law carry about equal weight in the country, with different instances of prevalence in accordance with the specific field. In contract law, it is observed the most complex blending and competition of the two traditions²³³, with interesting results, as will be analysed in this study.

Among the few codified norms applicable to contracts, reference is made to the Consumer Protection Act 68 of 2008, which is mandatory and directly applies regardless of what the proper law may provide to every transaction occurring within South Africa²³⁴. The scope of this Act is extremely wide, since the consumer party may not necessarily be the end-consumer (natural person), but also legal entities whose business leads to consumer relationships (for instance, franchisees and small business in the supply chain with lower income)²³⁵.

As well as India, South Africa did not ratify the most important international treaties/conventions applicable to international contract law. The country is not a contracting party of the CISG, of the Convention on the Limitation Period in the International Sale of Goods, or of the United Nations Convention on the Use of Electronic Communications in International Contracts. On the other hand, South Africa has issued some legislation to deal with this lack of ratifications.

For instance, the International Trade Administration Act 71 of 2002²³⁶ provides for rules related to a variety of forms of import and export control, such as issuing permits and imposing duties and can influence international contracts. Also relevant to this is the

²³² ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 233 and 235; ZIMMERMANN, Reinhard, *'Double Cross'*, cit., p. 5.

²³³ ZIMMERMANN, Reinhard, *'Double Cross'*, cit., pp. 6-7 and 17.

²³⁴ English text of the Consumer Act available at: https://www.gov.za/sites/default/files/gcis_document/201409/321864670.pdf. Accessed on 15 August 2021.

²³⁵ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law of Contract in South Africa, Private Law*, 3rd ed., Cape Town, Oxford University Press, 2018, p. 35.

²³⁶ English text available at: https://cisp.cachefly.net/assets/Articles/attachments/00476_intrtradeadminact71.pdf. Accessed on 15 August 2021.

Electronic Communications and Transactions Act 25 of 2002²³⁷, which was largely based on the UNCITRAL Model law on Electronic Commerce with Guide to Enactment 1996 and comprises of the conclusion of contracts by various electronic means, such as the internet, email messages, SMS messages, and other similar forms.

This lack of codified norms and of ratification of relevant international instruments introduces a challenging ingredient in finding the correct treatment attributed by South African law to the various issues of contract law. For such an enterprise, one author advises to, first, consult case law, then legislation and literature²³⁸. For the purposes of this thesis, the order is inverted, *i.e.*, the analysis will start from literature – which is a recognised source of legal development²³⁹ – in order to obtain the necessary guidance in searching for legislation and case law, when necessary.

5.2. General principles of contract law

South African contract law is generally ruled by five principles: (i) consensus; (ii) freedom of contract; (iii) sanctity of contract; (iv) privity of contract and (v) good faith and fair dealing²⁴⁰. While consensus is deemed to be an obvious and fundamental concept to any contractual relationship (which approximates the South African legal system to the others analysed above), items (ii), (iii) and (iv) are competing values with item (v).

The first values come from economic liberalism, limiting the State's interference into private relationships. The latter (good faith and fair dealing) implies a degree of social control over such private business. Given the lack of rigid legislation imposing prevalence among them, the balance of those principles is left to the judges in a case-by-case analysis²⁴¹. It is possible to identify some directions though, as will become apparent.

The treatment attributed to the freedom of contract in South Africa is very similar to the other systems analysed above. It comprehends the ability of the parties to decide whether or not to contract, with whom and on what terms, without external

²³⁷English text available at: https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf. Accessed on 15 August 2021.

²³⁸ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 72-74.

²³⁹ Due to the lack of codified norms and mixed systems integrated (as well as different legal vocabulary coexisting within the country), South African scholars have become important partners in the task of developing and refining the law (ZIMMERMANN, Reinhard – VISSER, Daniel, *South African*, cit., p.11).

²⁴⁰ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., pp. 21-22.

²⁴¹ *Idem, ibidem*, p. 23.

interference²⁴². This freedom is also reflected in the permission given to parties to choose the proper law applicable to their international contracts, on the condition that it does not affect South African public order or any imperative norm (such as those provided for in the Consumer Act)²⁴³.

As in the other systems, this principle faces exceptions and limitations which have received considerable attention by South African courts in the recent years, for instance: the increase of standardised terms and imbalanced relationships²⁴⁴, the advent of the welfare state and social concern – which requires a certain degree of intervention –, the growing importance of human rights and, as is often the case, the limitations imposed by public order and morals²⁴⁵.

Sanctity of contracts refers to the principle of preservation of contracts (comparable to *pacta sunt servanda*), by which the parties shall honour the obligations entered into by means of the contracts and, if necessary, through judicial enforcement²⁴⁶. This principle is intrinsically related to the freedom of contract and, as such, faces limitations either deriving from the formation of the contract (cases of invalidity) or from its performance (cases of impossibility, as will be analysed throughout this study)²⁴⁷.

Similar to the other systems, privity of contracts means that only the contracting parties acquire duties and incur liabilities created under a contract, which shall have a relative effect. On the other hand, this principle also has a negative application in the sense that no third party has a contractual cause of action against the contracting parties and shall respect the private relationship²⁴⁸.

This principle is, however, relaxed when related to the creation of rights for outside parties (for instance, by means of a stipulation in favour to a third party), provided that there is no formal objection to it²⁴⁹. Other often mentioned exceptions to this principle are the cases of successors and the representation and agency contracts²⁵⁰.

²⁴² HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 24.

²⁴³ FORSYTH, Christopher, *Private International Law*, cit., pp. 316-317 and 325-326.

²⁴⁴ Which received special treatment by the law since 2008 with the enactment of the Consumer Code.

²⁴⁵ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 25.

²⁴⁶ *Idem, ibidem*, p. 21.

²⁴⁷ ZIMMERMANN, Reinhard, *Good Faith and Equity*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996, p. 256.

²⁴⁸ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 149.

²⁴⁹ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 233.

²⁵⁰ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 149-150.

Finally, good faith and fair dealing are principles subjected to recent debate under South African contract law. As can be inferred by the other principles, the South African system grants strong prevalence to freedom and autonomy of contract and, as a consequence, good faith and fairness are not recognised or developed as a persuasive, objective and directly enforceable principle or norm under contract law (either considering contract formation, performance or interpretation). Indeed, this orientation has been regularly applied by the Supreme Court of Appeal and is still relevant nowadays²⁵¹.

Although the court's precedents recognise good faith as fundamental to contractual relationship, the courts consider the concept too vague and abstract to be considered enforceable as a rule of law²⁵². On the one hand, the concept refers to the Roman-Dutch law tradition and must guide parties' behaviour and also judges' interpretation of contracts to what is reasonable and equitable²⁵³. On the other hand, the narrow interpretation and application of good faith is a clear legacy of common law tradition, as is the case with Indian contract law.

In an opposed direction of the Supreme Court of Appeal, the Constitutional Court of South Africa, in 2012, issued an *obiter dictum* conferring fundamental importance towards good faith in contract law²⁵⁴ and that this principle shall be approximated to the constitutional concept of *ubuntu*, which, under South African tradition “*carries in it the idea of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to the basic norms and collective unity*”²⁵⁵.

The recent disjunction between the two most important courts in South Africa has brought about doubts regarding prevalence of contractual principles. Historically, South African case law has conferred prevalence to a liberal approach (freedom and sanctity of contract). However, the current trend initiated by the Constitutional Court may show that the

²⁵¹ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 30, quoting case *South African Forestry Co Ltd. vs. York Timbers Ltd.* 2002 (3) SA 323 (SCA) § 27; HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 60.

²⁵² See VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 61, footnote 120, where the author refers to several precedents in this direction.

²⁵³ ZIMMERMANN, Reinhard, *Good Faith*, cit., p. 220.

²⁵⁴ *Everfresh Market Virginia (Pty) Ltd vs. Shoprite Checkers (Pty) Ltd* 2012 (1) SA256 (CC), *apud* HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 33; HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 60; HUTCHISON, Andrew, *Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication*, in *South African Law Journal*, vol. 134, no. 2, 2017, pp. 298 and 302, where the author mentions other cases in the same direction: *Botha vs. Rich*, 2014 (4) SA 124 (CC) and *Barkhuizen vs. Napier* 2007 (5) SA 323 (CC).

²⁵⁵ Pursuant to the above mentioned precedent of the Constitutional Court, *apud* HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 60.

‘pendulum’ is moving towards the opposite direction, creating some sort of uncertainty for the business environment²⁵⁶.

The future of this judicial controversy is still to be developed and marks the South African mixed system as a living one. Considering scholarly opinion, the orientation constantly issued by the Supreme Court of Appeal is the most suitable to private business relationships, especially regarding international contracts. This means that good faith may be recognised as a conduct to be observed by the parties and is reflected in several instances (such as the duty to mitigate losses) but cannot be autonomously applied and interfere in the private willingness of the parties²⁵⁷. An exception could be with regard to consumer contracts that fall under the scope of the Consumer Act²⁵⁸.

A final remark in order to conclude this chapter is to clarify that, differently from Indian contract law, South African contract law does not provide for the consideration requirement, but rather the *justa causa*. For many years during the nineteenth century, both concepts were referred as synonymous and were subject to heated debate²⁵⁹.

However, *justa causa* is currently understood as not equivalent to consideration and, despite some continuous discussions on its meaning and application, refers to the need of consensus/serious intention to be bound by a lawful obligation. By this interpretation, unlike in India, gratuitous contracts and promises are valid in South Africa²⁶⁰.

From the above brief and preliminary considerations regarding the BRICS countries’ contract law, the study will move into the analysis of the specific treatment conferred by each legal system to the issues to be harmonised: validity/invalidity of contracts and hardship. The background and general principles presented in this chapter will play an important role to examine the essential pillars of each system in order to permit harmonisation.

²⁵⁶ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., pp.23 and 34.

²⁵⁷ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, in ZIMMERMANN, Reinhard – VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004, p. 132; HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 34.

²⁵⁸ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 34.

²⁵⁹ For a historical analysis of the doctrine of *justa causa* vs. consideration under South Africa law, see HUTCHISON, Dale, *Contract Formation*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996, pp. 166-173.

²⁶⁰ VAN HUYSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 36 and 84-85; HUTCHISON, Dale, *Contract*, cit., pp. 172-173.

CHAPTER 2: VALIDITY AND INVALIDITY OF CONTRACTS

1. Brazil

Brazilian Civil Code sets forth requirements for the validity of contracts in both general and specific terms. The former are provided for in the general part of the Code and are applicable to the validity of all legal acts (Articles 104 to 109), while the latter, deriving from these general requirements, are sparsely provided for in the Special Part of the Code for each type of contract.

For legal acts (or transactions) in general, Brazilian literature distinguishes three plans: the existence plan, the validity plan and the effectiveness plan. For each plan, different elements and criteria are required for an act to be able to ‘climb’ the steps, beginning with its existence and ending with its effectiveness. This means that a legal act can be existing and valid, but unenforceable and, on the other hand, there is no proper effectiveness if the act is not deemed valid.

A legal act exists when the supported fact described in a norm is concretised in the legal world²⁶¹. The elements for the existence of all types of legal acts are the form (similar to the declaration of will that forms the act), object (content of the act), negotiation circumstances, agent (person subject to the act’s effects) and time and place. In case one of these elements are missing, the act cannot be considered existing. There are also additional elements of existence related to specific acts, for instance, a sales contract cannot exist without the price²⁶². These elements are not provided for specifically in the law but are deducted from several other provisions applicable to valid and enforceable acts.

More importantly for the present study are the requirements of the next plan, the validity plan, which permits the acts to regularly enter into the legal world²⁶³. The validity requirements applicable to all types of acts – and, as such, applicable to contracts in general – are established in Article 104 of the Brazilian Civil Code: (i) capacity of the agent, (ii) the

²⁶¹ LÔBO, Paulo, *Direito Civil, Parte Geral*, 3rd ed., São Paulo, Saraiva, 2012, p. 214.

²⁶² AZEVEDO, Antônio Junqueira de, *Negócio Jurídico, Existência, Validade e Eficácia*, 4th ed., São Paulo, Saraiva, 2002, pp. 31-34.

²⁶³ *Idem, Ibidem*, p. 42.

object must be legal, possible and determined or determinable and (iii) specific form provided by law or not prohibited by law.

The capacity of the parties can be summarised as the capacity to exercise legal rights and assume duties, which is acquired with the age of majority or by other situations established by the law²⁶⁴. In Brazil, there is the category of relative incapacity (persons who are between sixteen and eighteen years old²⁶⁵) which may result in a contract being voidable and cannot be alleged by a contracting party that was aware of this situation, according to Article 105 of the Civil Code²⁶⁶.

The object of an act must not affront the mandatory norms of Brazilian Law and be at least determinable, since the contrary would lead to arbitrary determination by one of the parties. Moreover, the object must be possible, *i.e.*, feasible of being performed or achieved by the normal debtor. The parties are free to establish the form of the act, provided that such form is legal and unless law expressly provides for specific form²⁶⁷.

The third plan, effectiveness, refers to the ability of the act to produce the effects desired by the agents *i.e.*, the creation, modification or extinction of legal relationships, rights or duties²⁶⁸. The factors of effectiveness can be general (subject the entire act to the factor, for instance, an act subject to a suspensive condition, of the death of the tester, the reception of the declaration in receptive acts, among others), directed (the act is partially effective, but the full effectiveness is subject to a specific factor) or extended (when an act is effective, but, after the verification of the factor, it increases its effectiveness, for instance, an assignment of creditor is effective between the parties, but, after officially registered, becomes effective against third parties)²⁶⁹.

As for the special criteria for the validity of contracts (not only acts) they can be segregated into subjective, objective and formal criteria. The first subjective criterium is the capacity of the parties, which derives from Article 104(a) of the general part, but is also provided in specific provisions, such as Article 496 that prohibits the conclusion of sales

²⁶⁴ Under Brazilian law, the age of majority is 18 years old, but a younger agent can acquire capacity by emancipation by the parent, marriage, among other situations.

²⁶⁵ Pursuant to Article 4, I: “*The following are incapable as regards certain acts or the manner of performing them: those over the age of sixteen and under the age of eighteen;*”.

²⁶⁶ Article 105: “*The relative incapacity of one of the parties may not be invoked by the other party for its own benefit, nor may it benefit capable co-interested parties, except if, in this case, the object of the common right or obligation is indivisible.*”

²⁶⁷ LÔBO, Paulo, *Direito Civil, Parte*, cit., pp. 237-238.

²⁶⁸ *Idem, Ibidem*, p. 216.

²⁶⁹ AZEVEDO, Antônio Junqueira de, *Negócio*, cit., p. 57.

contracts between ascendants and descendants²⁷⁰. From the capacity of the parties, some authors extract the requirement of legitimacy of the party, which means that a party must also be legitimate to be bound by the contract²⁷¹. The second subjective criterium is the consent of the parties to be bound by the contracts, which comprises the free consent about the existence and nature of the contract, about the object of the contract, and about its provisions²⁷².

The objective criteria are the possibility, legality and determination. These three criteria are those set forth for all legal acts in Article 104 of the Brazilian Civil Code mentioned above. The possibility must take place at the moment of the conclusion of the contract and must be material (physically susceptible to be performed) and legal (is not prohibited by any norm, including norms of public order and good usages). The legal possibility is equivalent to the legality requirement. Determination relates to the object of the contract, which must be at least determinable at the moment of the conclusion of the contract²⁷³.

The formal criterium is not applicable to all contracts, but solely to those for which the law requires the adoption of certain formality in order for a contract to be valid, since the general principle is that, under Brazilian law, contracts are free of form. That is the specific case, for instance, of donation contracts (must be in writing according to Article 541) and contracts for the transfer of real estate property rights²⁷⁴.

When a contract fails to contain any of the above requirements, it is deemed invalid or unenforceable. However, Brazilian law recognises the difference between void and voidable contracts according to the degree of seriousness of the contract's defects and, therefore, provides for different treatment in each case²⁷⁵.

Under Article 171, voidable contracts (also referred to as relative voidance) are those concluded by a party that has some relative legal capacity or is impacted by a defect

²⁷⁰ Article 496: "A sale by an ascendant to a descendant is voidable unless the other descendants and the seller's spouse have expressly consented to it." (free translation)

²⁷¹ For instance, a party which is forbidden to have interest on an object is not legitimate to enter into a sales contract to acquire such object (GOMES, Orlando, *Contratos*, cit., p. 55).

²⁷² PEREIRA, Caio Mário da Silva, *Instituições*, cit., pp. 30-32.

²⁷³ GOMES, Orlando, *Contratos*, cit., pp. 53-54; PEREIRA, Caio Mário da Silva, *Instituições* cit., pp. 33-34.

²⁷⁴ Article 541: "A gift shall be made by public writing or by private instrument. Sole paragraph: An oral gift is valid if it concerns movable property of small value and is immediately followed by the delivery of the thing". As for real estate transfer, see Articles 108 and 1,245 transcribed above.

²⁷⁵ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado. Parte Geral. Validade. Nulidade. Anulabilidade*, tomo IV, at. MELLO, Marcos Bernardes de – EHRHARDT JR, Marcos, São Paulo, RT, 2012, p. 92.

of consent, such as mistake, malice, coercion, state of danger, gross disparity or fraud against creditors, which are defects expressly provided for in the Civil Code. The objective of these legal provisions is to protect the innocent party's willingness and rights, which is or may be harmed by the defect²⁷⁶.

The defect of mistake (or ignorance²⁷⁷) refers to the false representation of the reality that determinately induced the party to conclude the contract, and it is generally recognisable (capable of being perceived by a common person)²⁷⁸. The party is, independently, deceived about the substantial elements of the contracts or of the transmission of the willingness statement, both leading to the contract to be voidable at the interest of such party²⁷⁹. There was consent through the dispatch of a statement of will which entered the legal world. In order to result in a voidable contract, the mistake needs to be substantial according to a subjective requirement (the importance conferred by the party to the false element) and an objective requirement (reasonableness of the mistake to affect the validity of a contract), which must be cumulatively met²⁸⁰.

Article 139 of the Civil Code provides for instances for a mistake to be substantial, such as the mistake (i) on the nature of the contract, its main subject matter or essential quality; (ii) on the identity or essential quality of the contracting party (for instance, when the party believes to contract with someone with specific expertise); or (iii) on the law, but solely if this is the unique reason for contracting and does not imply in a refusal of law²⁸¹. Being determinant and substantial, the mistake affects the declaration of willingness as a whole and radiates to the entire contract, while the accidental mistake (impacting only secondary elements of the contract) will not lead to voidability²⁸².

²⁷⁶ LÓBO, Paulo, *Direito Civil, Parte*, cit., p. 216.

²⁷⁷ The Civil Code refers, in title of Section 1, to “mistake or ignorance” and, throughout the other provisions, solely refers to “mistake” leading to the conclusion that both lead to the same consequence, even though they have different meanings (mistake is a false knowledge of the reality, while ignorance is the absence of knowledge about the reality). See JUNIOR, Humberto Theodoro, *Livro III-Dos fatos jurídicos: Do Negócio Jurídico*, in TEIXEIRA, Sálvio de Figueiredo (coord.), *Comentários ao Novo Código Civil*, vol. III, tomo I, Rio de Janeiro, Forense, 2008, pp. 36-37.

²⁷⁸ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários ao Código Civil. Direito privado contemporâneo*, São Paulo, Saraiva, 2019, p. 227; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 58.

²⁷⁹ Pursuant to Articles 138 and 140 of the Civil Code: “Legal transactions are voidable when the statements of willingness are based on a substantial mistake that could be perceived by a person of normal diligence, in view of the circumstances of the transaction.”; “The false motive only vitiates the declaration of will when expressed as a determining reason” (free translation).

²⁸⁰ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado. Parte Geral. Validade. Nulidade. Anulabilidade*, tomo IV, 4th ed., São Paulo, Revista dos Tribunais, 1983, pp. 272-273 and 285-286.

²⁸¹ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 229-230;

²⁸² JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 70.

Considering those requirements, the avoidance of a contract due to mistake is deemed to be exceptional and the law provides for clear exceptions in order to privilege the preservation of the contracts, such as the case where the mistake could have been inferred by the context and surrounding circumstances, and when the other party offers to perform the contract in accordance with the real interest of the affected party²⁸³. These cases will not lead to voidability, being the second instance (the offering of the correct performance), a faculty of the other party and it is not subject to the request of the aggrieved party (to this one, the only available remedy is the avoidance)²⁸⁴.

The defect of malice differs from the mistake since the false representation of the reality derives from an intentional action or omission by the other party or third party in order to substantially induce the aggrieved party to conclude the contract. The party at malice consciously induce, maintain or confirm the aggrieved party in that false representation²⁸⁵, and, therefore, entails voidability by the latter²⁸⁶.

Covering different types of conducts, even conscious silence may be regarded as malice and able to result in a contract being voidable in cases where there is a duty to inform (according to the usages, negotiations or given circumstances)²⁸⁷. Based on Article 147 of the Civil Code, the silence must: be intended to lead the party to deviate from its true will, refer to an essential circumstance which was ignored by the party, there must be a causal connection between the essentiality and the declaration, and must be committed by the contracting party (there is no malice by silence by a third party)²⁸⁸.

Just like the mistake, malice must also be essential in order to entail voidability. The deception must affect an essential element of the contract without it the party would

²⁸³ Pursuant to Articles 142 and 144 of the Civil Code: “A mistake in the indication of the person or the object to which the statement of intent refers will not vitiate the transaction when, due to its context and the circumstances, it is possible to identify the object or person cogitated.”; “The mistake does not affect the validity of the legal transaction when the person, to whom the declaration of will is addressed, offers to perform it in conformity with the real will of the person making the declaration.” (free translation).

²⁸⁴ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 233-234; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 110.

²⁸⁵ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 326; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 234; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 113.

²⁸⁶ Pursuant to Article 145 of the Civil Code: “Legal transactions may be avoided by malice, when this is the cause thereof.” (free translation)

²⁸⁷ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 236; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 326.

²⁸⁸ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 145; Article 147 of the Civil Code: “In bilateral legal transactions, the intentional silence of one of the parties with respect to a fact or quality that the other party was unaware of constitutes a malicious omission, proving that without it the transaction would not have been concluded.” (free translation).

have never agreed to conclude the contract. Contrastingly, an intentional deception affecting a secondary element of the contract is qualified as accidental malice (*dolo accidental*) and does not lead to avoidance, since the party would, despite the wrongful representation, still be interested in concluding the contract, while the offending party will be liable only for the damages incurred by the aggrieved party²⁸⁹.

The liability for damages incurred by the aggrieved party is a distinctive feature of malice compared to mistake (which does not comprehend a wrongful act)²⁹⁰. When the malice is operated by a third party and the benefited party is not aware of such a wrongful act, only the third party is liable for damages and the contract is not subject to avoidance²⁹¹. Moreover, when both parties engage in the malicious act, neither of them is entitled to avoid the contract or to claim damages pursuant to Article 150 of the Brazilian Civil Code²⁹². The conducts are “neutralised”, and the law will not assist the parties from their turpitude or, in other words: who acted with malice, cannot base its claim on malice²⁹³.

Threat or coercion is a defect provided for in Articles 151 to 155 of the Brazilian Civil Code. It refers to a threat of imminent damage (to the party, its assets or someone close to the party) which is sufficiently serious to force a party (the “patient”) to conclude a contract or perform an act contrary to its true intention, making the declaration of willingness to be defective²⁹⁴. Here, the literature differentiates the absolute coercion (*vis absoluta*) from the relative coercion (*vis compulsiva*), where the first involves effective violence from the party or third party and, therefore, totally removes the consent (formative element) leading the contract to be inexistent. Article 151 of the Civil Code, on the other hand, refers to the

²⁸⁹ Pursuant to Article 146 of the Civil Code: “Accidental malice only obliges the payment of losses and damages, and is accidental when, in spite of it, the business would have been performed, although in another way.” (free translation); MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 235-236; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 339; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., pp. 115-118, 125 and 134.

²⁹⁰ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 234.

²⁹¹ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 336.

²⁹² Article 150 of the Civil Code: “If both parties act at malice, neither of them may allege the wrongful conduct to avoid the transaction or to claim indemnification”.

²⁹³ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 341; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 237; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 159.

²⁹⁴ Article 151 of the Civil Code: “The coercion, in order to vitiate the declaration of the will, must be such that it instils in the patient a well-founded fear of imminent and considerable damage to his person, his family or his assets. Sole paragraph. If it concerns a person who does not belong to the patient's family, the judge, based on the circumstances, will decide if there was coercion.” (free translation).

vis compulsiva, where there is “willingness” but vitiated due to the loss of spontaneity by the aggrieved party²⁹⁵.

The coercion must be wrongful, which means that the normal and valid exercise of a right will not lead to voidability²⁹⁶. The feared damage, used by the coercer to obtain the contract, may be future, but the fear and the threat must be actual (a future or possible threat will not invalidate the contract)²⁹⁷. Similar to malice, whether the coercer is a third party, the contract may be maintained if the benefited party is unaware or should not be aware of the coercion, and the true coercer will be liable for damages to the patient (this was a novelty from the 2002 Civil Code)²⁹⁸. If, nevertheless, the benefited party knew or should have known about the coercion by the third party, the contract is voidable and the party together with the coercer will be severally liable for damages to the patient²⁹⁹.

The Brazilian system has also accepted the notion of economic coercion, which is an influence from the “economic duress” of common law tradition. It refers to exceptional circumstances where the negotiation pressure extrapolates reasonable limits and leaves the other party with no way out but to contract, such as the threat to breach an important ongoing contract or to cease future contracts with the aggrieved party³⁰⁰.

The state of danger is a specific defect of consent introduced by the Civil Code of 2002. It refers to the situation where the party agree on a very disadvantageous contract in order to save him/herself (or a close related person) from a serious and imminent damage known to the other contracting party³⁰¹. The objective elements for the occurrence of the

²⁹⁵ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 238; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 348; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 163-164.

²⁹⁶ Pursuant to Article 153 of the Civil Code: “Neither the threat to the normal exercise of a right nor the mere reverential fear shall be considered coercion” (free translation). See PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 348; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 240.

²⁹⁷ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 356; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 170.

²⁹⁸ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., pp. 195-196; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 240-241.

²⁹⁹ Pursuant to Articles 154 and 155 of the Civil Code: “The coercion exercised by a third party, if the party who benefits from it was or should have been aware of it, vitiates the legal transaction, and the latter will be jointly and severally liable with the third party for losses and damages.”; “The legal transaction shall subsist, if the coercion arises from a third party, and the party who benefits from it was not or should have been aware of it; but the author of the coercion shall be liable for all the losses and damages caused to the coerced party.” (free translation)

³⁰⁰ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 238.

³⁰¹ Pursuant to Article 156 of the Civil Code: “A state of peril exists when someone, pressed by the need to save himself or a member of his family from serious damage known to the other party, assumes an excessively onerous obligation. Sole Paragraph. In the case of a person not belonging to the family of the declarant, the judge will decide according to the circumstances.” (free translation)

state of danger are (i) the existence and actuality of the serious damage; (ii) causal connection between the threatening damage and the conclusion of the agreement; (iii) knowledge of the danger by the other party and (iv) assumption of an extremely onerous obligation by the aggrieved party, while there is a subjective element related to the intention to save him/herself or a close person (which may vary from one person to another)³⁰². Once these elements are verified, the aggrieved party may claim the avoidance of the contract.

The assessment of the onerousness of the obligation undertaken due to the state of danger takes into account the patrimony of the affected party. Although not stated in Article 156, by analogy to the rule applicable to gross disparity³⁰³, the voidability of the contract can be removed if the other party offers to adapt the obligation in order to reduce the extreme onerousness³⁰⁴.

Quite similar to state of danger is the gross disparity or lesion provided in Article 157 of the Civil Code³⁰⁵. It was also introduced in 2002 and refers to a patrimonial risk, opposed to the personal nature of the state of danger's risk³⁰⁶. The lesion is verified where a party, due to urgent need or inexperience (subjective element) agrees on a manifestly imbalanced obligation (objective element)³⁰⁷. Even though there is no requirement of malice by the other party, the disproportion must be so exorbitant to represent an unfair exploration of the aggrieved party to the other's benefit³⁰⁸.

Differently from the other analysed defects, the willingness of the aggrieved party is free, and the undertaken obligation is in accordance with the party's true intention. However, such intention is derived from a particular condition of the party that makes the contract extremely disproportional and, therefore, voidable. The application of this defect is exceptional (with little case law) and seeks the preservation of the economic balance at the moment of the conclusion of the contract, not aiming to "rescue" bad bargains³⁰⁹. As

³⁰² MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 242; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., pp. 207-208.

³⁰³ Pursuant to the Statement 148 approved in the III Journey of Civil Law: "To the 'state of danger' (art. 156) applies, by analogy, the provisions of § 2 of art. 157", where Article 157§2º states that: "The avoidance of the transaction shall not be decreed if a sufficient supplement is offered, or if the favoured party agrees with the reduction of the profit." (free translation).

³⁰⁴ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 243-244.

³⁰⁵ "Lesion occurs when a person, under urgent necessity or through inexperience, undertakes a performance that is manifestly disproportionate to the value of the opposite performance." (free translation)

³⁰⁶ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 201.

³⁰⁷ *Idem, ibidem*, pp. 218, 222 and 224.

³⁰⁸ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 246; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 231.

³⁰⁹ MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 244-247.

highlighted above, the voidability may be removed if the benefitted party offer to reduce the imbalance (cure the defect), pursuant to §2 of Article 157.

Finally, the vice of fraud under Brazilian law is different from what will be seen in the other systems since it comprises the fraud against creditors and, therefore, is related to insolvency issues. In other legal systems, there are specific rules in the insolvency field to deal with the conducts provided for in Articles 158 to 165 of the Brazilian Civil Code. Moreover, the general idea of fraud seen in other countries is equivalent to the malice under Brazilian law³¹⁰. Fraud, in general terms, is an indirect violation which frustrates the interest of the party or third parties³¹¹.

Fraud against creditors is not a defect of consent, but rather a social defect. There is free and real intention, however, aimed at harming interests of third parties (*scientia fraudis* or the defrauding intention)³¹². Hence, the elements for the fraud against creditors are the existence of the credit before the fraudulent act and the insolvency by the debtor³¹³. Upon those elements, some fraudulent conducts are qualified under this defect making the act to be voidable, such as: gratuitous transmission of assets or debt write-off by the insolvent debtor (Article 158), onerous contracting with a debtor who is manifestly insolvent (Article 159 - the insolvency must be clearly notable and not mere knowledge of some debts³¹⁴), payment or grant of collateral to a creditor without observing the *par conditio creditorum* (Articles 162 and 163), except for those ordinary transactions which are necessary for the subsistence of the debtor or maintenance of the business (Article 164).

Upon the verification of one of these defects, an effective (but voidable) contract may be declared void by a judge or arbitral tribunal upon the request of the aggrieved party and, after such decision, it ceases to produce effects and the parties shall reconstitute the other party to the *status quo ante*. In these cases, the voidable contracts are considered to have provisional or transitory effectiveness³¹⁵.

³¹⁰ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 253.

³¹¹ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 415.

³¹² MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 248; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 435.

³¹³ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 324.

³¹⁴ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 435.

³¹⁵ VELOSO, Zeno, *Invalidez do Negócio Jurídico. Nulidade e anulabilidade*, 2nd ed., Belo Horizonte, Delrey, 2005, pp. 265-266; MELLO, Marcos Bernardes de, *Teoria do Fato Jurídico. Plano da Validade*, 6th ed., São Paulo, Saraiva, 2004, p. 228.

A voidable contract can remain in force if it is either expressly confirmed³¹⁶ or partially performed³¹⁷ by the aggrieved party aware of the defect, since such conduct implicitly extinguishes any potential claims by that party³¹⁸. Additionally, the contract can remain enforceable by the lapse of time. Article 178 of the Brazilian Civil Code stipulates the limitation period for claiming invalidity of four years from the conclusion of the contract (in case of mistake, fraud, malice, state of danger or gross disparity) or from the date the coercion ceases or, in case of incapacity, from when the injured person attains capacity. For any other cases not expressly provided by the law, the limitation period will be two years from the conclusion of the act, pursuant to Article 179.

Regarding the null and void contracts, the Civil Code – in addition to providing the requirements for validity – expressly stipulates the grounds for invalidity in Articles 166 and 167. An act is considered void if it is so seriously impacted that: (i) it is incurable (cannot be confirmed), (ii) its nullity can be alleged by any interested person (not only the party), (iii) the judge must declare its nullity even without specific request by the parties, (iv) it is not subject to limitations and (v) it does not produce any legal effect³¹⁹.

Voidable and void contracts refer to invalidity, which means that those acts initially entered the legal world breaching essential validity requirements of social interest and public order. The voidable acts cannot be considered *valid* until either confirmed or nullified, but rather, are only *effective* (produce effects). If declared void, the effects cease and the act is deemed retroactively invalid (*ex tunc*); but, if the act is confirmed or if the defect is cured by performance or adjustment, then the act becomes valid and keeps its effects³²⁰. In contrast, the void can never be deemed effective.

³¹⁶ Pursuant to Articles 172 and 173 of the Brazilian Civil Code. Article 172: “A voidable transaction may be confirmed by the parties, saving the rights of third parties”. Article 173: “The act of confirmation must contain the substance of the transaction entered into and an express declaration of the willingness to maintain it”.

³¹⁷ Pursuant to Article 174: “Express confirmation is dispensed when the transaction has already been performed in part by the debtor, aware of the defect that taints it”.

³¹⁸ Pursuant to Article 175: “Express confirmation or voluntary performance of a voidable transaction, within the terms of articles 172 to 174, brings about the extinguishment of all actions and exceptions that the debtor had on or against it”. The late allegation of invalidity, after consciously performing the contract in practice violates good faith and is considered *venire contra factum proprium* (AZEVEDO, Antônio Junqueira de, *A lesão como vício do negócio jurídico. A lesão entre comerciantes. Formalidades pré-contratuais. Proibição de venire contra factum proprium e ratificação dos atos anuláveis. Resolução ou revisão por fatos supervenientes. Excessiva onerosidade, base do negócio jurídico e impossibilidade da prestação*, in *Estudos e Pareceres de Direito Privado*, São Paulo, Saraiva, 2004, p. 119).

³¹⁹ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, (at.), cit., p. 82.

³²⁰ VELOSO, Zeno, *Nulidade do negócio Jurídico*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003, pp. 598-599 and 606-607.

Article 166 stipulates seven grounds for the nullity of acts, which are consistent with the requirements set forth in Article 104: (i) if it is concluded by an incapable party; (ii) if its object is illegal, impossible or indeterminable; (iii) the essential purpose of the contract is illegal; (iv) noncompliance with the form provided by law; (v) noncompliance with any solemnity essential for the validity of the contract; (vi) if its object violates mandatory rules; (vii) if the law declares its annulment or prohibits its practice.

In addition, Article 167 provides that a simulated act is also null and void³²¹. Simulation refers to the declaration by both parties that intentionally does not correspond to the reality with the aim of obtaining an advantage and harming third parties. The simulation can be absolute (conclusion of a transaction that, in fact, does not exist and the parties do not desire) or relative (conclusion of a transaction in order to conceal another real transaction). The former leads to the contract becoming void, while the latter may allow a transaction to subsist if it meets substantial and formality requirements (phenomenon called “*extraversão*”)³²².

The above grounds for nullity can be alleged by any interested person, even by the Public Prosecutor, and cannot be excluded by a judge or arbitrator, even upon request from the parties. Moreover, void contracts can neither be confirmed by the parties nor by the lapse of time³²³. If a contract suffers from vices that result in it becoming both voidable (for instance, concluded with malice) and void (for instance, is declared void by the law), the judge must firstly decide on the nullity and the voidable character loses relevance, except for the purposes of damage allocation³²⁴. Despite the nullity (Article 166) occurs *ipso iure* since the beginning, Brazilian law requires its declaration by a judge or arbitral tribunal³²⁵.

³²¹ Article 167: “A simulated juridical transaction is null, but what was distinguished will subsist if it is valid in substance and form. §1 Acts are deemed simulated when: I. they appear to confer or transmit rights to persons other than those to whom the rights are really conferred or transmitted; I. they contain a declaration, confession, condition or clause that is untrue; III. Private instruments are predated or postdated. §2^a the rights of good faith third parties in relation to the contracting parties to a simulated act are safeguarded”. For a detailed explanation of all grounds for invalidity see VELOSO, Zeno, *Nulidade*, cit., pp. 599-605.

³²² PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., pp. 373 and 401-402; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., pp. 270-271.

³²³ Pursuant to Articles 168 and 169. Article 168: “The nullities referred to in the preceding articles may be alleged by any interested party, or by the Public Prosecutor, when it has the power or duty to intervene.” Article 169: “A null juridical transaction is not susceptible of confirmation and is not cured by the passage of time”

³²⁴ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., pp. 317-318.

³²⁵ VELOSO, Zeno, *Invalidade*, cit., pp. 152-153.

Brazilian law recognises partial invalidity, when the invalidity affects a ‘separable’ part of the contract³²⁶. In such cases, mostly comprising complex contracts with more than one set of separable obligations, provided that the parties are interested in maintaining the relationship, the partial invalidity does not affect the remaining valid part of the contract³²⁷.

Furthermore, even in cases of nullity, the Civil Code crystalised the principle of the conservation/conversion of the legal acts in Article 170³²⁸. According to this provision, the void contract might be converted into a valid contract of other type or into a contract with a valid different content, as long as it was the parties’ intention if they could foresee the invalidity. In other words, the legislator (as well as the judges) seeks to maintain, as long as it is possible, the legal act in one of the plans.³²⁹

As mentioned above, upon the declaration of avoidance of a contract, the parties shall be restored to the *status quo ante* with *ex tunc* effect.³³⁰ The nullity award is “constitutive negative” in order to deconstruct the contract³³¹. In other words, according to Article 182, upon such award, each party shall restate to the other the benefit received from the void contract. If, however, the restitution is not possible, the parties shall be indemnified by the equivalent. Such provision applies to both cases of voidable or absolute void contracts, since such distinction made by the law is more relevant prior to the declaration of avoidance³³².

The rule provided for in Article 182 is also relevant for the cases which involve rights of third parties in good faith over the avoided contract (for instance, a party who

³²⁶ Pursuant to Article 184: “*Provided that the intention of the parties is respected, partial invalidity of a juridical transaction does not affect the valid part, if it can be separated; the invalidity of the principal obligation results in that of the accessory obligations, but the invalidity of the accessory obligations does not result in that of the principal obligation*”.

³²⁷ VELOSO, Zeno, *Nulidade*, cit., pp. 604-605.

³²⁸ Pursuant to Article 170: “*If, however, the null juridical transaction contains the requirements of another, the other transaction will subsist if the purpose contemplated by the parties permits the supposition that they would have so intended, if they had foreseen the nullity*”.

³²⁹ AZEVEDO, Antônio Junqueira de, *Negócio*, cit., pp. 67-69; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, (at.), cit., p. 131; VELOSO, Zeno, *Nulidade*, cit., p. 605; ZANETTI, Cristiano de Sousa, *A Conservação dos Contratos Nulos por Defeito de Forma*, São Paulo. Quartier Latin, 2013, p. 55.

³³⁰ Pursuant to Article 182: “*Upon the annulment of a juridical transaction, the parties shall be restored to the state in which they found themselves prior to the transaction; if it is impossible to restore them to that state, they shall be indemnified by the payment of the equivalent*”.

³³¹ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado* (at.), cit., p. 357; MELLO, Marcos Bernardes de, *Teoria*, cit., pp. 247 and 251.

³³² VELOSO, Zeno, *Invalidade*, cit., p. 331; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, (at.), cit., p. 357; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 618.

acquired the object of a previous contract impacted by simulation or malice). In those cases, the nullity/voidability will be kept, but the restitution of the object in the hands of the third party will not be possible and, therefore, the parties shall compensate the equivalent³³³, since the annulment of a contract does not rely on the possibility of restitution, but instead on the defect of the contract³³⁴. The indemnification of the equivalent refers only to the exchanged performances, and does not comprise the further compensation for possible damages incurred by a party (or third parties) due to the wrongful act that led the contract to be avoided³³⁵.

However, the Brazilian Civil Code does not stipulate different requisites for restitution when deriving from the situation where just one of the parties acted for the avoidance of the contract from those where both parties concur for the avoidance, for instance, both parties agreed to an illegal object. Such differentiation is only made for the purposes of removing the right to claim damages in case of voidable contracts due to bilateral malice (as in accordance with Article 150 mentioned above).

Due to such absence of specific regulation, there are some debates on cases where, despite the extinction of a contract due to illegality, effective performance occurred and was confirmed by parties (for instance, a construction contract). In such cases, the mere declaration of voidance and unenforceability, cancelling any effect from the contract, would create a situation of undue enrichment, also forbidden by the law³³⁶.

In order to solve this problem, literature differentiates the pure *void* acts from *illegal* acts. The void acts refer to declaration of willingness destined to produce effects but do not comply with the express requirements by law. Illegal acts are those reprovved by the legal system and the law only provides for its consequences, meaning that those acts may solely enter the plans of existence and effectiveness, but never the validity. Therefore, while the declaration of voidance restores to the *status quo ante* imposing due restitution (Article 182), the declaration of illegality entails payment of incurred damages as mentioned³³⁷.

³³³ JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 640; PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., p. 224.

³³⁴ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, (at.), cit., p. 361.

³³⁵ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., pp. 344-346.

³³⁶ Pursuant to Article 884: “*Anyone who, without just cause, is enriched at another’s expense is bound to restitute the undue gain, adjusted for inflation*”. VELOSO, Zeno, *Invalidade*, cit., p. 335.

³³⁷ AZEVEDO, Antônio Junqueira de, *O direito como sistema complexo e de 2ª ordem; sua autonomia. Ato nulo e ato ilícito. Diferença de espírito entre responsabilidade civil e penal. Necessidade de prejuízo para haver direito de indenização na responsabilidade civil*, in *Estudos e Pareceres de Direito Privado*, São Paulo, Saraiva, 2004.

This explanation is valuable for understanding the different treatment and consequences applied to each kind of defect and reduces some confusion created when speaking about the “effects” of void or illegal acts. Illegal acts entail payment of damages for the strong violation of law and a void act entails restitution since no effect may, in principle, take place.

The differentiation above helps to solve the problem of executed illegal *and* void acts or contracts that cannot be simply restored. May someone allege these acts produced effects which must be maintained for avoiding undue enrichment by the parties? According to Brazilian law, the answer is no. As highlighted above, a void contract can never produce effects³³⁸. However, these exceptional situations have been discussed under Brazilian literature, by the distinguishment between *typical* (or proper) and *atypical* (improper) effects of the contracts. This means that the nullity removes from the contract its typical effects, those desired by the parties when contracting, while atypical effects may be produced³³⁹.

The relationship deriving from a void contract is a factual relationship or paracontractual relationship which produces improper effects. In this scenario, there is a long-term relationship with executed performances and the restoring to the *status quo ante* shall be harmonised to good faith and based on the objective equivalence between each performance, in order to avoid undue enrichment. The restitution according to this equivalence exercise is different from the indemnification of damages - applied due to illegality and when actually incurred by the parties -, but rather a balance of the patrimonial displacements made during this paracontractual relationship³⁴⁰.

However, the criterium for the restitution of “equivalent” value is still obscure, as is the whole theory of invalidity under Brazilian Law. It is not certain whether the restitution must comprise the pure costs incurred, contract price, devolution of profit, application of market prices etc. The answer will depend on the concrete case, upon the identification of the affected values and interests, the importance of the performances and the existence or not of undue excess in the exchanged performances³⁴¹.

³³⁸ Pursuant to traditional literature, confirmation is not possible for void contracts, but solely if the parties agree on a new valid contract (PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit., (at.), p. 113).

³³⁹ AZEVEDO, Antônio Junqueira de, *Negócio*, cit., p. 64; AZEVEDO, Antônio Junqueira de, *O direito como*, cit., p. 31.

³⁴⁰ AZEVEDO, Antônio Junqueira de, *O direito como*, cit., pp. 31-32. In the same sense, also see JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit., p. 621.

³⁴¹ VELOSO, Zeno, *Nulidade*, cit., p. 608; AZEVEDO, Antônio Junqueira de, *O direito como*, cit., p. 32; AZEVEDO, Antônio Junqueira de, *Negócio*, cit., p. 62.

Therefore, under Brazilian law, one might wrongly state that void contracts can produce some sort of effects to the parties and third parties, entailing indemnification of the illicit. This conclusion would lead to an exception to the doctrine of the three plans, since a contract which does not pertain to the validity plan, would have entered into the effectiveness plan. This is not the case, however, because the acts that are effective are those which produce typical effects (effects desired by the parties), while the void contracts produce atypical effects, merely with the objective of restitution in accordance with the concrete case and, as such, it cannot be affirmed that they reached the effectiveness plan³⁴².

2. Russia

Differently from the Brazilian Civil Code, the Russian Civil Code does not contain specific provisions enumerating the requirements for a valid legal act or contract (referred to as “*transaction*” or “*deal*” in the Civil Code), but solely the grounds for invalidity and its consequences. This approach is simpler and avoids redundancy and the existence of contradictory provision inside the same legal instrument.

The specific rules regarding contract invalidity are set forth in Articles 166 to 181 of the Russian Civil Code. Although they are general provisions applicable to all acts/transactions, according to Article 431.1 (introduced by the 2015 amendment), they shall apply also to contracts as well³⁴³. In addition to these provisions, as evident in the preliminary articles with respect to concept and characteristic of transactions, it is possible to infer one first requirement for validity of contracts, whose failure to fulfil will render the contract invalid or even not existent: the form.

According to Article 158, the contracts can be concluded either orally or in written form³⁴⁴. As regards to the written contract, both Articles 160 (general) and 434 (specific for contract formation) requires the compilation in a document to be signed by the

³⁴² AZEVEDO, Antônio Junqueira de, *Negócio*, cit., p. 64.

³⁴³ Article 431.1: “*The provisions of the present Code concerning the invalidity of transactions (Chapter 9, §2) shall apply to contracts unless established otherwise by rules concerning individual types of contracts and the present article*”. In this sense, previously to the introduction of Article 431.1, see RASSKAZOVA, Natalya, *Russian Law*, cit., p. 142.

³⁴⁴ Article 158. “*The Form of the Deals 1. The deals shall be effected orally or in written form (simple or notarial). 2. The deal, which may be made orally, shall be regarded as having been effected also in the case, when the behaviour of the person clearly testifies to his will to effect the deal. 3. Silence shall be recognized as the expression of the will to effect the deal in the cases, stipulated by the law or by the agreement between the parties.*”

parties³⁴⁵. Article 434 states that, as an alternative to the document signed by the parties, the written form of a contract is also met by means of the exchange of documents by post, telegraph, electronic and other communications, unless otherwise provided by law or by the parties. Therefore, the requirement of effective signature of a common document seems to be ‘relaxed’ with regard to bilateral (or multilateral) contracts.

The Russian Civil Code imposes limitation on whether a contract is allowed to be concluded orally or shall be in written form. Non-written transactions are considered exceptional and may also be inferred from the so-called conclusive conduct of the parties, generally comprising instantaneous transactions undertaken by non-business parties³⁴⁶.

On the other hand, simple written form (without registration) is required to validate transactions between legal entities and with individuals (natural person) and also between citizens where the amount of the transaction exceeds ten thousand roubles or when expressly stipulated by the law (for instance, the donation contract stipulated in Article 574)³⁴⁷. Simple written contracts can also be deemed concluded by performance of the other

³⁴⁵ Article 160: “*The Written Form of the Deal 1. The deal in written form shall be effected by way of compiling a document, expressing its content and signed by the person or by the persons, who are effecting the deal, or by the persons, properly authorized by them to do so. The bilateral (multilateral) deals may be made in the ways, stipulated by Items 2 and 3 of Article 434 of the present Code. The law, the other juristic acts and the agreement between the parties may decree additional requirements, to which the form of the deal shall correspond (it shall be made on the form of a definite kind, shall be certified by the stamp, etc.), and also the consequences of not satisfying these requirements. If such consequences have not been stipulated, the consequences of not observing the simple written form of the deal shall be applied (Item 1 of Article 162)*”; Article 434: “*The Form of the Contract 1. The contract may be concluded in any form, stipulated for making the deals, unless the law stipulates a definite form for the given kind of contracts. If the parties have agreed to conclude the contract in a definite form, it shall be regarded as concluded after the agreed form has been rendered to it, even if the law does not require such form for the given kind of contracts. 2. The contract in written form shall be concluded by compiling one document, signed by the parties, and also by way of exchanging in the form of letters, telegrams, telex messages, facsimile messages and other documents, including electronic ones, transmitted via communication lines that make it possible to establish for certain that the document comes from the party by the contract. As an electronic document to be transmitted via communication lines shall be deemed the information prepared, sent, received or kept with the help of electronic, magnetic, optical or similar facilities, including the exchange of information in electronic form and electronic mail. 3. The written form of the contract shall be regarded as observed, if the written offer to conclude the contract has been accepted in conformity with the order, stipulated by Item 3, Article 438 of the present Code. 4. Where it is provided for by law or agreed by the parties, a contract in writing may only be made by drawing up a single document signed by the parties to the contract.*”

³⁴⁶ KOZLOV, Victor, *The new Russian*, p. 14; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 77; See Article 159 of the Civil Code.

³⁴⁷ Pursuant to Article 161: “*The Deals Made in the Simple Written Form 1. Shall be effected in the simple written form, with the exception of the deals, requiring notarial certification: 1) the deals of the legal entities between themselves and with the citizens; 2) the deals of the citizens between themselves to the sum of ten thousand roubles, and in the law-stipulated cases - regardless of the sum of the deal. 2. The observance of the simple written form shall not be required for the deals, which, in conformity with Article 159 of the present Code, may be effected orally.*”

party, even initial performance, which is an important threshold for determining liability in case of posterior non-performance³⁴⁸.

Similar limitation is imposed to some types of transactions that require notarial certification or state registration, provided for in Articles 163 and 164. For instance, transactions for rent require notarial certification, while contracts for commercial concession require state registration³⁴⁹.

Failure to comply with these requirements of form may render the transaction invalid according to Articles 162 and 165. Article 162 states that the non-observance of the written form in contracts will cause the contract to be invalid where the law expressly imposes such form or where the parties have expressly agreed thereto³⁵⁰. The invalidity in the case of failure to provide notarial certification or state registration is not absolute, since, according to Article 165, the transaction may become valid if the party presents a specific claim in court within the limitation period of one year, being the affected party entitled to damages³⁵¹.

The former wording of Article 162(3) also used to establish the invalidity of the contracts without written form in cases of foreign economic transactions. According to that provision, under Russian law, an international contract should always be conceived in

³⁴⁸ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 77-78; See Article 438(3) of the Civil Code.

³⁴⁹ Pursuant to Articles 584: “*The Form of the Rent Contract. The rent contract shall be subject to notarization*” and 1028(2): “*The provision of the right to apply in the user's business activities a set of the exclusive rights held by the right holder under a contract of commercial concession is subject to state registration with the federal executive power body in charge of intellectual property matters. If the requirement for the state registration is not satisfied, the provision of the right shall be deemed frustrated*”.

³⁵⁰ Article 162: “*The Consequences of the Non-observance of the Simple Written Form of the Deal 1. The non-observance of the simple written form of the deal shall in the case of a dispute deprive the parties of the right to refer to the testimony for the confirmation of the deal and of its terms, while not depriving them of the right to cite the written and the other kind of proofs. 2. In the cases, directly pointed out in the law or in the agreement between the parties, the non-observance of the simple written form of the deal shall entail its invalidity*”.

³⁵¹ Article 165: “*Effects of Evading the Certification of a Transaction by a Notary or the State Registration of a Transaction 1. If either party has executed in full or in part a transaction for which certification thereof by a notary is required, while the other party evades such certification of the transaction, a court is entitled on the demand of the party that has executed the transaction to declare the transaction valid. On such occasion, the subsequent certification of the transaction by a notary is not required. 2. If a transaction whose state registration is required has been carried out in a proper form but one of the parties thereto evades its registration, a court on demand of the other party is entitled to render the decision on the transaction's registration. On such occasion, the transaction shall be registered in compliance with the court's decision. 3. Where it is provided for by Items 1 and 2 of this article, the party that has unfoundedly evaded the notarial certification or the state registration of a transaction is bound to compensate to the other party for the losses caused by a delay in the transaction's making or registration. 4. The limitation period for the claims cited in this Article shall be one year*”.

written form, which was a requirement contradictory to the international instruments of contract law, such as the PICC and the CISG³⁵².

This kind of provision, as well as the detailed rules on contract form, reflected the formalistic character of the Russian contract law and is seen as a limitation to the principle of freedom of contract³⁵³. The underlying reason for that was to prevent the occurrence of fraud and to protect ordinary citizens³⁵⁴.

However, the former wording of Article 162(3) was abrogated by the amendment of the Civil Code in 2013 and resulted in the Russian system becoming harmonised with the other civil law systems. In any case, the former limitation would not affect the international sales contracts, since the CISG is a treaty ratified by the Russian Federation and, therefore, its rules on freedom of form shall be directly applicable to those contracts³⁵⁵.

Russian law also differentiates contracts between their *existence* and *validity*. Generally, failure to comply with requirements of form (lack of either written form, notarisation or state registration when mandatory by law) leads the contract to be considered as “not concluded”, while the invalidity is expressly indicated in legal provisions. Literature approximates the situations of non-conclusion and invalidity, stating that in both cases the result is the same: the contract is regarded as never existing and there is the nullification of all rights and obligations under the (non-existent) contract³⁵⁶.

This characteristic is interesting, since it approximates Russian law to common law systems, while distinguishing from the Brazilian treatment, according to which, as described in item 1 above, the invalid contracts (whether voidable or void) step into the existence level, but not into the validity one.

Moving to the specific rules applicable to *invalidity*, the Russian Civil Code classifies the acts/transactions, in Articles 166, into *voidable* transactions which must be requested and declared by courts (called as *contested* or *disputable* transactions) from those

³⁵² See Article 1.2 of the PICC: “Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.” And Article 11 of the CISG: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”.

³⁵³ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 76.

³⁵⁴ SNIJDERS, W, *The Civil Codes*, cit., pp. 25-26; KOZLOV, Victor, *The new Russian*, cit. 14.

³⁵⁵ Pursuant to Articles 7 and 1186 of the Russian Civil Code.

³⁵⁶ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 84, 126 and 156.

void transactions³⁵⁷. While the voidable transactions must be declared by courts or arbitral tribunals upon the request of one of the parties, void transactions are deemed void regardless of such judicial declaration and the role of the judges and arbitrators is to apply the consequences of such avoidance, which, in turn, can be applied *ex officio* by the court or upon request by any interested person³⁵⁸.

Article 166, after amendments, contains other relevant provisions for the legitimate parties to claim avoidance or the effects of avoidance in case an amicable solution is not possible. For instance, if the party's willingness to preserve the transaction is demonstrated, he or she loses the right to dispute the contract validity. Moreover, item 3 of the amended provision, following a guidance from the former Supreme Commercial Court³⁵⁹, allows a legitimate interested party to claim the mere declaration of a contract to be void, regardless of its consequences, something that was not provided before.

Furthermore, the declaration *ex officio* of voidance by the judging authority was limited by the amendments of Article 166 (4) (only if "*it is necessary to protect public interests and in other cases stipulated by law*"). Although the intention was to make the judging activity more predictable and increase the stability of civil transactions, the vagueness of the concept of public interest entails some risk of uncertainty. The same risk is observed in the modified broad range of potential claimants entitled to demand for

³⁵⁷ Article 166: "*The Disputable and the Insignificant Deals 1. A deal shall be deemed invalid on the grounds established by law by virtue of declaring it as such by court (disputable transaction) or irrespective of such declaring (void transaction). 2. The claim for declaring invalid a disputable transaction may be raised by a party to the transaction or by other person specified by law. A disputable deal may be declared invalid if it violates the rights and legitimate interests of the person disputing the transaction, in particular if it has entailed unfavourable effects for such person. Where in compliance with law a transaction is disputed in the interests of third persons, it may be declared invalid if it violates the rights or legitimate interests of such third persons. The party whose behaviour demonstrates its will to preserve a transaction's force is not entitled to dispute the transaction on a ground about which this party knew or should have known when expressing its will. 3. A party to a transaction or, where it is provided for by law, a different person is entitled to raise the claim for applying the effects of invalidity of a void transaction. The claim for declaring invalid a void transaction, regardless of applying the effects of its invalidity, may be allowed if the person raising such claim has a legitimate interest in declaring this transaction invalid. 4. A court is entitled to apply the effects of invalidity of a void transaction on its own initiative, if it is necessary for the protection of public interests, as well as in other cases provided for by law. 5. An application for invalidity of a transaction shall not have a legal effect if the person making reference to the transaction's invalidity does not act in good faith, in particular if the behaviour thereof after carrying out the transaction gave grounds to other persons to rely upon the transaction's validity.*". KOZLOV, Victor, *The new Russian*, cit, pp. 14-15.

³⁵⁸ IAKOVLEV, Veniamin, *The arbitrazh*, cit. pp. 103-104; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 127.

³⁵⁹ The Decree of 1 July 1996, No 6/8, "*On Certain Questions Connected with the Application of Part One of the Civil Code of the Russian Federation*" indicated that the Russian Civil Code does not exclude the possibility of suits being presented to deem invalid a void transaction (*apud* MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil and Commercial Law*, vol. 1, ed. and transl. BUTLER, William E., London, Wildy, Simmonds & Hill Publishing Ltd., 2009, p. 265).

avoidance, since it is enough that the act “*violates the rights and legitimate interests*” and caused “*unfavourable effects*” to a person³⁶⁰.

In practice, these amendments bring some additional confusion and complexity. If both void and voidable acts are declared by the court, which is the difference? Literature refers to the moment as the central issue. In case of a void contract, the party can refuse performance from the outset by notifying the other party, regardless of a court decision, and only if the other party resists by claiming breach of contract, the issue of liability will be settled in court. Conversely, when the contract is voidable, it has effectiveness of “unstable character”³⁶¹ and the party alleging invalidity cannot refuse performance, *i.e.* the party shall regularly comply with the contract, bring the invalidity claim to be declared in court/arbitration and, only upon the decision, it is possible to refuse performance and discuss the liability consequences³⁶².

After this introduction and clarification in Article 166, the Russian Civil Code provides for the general provisions on the consequences of invalidity and the subsequent Articles combine the explanation of each different ground of invalidity along with the individual consequences arising therefrom. This is also a different approach when compared to Brazilian Civil Code, which, as seen above, firstly provides for the grounds of invalidity, and then the consequences in general terms, creating doubts of their application in individual cases.

The general consequence of an invalid transaction/contract is that it shall not produce effects (except from those connected with the invalidity) since the moment of its conclusion (*ex tunc*)³⁶³. As a result, Article 167³⁶⁴ provides that the parties shall be restored to the *status quo ante* and return to the other party everything received under that transaction,

³⁶⁰ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 131-132.

³⁶¹ MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil*, cit., p. 267.

³⁶² YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 127-128.

³⁶³ *Idem, ibidem*, p. 127.

³⁶⁴ Article 167: “*The General Provisions on the Consequences of the Invalidity of the Deal 1. The invalid transaction shall not entail legal consequences, with the exception of those involved in its invalidity, and shall be invalid from the moment of its effecting. The person that knew or should have known about the grounds of invalidity of a disputable transaction shall not be deemed as having acted in good faith after declaring this transaction invalid. 2. If the deal has been recognized as invalid, each of the parties shall be obliged to return to the other party all it has received from it by the deal, and in the case of such return to be impossible in kind (including when the deal has been involved in the use of the property, the work performed or the service rendered), its cost shall be recompensed, unless the other consequences of the invalidity of the deal have been stipulated by the law. 3. If it follows from the essence of the disputed deal that it may only be terminated for the future, the court, while recognizing the deal to be invalid, shall terminate its operation for the future. A court has no right to apply the effects of a transaction's invalidity (Item 2 of this article) if their application is at variance with the basics of legal order and morals.*”

as it never existed. There is, however, an exception in item 3 of this provision when it follows from the essence of the contract that it may only be extinguished “for the future” and, in this case, what was already received under the transaction remains with the parties, and the remaining is not subject to further performance³⁶⁵.

In case restitution in kind is not possible (and the Code provides for the specific situation of use of property and work fulfilled), the parties must compensate the “*cost*” attributed to the obligations performed. The former wording of Article 167 provided for the compensation “*in money*”, which was excluded. The literature analysed for the present study does not provide for more information on such recent amendments and the concept of *cost* is not clear (for instance, whether it refers to the price at the moment of the conclusion of the contract or the moment of avoidance, whether market standards shall be applicable or not). There was a preference for quantifying based on the moment of the avoidance³⁶⁶, but it was not adopted as a rule. Most probably, the amendment envisioned to incorporate more possible forms of compensation.

Moreover, the amended Article 167 establishes a vaguer limitation to judges in applying these consequences: non-violation of legal order and morals.

For the restitution to *status quo ante*, courts commonly consider the equal value of the performances in observance of the criteria of material equivalence of the parties discussed in Chapter 1 (item 2.2 above). It follows from this criterion that if a party received performance in excess from an invalid contract, the other party may seek the recovery of the undue enrichment and claim the difference in order to maintain equivalence. Therefore, the undue enrichment claims are generally considered as one of the consequences of invalidity and also to non-concluded contracts, even though not expressly provided in law³⁶⁷.

Such a ruling on the consequences is also important to prevent parties from claiming invalidity of contracts merely because they desire to avoid complying with their obligations after receiving part of the performance of the other party. In one specific case where a party refused to pay for executed work based on an invalidity claim, the Supreme

³⁶⁵ MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil*, cit., p. 268.

³⁶⁶ MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil*, cit., p. 269.

³⁶⁷ Ruling of Supreme Commercial Court of 22 February 2011 No VAS-1312/11, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 134 and 157.

Commercial Court referred to an independent expert to evaluate the fair price of the developed work and ordered the party claiming invalidity to pay it to the executor³⁶⁸.

With regards still to the matter of consequences, the Supreme Commercial Court also took the position that, if the invalidity comprises the restitution of property, the rules on restitution of Article 167 shall prevail over the other possessory remedies (such as claims for vindication of property), and the claimant is entitled to rely on only one remedy: restitution³⁶⁹.

Article 168 provides for the first ground of invalidity, which refers to the non-conformity with the requirements set forth in the law or other legal acts³⁷⁰. The non-conformity renders the transaction voidable. However, if the non-conformity infringes public interests or the rights and legitimate interests of third persons the transaction is void (subject to court appreciation *ex officio*)³⁷¹, unless the law specifically provides that the failure to comply with a legal requirement results in the transaction being voidable. If no other consequences are specifically provided, those of Article 167 will apply.

The second ground for invalidity set forth in Article 169 refers to the affront of Russian fundamental principles of legal order or morality, when intentionally agreed by one party or by both parties³⁷². In this case the contract is void and shall be subject to the effects established in Article 167. However, when provided by law, everything received under the transaction shall be recovered to the revenue of the Russian Federation.

³⁶⁸ Ruling of Supreme Commercial Court of 27 December 2010 No VAS-17039/10, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 135.

³⁶⁹ Informational Circular of Supreme Commercial Court, above n 11, Part 1, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 133.

³⁷⁰ Article 168: “*Invalidity of a Transaction Carried out in Defiance of the Requirements of a Law or Other Juristic Act 1. Except as provided for by Item 2 of this article or other law, a transaction carried out in defiance of a law or other juristic act shall be deemed disputable, if it follows from the law that other effects of this violation which are not connected with the transaction's invalidity must be applied. 2. A transaction made in defiance of a law or other juristic act and infringing upon public interests or the rights and legitimate interests of third persons shall be void, unless it follows from the law that such transaction is disputable or other effects of such violation which are not connected with the transaction's invalidity must be applied.*”

³⁷¹ USOKIN, Sergey, *Russian Experience and Practice on Civil Law. Consequences of Corruption*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015, p. 294.

³⁷² Article 169: “*Invalidity of a Transaction Carried out with the Aim Which Is Contrary to the Basics of Legal Order or Morals. A transaction carried out with the aim which is wittingly contrary to the basics of legal order or morals shall be void, and shall entail the effects established by Article 167 of this Code. Where it is provided for by law, a court may recover for the benefit of the Russian Federation everything that has been received under such transaction by the parties thereto that have acted wilfully or may apply the other effects thereof established by law.*”

Before the amendment of 2013, the recovery by the Russian Federation was an automatic effect when both parties contributed to the violation of fundamental principles of legal order or morality (for instance, in cases of corruption)³⁷³. The provision was criticised due to its vagueness and analysed by the former Supreme Commercial Court, which clarified that it is not only applicable to tax retention, but also to some types of contracts related to the production and distribution of prohibited objects (weapons, drugs, etc), literature and other goods advocating war or national, racial and/or religious conflict or false documents³⁷⁴.

Even after the amendment, this provision differentiates Russian treatment on invalid transactions from the other legal systems analysed herein and shall be further detailed in this thesis. For instance, Brazilian law only provides for the restoration of the parties to the *status quo ante*, with equivalent compensation and, with both parties act with malice, none of them are entitled to damage indemnification. Furthermore, as it will be seen in the Indian system, the general rule is that no remedy is available in cases of illegality and the parties shall remain as they are. Although the Russian approach may appear too rigid in granting a degree of power of confiscation to the government in relation to private transactions, it gives a more precise solution in comparisons to other approaches.

A possible example is a contract where both parties acted intentionally against mandatory rules and, as a consequence, it is declared void. If none of the parties is entitled to compensation, one of them will remain with either work performed or goods delivered, creating a situation of unjustified enrichment. Under Russian Law, the subject matter performed could be recovered by the government and both parties would be equally 'sanctioned' for the invalidation (none of the parties is benefited by an action that is deemed wrongful behaviour).

Simulated contracts (called "*sham*" or "*fictitious*" transactions) are also deemed null and void by Russian law under Article 170³⁷⁵. The provision covers contracts concluded only in form (with no legal consequences) and contracts with the purpose to conceal another

³⁷³ USOKIN, Sergey, *Russian Experience*, cit., pp. 294-295.

³⁷⁴ Ruling of the Supreme Arbitration Court No. 22, NOVOSTI [NEWS], Apr. 10, 2008, *apud* IAKOVLEV, Veniamin, *The arbitrazh*, cit. p. 103; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 137-138.

³⁷⁵ Article 170: "*Invalidity of the Sham and of the Feigned Deal 1. The sham deal, i.e., the deal, effected only for the form's sake, without an intention to create the legal consequences, corresponding to it, shall be regarded as insignificant. 2. A fraudulent transaction, that is, a transaction carried out for the purpose of disguising another transaction, including a transaction made under other terms, shall be void. To a transaction which the parties have genuinely had in mind shall apply the rules related to it, subject to the transaction's essence and content.*"

transaction. The circumstances to be analysed are the reality of the contract and its reasonable business purpose³⁷⁶. The general consequences set forth in Article 167 shall apply in those cases.

Articles 171 to 177 of the Civil Code refer to the treatment of transactions affected by lack or limitation of capacity to enter into a transaction. Therefore, similar to other BRICS legal systems, capacity is deemed as a requirement of validity.

The first provision regards transactions performed by a citizen possessing a lack of dispositive or active legal capacity (capacity to assume obligations and sacrifice rights) due to reduced mental capacity and states that such transaction is void, unless concluded to his or her benefit and requested in court by the competent and interested party³⁷⁷. The article also stipulates the consequences of such grounds of avoidance, which shall be applicable to all other cases of invalidity related to capacity and involves the return of any benefit received to the other party or compensate its cost in addition to an indemnification of damages to be paid by the capable party to the party lacking capacity.

The subsequent articles sets forth the other types of invalidity, especially transactions concluded by: (i) minors up to the age of fourteen years old, with similar rules applicable to lack of capacity (Article 172); (ii) minors between fourteen and eighteen years old, without the consent of his or her parents or tutor (Article 175); (iii) citizen with limited dispositive legal capacity restricted by court³⁷⁸, without the consent of his or her trustee (Article 176) and (iv) citizen with transitory lack of capacity (Article 177).

Not only the lack of capacity, but also the abuse of legal capacity shall turn a transaction invalid upon request to the court. Article 173 of the Russian Civil Code refers to legal entities which conclude transactions which are contrary to the activities and purposes stipulated by their bylaws or articles of association or without the necessary licence³⁷⁹. The

³⁷⁶ Ruling of Supreme Commercial Court of 25 December 2008 No VAS-16667/08, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 140.

³⁷⁷ Article 171: “1. *The deal, effected by the citizen, who has been recognized as legally incapable on account of a mental derangement, shall be regarded as insignificant. Each of the parties to such a deal shall be obliged to return to the other party all it has received in kind, and if it is impossible to return what has been received in kind - to recompense its cost. Besides that, the legally capable party shall also be obliged to recompense to the other party the actual damage the latter has sustained, if the legally capable party has been aware, or should have been aware, of the legal incapability of the other party.* 2. *In the interest of the citizen, recognized as legally incapable on account of a mental derangement, the deal he has effected may be recognized by the court as valid upon the demand of his guardian, if it has been made to the benefit of the said citizen*”.

³⁷⁸ In the former Article 176, this provision was limited to cases of incapacity caused by drugs or alcohol.

³⁷⁹ Article 173: “*A transaction carried out by a legal entity contrary to the aims of its activities clearing limited in the constituent documents thereof may be declared invalid by court at the suit of this legal entity, its founder*

amendment of 2013 included Article 173.1 stating that transactions concluded without proper authorization are voidable, unless otherwise provided by law.

Similar treatment is conferred by Article 174, applicable to parties with limited powers (either by a power of attorney or constitutive document) to conclude a particular transaction, which is deemed voidable.³⁸⁰ The former Supreme Court has also ruled on these provision, stating that when the lack of legal capacity is established by law, the transaction is void, while, if deriving from defects in documents, it is deemed voidable and can be cured³⁸¹.

Article 178 provides for the rules applicable to invalidity deriving from material delusion of a contracting party³⁸². Although not exactly the same situation, the treatment of

(participant) or another person in whose interests the limitation is established, if it has been proved that the other party to the transaction knew or should have known about such limitation.”

³⁸⁰ Article 174: “*The Consequences of the Restriction of Powers for Making the Deal 1. If the authority of a person as to carrying out a transaction is limited by an agreement or regulations on a branch or representative office of a legal entity or the authority of a legal entity's body acting on behalf of the legal entity without a letter of attorney is limited by the constituent documents of the legal entity or by other documents regulating the activities thereof as compared to the way they are defined by a letter of attorney, law or as they can be deemed evident in the situation under which the transaction is being made and, while carrying it out, such person or such body fell outside the limits of this limitation, the transaction may be only declared by court invalid at the suit of the person in whose interests the limitations are established, if it is proved that the other party to the transaction knew or should have known about these limitations. 2. A transaction made by a representative or by a legal entity's body acting on behalf of the legal entity without a letter of attorney to the detriment of the interests of the represented person or the interests of the legal entity may be declared by court invalid at the suit of the legal entity and, where it is provided for by law, at the suit made in their interests by other person or other body, if the other party to the deal knew or should have known about the evident damage for the represented person or for the legal entity or there were circumstances which testified to a conspiracy or other joint actions of the representative or the legal entity's body and the other party to the transaction to the detriment of the interests of the represented person or to the interests of the legal entity.”*

³⁸¹ IAKOVLEV, Veniamin, *The arbitrazh*, cit. p. 104. An author also discusses whether Article 174 may be considered for the cases of corruption (instead of Articles 168 and 169), but, in this case, the effects would be different, since, if the corrupting act is subject to Article 174, it is voidable and can be confirmed or avoided within one year (pursuant to Article 181 do be discussed ahead), whereas, if subject to Articles 168/169, it is void and neither subject to confirmation nor to limitation periods, and the request for the consequences must be filed within three years (see USOKIN, Sergey, *Russian Experience*, cit., pp. 295 and 297).

³⁸² Article 178: “*1. The transaction carried out under the influence of a delusion may be declared by court invalid at the suit of the party that acted under the influence of the delusion, if the delusion was so substantial that this party, upon evaluating the situation on a reasonable and unbiased basis, would not have carried out the transaction if it had known about the real state of affairs. 2. Under the circumstances provided for by Item 1 of this article, a delusion is supposed to be substantial enough, in particular if: 1) a party has made an evident lapse, slip of the pen, misprint etc.; 2) a party is mistaken in respect of the subject of the transaction, in particular in respect of such properties which are deemed substantial enough in the intercourse; 3) a party is mistaken in respect of the transaction's nature; 4) a party is mistaken in respect of the person which it intends to carry out a transaction with or of a person connected with a transaction; 5) a party is mistaken in respect of the circumstance which it mentions in its declaration of will or from whose availability it proceeds when carrying out a transaction and it is evident for the other party. 3. A delusion in respect of a transaction's motives shall not be deemed substantial enough for declaring the transaction invalid. 4. A transaction may not be declared invalid on the grounds provided for by this article if the other party gives its consent to preserving the transaction's validity under the terms, the notion of which served as a basis for the actions of the party acting under the influence of a delusion. On such occasion a court when refusing to declare a transaction*

delusion is similar to that applicable to mistake under Brazilian law, since it should have material significance (nature of the transaction, identity or quality of the other party) in order to make a contract invalid. The amendment of 2013 included several situations where a delusion is regarded as material, as well as limitations for claiming avoidance, which the case law considers as exhaustive circumstances³⁸³. Article 179 comprises the rules and consequences of invalidity caused either by fraud, violence, threat or unfavourable circumstances³⁸⁴.

Some confusion exists in practice between the concept of delusion and fraud, and generally the claimant may apply to court based on both factors when declaring a contract invalid. The main difference lies in the manner the guilty party acts. In case of fraud, he/she must act intentionally to create for the other contractual party a wrong impression about the contract, while negligent or even innocent misleading might still cause delusion³⁸⁵.

In both cases of Articles 178 and 179, the contract is considered voidable and will only be declared void by a judge or arbitrator upon the request of the interested party

invalid shall cite in the decision thereof these terms of the transaction. 5. A court may refuse to declare a transaction invalid if the delusion under which a party to the transaction acted was such that it could not be discerned by a person acting with a normal care and taking into account the transaction's content attending circumstances and specifics of the parties thereto. 6. If a transaction is declared invalid because it was carried out under the influence of a delusion, the rules provided for by article 167 of this Code shall apply thereto. The party at whose suit a transaction is declared invalid is bound to compensate to the other party for the real damage caused thereto as a result of it, except when the other party knew or should have known about the presence of the delusion, in particular if a delusion has occurred due to circumstances under its control. The party at whose suit a transaction is declared invalid is entitled to demand of the other party compensation for the losses caused thereto if it can prove that a delusion has occurred as a result of the circumstances which the other party is responsible for."

³⁸³ Resolution of Federal Commercial Court of North-Western District of 17 January 2011 case No A13-2968/2010, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 150.

³⁸⁴ Article 179: "*The Invalidity of the Transaction Carried out under the Impact of Fraud, Violence, Threat or Unfavourable Circumstances* 1. A transaction carried out under the impact of violence or threat may be declared by court invalid at the suit of the aggrieved person. 2. A transaction carried out under the impact of fraud may be declared by court invalid at the suit of the aggrieved person. As fraud shall be deemed an intentional non-disclosure of the circumstances about which a person had to report on, subject to the good faith required of him in compliance with the terms of the intercourse. A transaction carried out under the impact of fraud of the aggrieved person effected by a third person may be declared invalid at the suit of the aggrieved person, provided that the other party or the person to which a unilateral deal is addressed knew or should have known about the fraud. It is considered, in particular, that a party knew about fraud if the third person guilty of the fraud was its representative or employee or assisted thereto in carrying out the transaction. 3. A transaction carried out under the extremely unfavourable terms which a person had to make as a result of a set of hard circumstances, which the other party took advantage of (hard transaction), may be declared by court invalid at the suit of the aggrieved person. 4. If a transaction is declared invalid on one of the grounds cited in Items 1-3 of this article, the effects of the transaction's invalidity established by article 167 of this Code shall apply. Moreover, the loss caused to the aggrieved person shall be recompensed thereto by the other person. The risk of accidental destruction of the subject of the transaction shall be borne by the other party to the transaction."

³⁸⁵ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 154.

(victim). Similarly to other cases, the parties must return to each party everything received by virtue of the transaction, while the victim has the right of additional compensation for the damages incurred. In the original text of the Civil Code, for the situations provided for in Article 179, due to their seriousness, the obligation of restitution should be otherwise recovered by the revenue of the Russian Federation. However, similar to the issues highlighted back in Article 169, this rule was relaxed.

The Russian law also recognizes the doctrine of partial invalidity, according to which the invalidity of a part of the transaction can be separated from the valid part. The requirement imposed by Article 180 is the possibility to suppose that the parties would have entered into that transaction even without the invalid part³⁸⁶.

Despite the comprehensiveness of the provisions stipulated by the Russian Civil Code, there is no general rule on the possibility of confirmation of invalid acts, which are only specific in the case of delusion (Article 178(4) of the Civil Code). For voidable transactions which depend on the victim's or interested party's express claim, it can be understood that defect may be 'cured' or confirmed by the parties if no objection is made during the limitation period imposed by the law³⁸⁷.

In regard to void transactions, the Russian Civil Code does not confer a uniform solution, which will depend on the grounds of such avoidance. For instance, there is no statement of possible confirmation in cases of affront to legal order (Article 169) or simulated transactions (Article 170), which lead to the conclusion that, in these cases, the avoidance is insoluble and the transaction does not produce any effect (except for those related to avoidance, such as the restitution).

Conversely, in other cases of express nullity, such as the limited capacity, the act is subject to confirmation if in the benefit of this party (Article 171). The benefit requirement is verified when the court finds that the incapable's trustee, acting in good faith under the same circumstances, would have concluded that contract on behalf of him/her.

³⁸⁶ Article 180: "*The Consequences of the Invalidity of a Part of the Deal The invalidity of a part of the deal shall not entail the invalidity of its other parts, if it may be supposed that the deal could have been effected without the incorporation into it of the invalidated part.*"

³⁸⁷ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 127. Pursuant to Article 181, the period is three years for the consequences of a void transaction and one year for requesting invalidity and consequences of voidable transactions. For a person which is not a party to the transaction, in any case, the period may not exceed ten years.

This is a clear exception to the general rule that there can be no contract when there is no willingness to conclude it³⁸⁸.

The issue of confirmation may also be analysed in light of the rules of limitation periods, since Article 181 provides that only the claim for the consequences of a void transaction is subject to limitation (three years for the party and ten years for third parties when applicable) and for the request of voidability (one year), but not the application for nullity itself³⁸⁹. This statement leads to the conclusion that void transactions can never be confirmed, even with the lapse of time.

Finally, as highlighted earlier, the amendment of 2015 introduced Article 431.1 with specific provisions on validity of contracts. In summary, the provision establishes that all Articles of the general part (from 166 to 181) apply to contracts, as well as the consequences stipulated in Article 167, unless otherwise established by specific rules. Furthermore, the provision limits the resort to the avoidance claim in cases where the party is in breach after he or she accepted the contract (except for the cases of abuse of capacity, delusion or other defects of consent)³⁹⁰.

It can be inferred from this chapter that the provisions stipulated by the Russian Civil Code regarding the invalidity of acts (and, consequently, of contracts) are very comprehensive and much more detailed than in other legal systems within the BRICS.

³⁸⁸ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 143; MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil*, cit., pp. 273-274.

³⁸⁹ Article 181: “*Statute of Limitations for Invalid Transactions. 1. The limitation period in respect of claims for applying the effects of invalidity of a void transaction and for declaring such transaction invalid (Item 3 of Article 166) shall be three years. The running of the limitation period in respect of the cited claims shall start from the date when the execution of a void transaction was started or, where a claim is raised by a person which is not a party to the transaction, from the date when this person learnt or should have learnt about the start of its execution. With this, the limitation period for a person which is not a party to the transaction in any case may not exceed ten years from the starting date of the deal's execution. 2. The time limit of the statute of limitations for a claim for declaring a voidable transaction invalid and for the application of consequences of the invalidity thereof is one year. The period of limitations for such a claim is counted from the day of termination of the violence or duress under the influence of which the transaction has been concluded (Item 1 of Article 179) or from the day when the plaintiff learned or should have learned about other circumstances deemed a ground for declaring the transaction invalid.*”

³⁹⁰ Article 431.1: “*A Contract's Invalidity 1. The provisions of this Code as to the invalidity of transactions (Paragraph 2 of Chapter 9) shall apply to contracts, if not otherwise established by rules in respect of individual kinds of contracts and by this article. 2. The party that has accepted execution from a contractor under a contract connected with the exercise by the parties thereto of business activities and, in so doing, has not executed in full or in part the obligation thereof, is not entitled to demand that the contract be declared invalid, except for declaring a contract invalid on the grounds provided for by Articles 173, 178 and 179 of this Code, as well as if the provision granted by the other party is connected with wittingly unfair actions of this party. 3. In the event of declaring a contract that is a disputable deal and whose execution is connected with the exercise of business activities by the parties thereto invalid at the request of either party, the general effect of a transaction's invalidity (Article 167) shall apply, if other effects of the contract's invalidity are not provided for by the agreement made by the parties after declaring the contract invalid and doing so does not affect the interests of third persons or infringe upon public interests.*”

Despite the complexity and some confusion caused, the abundant norms aim to avoid the misuse of invalidity claims by parties who simply intend to evade contracts³⁹¹.

3. India

In the first chapter, the analysis of the general principles of Indian contract law was made based on Section 10 of the Indian Contract Act. The same Section provides for the general grounds of validity of contracts. Except for those issues analysed in Chapter 1, Section 10 of the Contract Act provides for the requirements of the parties' competency and legality, which comprises the lawful object, lawful consideration and that the agreement is not declared void by the Contract Act.

In regard to the competency (or capacity) requirement, Section 11³⁹² provides for three conditions: (i) age of majority, which will vary in accordance with the law or agreement that party is subject to³⁹³, (ii) sound of mind state, which is defined by Section 12³⁹⁴ as the capacity of understanding a contract and forming a rational judgement on its effects upon the party's interest and (iii) absence of disqualification by any law for the specific contract. The provision only deals with inherent competency to contract, and not with the authority, which is granted to legal entities by the law or constitutive documents.

As for the majority requirement, it is debatable whether an invalid contract may be subject to ratification after the party reaches age of majority³⁹⁵. Disqualification by the law is generally present in situations where a party, due to its position, would be tempted to use influence or information acquired by virtue of such position, for instance, judges shall not contract to buy any share or interest in any actionable claim³⁹⁶.

³⁹¹ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 160.

³⁹² Section 11: "*Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.*"

³⁹³ The general rule provided by Section 3 of the Indian Majority Act of 1875, is that every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

³⁹⁴ Section 12: "*A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.*"

³⁹⁵ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 299 and 301; NAIR, M. Krishnan, *The Law*, cit., p. 88. Opposite understanding is that ratification is only possible if the contract was entered into by representation and, after reaching majority, the former minor assumes the contract as a party (BANGIA, R. K., *The Indian Contract*, cit., p. 86).

³⁹⁶ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 315.

Section 23 provides for the legality requirement and states that an unlawful object or consideration leads to the invalidity of the contract. In accordance with this provision, a consideration or a contract object is unlawful if it is forbidden by the law, where its permission defeats the provisions of any law, is fraudulent, involves or implies injury to the person or to property or is regarded as immoral or opposed to public policy (injurious to the public welfare)³⁹⁷.

Similar to the other systems studied above, the Indian Contract Act also attributes different characteristics and effects to contracts which are voidable from those declared void. While void contracts are totally unenforceable from its conclusion (*ab initio*), the voidable contracts are enforceable until its rescission³⁹⁸.

Section 2(g) and (i) expressly defines both types of invalidity. A contract not enforceable by law is void, whereas voidable contracts are those enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others. Indian law also recognises the situation of a contract that “*becomes void*” and, in this case, it ceases to produce effects (Section 2(j))³⁹⁹.

Voidable contracts are generally those impacted by a defect of the free consent of the parties⁴⁰⁰. The Indian Contract Act defines in certain detail the defects of coercion, undue influence, misrepresentation and fraud in Sections 15 to 18.

The defect of coercion is defined in Section 15 and means to illegally force another person to conclude a contract and, when such pressure is the determinant reason for the contract, this will be deemed voidable at the option of the aggrieved party⁴⁰¹. Section 15

³⁹⁷ Section 23: “*What considerations and objects are lawful, and what not. The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*”

³⁹⁸ BHADBHADE, Nilima, *Contract*, cit., p. 48; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 443; BANGIA, R. K., *The Indian Contract*, cit., pp. 3-4.

³⁹⁹ Section 2: “*In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: (...) (g) An agreement not enforceable by law is said to be void; (...) (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract; (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable*”.

⁴⁰⁰ SINGH, Avtar, *Law of contract (a study of the Contract Act, 1872) and specific relief*, 12th ed. (reprinted), Lucknow, EBC, 2019, p. 176.

⁴⁰¹ PATHAK, Akhileshwar, *Contract Law*, New Dehli, Oxford University Press, 2011, p. 180.

refers to two possibilities of coercion⁴⁰², where the first refers to the violation of the Indian Penal Code and is more related to violence, while the second (property detainment) is more economically oriented⁴⁰³. If the coercion is imposed by law (legally exercised), then it will not result in a contract becoming voidable⁴⁰⁴.

Indian literature highlights the slight difference of coercion compared to the classic English common law defect of duress. Coercion is a wider concept which comprises the specific instance of illegal acts under the Indian legislation and is also applicable as a threat to the person's patrimony, while the classic duress is limited to personal threat (despite economic duress is a concept that has been also developed). Moreover, the coercion under Indian law can be exercised by a third party and make the contract voidable, while in the traditional common law, duress is limited to the contracting party⁴⁰⁵.

Undue influence, in turn, is a vice which affects the consent of one party by reason of a dominant position exercised by the other party in order to take advantage with the conclusion of the contract. Section 16 of the Contract Act⁴⁰⁶ defines this defect and provides for the *sine qua non* requirements of: a dominant position which entails inequality between the parties, the effective exercise of this dominant position and the result of such exercise is an unfair transaction with an unfair advantage to the dominant party⁴⁰⁷.

The distinctive qualifying aspect of undue influence is the existence of a special relationship between the parties that leads to inequality, asymmetry and power to dominate

⁴⁰² Section 15: "Coercion" defined. 'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

⁴⁰³ SINGH, Avtar, *Law of contract*, cit., p. 178.

⁴⁰⁴ PATHAK, Akhileshwar, *Contract Law*, cit., p. 183.

⁴⁰⁵ UJJANNAVAR, S. S., *Law of Contract*, 2nd ed., New Delhi, Eastern Law House, 2009, p. 72; PATHAK, Akhileshwar, *Contract Law*, cit., p. 183; BANGIA, R. K., *The Indian Contract*, cit., p. 114-115; SINGH, Avtar, *Law of contract*, cit., pp. 179-180.

⁴⁰⁶ Section 16: "Undue influence" defined. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another - (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

⁴⁰⁷ UJJANNAVAR, S. S., *Law of Contract*, cit., p. 73; PATHAK, Akhileshwar, *Contract Law*, cit., p. 185.

one party's willingness⁴⁰⁸. According to case law: “*In contrast to duress, undue influence may exist without violence or threats of violence against the victim. It depends upon the existence of a relationship between two parties which, while it continues, causes one to place a confidence in the other which produces a natural influence over the one which that other abuses to his own advantage*”⁴⁰⁹. The provision of the Contract Act indicates the reduced capacity, apparent authority and even fiduciary relations as triggering the dominant position. Fiduciary relation has a very wide scope and includes any relationship of trust, such as those between solicitor and client, doctor and patient, parent and child, creditor and debtor, among others⁴¹⁰.

According to item (3) of Section 16, undue influence also comprises the presumption of the so-called “unconscionable bargain”, or inequality of bargaining power, which means that, in case of dominant position and the resulting contract is unfair and hugely imbalanced, there will be a presumption that it was obtained through undue influence, and the burden of proof is shifted to the dominant party to demonstrate the opposite⁴¹¹. This presumption exists to protect weaker and poor parties from extortion due to a lack of independent advice. In any case, this is an exceptional instance, and mere hard bargain or imbalanced prices, as well as natural persuasion (which does not attach real fears and hopes), will not make the contract voidable⁴¹².

The other defect that leads a contract to be voidable is misrepresentation, which is defined as a misstatement of a material fact of the contract or simply, a representation that is not true and substantially induces the party to enter into a contract (it must be the cause of the contracting)⁴¹³. In accordance with Section 18 of the Indian Contract Act⁴¹⁴, there are three sets of conducts that may correspond to misrepresentation and, when determinant for the contract, leads to voidability, such as: positive statements not warranted to be so, though

⁴⁰⁸ PATHAK, Akhileshwar, *Contract Law*, cit., p. 183; SINGH, Avtar, *Law of contract*, cit., p. 181 (quoting the case *Bellachi vs. Pakeeran* (2009) 12 SCC 95: (2009) 4 SCC (Civ) 640); UJJANNAVAR, S. S., *Law of Contract*, cit., p. 77.

⁴⁰⁹ *Saxon vs. Saxon* (1976) 4 WWR 300, 305, 306 (BC SC), *apud* SINGH, Avtar, *Law of contract*, cit., p. 181.

⁴¹⁰ PATHAK, Akhileshwar, *Contract Law*, cit., p. 184; SINGH, Avtar, *Law of contract*, cit., pp. 183-184.

⁴¹¹ SINGH, Avtar, *Law of contract*, cit., p. 187.

⁴¹² UJJANNAVAR, S. S., *Law of Contract*, cit., pp. 76-78; SINGH, Avtar, *Law of contract*, cit., p. 188.

⁴¹³ SINGH, Avtar, *Law of contract*, cit., p. 200 and 208; PATHAK, Akhileshwar, *Contract Law*, cit., p. 190; UJJANNAVAR, S. S., *Law of Contract*, cit., p. 87.

⁴¹⁴ Section 18: “*Misrepresentation defined. – ‘Misrepresentation’ means and includes— (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.*”

the party believed to be true; breaches of a duty based on equity (without intention to deceive); acts that induce mistake about the subject matter of the contract, however innocent (includes the suppression of vital facts regarding the contract)⁴¹⁵.

Based on such definition, the elements of voidable misrepresentation are generally the (i) existence of a false statement (very widely comprehended, encompassing actions, omissions, specific circumstances, changes of circumstances, and even the silence or expression of opinion pursuant to the circumstances), (ii) the statement can be made expressly or through conduct, (iii) the inducement of the party and (iv) such party enters into the contract relying on such false statement⁴¹⁶. Similar to the concept of the mistake in Brazil, the misrepresentation will not lead to avoidance if the party has available means to discover the truth and refuse to enter into a contract⁴¹⁷.

However, a difference from the Brazilian mistake is the requirement of a *statement* that induces the party to have a wrong perception of the reality. Such a statement must be innocent, without intention to deceive and, for those reasons, in English common law such a defect is called “innocent misrepresentation”, opposed to the “intentional misrepresentation”, where the issuance of the statement is deliberate. Indian law does not follow these qualifications, since the vice related to the intentional false statement (with the knowledge and intention to mislead, or even issued without due care or recklessly) is regarded as fraud, which is the next defect analysed⁴¹⁸.

Fraud is defined in Section 17 of the Contract Act⁴¹⁹ and corresponds to a deliberate deception towards securing something by taking unfair advantage of another’s loss⁴²⁰. Differently from misrepresentation, the assertion of facts is made without belief in truth and with the intention to deceive the other to obtain the contract. As for the list of Section 17, it comprises active concealment of facts, silence where there is duty to inform,

⁴¹⁵ SINGH, Avtar, *Law of contract*, cit., pp. 201-208.

⁴¹⁶ PATHAK, Akhileshwar, *Contract Law*, cit., pp. 191-192 and 199; UJJANNAVAR, S. S., *Law of Contract*, cit., pp. 90 and 92; SINGH, Avtar, *Law of contract*, cit., pp. 202-208.

⁴¹⁷ SINGH, Avtar, *Law of contract*, cit., p. 209.

⁴¹⁸ PATHAK, Akhileshwar, *Contract Law*, cit., pp. 190 and 192; UJJANNAVAR, S. S., *Law of Contract*, cit., 87.

⁴¹⁹ Section 17: “*Fraud defined.* – ‘*Fraud*’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent², with intent to deceive another party thereto of his agent, or to induce him to enter into the contract: - (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent”.

⁴²⁰ PATHAK, Akhileshwar, *Contract Law*, cit., p. 192.

half-truth when voluntarily made, a promise made without the intention to perform, and any other act fitted to deceive which is decisive for the conclusion of the contract⁴²¹.

As occurs with misrepresentation, change of circumstances may result in a contract becoming voidable for fraud, when the party knew about such change after the statement is made, understood the importance of such change for the contract and, intentionally, omits the change to the other party⁴²². Likewise, the expression of an opinion, in some circumstances, may be regarded as fraud, such as the cases of asymmetric relationships, where one party is more skilful and knowledgeable about the subject matter of the contract and gives an opinion which does not correspond to the truth⁴²³.

For these types of consent defectiveness, when affecting the conclusion of the contract, Sections 19 and 19.A provide for the ‘voidability’ of the agreements at the option of the party aggrieved by the defect⁴²⁴. In case of undue influence, the provision (Section 19.A) opens the alternative to take a measure that the court may seem just. Confirmation of voidable contracts by the aggrieved party may be expressed or implied, for instance, by a conduct inconsistent with the rescission⁴²⁵. If the contract is confirmed, the party may request the performance of the contract in order that he or she shall be put in the position in which he or she would have been if the representations made had been true (Section 19).

The right to rescission or confirmation, once exercised, is final, exhausted, irrevocable and cannot be cumulated with another option⁴²⁶. For instance, if one party elects to rescind, he or she cannot confirm the contract thereafter and allege breach of contract. The option must be completed promptly based on the surrounding circumstances and upon the knowledge of the voidability (the right is not lost by the lapse of time if the innocent party is still unaware of the fraud or if the coercion has not ceased yet) and the Contract Act

⁴²¹ SINGH, Avtar, *Law of contract*, cit., pp. 211-217.

⁴²² SINGH, Avtar, *Law of contract*, cit., p. 215.

⁴²³ PATHAK, Akhileshwar, *Contract Law*, cit., p. 196.

⁴²⁴ Section 19: “When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.” Section 19.A: “When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.”

SINGH, Avtar, *Law of contract*, cit., p. 220.

⁴²⁶ PATHAK, Akhileshwar, *Contract Law*, cit., p. 205; UJJANNAVAR, S. S., *Law of Contract*, cit., p. 98.

does not provide for any specific limitation period for such exercise⁴²⁷. In one English case quoted by Indian authority, the court has rejected a claim for avoidance brought five months after the knowledge of a fraud without due explanation⁴²⁸.

The final part of Section 23 expressly states that lack of legality (lawfulness of consideration and object) results in the contract becoming void⁴²⁹. The invalidity of the entire contract also occurs in case the unlawfulness affects only part of the consideration (or considerations) of a contract, pursuant to Section 24⁴³⁰.

However, this situation must not be confounded with the case of partial invalidity – recognised by court practice –, since the unlawfulness of a consideration, even in part, affects the entire contract (cannot be segregated), while partial invalidity may occur when the invalid part can be separated from the valid part of the contract (generally called as “*blue pencil rule*”) and must be only decided by a court⁴³¹.

For instance, Section 57 of the Indian Contract Act states that, when a contract contains reciprocal separate obligations and one of them is illegal, the legal obligations form a contract, whereas the illegal element is void and cannot be enforceable⁴³². The same applies in case of alternative obligations, where the set of legal obligations, when separable from the illegal one, can be enforced.⁴³³ On a contrary direction, however, Indian judicial precedents tend to decide that the nullity of a contract leads to the nullity of the arbitration clause⁴³⁴ - which, in other systems, is understood as an autonomous part of the contract⁴³⁵.

⁴²⁷ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 444 and 449; BHADBHADE, Nilima, *Contract*, cit., p. 138; SINGH, Avtar, *Law of contract*, cit., p. 220.

⁴²⁸ *Christineville Rubber Estates Ltd*, re, (1911) 81 LJ Ch 63, apud SINGH, Avtar, *Law of contract*, cit., p. 221.

⁴²⁹ Section 23, final part: “*In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*”

⁴³⁰ Section 24: “*If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.*”

⁴³¹ Partial validity must be declared in court and not autonomously communicated by the party, since the party is only entitled to rescind or ratify the entire contract. POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 446 and 581; NAIR, M. Krishnan, *The Law*, cit., pp. 165-166; UJJANNAVAR, S. S., *Law of Contract*, cit., p. 192.

⁴³² Section 57: “*Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.*”

⁴³³ Pursuant to Section 58: “*In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.*”

⁴³⁴ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 254.

⁴³⁵ For instance, Article 8 of the Brazilian Arbitration Law (Law n° 9,307/1996): “*An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*”

Moreover, the Contract Act provides for other specific situations where a contract is deemed void, clearly distinguishing their effects from the cases of other defects of consent analysed above. And the most “polemic” issue refers to the vice of mistake.

Pursuant to Section 20 of the Indian Contract Act, a mistake will only render nullity (and not voidability) if affecting both parties (common mistake or bilateral mistake) and to a matter of fact essential to the agreement⁴³⁶. Different from the Brazilian and Russian cases, a mistake affecting the consent of just one of the parties (unilateral mistake) does not make the contract voidable⁴³⁷, unless the other party was aware of the first party’s mistake and there is an inducing statement (misrepresentation)⁴³⁸. The same occurs with respect to mistakes of law, pursuant to Section 21⁴³⁹.

The rationale of Indian treatment to unilateral mistake (as other common law countries) is that allowing a party to rescind a contract and claim the performance back due to its own mistake would erode the value of contracts, lead to uncertainty and also harm the other party who acted with no fault or mistake⁴⁴⁰. Therefore, the law will protect only those mistakes generated upon misrepresentation and fraud, which are the most common⁴⁴¹. And, even in the case of bilateral mistake, where the same mistake affects both parties, this must be essential, related to the quality of the parties or subject matter, its nature, the content of the promise, and other instances to be evaluated in accordance with the concrete cases⁴⁴².

Still on the issue of mistake, Indian literature differentiates the types of mistakes and effects provided by the law (common and unilateral mistakes) from the so-called mutual mistake, which removes the consent to deal and makes the contract inexistent. In contrast to the common mistake (where the consent of the parties is just misled due to the same error), in the mutual mistake the offer and acceptance do not correspond and, therefore, no contract

⁴³⁶ Section 20: “Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void”.

⁴³⁷ Section 22: “A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact”.

⁴³⁸ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 467.

⁴³⁹ Section 21: “Effect of mistakes as to law. - A contract is not voidable because it was caused by a mistake as to any law in force in 1 [India]; but a mistake as to a law not in force in 1 [India] has the same effect as a mistake of fact”.

⁴⁴⁰ PATHAK, Akhileshwar, *Contract Law*, cit., p. 123; SWADLING, William John, *Restitution and Unjust Enrichment*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 1st ed., Nijmegen, Ars Aequi Libri, 1994, p. 279; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 423.

⁴⁴¹ SINGH, Avtar, *Law of contract*, cit., p. 243.

⁴⁴² UJJANAVAR, S. S., *Law of Contract*, cit., p. 126; SINGH, Avtar, *Law of contract*, cit., pp. 228 and 234-240.

is deemed concluded⁴⁴³. The destruction of the consent leading to the inexistence of contract also happens in cases of unilateral mistake that is fundamental (for instance, there is no “common meeting of minds” when the identity of one party is wrong and it is of the essence of the deal)⁴⁴⁴.

Sections 24 to 30 provide for other detailed and specific grounds for a contract to be deemed null and void. In addition to the unlawfulness of the consideration, object and both parties’ mistake, contracts without consideration (despite some specific situations), in restraint of marriage, in restraint of trade (subject to the exception of sales of the good will of a business), in restraint of legal proceedings (subject to the exceptions of arbitration and banking guarantee), without certainty (or even capable of being certain) and by way of wager (subject to the exception of certain prizes for horse-racing) are null and void under Indian law and, as a consequence, cannot be enforceable.

Impossibility also affects the validity of a contract, especially if the object of the contract is impossible from the beginning⁴⁴⁵ or the contract is contingent (precedent condition) on an impossible event, regardless of the awareness of the parties with respect to such impossibility⁴⁴⁶. However, if one of the parties was aware of the impossibility, Section 56 states that such party shall compensate the other for any loss which he or she incurred due to the invalidity caused by impossibility.

Moving to the consequences of invalidity, the remedy provided for voidable contracts is the rescission by the interested party, as mentioned above. According to Section 66 of the Indian Contract Act, combined with Section 3, the rescission can be exercised by mere communication by the aggrieved party, without the need to submit to court⁴⁴⁷. Such

⁴⁴³ SINGH, Avtar, *Law of contract*, cit., pp. 226 and 251; PATHAK, Akhileshwar, *Contract Law*, cit., pp. 118, 121 and 258; UJJANNAVAR, S. S., *Law of Contract*, cit., pp. 107, 124 and 126.

⁴⁴⁴ UJJANNAVAR, S. S., *Law of Contract*, cit., p. 108; PATHAK, Akhileshwar, *Contract Law*, cit., pp. 118-121; SINGH, Avtar, *Law of contract*, cit., pp. 226 and 251 (quoting the case *Raffles vs. Wichelhaus*, 1864 2 H&C 906: 159 ER 375).

⁴⁴⁵ Pursuant to Section 56: “An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.”

⁴⁴⁶ Pursuant to Section 36: “Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.”

⁴⁴⁷ Section 66: “The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal”. While the communication or revocation means are stated in Section 3: “Communication, acceptance and revocation of

autonomy attributed to the parties to rescind, that differentiates the Indian system from the Brazilian, Russian and Chinese (as will be discussed below), is called as “self-help remedy”, which, however, does not prevent the other party to challenge the communicated rescission in court, and judicial measure is also available to the party with a right to rescind⁴⁴⁸. In this case, the judicial request for rescission is subject to a three-year limitation period according to the Indian Limitation Act⁴⁴⁹.

The rationale of the adoption of a self-remedy is to confer to the parties, for the rescission, the same means offered for the formation of the contracts (which may occur by mere express or implied communications). When the party first communicates the rescission and then needs to resort to the judicial measure afterwards (due to the resistance by the other party, for instance), the award granting rescission will consider the date at which it was effectively communicated⁴⁵⁰.

In case of void contracts, however, it is not necessary for a party to rescind or to seek a judicial or arbitral declaration of avoidance and the nullity can be recognised directly by the court when judging a claim based on a void contract. The party may directly request proper relief (compensation or restitution)⁴⁵¹, also subject to a three-year limitation period according to the residuary Section 113 of the Limitation Act⁴⁵².

The immediate effect of rescission of a contract is that it does not need to be performed by the parties⁴⁵³. If the rescission is made on grounds of voidability, the parties shall restore the benefits received under the rescinded contract, pursuant to Section 64 of the

proposals. The communication of proposals the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.”

⁴⁴⁸ BHADDBHADE, Nilima, *Contract*, cit., p. 203; BANGIA, R. K., *The Indian Contract*, cit., p. 140.

⁴⁴⁹ Pursuant to Section 59 of the Limitation Act: “*To cancel or set aside an instrument or decree or for the rescission of a contract. Three years. When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him*”. This is a difference from the English common law, which does not provide for a fixed limitation period for rescission.

⁴⁵⁰ PATHAK, Akhileshwar, *Contract Law*, cit., pp. 202 and 204. As in the English common law, see TREITEL, Guenter, *The Law of Contract*, 15th ed., at. PEEL, Edwin, London, Sweet&Maxwell, 2020, p. 465.

⁴⁵¹ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 304; SINGH, Aytar, *Law of contract*, cit., p. 219 and 346-347.

⁴⁵² Pursuant to Section 113 of the Limitation Act: “*Any suit for which no period of limitation is provided elsewhere in this Schedule. Three years. When the right to sue accrues.*”. POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 998.

⁴⁵³ Pursuant to Section 62: “*If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*”

Contract Act⁴⁵⁴. Differently from what is observed in other systems, in case the rescinding party is not able to restore the former state (*restitutio in integrum*), the rescission cannot take place. Therefore, the condition to provide restitution is deemed not only an effect, but also a requirement for rescission under Indian law (the courts insist on evaluating and ordering first the restitution and, afterwards, award the right for rescission)⁴⁵⁵. Additionally, in one case, the complete performance of the obligations of the contract by both parties prevented the aggrieved party to rescind, even if the awareness of the voidability took place afterwards⁴⁵⁶.

Section 27, item 2, of the Specific Relief Act details this and other grounds that preclude the exercise of rescission. In addition to the confirmation of the contract and the impossibility to proceed to the restitution *in integrum* (“*the parties cannot be substantially restored to the position in which they stood when the contract was made*”), the court may refuse rescission if: third parties have acquired rights in good faith during the performance of the contract and in cases of partial invalidity⁴⁵⁷. The exception related to third party’s rights is different from the treatment conferred by Brazilian law, according to which the contract may be avoided, despite the protection of the acquired rights of the third party.

Such requirement for necessary restitution *in integrum* to promote rescission of the contract can be though relaxed in practice. There are cases in which the courts allowed rescission by doing what is “*practically just in the circumstances*” in order to “*achieve*

⁴⁵⁴ Section 64: “When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding avoidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.”. The word benefit is not to be interpreted as equal to “profit”, but rather to the performance received (POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 990-991).

⁴⁵⁵ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 451 and 966; SINGH, Avtar, *Law of contract*, cit., p. 222; BANGIA, R. K., *The Indian Contract*, cit., p. 142; PATHAK, Akhileshwar, *Contract Law*, cit., p. 203; UJJANAVAR, S. S., *Law of Contract*, cit., p. 100.

⁴⁵⁶ *Oriental Insurance Co Ltd vs. Mantora Oil Products (P) Ltd*, (2000) 10 SCC 23, *apud* SINGH, Avtar, *Law of contract*, cit., p. 221.

⁴⁵⁷ Section 27 of the Specific Relief Act: “When rescission may be adjudged or refused.—(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:— (a) where the contract is voidable or terminable by the plaintiff; (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. (2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract— (a) where the plaintiff has expressly or impliedly ratified the contract; or (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or (c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract”

equity”. Nonetheless, exception is made when both parties have fulfilled their obligations and reciprocal restitution is not possible. In such a case, rescission is generally denied⁴⁵⁸.

In addition to restitution of benefits, damage compensation to the innocent party of a voidable act may be granted, if proved, under the Specific Relief Act⁴⁵⁹. This relief was reinforced after the reform of the English Misrepresentation Act. As seen above, English statutes is regarded by Indian scholarship and courts as a source of law. In accordance with this Act, the courts shall have the power, in cases of misrepresentation, to keep the effectiveness of a voidable contract and award damages instead (damages *in lieu* of rescission), when equitable to do so⁴⁶⁰.

The provision of the Specific Relief Act, combined with the English Misrepresentation Act, may raise the argument that the Indian system would authorise equivalent compensation and rescission in cases of inability of restitution. Nevertheless, these rules, in addition to be limited to misrepresentation, are considered applicable only in cases where the party is entitled to rescind, and the court has the discretion to evaluate the most just consequence (restitution or compensation)⁴⁶¹. When there is a bar to rescission (*e.g.*, when restitution cannot be made), courts would not have discretion to award damages *in lieu*⁴⁶².

In case a contract is discovered to be void or becomes void, none of the parties (nor any person) must receive any advantage from that contract and, therefore, they must restore the former situation either by restitution or compensation (refund), pursuant to Section 65⁴⁶³. The restoring obligation is founded on the equitable principle of restitution

⁴⁵⁸ *Molton vs. Camrous*, 154 ER 1107: (1848) 2 Exch 487, quoting case *Erlanger vs. New Sombrero Phosphate Co*, 1878 AC 1218, *apud* SINGH, Avtar, *Law of contract*, cit., pp. 223-224.

⁴⁵⁹ Section 30 of the Specific Relief Act: “*On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.*”

⁴⁶⁰ Section 2(2) of the Misrepresentation Act: “*Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party*”. BANGIA, R. K., *The Indian Contract*, cit., p. 143.

⁴⁶¹ SINGH, Avtar, *Law of contract*, cit., p. 926; BANGIA, R. K., *The Indian Contract*, cit., p. 144.

⁴⁶² TREITEL, Guenter, *The Law*, cit., p. 447 and 469.

⁴⁶³ Section 65: “*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it*”. Similar to Section 64, the word advantage is not to be interpreted as equal to “profit”, but rather to the performance received (POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 990-991).

and prevention of unjust enrichment⁴⁶⁴. Here, the alternative to allow compensation instead of restitution (*in integrum*) is different from the solution set forth in Section 64 applicable to voidable contracts - where the impossibility to retribute may not be converted into compensation, but rather prevents the party from rescinding the contract. In any case, a party (or parties) cannot take advantage of the ruling of Section 65 if he/she knew about the nullity since the formation of the contract (contract “*discovered*” to be void)⁴⁶⁵.

Indian Law segregates purely void contracts from illegal and immoral contracts. Sections 25 to 30 of the Indian Contract Act (to which Section 65 makes reference) comprises cases of void contracts, while Section 23 refers to illegality (unlawful consideration). An illegal contract is forbidden by law, while void contracts may not be forbidden, although a court can never enforce them⁴⁶⁶.

And, in cases of nullity deriving from immorality or illegal contract (*ex turpi causa*), the party (or parties) conducting the illegal or immoral act that caused the nullity is neither entitled to any remedy under the contract, as a way to discourage these types of acts. This rule follows the principle *ex dolo mala non oritur action*, which means that no court will lend its aid to a party who found his cause of action upon an immoral or illegal act⁴⁶⁷, inspired by the English precedent *Holman vs. Johnson*⁴⁶⁸.

Likewise, when both parties conduct in illegality or immorality in a given agreement, neither can claim restitution of the performances upon the invalidity, unless they were not aware of the illegality⁴⁶⁹. This situation is a maxim called *in pari delicto potior est conditio possidentis* (or just “*in pari delicto*”), according to which, upon the avoidance of the contract, the parties who jointly and freely agreed on an illegal contract shall not have access to justice in order to seek the general effects of invalidity (restoration and compensation). There are exceptions to this rule though: (i) situations in which the illegal purpose was not carried out yet and the contract is still executory, (ii) one of the parties was forced to enter into the illegal contract (*not in pari delicto*), and, hence, this less guilty party will be entitled to restitution, (iii) when the party does not have to rely upon the illegality to

⁴⁶⁴ SINGH, Avtar, *Law of contract*, cit., p. 419-421.

⁴⁶⁵ BANGIA, R. K., *The Indian Contract*, cit., p. 251; UJJANNAVAR, S. S., *Law of Contract*, cit., p. 279.

⁴⁶⁶ SINGH, Avtar, *Law of contract*, cit., pp. 342-343. BANGIA, R. K., *The Indian Contract*, cit., p. 4.

⁴⁶⁷ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 571; NAIR, M. Krishnan, *The Law*, cit., p. 161; SINGH, Avtar, *Law of contract*, cit., p. 343.

⁴⁶⁸ Lord Mansfield in *Holman vs. Johnson* (1775) 1 Cowp. 341, 98 ER 1120, *apud* BEALE, Hugh *et al.* (eds.), *Cases, Materials and Text on Contract Law*, Oxford and Portland, Hart Publishing, 2002, p. 327.

⁴⁶⁹ As inferred by Section 65, with the “discovered to be void”, which applies to illegal contracts. PATHAK, Akhileshwar, *Contract Law*, cit., pp. 324-325.

make his or her claim (otherwise it would lead to a situation of unjust enrichment) and (iv) in cases of partial voidance or illegality, when severable/separable⁴⁷⁰.

An example of a contract still executory is when someone who is insolvent transfers assets to another person aiming to defraud creditors, and then repents and decides to claim restitution afterwards. This party may have the right to revoke the act of transfer and to claim restitution of the asset, because in this case, the restitution is important for the non-occurrence of the illegal purpose (to defraud creditors)⁴⁷¹.

Consequently, Indian law concedes different treatments in cases of simple voidance or voidability of contracts and in cases of voidance due to illegality. In addition to these rules preventing restitution for an illegal contract, it is noteworthy to identify that collateral (ancillary) transactions can be subject to restitution in case of voidance of the main contract when these collateral transactions are not tainted by such voidance, whereas if the main transaction is illegal (and thus, void), all collateral transaction are also void by illegality and cannot be restored⁴⁷².

As regards to the quantification of the compensation alternative to restitution, when available and permitted, no specific standard is provided by the Contract Act in Section 65. The practice refers to the doctrine of *quantum meruit* (for services) or *quantum valebat* (for goods), even though it is more used in claims for breach of contract. The value of the material used or supplied in the performance is a factor which furnishes a basis for assessing the amount of restitution⁴⁷³.

The remedy must be a recompense for the value of the work undertaken by the party in order to restore him or her to the position which he or she would have been if the contract had never been entered into⁴⁷⁴. In one case, the Supreme Court was restrictive and observed: “*We do not have the slightest doubt that net profits realized by the company as a*

⁴⁷⁰ BHADBHADE, Nilima, *Contract*, cit., p. 139; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 572-573 and 577; NAIR, M. Krishnan, *The Law*, cit., p. 161; SINGH, Avtar, *Law of contract*, cit., pp. 344-346 and 422-423; PATHAK, Akhileshwar, *Contract Law*, cit., pp. 323-324; UJJANNAVAR, S. S., *Law of Contract*, cit., p. 191.

⁴⁷¹ Pursuant to the English case *Tribe vs. Tribe*, 1996 Ch 107 (CA), *apud* SINGH, Avtar, *Law of contract*, cit., p. 344. Also in SWADLING, W. J., *The role of illegality in the English law on unjust enrichment*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, pp. 296-297 and in TREITEL, Guenter, *The Law*, cit., p. 593.

⁴⁷² *Gherulal Parakh vs. Mahadeodas*, AIR 1959 SC 781: (1959) 2 SCR 406, *apud* SINGH, Avtar, *Law of contract*, cit., p. 346.

⁴⁷³ SINGH, Avtar, *Law of contract*, cit., p. 423; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 1002.

⁴⁷⁴ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 998-999.

*result of various business activities can never be the measure of compensation to be awarded under Section 65*⁴⁷⁵. The assessment will consider the specific circumstances, and, in the referred case (related to the excavation of stones), the calculation of restitution was based on the royalty paid due to the excavated stones⁴⁷⁶.

Finally, Indian law differentiates the act of avoidance, a self-help remedy, from the cancellation of written instruments in cases of voidability or nullity, which shall be brought to the court's appreciation⁴⁷⁷. The cancellation of written instruments is a remedy provided for in Section 31 of the Specific Relief Act to the party of a voidable or void instrument only in case such instrument is proved to cause him or her serious injury⁴⁷⁸. The effects of the cancellation are similar to the invalidation, *i.e.*, the restoring of any benefits received under the cancelled instrument⁴⁷⁹. Being a judicial remedy, it is also subject to a three-year limitation period according to Section 59 of the Indian Limitation Act.

Considering the foregoing, Indian law gives different treatment to the mechanism and consequences of avoidance compared to the other legal systems analysed so far. This is also important regarding the comparisons that will be made in the following chapters.

4. China

⁴⁷⁵ *State of Rajasthan vs. Associated Stone Industries* (1985) 1 SCC 575, 580: AIR 1985 SC 466, *apud* SINGH, Avtar, *Law of contract*, cit., p. 424. Also quoted in PATHAK, Akhileshwar, *Contract Law*, cit., p. 322.

⁴⁷⁶ PATHAK, Akhileshwar, *Contract Law*, cit., p. 322.

⁴⁷⁷ SINGH, Avtar, *Law of contract*, cit., p. 931.

⁴⁷⁸ Section 31 of the Specific Relief Act: “When cancellation may be ordered. (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.”

⁴⁷⁹ Pursuant to Section 33 of the Specific Relief Act: “Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require. (2) Where a defendant successfully resists any suit on the ground— (a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it; (b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby”.

The issue of validity and invalidity of contracts is provided with some degree of exhaustiveness in the new Civil Code, strongly based on the former provisions of both the Contract Law of 1999 and in the GRCL of 2017. There were also rules in this regard in the GPCL, however, they were less exhaustive and, as per the former Contract Law, were incorporated or repealed by Civil Code.

The Contract Law directly provided for rules on the invalidity of contracts and its consequences (Articles 47 to 59), while the Civil Code, reflecting the former GRCL and similar to the Brazilian Civil Code, addresses firstly the conditions of validity (Article 143) and, subsequently, the rules on invalidity and its consequences (Articles 144 to 157). Even though such subdivision raised some critics of redundancy under the former GRCL⁴⁸⁰, it was confirmed in the text of the recent Civil Code.

In order to be valid according to the Civil Code, a civil legal act must be concluded and performed by persons with the required civil capacity for the specific act, with true expressed intent and the content of the act must not violate mandatory provisions, public order or good morals⁴⁸¹. Very similar to what was provided in the GRCL, these are the grounds that the Chinese State considers for a contract to be valid and enforceable⁴⁸².

These three criteria contained in Article 143 are important to understand the three different grounds for invalidity provided for in the following articles of the Civil Code. Since the former Contract Law and GRCL, the Chinese law separates acts/contracts within those pending validity, voidable and void. The acts pending validity are those which require an additional act (ratification, confirmation, verification of a condition, etc.) in order to be valid and enforceable. Therefore, they are more closely linked with the capacity requirement⁴⁸³.

The regime of voidable and void acts is similar to what was observed in other legal systems, where the voidable acts are enforceable until a court decision of invalidation

⁴⁸⁰ BU, Yuanshi, *Chinese*, cit., p. 112.

⁴⁸¹ Pursuant to Article 143: “A civil juristic act is valid if the following conditions are satisfied: (1) the person performing the act has the required capacity for performing civil juristic acts; (2) the intent expressed by the person is true; and (3) the act does not violate any mandatory provisions of laws or administrative regulations, nor offend public order or good morals.”

⁴⁸² QIU, Xuemei, *Contract* cit., p. 167 ; XIAOYAN, Zhou, *Provisions on Validity of Contracts in the Contract Law of China*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003, p. 95.

⁴⁸³ ZOU, Mimi, *Chinese Contract*., cit., pp. 68; XIAOYAN, Zhou, *Provisions on Validity*, cit., pp. 93-94; QIU, Xuemei, *Contract* cit., pp. 163 and 168; WANG, Yi, *Prospect of Validity in Chinese Contract Law*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, pp. 228-229.

and the void acts have no binding force from the beginning, irrespective of the parties' intent. Hence, voidable acts are linked to defects on the requirement of intent, while the void acts are those not connected with the intent of the parties, but rather to the requirement of compliance with mandatory rules, public order and morals⁴⁸⁴.

The text of the Civil Code provides easy identification of which acts are deemed voidable or void. When the legal provision states that, upon the verification of a defect, a party "*has the right to request the people's court or an arbitration institution to revoke the act*", this act is voidable, while the void acts are expressly established as "*void*" by the provision's text⁴⁸⁵.

If one analyses the evolution of Chinese legislation on this matter, important innovation is observed towards the privilege of the parties' intent in conducting private relationships. The former Contract Law had already expanded the scope of voidable contracts, allowing the aggrieved party to decide whether the defects should remain, or modified or extinguish the act by the decision of avoidance. It provided fewer cases of situations of a contract to be void compared to former laws, since the previous several situations resulted in unnecessary wastage of resources and undermined the parties' real interests and intent⁴⁸⁶. The Civil Code followed the same approach and reduced the hypotheses where an act is deemed null and void, as will be demonstrated herein.

Beginning with the criteria of limitation of civil capacity, although the act is deemed invalid in general⁴⁸⁷, there are some grounds for ratification, placing those acts within the category of pending validity. In cases of limited capacity - minors between eight and eighteen years old or partial mental disability⁴⁸⁸ - Article 145 of the Civil Code states that all contracts can only be valid upon the ratification of the legal agent/tutor (which must be completed within one month when challenged), with exception to contracts for their pure

⁴⁸⁴ XIAOYAN, Zhou, *Provisions on Validity*, cit., p. 95

⁴⁸⁵ QIU, Xuemei, *Contract* cit., p. 167.

⁴⁸⁶ ZOU, Mimi, *Chinese Contract*, cit., pp. 68-69.

⁴⁸⁷ Pursuant to Article 144 of the Civil Code: "*A civil juristic act performed by a person who has no capacity for performing civil juristic acts is void.*"

⁴⁸⁸ Article 19 of the Civil Code: "*A minor aged 8 or above has limited capacity for performing civil juristic acts, and may perform a civil juristic act through or upon consent or ratification of his legal representative, provided that such a minor may independently perform a civil juristic act that is purely beneficial to him or that is appropriate to his age and intelligence*" and Article 22 of the Civil Code: "*An adult unable to fully comprehend his own conduct has limited capacity for performing civil juristic acts, and may perform a civil juristic act through or upon consent or ratification of his legal representative, provided that such an adult may independently perform a civil juristic act that is purely beneficial to him or that is appropriate to his intelligence and mental status.*"

benefit or compatible with their age, intelligence and mental health⁴⁸⁹. The ability of a minor to carry out needs of daily life (for instance, buying food at school) is considered to be comprised by this latter exception of validity⁴⁹⁰.

The Civil Code provides for other rules on civil capacity and the need for ratification in order to make an act valid. Those rules apply to cases of agency (where some acts require the ratification of the principal) and legal entities (where the acts must be ratified by the person with due authority)⁴⁹¹, property rights and acts subject to conditions of validity⁴⁹². In those cases of contracts pending validity, the non-performance of the required ratification entails the act to be void *ab initio*⁴⁹³.

This category of invalidity is very particular of the Chinese system. Although it is not valid until proper ratification (and void if the ratification is refused), the legislators were cautious in not confusing them with void contracts. A void contract, as mentioned above, has no effect since it does not possess valid elements. By contrast, a contract yet to be effective has valid elements and possess a certain binding force on both parties and may not be rescinded, terminated or modified by either party until it is ratified or considered void⁴⁹⁴.

Apart from civil capacity, true intention to be bound by the contracts is one condition for a contract to be valid. Therefore, problems affecting parties' intent may lead

⁴⁸⁹ Article 145 of the Civil Code: "A civil juristic act, performed by a person with limited capacity for performing civil juristic acts that is purely beneficial to the person or is appropriate to the age, intelligence, or mental status of the person is valid; any other civil juristic act performed by such a person is valid if a consent or ratification is obtained from his legal representative. A third person involved in the act performed by a person with limited capacity for performing civil juristic acts may request the legal representative of the latter to ratify the act within 30 days from receipt of the notification. Inaction of the legal representative is deemed as refusal of ratification. Before such an act is ratified, a bona fide third person is entitled to revoke the act. The Revocation shall be made by notice."

⁴⁹⁰ BU, Yuanshi, *Chinese*, cit., p. 113; WANG, Yi, *Prospect*, cit., pp. 216-217; ZOU, Mimi, *Chinese Contract*, cit., p. 71.

⁴⁹¹ Pursuant to Article 171 of the Civil Code: "An act performed by a person without authority, beyond the authority, or after the authority is terminated is not effective against the principal who has not ratified it. A counterparty may urge the principal to ratify such an act within 30 days after receipt of the notification. Inaction of the principal is deemed as a refusal of ratification. Before such an act is ratified, a bona fide counterparty has the right to revoke the act. Revocation shall be made by notice." In case of agency, the Civil Code recognized the possibility of ratification through conduct in Article 503 ("Where a person without authority concludes a contract in the name of a principal, and if the principal has already started performing the contractual obligations or accepted the performance of the other party, the contract is deemed ratified").

⁴⁹² According to Article 158 of the Civil Code: "A condition may be attached to a civil juristic act unless the nature of the act denies such an attachment. A civil juristic act subject to a condition precedent becomes effective when the condition is fulfilled. A civil juristic act subject to a condition subsequent becomes invalid when the condition is fulfilled."

⁴⁹³ ZOU, Mimi, *Chinese Contract*, cit., p. 69.

⁴⁹⁴ *Idem*, *ibidem*, p. 79. However, there are legal exceptions, such as the final part of Article 145.

to the invalidity of the contract. These are the so-called voidable contracts. The defects of true intent are addressed in Articles 147 to 151 of the Civil Codes, which introduced some innovations compared to the Contract Law and GRCL, as will be individually analysed.

The first ground for avoidance is the serious misunderstanding (generally deemed to be synonymous with mistake⁴⁹⁵) provided for in Article 147 of the Civil Code⁴⁹⁶. This defect must be substantial and refers to the deceit of the party in entering into a contract and, as such, allows the party to claim the rescission (or revocation). Since the provision does not provide for a more detailed definition, as it was in the former Contract Law, GRCL and GPCL, the Supreme People's Court issued a formal Opinion back in 1988 to guide courts according to the abolished GPCL: "*Where a person performs an act on the basis of a false understanding of the nature of the act, the other party, or the variety, quality, specification, or quantity of the subject matter, so that the consequences of the act are contrary to his true intent and cause significant losses*"⁴⁹⁷.

Despite the old directive, it still plays an important role in deciding cases in practice. Along with the aforementioned Opinion, literature developed other requirements for a misunderstanding entailing avoidance, such as an error in at least one party's declaration of intent, an error rather than a deliberate cause (otherwise it would be the case of fraud) and the causal link between the erroneous declaration and the contract⁴⁹⁸.

Contracts or other legal acts affected by fraud are also subject to rescission at the request by the infringed party, either if the fraud was committed by the counterparty or by a third party with the awareness of the counterparty, according to Articles 148 and 149 of the Civil Code⁴⁹⁹. The possibility of alleging fraud by a third party was an innovation not

⁴⁹⁵ Pursuant to ZHANG, Mo, *Chinese*, cit., pp. 185-196, even though the author mentions the difference made by literature that the serious misunderstanding deals with the contract itself, while the mistake refers to the fact on which the contract is based.

⁴⁹⁶ Article 147 of the Civil Code: "*Where a civil juristic act is performed based on serious misunderstanding, the person who performs the act has the right to request the people's court or an arbitration institution to revoke the act*".

⁴⁹⁷ Opinion (for trial use) of the Supreme People's Court on Questions Concerning implementation of the General Principle of Civil Law, 26/01/1988, Article 71, *apud* ZOU, Mimi, *Chinese Contract.*, cit., pp. 85-86.

⁴⁹⁸ ZOU, Mimi, *Chinese Contract.*, cit., pp. 85-86.

⁴⁹⁹ Articles 148 and 149 of the Civil Code: "*Where a party by fraudulent means induces the other party to perform a civil juristic act against the latter's true intention, the defrauded party has the right to request the people's court or an arbitration institution to revoke the act.*"; "*Where a party knows or should have known that a civil juristic act performed by the other party is based on a third person's fraudulent act and is against the other party's true intention, the defrauded party has the right to request the people's court or an arbitration institution to revoke the civil juristic act.*"

existing in the former Contract Law, but solely in the GRCL and was incorporated by the recent Civil Code.

The Supreme People's Court also issued an Opinion for more detailed definition of fraud, which offers important guidance to courts: *“If one party deliberately conveys false information to the other party or deliberately conceals the truth (from the other party) and induces the other party into making an erroneous declaration of intent, such act shall be determined as a fraudulent act”*⁵⁰⁰.

Voidable are also the cases where a party enters into a contract due to coercion/duress/threat by the other party or by a third party, pursuant to Article 150 of the Civil Code⁵⁰¹. Similar to the case of fraud, the expansion to third parties' coercion was a novelty by the GRCL of 2017, now incorporated into the Civil Code.

The coercion for entailing avoidance must be so strong that it leaves the party with no other alternative but to make a declaration of intent. The definition also comprises aggressive negotiation, even though the distinction between bargaining tactics and coercions are difficult to draw in practice. It is noteworthy to clarify that the threat must be wrongful, meaning that if it is lawful to put pressure on a party, this conduct will not entail any rescission based on Article 150⁵⁰².

Chinese law finally provides for obvious unfairness as grounds for the invalidity of the contract. In this regard, Article 151 of the Civil Code innovated from the former Contract Law by merging, into one single provision, the obvious unfairness and act of taking advantage of the parties' state of distress, which was previously separated⁵⁰³. The reason for the merger was that the “obvious unfairness” was too broad a concept and now the Civil Code specifies this unfairness by stating that it is a result of a party taking advantage of the distressed situation of the other party⁵⁰⁴.

⁵⁰⁰ Opinion (for trial use) of the Supreme People's Court on Questions Concerning implementation of the General Principle of Civil Law, 26/01/1988, Article 68, *apud* ZOU, Mimi, *Chinese Contract.*, cit., p. 88.

⁵⁰¹ Article 150 of the Civil Code: *“Where a party performs a civil juristic act against its true intention owing to duress of the other party or a third person, the coerced party has the right to request the people's court or an arbitration institution to revoke the civil juristic act.”*

⁵⁰² ZOU, Mimi, *Chinese Contract.*, cit., pp. 89-90.

⁵⁰³ Article 151 of the Civil Code: *“In situations such as where one party takes advantage of the other party that is in a desperate situation or lacks the ability of making judgment, and as a result the civil juristic act thus performed is obviously unfair, the damaged party is entitled to request the people's court or an arbitration institution to revoke the act”.*

⁵⁰⁴ ZOU, Mimi, *Chinese Contract.*, cit., pp. 93-94.

This characteristic of the Chinese legal system is intrinsically related to the country's general principles of contract law. As analysed before, Chinese law recognises fairness as an autonomous principle and, in the case of invalidity, it refers to the substantial imbalance between the parties (similar to the concept of lesion or gross disparity) caused intentionally by the other party⁵⁰⁵. Such ground for invalidity includes the situations of one party with urgent needs of an economic nature, or even a lack of experience, but is not as broad as the undue influence of the common law systems⁵⁰⁶.

The misunderstanding, fraud coercion and obvious unfairness are the defects which render an act voidable. This means that, for those acts, the aggrieved party (or any of the parties in the case of misunderstanding) must request the rescission to a court or an arbitral tribunal. A party cannot rescind a voidable contract on his/her own and as well as this, a court shall not do it *ex officio*. If a party does not request its rescission, the act remains valid by the lapse of time or by conduct of the aggrieved party, which is not possible and is not set forth in the case of void contracts⁵⁰⁷.

Article 152 of the Civil Code lists the circumstances that a party loses his/her claim for rescission, which comprises the limitation period of one year counting from the date the party becomes aware of the cause of avoidance, as well as the express conduct in favour to the preservation of the act. Moreover, the provision stipulates the limitation period of five years for the extinguishment of the right to revocation⁵⁰⁸. The considerably short period for the revocation request (shorter than the other civil law systems analysed herein⁵⁰⁹) seems to be aligned with the strong prevalence given to the preservation of the contracts and to the intent of the parties in the formation of contracts.

As for the acts expressly defined as void, the Civil Code begins with the situation of lack of capacity. Different from what was seen in cases of limited capacity, where the acts

⁵⁰⁵ WANG, Yi, *Prospect*, cit. p. 225.

⁵⁰⁶ ZOU, Mimi, *Chinese Contract.*, cit., pp. 94-95 and 97.

⁵⁰⁷ WANG, Yi, *Prospect*, cit., p. 221; ZOU, Mimi, *Chinese Contract.*, cit., p. 84; XIAOYAN, Zhou, *Provisions on Validity*, cit., pp. 99-100.

⁵⁰⁸ Article 152 of the Civil Code: "A party's right to revoke a civil juristic act is extinguished under any of the following circumstances: (1) the party has failed to exercise the right to revocation within one year from the date when it knows or should have known of the cause for revocation, or within 90 days from the date when the party who has performed the act with serious misunderstanding knows or should have known of the cause for revocation; (2) the party acting under duress has failed to exercise the right to revocation within one year from the date when the duress ceases; or (3) the party who becomes aware of the cause for revocation waives the right to revocation expressly or through its own conduct. The right to revocation is extinguished if the party fails to exercise it within five years from the date when the civil juristic act has been performed."

⁵⁰⁹ For instance, under Brazilian Law, the limitation period for voidable acts is four years (Article 178 of the Civil Code), while in Russia is three years (Article 181 of the Civil Code).

are placed within the category of “pending validity”, the total lack of capacity (minor of eight years old, adult with no comprehension capacity⁵¹⁰ or even lack of suing capacity) turns the contract void *ab initio* under Article 144 of the Civil Code⁵¹¹.

Article 146 refers to the so-called simulated acts or contracts, which comprises a false expression of intent or attempt to conceal acts under a different form⁵¹². Pursuant to the former Contract Law, the two concepts (false declaration and concealed acts) were segregated. However, in order to avoid redundancy, the legislators opted to unify them under the former GRCL, incorporating this standard into the Civil Code⁵¹³.

Despite this formal unification, the Civil Code provides for different consequences to both situations: where false declaration entails the act to be void, the validity of the concealed acts shall be determined in accordance with the relevant laws. Therefore, a concealed act will only become void if it possesses the legal grounds for avoidance (for instance, violates mandatory rules), while the acts that do not conceal illegal or other void acts may not be declared void. For this reason, the legislator excluded the former wording of the Contract Law that stipulated concealed acts as only those hiding an “illegal purpose/intention”⁵¹⁴. Finally, unlike other civil law systems (such as the Brazilian one), Chinese Law does not recognise the validity of simulated acts in relation to third parties in good faith⁵¹⁵.

The last ground for validity of an act provided for in Article 143 mentioned above is compliance with mandatory provisions, public order and good morals. *Contrario sensu*, the violation of such requirement turns the act null and void in accordance with Article 153 of the Civil Code⁵¹⁶. In fact, the provision contains two slightly distinct grounds for

⁵¹⁰ Article 20 of the Civil Code: “A minor under the age of 8 has no capacity for performing civil juristic acts, and may perform a civil juristic act only through his legal representative”; Article 21 of the Civil Code: “An adult unable to comprehend his own conduct has no capacity for performing civil juristic acts, and may perform a civil juristic act only through his legal representative. The preceding paragraph is applicable to a minor aged 8 or above who is unable to comprehend his own conduct.”

⁵¹¹ Article 144 of the Civil Code: “A civil juristic act performed by a person who has no capacity for performing civil juristic acts is void.”

⁵¹² Pursuant to Article 146 of the Civil Code: “A civil juristic act performed by a person and another person based on a false expression of intent is void. Where an expression of intent deliberately conceals a civil juristic act, the validity of the concealed act shall be determined in accordance with the relevant laws.”

⁵¹³ ZOU, Mimi, *Chinese Contract.*, cit., pp. 105-106.

⁵¹⁴ *Idem, ibidem*, pp. 105-106.

⁵¹⁵ BU, Yuanshi, *Chinese*, cit., p.116.

⁵¹⁶ Article 153 of the Civil Code: “A civil juristic act in violation of the mandatory provisions of laws or administrative regulations is void, unless such mandatory provisions do not lead to invalidity of such a civil juristic act. A civil juristic act that offends the public order or good morals is void.”

invalidity, namely direct illegality (violation of provisions) and the violation of public order and morals.

As regards to illegality, an act/contract is void when it violates mandatory law or administrative regulations, except if the mandatory rule or regulation does not entail the invalidity of the contract (*i.e.* the mandatory provision stipulates an exception of validity). Given the wide range of provisions and administrative regulations in China, there has been an effort to typify all or at least some situations covered within the illegality requirement⁵¹⁷. As part of this effort, in 2009, the Supreme People's Court provided for a distinction of two categories of provisions to be used for courts' guidance: (i) mandatory provisions that impose sanctions to the wrongdoer and also provide for the invalidation of a contract arising from the violating act, and (ii) mandatory provisions of an administrative nature that merely punishes the conduct without affecting the validity of the act. Only the first category entails direct voidance of an act, while for the second, the court shall decide on a contract's validity in light of the circumstances of the case⁵¹⁸.

Although helpful, the lack of more details of such categorisation continued to raise debate and usually led courts to place acts within the second category in order to keep their validity, following the general mindset of Chinese practice to preserve contracts and parties' intent. As a result, the Supreme People's Court issued new guidance in 2019, according to which the courts, in making the decision to place in one or other category, shall consider the overall goal of the provision and weight up factors such as the type of rights and interests involved and the need to secure transactions. Furthermore, the Court listed some instances of mandatory provisions to be placed in the first category to entail the voidance of the contract:

- “(i) mandatory provisions related to public order and good morals such as financial security, market order, national macro policies;*
- (ii) prohibition on subject matter of transaction or trade such as human organs, drugs and firearms;*
- (iii) provisions on violation of concessions such as shadow margin loan contracts;*

⁵¹⁷ BU, Yuanshi, *Chinese*, cit., pp. 119-120.

⁵¹⁸ Guiding Opinion of the Supreme People's Court on Several Issues concerning Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation, 07/07/2009, Fa Fa No. 40, Article 12, *apud* ZOU, Mimi, *Chinese Contract*, cit., pp. 99-100.

(iv) provisions on highly illegal trading methods, such as concluding contracts that violate bidding and other competitive methods for contracting; and

(v) provisions on trading venues violations, such as features trading outside approved trading venues.”⁵¹⁹

Conversely, the same guidance of the Court stated that mandatory provisions that relate to the scope of business, time of trading, and quantity shall be regarded as belonging to the second category of provisions of administrative nature, which do not necessarily entail invalidity⁵²⁰.

Regarding the violation of public order and good morals, the requirement is intrinsically related to the principles discussed in Chapter 1 above (item 4.2). It is a very broad and vague concept, comprising a large number of acts, such as the infringement of human dignity, damage to family relations, violation of sexual morals, restriction of economic or business activities and the violation of fair competition and consumer interests, among others. In deciding those cases, courts shall consider the level of regulatory intensity, the protection of underlying transaction, the social impact and any other factors which must be fully reasoned in the decision⁵²¹.

Article 154 of the Civil Code provides for the so-called malicious collusion as a ground for deeming a contract void and refers to the collaboration between parties who knowingly and willingly cause damage to the interest of a third party⁵²². As a modification compared to the former Contract Law, the Civil Code excluded the express reference to the damage to the State and collectivity.

Among practices that are considered as malicious collusion (a concept borrowed from Soviet law), reference is usually made to collusive bidding, double transfer of shares or trademarks, evasion of debts and even corruption cases, being the “subjective malice by

⁵¹⁹ Minutes of the National Court’s Civil and Commercial Trial Work Conference, issued by the Supreme People’s Court on 08/11/2019, No. 254, §30, *apud* ZOU, Mimi, *Chinese Contract.*, cit., pp. 100-101.

⁵²⁰ *Idem, ibidem.*

⁵²¹ ZOU, Mimi, *Chinese Contract.*, cit., pp. 101-102; LIU, Qiao – REN, Xiang, *Balancing Public Interest with Transactional Security: The Validity of Contracts tainted with Corruption under Chinese Law*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015, pp. 88-89.

⁵²² Article 174 of the Civil Code: “A civil juristic act is void if it is conducted through malicious collusion between a person who performs the act and a counterparty thereof and thus harms the lawful rights and interests of another person.”

both parties” its main requirement⁵²³. Some authors criticise the inclusion of this type of invalidity, due to its vagueness and since it would already be comprehended within the simulated/concealed contracts. However, others defend this specific inclusion on the grounds that it may directly affect State property and, in these types of conducts, normally, third parties are affected and could never know about the collusion and about their rights⁵²⁴.

In addition to the above express grounds indicated in Section 3 of Chapter VI of the Civil Code, there are also other circumstances that lead to a contract becoming void, which are sparsely provided for in the Code, such as the case of the clauses exempting liability, pursuant to Articles 506 and 497 (the latter applicable to standard terms)⁵²⁵.

Pursuant to the provisions discussed, the avoidance must be claimed either in judicial courts or in arbitration and such provisions must be applied in a restrictive manner⁵²⁶. However, due to the absence of this requirement for contracts which are directly considered void, it is not clear whether a judicial or arbitral intervention is necessary for the declaration of nullity of these contracts (since nullity operates automatically irrespective of the parties’ interests). The general understanding is that a contract, in order to become void, must be declared so by a judge or arbitrator. Even though the resort to court is not necessary, State intervention would be necessary in practice, especially if the other party is resistant to the avoidance or for claiming the consequences of nullity⁵²⁷.

The Civil Code also attributes the same effects to contracts which are directly invalid or were rescinded at the request of the party: both are not legally binding and do not produce effects from their conclusion, according to Article 155⁵²⁸. Similar to the other legal systems, China also recognises partial invalidity, when a valid part of the contract is separable and not affected by the invalid part⁵²⁹. The Civil Code (as did the former Contract Law) expands this rule to consider the independence of the clause for the settlement of

⁵²³ LIU, Qiao – REN, Xiang, *Balancing Public*, cit., pp. 86-87.

⁵²⁴ BU, Yuanshi, *Chinese*, cit., pp. 121-122.

⁵²⁵ Article 506 of the Civil Code: “An exculpatory clause in a contract exempting the liability on the following acts are void: (1) causing physical injury to the other party; or (2) causing losses to the other party’s property intentionally or due to gross negligence.”; Article 497 of the Civil Code: “A standard clause is void under any of the following circumstances: (1) existence of a circumstance under which the clause is void as provided in Section 3 of Chapter VI of Book One and article 506 of this Code;”.

⁵²⁶ QIU, Xuemei, *Contract* cit., p. 170.

⁵²⁷ BU, Yuanshi, *Chinese*, cit., p. 132; ZOU, Mimi, *Chinese Contract*, cit., p. 98; LIU, Qiao – REN, Xiang, *Balancing Public*, cit., p. 93; LING, Bing, *Contract Law in China*, Hong Kong, Sweet & Maxwell Asia, 2002, p. 201.

⁵²⁸ Article 155 of the Civil Code: “A void or revoked civil juristic act does not have any legal force *ab initio*”.

⁵²⁹ Pursuant to Article 156 of the Civil Code: “If invalidation of a part of a civil juristic act does not affect the validity of the other part, the other part of the act remains valid.”.

disputes (for instance, the arbitration clause) and, as such, is not affected by the invalidity of the contract⁵³⁰.

Since invalidity affects the conclusion of the contract, Chinese law provides that the parties must be restored to the *status quo ante* and its instruments are more comprehensive in stating how this restoration would work in case of existence of prior performance. Article 157 of the Civil Code provides for the general rule that properties obtained must be returned or otherwise compensated for based on the appraised value⁵³¹.

These rules apply not only to properties but also to any performed obligation and benefit received. The objective of the norm is that the parties shall be restored to the situation equal to the original one, as if they did not have any knowledge of the contract, preventing a situation of unjust enrichment⁵³², even though the restitution remedy in China is autonomous and more aligned with the rules of property rights than with the unjust enrichment doctrine (not a conceived as a quasi-contract)⁵³³.

Given the wide range of possibilities and circumstances to be analysed in order to define the amount to be compensated, the Supreme People's Court issued a very recent and detailed guidance on the scope of restitution in case of avoidance. Based on the principle of good faith, the Court orients that reasonable allocation should be made between the parties to prevent a party in bad faith from being enriched by the invalidation of the contract. Therefore, courts must consider the appreciation or depreciation of the goods/property when determining restitution, and correlation of the market factors applicable to the contract and transferee's activities⁵³⁴.

Furthermore, as previously accepted and defended by literature⁵³⁵, the measure of the reimbursement value shall be based on the market price or even the price agreed upon

⁵³⁰ Pursuant to Article 507 of the Civil Code: “Where a contract does not take effect, or is void, revoked, or terminated, the validity of a clause concerning dispute resolution shall not be affected.”

⁵³¹ Article 157 of the Civil Code: “Where a civil juristic act is void, revoked, or is determined to have no legal effect, the property thus obtained by a person as a result of the act shall be returned, or compensation be made based on the appraised value of the property if it is impossible or unnecessary to return the property. Unless otherwise provided by law, the loss thus incurred upon the other party shall be compensated by the party at fault, or, if both parties are at fault, by the parties proportionally.”

⁵³² QIU, Xuemei, *Contract* cit., p. 171; WANG, Yi, *Prospect*, cit. p. 237; ZOU, Mimi, *Chinese Contract*., cit., p. 110; LIU, Qiao – REN, Xiang, *Balancing Public*, cit., p. 93.

⁵³³ LING, Bing, *Contract Law*, cit, p. 205; ZHANG, Mo, *Chinese*, cit., p. 194.

⁵³⁴ Minutes of the National Court's Civil and Commercial Trial Work Conference, issued by the Supreme People's Court on 08/11/2019, No. 254, §32, 33 and 34, *apud* ZOU, Mimi, *Chinese Contract*., cit., p. 111.

⁵³⁵ BU, Yuanshi, *Chinese*, cit., p. 135. The author, who was still based on the former applicable law also mentions the price fixed by the State (for services) as another measure of reimbursement; XIAOYAN, Zhou, *Provisions on Validity*, cit., p. 99; ZHANG, Mo, *Chinese*, cit., p. 194.

the parties at the time of the transaction, taking into account any enrichment of the party at the time the subject matter of the contract was lost or sold. In case the enrichment obtained exceeds the contract price, that surplus shall be reasonably allocated between the parties. Also, if the party have used the subject matter of the invalid contract, the payment for the use shall be made and offset from the reimbursement⁵³⁶.

In addition to the restitution obligation, Article 157 provides that the party at fault (who caused the avoidance) must compensate the other party for the losses incurred and, if both parties were at fault, they shall bear their corresponding responsibility. In the same guidance recently issued by the Supreme People's Court, this provision was also elucidated, requiring the claimed damages to be proved and that there is a causal link between the damages and the respective fault. The rationale is to prevent double enrichment or double damages for either party and, at the same time, to limit the liability of the party at fault which cannot exceed the benefit that should be derived from contractual performance⁵³⁷.

With regards to cases where both parties acted wrongfully in the avoidance of the contract, the Contract Law used to provide for a consequence which is similar to the law from the Russian Civil Code: the property or benefit received by both parties to be returned to the State, the collective or the third party impaired by the parties' acts/contract⁵³⁸. This provision was strictly applicable by courts to cases of malicious collusion or conspiracy against the State and collectivity and raised scholarly criticism, advocating for further development of the rule⁵³⁹. However, with the exclusion of the "*State and collectivity*" from Article 154 of the Civil Code, as mentioned above, this specific rule on restitution of the former Contract Law was not incorporated into the new Code.

As a closing remark, Chinese law does not recognise the possibility of confirmation or reinterpretation of void contracts⁵⁴⁰. With regards to the voidable contracts,

⁵³⁶ Minutes of the National Court's Civil and Commercial Trial Work Conference, issued by the Supreme People's Court on 08/11/2019, No. 254, §32, 33 and 34, *apud* ZOU, Mimi, *Chinese Contract.*, cit., p. 111.

⁵³⁷ Minutes of the National Court's Civil and Commercial Trial Work Conference, issued by the Supreme People's Court on 08/11/2019, No. 254, §35, *apud* ZOU, Mimi, *Chinese Contract.*, cit., pp. 112-114.

⁵³⁸ Article 59 of the Contract Law: "*If the parties impair by malicious conspiracy the interests of the State, of the collective or of a third party, the property they have thus obtained shall be returned to the State, the collective or the third party.*"

⁵³⁹ BU, Yuanshi, *Chinese*, cit., p. 138; DIMATTEO, Larry A. – CHEN, Lei, *History*, cit., p. 22; LING, Bing, *Contract Law*, cit, p. 208.

⁵⁴⁰ ZOU, Mimi, *Chinese Contract.*, cit., p. 98. Reinterpretation has been already adopted in judicial practice in China when three requirements are met: (i) contract void; (ii) the void contract fulfils the validity conditions of another contract and (iii) reinterpretation complies with the intention of the parties (BU, Yuanshi, *Chinese*, cit., p. 139).

there has been a major modification by the Civil Code. Pursuant to the former Contract Law, the injured party could decide either on avoidance or modification of the contract⁵⁴¹, while the judge or arbitrator would give effect to this party's decision. More than that, given the prevalence to the preservation of the contracts, even if the party requested the avoidance, there was room for courts to alter or rescind the contract based on the real circumstances of the case⁵⁴².

Such 'right of adaption' of a voidable contract was not incorporated into the former GRCL (due to little application and the potential for abuse), and, in this context, some authors defended that this right to choose for the modification of the contract was already repealed⁵⁴³. The discussion was ended when the current Civil Code also excluded this possibility, reinforcing the GRCL, and repealing the former Contract Law. Under the Civil Code, modification of a contract is only possible pursuant to the doctrine of the change of circumstances, as analysed in Chapter 3 (item 4), and a void contract (either originally void or voidable) cannot be revived, confirmed or modified by the party or by a court.

5. South Africa

As previously mentioned, South African law belongs to a mixed tradition of civil law (Roman-Dutch) and common law (English) systems. Given the lack of codified norms regarding the issue of validity and the invalidity of acts and contracts, the analysis is strongly based on literature and on the case law mentioned thereby. The South African legal system recognises the following grounds of validity: (i) consensus; (ii) capacity, (iii) formalities, (iv) possibility, (v) certainty and (vi) legality⁵⁴⁴.

The first requirement is also a principle of contract law in South Africa. Consensus exists when the minds of the parties' consent meet in regard to all material aspects of the contract. Therefore, a defect of consensus may lead to the invalidity of the contract and is generally caused by mistake, misrepresentation, duress or undue influence.

⁵⁴¹ For instance, the final part of Article 54 of the Contract Law stated that: "*Where the request of the party is an alteration to the contract, the people's court or arbitration institution shall not rescind it.*"

⁵⁴² XIAOYAN, Zhou, *Provisions on Validity*, cit., p. 101; ZOU, Mimi, *An Introduction to Chinese Contract Law*, Beijing, LexisNexis, 2018, p. 91.

⁵⁴³ BU, Yuanshi, *Chinese*, cit., p. 133.

⁵⁴⁴ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 6.

Mistake refers to the misconception or incorrect impression about an underlying fact of the contract, it is a misapprehension as to the existence or non-existence of a fact or state of facts. Similar to what was observed in Indian cases, there are three classically recognised types of mistakes in South Africa with different effects in accordance with the circumstances: the common mistake (when both parties make the same mistake); the mutual mistake (when the parties misunderstand each other and are at cross purposes); and unilateral mistake (only one party is mistaken)⁵⁴⁵. The differentiation of types and effects of mistake characterises the flexibility of the South African system⁵⁴⁶.

The mutual mistake, as well as any other material mistakes (common or unilateral), which negate the elements of consensus between the parties (on the object, parties and other essential elements) will turn the contract void or inexistent if the party's decision to agree (consent) to enter into such a contract is affected⁵⁴⁷. Inexistence will occur in rare cases where, by reason of the mistake, there is no correspondence between the offer and acceptance. On the other hand, non-material and unilateral mistakes, which do not exclude the agreement between the parties, are regarded as an error of the intention of one party (mistake in motive) and will only entail invalidity if caused by external inducement⁵⁴⁸.

In order to result in a contract becoming void, the mistake must be fundamental for the conclusion of the contract and also be reasonable, according to the concept of *justus error*⁵⁴⁹. Despite this threshold being applicable to both common and unilateral mistakes (influence of the Roman-Dutch law), the recognition of nullity in the case of the latter is exceptional, if not almost inexistent in South Africa (English common law influence)⁵⁵⁰.

⁵⁴⁵ PALLEY, Claire B.A., *Comparative Study of Mistake*, in *The Rhodesia and Nyasaland Law Journal*, 1961, p. 141.

⁵⁴⁶ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 121.

⁵⁴⁷ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 110-111; PALLEY, Claire B.A., *Comparative Study*, cit., pp. 140, 149 and 171.

⁵⁴⁸ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., pp. 86-87; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 113; DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., pp. 121-122. According to the case *National & Overseas Distributors Corporation (Pty.) Ltd. vs. Potato Board* (1958 (2) S.A. 473 (A.D.): “Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (*justus*) and it would have to be pleaded”, *apud* PALLEY, Claire B.A., *Comparative Study*, cit., p. 178.

⁵⁴⁹ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., pp. 119-121; PALLEY, Claire B.A., *Comparative Study*, cit., p. 176.

⁵⁵⁰ PALLEY, Claire B.A., *Comparative Study*, cit., pp. 163, 172, 184, 204 and 206.

In cases of misrepresentation, duress or undue influence, the contract is not void *ab initio*, because the requirement of ‘consent’ exists although being vitiated. Since the obtainment of this consensus was illegitimate either by a false or wrong statement (misrepresentation/fraud⁵⁵¹), improper pressure/intimidation (duress or coercion) or by improper persuasion (undue influence), the contract is deemed voidable at the interest of the innocent party⁵⁵².

By influence of the English common law, South African case law also distinguishes the concepts of innocent misrepresentation and intentional misrepresentation (also referred to as fraud or *dolus*), where the first leads to the rescission of the contract even if there is no fraudulent element, and the second (which can be only committed by a contracting party and not third parties), in addition to the rescission, generally entitle the aggrieved party to damages. In both cases, the misrepresentation must be fundamental for the conclusion of the contract in order to entail the right of rescission⁵⁵³.

Duress and undue influence, although comparable, are not the same defects. Duress (or *metus*) is more restricted to the use of violence and threat which is unlawful and unwarrantable, while the legal pressure for the exercise of a right is excluded from this concept⁵⁵⁴. The undue influence refers to the abuse of power of one party to another in order to obtain the contract. This power weakens the other party’s ability to resist and act in accordance with his or her true will into the contract and, therefore entails avoidance by the innocent party⁵⁵⁵. According to a leading case in South Africa, undue influence was defined as follows:

*“Where one person acquires an influence over another which weakens the latter’s ability to resist and makes his volition pliable, and where such a person then exerts his influence in an unscrupulous manner in order to persuade the other to agree to a harmful transaction which he would not have agreed to with his normal volition.”*⁵⁵⁶

⁵⁵¹ LUBBE, Gerhard, *Voidable Contracts*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Claredon, 1996, pp. 281-282.

⁵⁵² HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., pp. 119-120, 140 and 145.

⁵⁵³ LUBBE, Gerhard, *Voidable Contracts*, cit., pp. 281-282; PALLEY, Claire B.A., *Comparative Study*, cit., p. 141 and 163-164; DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 122-124.

⁵⁵⁴ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., pp. 127-128.

⁵⁵⁵ LUBBE, Gerhard, *Voidable Contracts*, cit. pp. 288-290.

⁵⁵⁶ *Preller vs. Jordaen* 1956 (1) SA 483 (A), *apud* DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 129.

It can be inferred from the excerpt above that the concept of undue influence in South Africa is slightly different from the Indian concept, since it does not require the existence of a special relationship of trust or authority, but rather an unscrupulous conduct. Despite this it is still obscure whether the concept comprises economic influence, in case of duress, the economic aspect is only exceptionally recognised⁵⁵⁷.

Different from other legal systems, the aforementioned situations of defects impacting consensus (and making contracts voidable) shall not be understood as an exhaustive list. South African system adopts a flexible approach and considers voidability in any case of proven defective willingness or improper obtaining of consensus, which may fit into the concepts described above or into a not pre-defined defect⁵⁵⁸.

For instance, recently, case law has developed another ground for invalidity related to the consensual requirement for commercial bribery, which is be different from fraud or duress, since it is based on immorality in order to obtain a contract. The elements of this conduct are: (i) a reward; (ii) paid or promised (iii) by one party, the briber, (iv) to another, the agent (who may be an agent in the true sense or merely a go-between or facilitator, (v) who is able to exert influence over (vi) a third-party, the principal, (vii) with the intention that the agent (viii) should induce the principal; (ix) without the latter's knowledge and (x) for the direct or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate⁵⁵⁹. These cases will generally result in nullity of the contract, but, in cases of innocent principal, the contract may be voidable at the option of such principal (otherwise the absolute nullity would result in a punishment to an innocent party)⁵⁶⁰.

Contractual capacity refers to the legal competence to create rights and assume duties with other parties. For natural persons it relates to age and mental capacity⁵⁶¹, similar

⁵⁵⁷ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., pp. 128-129.

⁵⁵⁸ VAN HUYSTEEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 115; DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 134.

⁵⁵⁹ *Extel Industrial (Pty) Ltd. vs. Crown Mills (Pty) Ltd*, 1999 SA 719 SCA at §724, *apud* HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., pp. 120 and 147.

⁵⁶⁰ NAUDÉ, Tjakie, *The Civil Law Consequences of Corruption under South African Law*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015, p. 330.

⁵⁶¹ Until 1993, the capacity in South Africa was also measured to women in accordance with her status of marriage, due to the marital powers of the husband, which was abolished under Articles 11 and 12 of the Act 132 (available at: https://www.gov.za/sites/default/files/gcis_document/201409/act132of1993.pdf). Accessed on 15 August 2021.

to other legal systems. Contracts concluded by an ‘infant’ (under seven years old) or a person without mental faculties are void, since they can only enter into relationships by representation of their guardians⁵⁶².

On the other hand, contracts concluded by minors (aged between seven and eighteen years old) and other people with limited capacity can be valid if authorised by a guardian/tutor or independently if it only provides for benefits and not duties to these protected parties (for instance, a minor can accept a donation). In case of a lack of authorisation, South African law recognises the possibility of ratification of the act after the person attains the age of majority, with retroactive effects⁵⁶³.

For legal entities, the capacity is determined by their constitutive documents. The conclusion of a contract outside the scope of the powers of the entity used to entail validity problems. However, with the Companies Act of 1973, the lack of express powers (capacity) does not result in a contract to become void and, as a consequence, can be remedied⁵⁶⁴.

South African law, similar to the other systems, does not require specific formalities for contracts in general. However, formality becomes an element of validity if prescribed by law (for instance, contracts for the sale of real estate properties) or is expressly stipulated by the parties. In these cases, the contract is invalid and any recovery by the affected party may be claimed on grounds of unfair enrichment, but not on the validity of the contract⁵⁶⁵.

The flexibility of the South African systems also applies to effects of impossibility and uncertainty to the contracts. Possibility is often referenced as a requirement for the existence of a contract and not validity itself, since impossibility may prevent the creation of obligations. The impossibility must be subjectively and objectively verified at

⁵⁶² VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 107.

⁵⁶³ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 154-157; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 107.

⁵⁶⁴ Pursuant to Section 36 of the Companies Act: “*No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority.*”

⁵⁶⁵ VAN HUYSSSTEEN, Louis F. – LUBBE, Gehard F. – REINECKE, MFB, *Contract. General Principles*, 5th ed., Cape Town, Juta, 2016, p. 166; HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 163-164

the moment of the conclusion of the contract and entails the contract to have no effect⁵⁶⁶. However, there are also instances when the initial impossibility resulted in the contract becoming void, upon the influence of the Roman-Dutch law⁵⁶⁷. The obligations of a contract must also be certain or at least determinable in order to render a contract valid, otherwise it will be considered inexistent (when the court is unable to identify a contract) or void because of vagueness⁵⁶⁸. However, when feasible, the courts will always seek to favour an interpretation that provides validity to the act (for instance, apply a standard price when uncertain from the contract terms)⁵⁶⁹.

In both cases of impossibility and uncertainty, if the defect impacts only part of the contract, the separable remainder is valid. If the contract is entirely void, restitution can be claimed on grounds of unjust enrichment as in the other cases⁵⁷⁰.

Finally, in order to be valid and enforceable, the contract must meet the requirement of legality. Illegal contracts are those whose conclusion, performance or object are expressly or impliedly forbidden by legislation, violate public order or interest, as well as any law or usage recognised by the South African legal system. Given the variety of norms (codified or not), usage and the wide scope of public order and public interest, there is no exhaustive list of circumstances leading to invalidity due to illegality, which includes a wide range of contracts (for instance, contracts to commit crimes, injurious contracts to family life or marriage, contracts promoting sexual immorality, contracts to injure the State or public service - including corruption -, contracts to defraud creditors, contracts in restraint of trade, gaming/wagering contracts, among others)⁵⁷¹.

Different from India but similar to China, South African contract law attributes certain prominence to the fairness in verifying the validity of a contract. Good faith and fair dealing (*ubuntu*), as seen in the initial chapters, is intrinsically related to public order and

⁵⁶⁶ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 213; VAN HUYSSSTEEN, Louis F. – LUBBE, Gerhard F. – REINECKE, MFB., *Contract*, cit., p. 181.

⁵⁶⁷ PALLEY, Claire B.A., *Comparative Study*, cit., p. 199.

⁵⁶⁸ *Idem, ibidem*, p. 146.

⁵⁶⁹ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 124.

⁵⁷⁰ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 218, 224; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 134; VAN HUYSSSTEEN, Louis F., *Contract*, cit., p. 185.

⁵⁷¹ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 127; MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004, pp. 144 and 148-149.

justice and, therefore, an unfair contract (or unfair performance of a contract – for instance, the enforcement of a non-variation clause) may violate public policy and be declared void⁵⁷².

Such a decision is left to the courts, which shall balance the different interests of fairness, on one side, and sanctity of contracts, on the other side.⁵⁷³ The recognition of this cause of invalidity has its roots in the *laesio enormis* of the Roman-law, which protected equivalence of performances⁵⁷⁴. Similarly, gross disparity as grounds for invalidity - present in the PICC – is an example of the application of fairness as a requirement of validity.

The *just causa* of the contract, although regarded as a principle of contract law in South Africa, is not considered as a requirement for validity, since it is incorporated by the elements of consensus and legality⁵⁷⁵.

Notwithstanding the absence of express provisions, it is possible to infer that South African case law recognises the difference between different types of avoidance and ineffectiveness of contracts. Absence of consensus (as it happens in material mistake), impossibility and total uncertainty leads to the ‘inexistence’ of the contract and, thus, there is no action for performance or damages. If obligations were performed, restitution is possible on the grounds of unjust enrichment⁵⁷⁶.

Illegality, limited capacity and defects of consensus lead to the contract – depending on the circumstances – to be void (when, in the concrete case, the social interests shall prevail) or voidable at the choice of one of the parties (when private interest prevails). Therefore, unlike other systems, South African law also provides for a flexible approach in considering a contract void (more serious defect) or voidable (less serious), due to the wide and changeable characteristics of public order and legislation⁵⁷⁷.

As previously indicated, voidable contracts are subject to rescission, which is a unilateral act and, similar to Indian law, needs no confirmation by the court, except when the right to rescission is disputed by the other party or for the application of its consequences

⁵⁷² HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 190-191.

⁵⁷³ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. p. 211; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 128.

⁵⁷⁴ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 117.

⁵⁷⁵ VAN HUYSSSTEEN, Louis F. – LUBBE, Gehard F. – REINECKE, MFB, *Contract*, cit., pp. 191-192; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 122.

⁵⁷⁶ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 131 and 133.

⁵⁷⁷ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 137; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 132. In common law countries, there is usually the discussion whether an illegal contract is void/voidable or only unenforceable (does not produce effects), but in South Africa such distinction is seen as with little relevance and not applied (MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 163).

(restitution). South African law does not provide for a specific time limit to exercise the right of rescission, which lapses within a ‘reasonable’ time after the act or the awareness of the defect⁵⁷⁸.

As for void contracts the applicable rule is of absolute unenforceability of the contract since its beginning. When the parties consciously contribute to the nullity of the contract, no remedy is available thereunder (*ex turpi causa non oritur action* rule). This rule can neither be relaxed by a court decision nor by the supervening performance of the parties (there is no ground for ratification of void contracts). The South African system generally applies the *ex turpi* rule rigidly in cases of illegality, and there is almost no assistance for enforce an illegal contract⁵⁷⁹.

The avoidance of a contract (either voidable or void) has the consequence that it cannot produce any effect and the parties shall not receive an advantage from it, as well as any damage in case of non-performance. If performance of a voidable, void or illegal contract has taken place, the parties shall be restored into the *status quo ante* by restitution of property (*rei vindication*) or equivalent compensation in money on the grounds of unfair enrichment⁵⁸⁰, in addition to damages incurred by the innocent party⁵⁸¹. Instances of exemptions to the duty to retribute by the innocent party are generally criticised, since such party will be allowed to restore the equivalent and be indemnified with damages due to the wrongful act by the other party⁵⁸².

⁵⁷⁸ LUBBE, Gerhard, *Voidable Contracts*, cit., p. 262; VAN HUYSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 135; PALLEY, Claire B.A., *Comparative Study*, cit., p. 176.

⁵⁷⁹ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. 199; MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., pp. 162-163; NAUDÉ, Tjakie, *The Civil Law Consequences*, cit., p. 327.

⁵⁸⁰ DU PLESSIS, Jacques, *Fraud, duress and unjustified enrichment*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, p. 219; DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 137 and 139. Restitution is deemed as a contractual remedy, while unfair enrichment is a proper and extracontractual remedy. However, literature tends to approximate the two concepts in nature and differentiate them in applicability (for instance, under unfair enrichment, the party would be obliged to return only the enriched delta of the performances, while restitution implies the full return of the performance). The present study will not detail such discussion or defend one or other position in favour to the proximity or distance between the two concepts, since the important issue is the flexibility applied by South African system (In this regard, see VISSER, Daniel, *Unjustified Enrichment*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996, pp. 536-537; MILLER, Saul, *Unjustified Enrichment and Failed Contracts*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004, pp. 461-464; DU PLESSIS, Jacques, *Fraud*, cit., p. 203).

⁵⁸¹ VAN HUYSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 133 and 135-136; HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. p. 199.

⁵⁸² NAUDÉ, Tjakie, *The Civil Law Consequences*, cit., p. 336-337.

By allowing equivalent compensation, different to India, the South African system does not consider the possibility of restitution *in integrum* as a requirement for neither the restoration of a void contract, nor for a party to a voidable contract exercises the right of rescission. Such an approach was deemed preferable to the classic common law rule to preclude rescission, since the full restitution in cases of invalidity (*restitutio in integrum*) aims at preserving the notion of reciprocity, which is not at stake where the disadvantaged party merely seeks to rescind the contract⁵⁸³.

If, however, both parties contributed to the illegality and nullity of the contract (the two parties are guilty), the *par delictum* rule will apply, which is similar to the *in pari delicto* verified under Indian law. Under this rule, none of the parties is entitled to restitution of the obligation performed. It bars the parties' power to use an enrichment-based remedy in order to recover performances made under an unlawful contract, which means that a party in a possession of goods is generally entitled to retain possession⁵⁸⁴.

The *par delictum* is based on two considerations of public policy: a court will not assist those who approach it with “*unclean hands*”, and unlawful contracts should be discouraged. However, the consequences of the application of this rule may be relaxed in some circumstances in order to maintain fairness and avoid unjust enrichment: (i) when one party will be enriched at the expense of the other part if the rule is applied; (ii) when applying the rule would indirectly enforce the illegal contract and (iii) any other consideration of public order⁵⁸⁵. The classical exception referring to the contract being still “executory” and where the party repents the performance of the illegal purpose (English common law rule applied in India) is not part of South African law⁵⁸⁶.

Therefore, the *par delictum* rule, despite the similarity, is applied in a more flexible way than observed in India. The leading case of this approach was *Jajbhay vs. Cassim*⁵⁸⁷, where the court decided to relax the *par delictum* rule if it was necessary “to prevent injustice or to satisfy the requirements of public policy”, and this ruling was affirmed

⁵⁸³ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 139; NAUDÉ, Tjakie, *The Civil Law Consequences*, cit., p. 335. Both references quote also the leading case *Extel Industrial (Pty) Ltd. vs. Crown Mills (Pty) Ltd* 1999 SA 719 SCA.

⁵⁸⁴ MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 164.

⁵⁸⁵ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit. pp. 200-201; VISSER, Daniel, *Unjustified Enrichment*, cit., p. 543. Literature is not clear on the parameters for the restitution to be made (in both *ex turpi* or *par delictum*), for instance, which price must be considered for the purposes of equivalent restitution.

⁵⁸⁶ NAUDÉ, Tjakie, *The Civil Law Consequences*, cit., p. 329.

⁵⁸⁷ *Jajbhay vs. Cassim*, 1939 AD 537, *apud* MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 165.

in subsequent cases. South African courts purport to, based on such flexibility, secure the “*doing of simple justice between man and man*”, which allows a nuanced and context-sensitive consideration of all relevant factors, leading to the possible (though exceptional) enrichment-based remedy to a party undertaken an illegal conduct⁵⁸⁸.

This “relaxed” approach has been criticised due to the vagueness of its requirements and the possibility of conflictual standards for its application. Nevertheless, commentators consider it important to protect public order and prevent unjustified enrichment, as long as judicial creativity is avoided⁵⁸⁹.

Similar to other legal systems, as already mentioned, South African law recognises partial invalidity (either on grounds of impossibility, uncertainty or illegality), where the valid part can be severed from the defective provisions of the contract⁵⁹⁰.

With the analysis of each BRICS country’s treatment on the issue of validity and invalidity of contracts, the national reports will follow regarding the issue of hardship, which entails even more substantial differences among the countries.

⁵⁸⁸ MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., pp. 144 and 164-165; NAUDÉ, Tjakie, *The Civil Law Consequences*, cit., p. 328.

⁵⁸⁹ VAN HUYSSSTEEN, Louis F. – LUBBE, Gehard F. – REINECKE, MFB., *Contract*, cit., p. 203.

⁵⁹⁰ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 134-135.

CHAPTER 3: HARDSHIP

1. Brazil

This item will address the main features of the issue of hardship under Brazilian law, which is technically referred to as “termination of contracts due to excessive onerousness”.

First of all, Brazilian law differentiates the theory of hardship from the theory of the supervening impossibility of contracts. Impossibility is provided by Articles 234, 248, 250 and 256 of the Brazilian Civil Code⁵⁹¹ and refers to the involuntary non-performance of a contract, *i.e.*, the reason for non-performance cannot be attributed to the parties, but to an event beyond their control.

Therefore, impossibility generally derives from cases of force majeure or a fortuitous event provided for in Article 393 of the Civil Code⁵⁹². Force majeure contemplates the inevitable and unavoidable nature of the effects such an event creates, while a fortuitous event refers to the unpredictable and accidental nature of the event in question⁵⁹³.

The impossibility must be objective, not attributable to any of the parties, total (frustrate the entire performance of the contract) and definitive (temporary impossibility renders mere suspension). Once these requirements are met, the contract shall be terminated and the parties are released from their obligations or, if the contract was partially performed, the party who received any benefit shall return it to the other party in order to avoid undue enrichment⁵⁹⁴.

⁵⁹¹ Article 234: “*If, in the case of the preceding article, the thing is lost, without the fault of the debtor, before delivery, or pending a suspensive condition, the obligation is terminated for both parties; if the loss results from the fault of the debtor, he shall be liable for the equivalent and damages*”; Article 248: “*If the performance of the obligation becomes impossible, through no fault of the debtor’s, the obligation is dissolved; but if it becomes impossible by his fault, he is liable for losses and damage*”; Article 250: “*An obligation not to do is extinguished when, without the debtor’s fault, it becomes impossible for him to refrain from the act that he has obligated himself not to perform*”; Article 256, applicable to alternative obligations: “*If all the obligations become impossible to perform, without the debtor’s fault, the obligation is extinguished*” (free translation).

⁵⁹² Article 393 “*The debtor shall not be liable for damages resulting from fortuitous event or force majeure, if he has not expressly taken responsibility for them. Sole paragraph. The fortuitous event or force majeure is verified in the necessary fact, whose effects could not be avoided or prevented.*” (free translation)

⁵⁹³ In addition to Article 393, see also, TADEU, Silney Alves, *Responsabilidade civil: nexo causal, causas de exoneração, culpa da vítima, força maior e concorrência de culpas*. In: Doutrinas Essenciais de Responsabilidade Civil. Revista dos Tribunais. vol 1, 201 (567–606); MIRAGEM, Bruno, *Nota relativa à pandemia de coronavírus e suas repercussões sobre os contratos e a responsabilidade civil*, in Revista dos Tribunais, vol. 1015, 2020, (353-363).

⁵⁹⁴ GOMES, Orlando, *Contratos*, cit., pp. 212-213.

Hardship or excessive onerousness is not related to impossibility but rather to an extreme difficulty in performing obligations of the contract. The pandemic of COVID-19 has raised some discussions regarding the application of impossibility or hardship, highlighting confusions about the difference between the two. Basically, the concrete effects of such a terrible event must be assessed: whether it has caused an impossibility (for instance, due to prohibitions imposed by public authorities) or an extreme difficulty and imbalance between the contracting parties (for instance, in rental agreements involving commercial buildings)⁵⁹⁵.

The regulation on hardship was introduced in the Brazilian legal system with the enactment of the Brazilian Civil Code of 2002 in Articles 478 to 480 and it can lead to the termination of the contract or to the modification of its terms⁵⁹⁶.

Hardship is also set forth in Article 317 but limited to cases of extreme disproportion of the performance *price*, allowing the debtor to judicially request the reduction of the price in order to turn it adequate to the reality.⁵⁹⁷ Additionally, Articles 620 and 770 also provides for the possibility of contract modification/termination in case leading to extreme imbalance in price of construction and insurance contracts, respectively⁵⁹⁸.

⁵⁹⁵ Until now, few cases reached the Superior Court of Justice. However, even though plaintiffs generally argue impossibility and hardship together, confusing both circumstances and effects, courts' decisions have been adapting the claims to each institute. For instance, the Superior Court of Justice based its decision to maintain the suspension of charges of a contract (preserving the contract and not terminating it) on hardship of Article 478 and not on impossibility of Articles 250/393 (Superior Court of Justice, SLS 002783, Rel. Min. Humberto Martins, j. 23/09/2020). In addition, the State Court of São Paulo differentiates impossibility from hardship by denying claims for stopping payments based on the shortage of income. According to the decisions, shortage of income does not prevent performance, hence, it cannot be considered impossibility and the parties shall firstly renegotiate the contract conditions in order to overcome hardship or submit a claim for termination or revision based on hardship (State Court of São Paulo, Appeal No 2068208-07.2020.8.26.0000, Rel. Des. Gomes Varjão, j. 22/04/2020; State Court of São Paulo, Appeal No 2010052-89.2021.8.26.0000, Rel. Des. Cesar Luiz de Almeida, j. 02/03/2021). In another case, the State Court of São Paulo decided on the revision of the contract and denied the claim for stopping performance considering that it was a case of hardship and not impossibility (State Court of São Paulo, Appeal No 2179933-98.2020.8.26.0000, Rel. Min. Tércio Pires, j. 12/11/2020). See also: MARTINS, Guilherme Magalhães, *A Revisão dos Contratos Cíveis e de Consumo em tempos de Covid-19*, in *Revista de Direito do Consumidor*, vol. 132/2020, (31-56); MIRAGEM, Bruno, *Nota relativa*, cit.

⁵⁹⁶ Under the former legislation, hardship was applied when expressly agreed by the parties in a contract.

⁵⁹⁷ Article 317: “When, for reasons that could not be foreseen, the value of the obligation owed and its value it is performed become manifestly disproportionate, the judge may correct it, at the request of the party, in such a way to ensure, as far as possible, the real value of the obligation”.

⁵⁹⁸ Article 620: “If there is a reduction in the cost of materials or labor greater than the one-tenth of the global agreed price, the global price may be revised, upon request by the owner of the work, so as to grant him the benefit of the difference determined on revision”. Article 770: “Saving provision on the contrary, a reduction of the risk in the course of the contract does not bring with it a reduction of the stipulated premium; however, if the reduction of the risk was considerable, the insured may demand revision of the premium or the dissolution of the contract.”

The institute derives from the notion of material equivalence between the parties, but, at the same time, operates as a restriction to the principle of obligatory nature of the contract (*pacta sunt servanda*)⁵⁹⁹. Its roots refer to the clause *rebus sic stantibus* of Roman law, according to which all contracts have an implicit clause, that the parties shall duly fulfil the contracts provided that the circumstances of the conclusion of the contract remains the same during the performance phase⁶⁰⁰.

The remedy cannot be unilaterally declared and must be sought in court, where the strict and cumulative requirements provided by the law will be analysed. Such requirements are set forth in Article 478 of the Civil Code⁶⁰¹: (i) the contract must be of duration or deferred performance (successive or continued performance); (ii) one party must be experiencing an extremely onerous situation, while the other enjoys an extreme advantage and enrichment; (iii) the situation giving rise to the hardship must have arisen after the conclusion of the contract (supervening); (iv) and the causes of the onerous situation must be extraordinary and unforeseeable, meaning that they could not have been foreseen at the time of the conclusion of the contract.

It can be inferred from the requisites above that Brazilian Law adopted the so-called theory of unforeseeability (*teoria da imprevisão*) which is strongly influenced by Italian contract law⁶⁰².

The combination of the aforementioned requirements demonstrates how exceptional the situation must be for recognising a mitigation of the sanctity of the contracts. There must be a total breach of the equivalence of the parties added to the unpredictability of the event⁶⁰³.

The onerous situation must be objectively identified, which means that it is not enough to be onerous just towards the debtor, but to any person in his/her situation⁶⁰⁴. The requirement of extreme advantage to the other party is controversial under Brazilian

⁵⁹⁹ AZEVEDO, Antônio Junqueira de, *Princípios do atual*, cit., p. 141.

⁶⁰⁰ PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 162; LÓBO, Paulo, *Direito Civil*, cit., pp. 203-204.

⁶⁰¹ Article 478: “*In contract with continuing or deferred performance, if the obligation of one of the parties becomes excessively onerous, with extreme advantage for the other, by virtue of extraordinary and unforeseeable events, the debtor may apply for dissolution of the contract. The effects of the judgment that declares dissolution shall be retroactive to the date of citation*”

⁶⁰² VILLELA, João Baptista, *Equilíbrio*, cit., p. 16; FERREIRA, Antonio Carlos - RODRIGUES JR, Otavio Luiz – LEONARDO, Rodrigo Xavier, *Revisão judicial dos contratos no regime jurídico emergencial e transitório das relações jurídicas de direito privado na pandemia de 2020 (Lei 14.010, de 10 de junho de 2020)*, in *Revista de Direito Civil Contemporâneo*, vol. 25, 2020 (311-337).

⁶⁰³ LÓBO, Paulo, *Direito Civil*, cit., pp. 205-207.

⁶⁰⁴ PEREIRA, Caio Mário da Silva, *Instituições*, cit., pp. 165-166.

literature. Although expressly provided in law, and cannot be discarded, some consider the main requirement the existence of the strong imbalance between the obligations to be performed⁶⁰⁵. In support of this latter approach, the IV Journey of Civil Law approved Statement 365, according to which the extreme advantage must be construed as an incidental/circumstantial element⁶⁰⁶.

There must be a combination of extraordinariness and unforeseeability. It is not enough to be an abnormal event if it could be predicted, as well as it is not enough to be solely unpredictable⁶⁰⁷. Such requirements must be also related to the effects of the event and not only to the event itself, meaning that a fact can be predictable, but its effects are unpredictable⁶⁰⁸. For instance, a war or an economic crisis⁶⁰⁹ can be predictable, but their effects to a specific contract may be unpredictable.

The key point for hardship under Brazilian law is the *risk* assumed by the parties, which is the parameter characterising the initial balance between them⁶¹⁰. The risk is the weight of uncertainty agreed by the parties in a contract, it is the variable range inherent in all contracts and to which the parties are naturally subject, meaning that only extrinsic facts might be considered valid for breaching the assumed risk and, hence, entail resolution or modification by hardship⁶¹¹.

Generally, such risk derives directly or indirectly from the contractual provisions and, in case of silence, regard shall be given to some concrete criteria, such as the nature of the contract, the market context encompassing the transaction, qualification of the parties,

⁶⁰⁵ GOMES, Orlando, *Contratos*, cit., p. 215.

⁶⁰⁶ “*The extreme advantage of article 478 must be interpreted as an incidental element of the change of circumstances, which leads to the incidence of the resolution or revision of the transaction for excessive onerousness, regardless of its full demonstration.*” (free translation). However, such relativization does not alter the express requirement of Article 478 (ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários ao Código Civil. Direito Privado Contemporâneo*, São Paulo, Saraiva, 2019, p. 777)

⁶⁰⁷ VILLELA, João Baptista, *Equilíbrio*, cit., p. 15; GOMES, Orlando, *Contratos*, cit., p. 215. Noteworthy to mention that, in consumer contracts, the unpredictability and extraordinariness is not a requirement, but only the disproportion and supervening event, according to Article 6, V of the Brazilian Consumer Code (“*The basic rights of the consumer are: V: the modification of contractual provisions that provides for disproportional performances or their revision by virtue of supervening facts that turn them excessive onerous*” – free translation).

⁶⁰⁸ Pursuant to Statement 175 of the III Journey of Civil Law: “*The reference to unpredictability and to extraordinariness, inserted in article 478 of the Civil Code, must be interpreted not only in relation to the fact that creates the imbalance, but also to the consequences it produces*” (free translation).

⁶⁰⁹ In this sense, Article 7 of Law No 14,010/2020 applicable to COVID-10 pandemic expressly identifies issues deriving from economic crisis as predictable events for the purposes of hardship: “*For the exclusive purposes of articles 317, 478, 479 and 480 of the Civil Code, an increase in inflation, exchange rate variation, devaluation or replacement of the monetary standard are not considered to be unforeseeable events*” (free translation).

⁶¹⁰ ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 777.

⁶¹¹ AZEVEDO, Antônio Junqueira de, *A lesão*, cit., pp. 121-122.

temporal extension and specificity of the supervening events⁶¹². The idea is that no one can escape from its contractual obligations merely because its result was not favourable unless this undesired result was not comprised within the assumed risks. The legal provisions for the State's intervention (set forth in Articles 317 and 478) aim to correct the imbalance caused by facts objectively outside parties' risks⁶¹³.

Due to such numerous and strict requirements, which must be assessed in a case-by-case analysis, resolution or modification by hardship cannot be declared by one of the parties. Except where the supervening fact is expressly addressed in the contract as a resolutive condition, the claim for hardship must be presented in court or in arbitration and the termination or modification must be decided by means of an award⁶¹⁴. Furthermore, the claim must be filed prior to the maturity of the contractual obligation and to the breach⁶¹⁵.

As a consequence of the exceptionality required, Brazilian courts rarely accept termination or renegotiation claims based on hardship when not only the rules, but also the objective criteria defining the assumed risk are not met. For instance, regarding the criteria of the qualification of the parties, a claim filed by large or even medium-sized companies will hardly succeed. Instead, courts typically will only permit such claims in cases involving imbalanced transaction (such as consumer relationships), and even then, only in very exceptional cases involving external circumstances⁶¹⁶.

Companies are generally sophisticated players and are familiar with the market context and nature of the contracts they engage (another important objective criteria), being

⁶¹² Reinforced by Statement 439 of the V Journey of Civil Law: “*The revision of a contract for excessive onerousness based on the Civil Code must take into account the nature of the object of the contract. In business relationships, the sophistication of the contracting parties and the allocation of risks assumed by them with the contract will be observed.*” (free translation)

⁶¹³ ZANETTI, Cristiano de Sousa, *O Risco Contratual*, cit., *passim*.

⁶¹⁴ In case of express termination clause, Article 474 of the Brazilian Civil Code applies, which stipulates that the termination operates automatically (See ZANETTI, Cristiano de Sousa, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 778).

⁶¹⁵ GOMES, Orlando, *Contratos*, cit., pp. 218-219; PEREIRA, Caio Mário da Silva, *Instituições*, cit., p. 166; LÔBO, Paulo, *Direito Civil*, cit., p. 204. Case law rejected claims for revision based on hardship when the plaintiff was already in breach of its obligations (Superior Court of Justice, AREsp 500425-RJ, Rel. Min. Raul Araújo, j. 19/10/2020).

⁶¹⁶ MARQUES, Cláudia Lima, *Contratos*, cit. Upon research on case law, few returned in favor for the application of hardship and mainly in consumer cases (Superior Court of Justice, REsp 1087783-RJ, Rel. Min. Nancy Andrichi, j. 01/09/2009; Superior Court of Justice, REsp 579107-MT, Rel. Min. Nancy Andrichi, j. 07/12/2004), being the majority denying the claim for lack of proof of the requirements or assumption of risks (Superior Court of Justice, AgInt no AREsp 1724503-SP, Rel. Min. Marco Buzzi, j. 18/12/2020; Superior Court of Justice, REsp 1903878-MG, Rel. Min. Moura Ribeiro, j. 17/11/2020; Superior Court of Justice, AREsp 1394945-SC, Rel. Min. Marco Buzzi, j. 26/11/2018; Superior Court of Justice, REsp 964060-GO, Rel. Min. Sidnei Beneti, j. 28/09/2010; State Court of São Paulo, AC 0222100-44.2009.8.26.0100, Rel. Des. Achile Alesina, j. 20/10/2015).

aware of the advantages and harmful consequences of each transaction. Moreover, it is presumed that these parties are fully assisted and advised about possible future events that might affect the performance of the contract, and that they nevertheless accepted the risks involved in the transaction. The more assisted the parties are, the more capacity they have to internalise and accept risks, reducing the occurrence of facts that can be alleged as unpredictable and, consequently, the harder is the recognition of hardship situations⁶¹⁷.

As a reflection of this understanding, the Provisory Act No 881 of 2019 recently introduced new provisions to the treatment of hardship (Articles 480-A and 480-B⁶¹⁸). The objective of these provisions seemed to limit the application of hardship especially in commercial and inter-company relationships, by stating that the balance between the parties and allocation of risks between them must be presumed and respected. Moreover, the provisions reinforced the power of the parties to agree on the objective parameters for the interpretation of the requirements for modification and termination by hardship.

Although these new provisions were not converted into Law No 13,1874/2019, their pillars were included in Article 421, sole paragraph and in Article 421-A (transcribed in Chapter 1, item 1.2, above) with the prevalence of the allocation of risks, the presumption of parties' symmetry and objective interpretation of contracts. These Articles, as discussed, summarise the general rules for Brazilian contract law and observe, with respect to hardship, what was already pacific in literature with regards to the assumption of risks⁶¹⁹.

Also, these new provisions approximate Brazilian system to Italian Civil Code, whose Article 1.467 expressly provided that the termination by hardship cannot take place if the supervening facts are covered by the common risks of the contract⁶²⁰.

⁶¹⁷ ZANETTI, Cristiano de Sousa, *O Risco Contratual*, cit., pp. 457 and 464; VILLELA, João Baptista, *Equilíbrio*, cit., p. 8-9; In the same direction the aforementioned Statement 439 and case law: Superior Court of Justice, AgRg no AREsp 711391/MT, Rel. Min. João Otávio Noronha, j. 01/12/2015; Superior Court of Justice, REsp 849228/GO, Rel. Min. Luis Felipe Salomão, j. 03/08/2010; Superior Court of Justice, REsp 936741/GO, 4.ª T., j. 03.11.2011, v.u., rel. Min. Antonio Carlos Ferreira, j. 08/03/2012.

⁶¹⁸ Article 480-A: "*In inter-company relationships, it is legal for the contracting parties to agree on objective parameters for the interpretation of the requirements for revision or termination of the contractual pact*". Article 480-B: "*In inter-company relationships, the symmetry of the parties shall be presumed and the allocation of risk must be observed*" (free translation).

⁶¹⁹ In this regard, the Statement 366 was approved in the IV Journey of Civil Law: "*The extraordinary and unpredictable fact causing the excessive onerosness is the fact that is not objectively covered by the proper risks of the transaction*" (free translation); FERREIRA, Antonio Carlos - RODRIGUES JR, Otavio Luiz – LEONARDO, Rodrigo Xavier, *Revisão judicial*, cit.

⁶²⁰ Article 1467: "*(...) La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto*" ("*Termination may not be demanded if the onerosness is part of the normal risk of the contract*" – free translation).

Despite Article 478 solely refers to contract termination, Article 479 provides for the possibility of the modification of its terms if offered by the creditor and Article 480, when referring to unilateral contracts (only one party has to perform), stipulates that the debtor may request the reduction of the performance⁶²¹. In this sense, for bilateral contracts, the termination of the contracts is the rule and claims for general modification by the debtor rarely succeed, with the exception of claims for specific adjustment of price that fall under Article 317 (disproportion of price).

There is important literature and case law, however, defending the revision of contracts by judges and arbitrators based on the principle of the contractual preservation, which was consolidated in Statement 176 of the III Journey of Civil Law⁶²². This understanding is reflected in the huge number of cases with claims for revision of contracts, despite the absence of express legal authorization⁶²³. In any case, notwithstanding the numerous cases, both remedies (either revision or resolution) are hardly applied⁶²⁴.

The strict provisions of Brazilian law on hardship demonstrates the conciliation of the principle of the party autonomy, *pacta sunt servanda* and the exceptionality of the State's intervention. As stated already by an author, "*there is no freedom without liability*": if the parties are free to negotiate and assume obligations under a contract, this contract must be fully complied with⁶²⁵. However, the clear influence of the Italian Civil Code led

⁶²¹ Article 479: "*Dissolution may be avoided, if the defendant offers to modify the conditions of the contract, on an equitable basis*". Article 480: "*If only one of the parties has obligations under the contract, that party may petition that his obligations be reduced, or that the manner of performing them be altered, as to avoid excessive onerousness*." (free translation)

⁶²²Statement 176: "*In attention to the principle of contract preservation, article 478 of the Civil Code of 2002 shall conduct, whenever possible, to the judicial revision of the contracts and not to the termination*" (free translation). In the same direction: Superior Court of Justice, REsp 1087783-RJ, Rel. Min. Nancy Andrighi, j. 01/09/2009; Superior Court of Justice, REsp 579107-MT, Rel. Min. Nancy Andrighi, j. 07/12/2004). Also, see LUCCA, Newton de, *A principiologia inerente aos contratos comerciais*, Revista dos Tribunais, vol. 923/2012 (187 – 217). For a recent and comprehensive analysis of the possibility of contract revision due to excessive onerousness under Brazilian law, see MARINO, Francisco Paulo de Crescenzo, *Revisão Contratual: Onerosidade Excessiva e Modificação Contratual Equitativa*, São Paulo, Almedina, 2020.

⁶²³ FERREIRA, Antonio Carlos - RODRIGUES JR, Otavio Luiz – LEONARDO, Rodrigo Xavier, *Revisão judicial*, cit. The authors bring a huge number of decisions over the past 20 year dealing with revision of contracts (approximately six thousand judgements and almost three hundred thousand monocratic decisions) even though the law does not speak about revision, but solely termination.

⁶²⁴ In addition to the cases listed in the notes above, reference is made to a specific case comprising the sales of harvest affected by a rare plague and where two court instances have decided for the resolution of the contract, but the Superior Court of Justice reformed those decisions confirming the understanding that, even though the plague was new and unpredictable, the nature of this contract does not allow resolution by hardship (Superior Court of Justice, REsp 1115596-GO, Rel. Min. Raul Araújo, j. 09/08/2017).

⁶²⁵ ZANETTI, Cristiano de Sousa, *O Risco Contratual*, cit., p. 457.

Brazilian legislators to address exceptional cases of imbalance, since the future is hardly identical to current circumstances⁶²⁶.

2. Russia

Similar to Brazilian law, Russian legislation also provides for the doctrine of hardship separated from impossibility, although both may have the same consequence that is the extinguishment of the contractual relationship.

Impossibility is set forth in Article 416 of the Russian Civil Code and refers to all types of obligations. The provision is minimal and states that an obligation shall be terminated if it, after its origination, became impossible due to a cause not attributable to any of the parties⁶²⁷.

The criterium for impossibility is the existence of objective circumstances which prevent the performance of the contract, such as the case where the contract's object ceases to exist⁶²⁸. In addition, Articles 417 to 419 details special types of impossibility, such as (i) where there is an act of a state agency/body; (ii) the death of the promisor; or (iii) the liquidation of a legal entity which is a contracting party.

Although not expressly provided, it can be inferred from item (2) of Article 416 that, when terminated by impossibility (without fault by any party), the obligation will not be performed and, in case of bilateral contracts, the party who have performed has the right to receive his or her performance back and any sum of excess shall be returned to the affected party in order to avoid undue enrichment⁶²⁹.

⁶²⁶ PEREIRA, Caio Mário da Silva, *Instituições* cit., p. 167; ROPPO, Vincenzo *Il Contratto*, seconda edizione, in IUDICA, Giovanni – ZATTI, Paolo, *Trattato di Diritto Privato*, Milano, Giuffrè, 2011, p. 943.

⁶²⁷ Article 416: “*Termination of the Obligation Because of the Impossibility to Discharge It 1. The obligation shall be terminated because of the impossibility to discharge it, caused by the circumstance occurring after the origination of the obligation, for which neither of the parties is answerable. 2. In case of the impossibility for the debtor to discharge the obligation because of the faulty actions of the creditor, the latter shall not have the right to claim the return of what he has discharged by the obligation*”.

⁶²⁸ Pursuant to the Resolution of Federal Commercial Court of Moscow District of 10 November 2009 No KG-A41/11592-09, case No A41-13282/09, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 277.

⁶²⁹ Pursuant to the Ruling of Supreme Commercial Court of 20 December 2011 No BAC-15941/11, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 279.

In any case, if the impossibility of performance was caused by a wrongful act by the other party, the latter is not entitled to restitution of what he or she has eventually performed⁶³⁰.

The Civil Code does not provide for a specific procedure for terminating a contract due to impossibility. According to literature, the mere notification of termination is sufficient, which can inevitably lead to a judicial/arbitral proceeding if the other party challenges the impossibility situation and treat it as a breach of contract⁶³¹.

Hardship, in turn, is comprised within the specific provisions applicable to contracts and refers to modification and termination of contracts due to *material or essential change of circumstances*, pursuant to Article 451 of the Russian Civil Code. Despite the different structure, this provision was clearly inspired by the UNIDROIT PICC⁶³². Actually, the drafting of the Russian Civil Code and the first version of the referred international principles were contemporary and several of the Russian drafters had participated in the Working Group that prepared the Principles⁶³³.

The concept was integrated into the Russian system due to the need to face the drastic economic changes that took place in the country after the collapse of the USSR, particularly the great instability of private commercial relationships⁶³⁴.

Differently from impossibility, the material change of circumstances does not make performance impossible, but rather exceptionally burdensome for one party, altering the parties' balance of interests⁶³⁵. This distinguishment threshold is very similar of what is verified under Brazilian law.

Item (1) of this article provides for the general rule that, unless otherwise agreed by the parties, the Russian legal system recognises the possibility of contract dissolution or modification due to material change of the circumstances that were considered at the moment of the conclusion of the contract⁶³⁶. Moreover, the provision defines the adjective

⁶³⁰ DOZHDEV, Dmitry, *Russian Private*, cit., p. 220.

⁶³¹ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 280.

⁶³² KOMAROV, Alexander, *The UNIDROIT*, cit., p. 1500; DOZHDEV, Dmitry, *Russian Private*, cit. p. 221.

⁶³³ DOUDKO, Alexei G., *Hardship*, cit., pp. 486 and 507.

⁶³⁴ *Idem, ibidem*, p. 486.

⁶³⁵ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 287.

⁶³⁶ Article 451 (1): “An essential change of the circumstances, from which the parties have proceeded when concluding the contract, shall be the ground for its amendment or cancellation, unless otherwise stipulated by the contract or following from its substance. The change of the circumstances shall be recognized as essential, if they have changed to such an extent that in case the parties could have wisely envisaged it, the contract would not have been concluded by them or would have been concluded on the essentially different terms.”

“material/essential/fundamental” as related to the unpredictability of the change of circumstances which would lead the parties not to conclude a contract or to conclude a very different contract⁶³⁷.

Notwithstanding such wide recognition, the remedy in the Russian system is exceptional⁶³⁸ and item (2) provides for the strict requirements that allow one party to claim (and this is a remedy to be subject to court or arbitral proceeding) the change or termination of the contract: (i) unpredictability at the moment of the conclusion of the contract; (ii) irresistibility, where the aggrieved party could not overcome the consequences of the change, even engaging the diligence required for that type of contract; (iii) serious imbalance between the parties, with losses to the interested party which was not considered at the moment of the conclusion of the contract and (iv) exceeding the degree of risk to be borne by the interested party according to the contract or to the usages applicable to that contract⁶³⁹. This last requirement approximates Russian to Brazilian Law, especially after the recent amendments brought by Law No 13,874/2019, as discussed above, and is also oriented by the particular nature of the contract and business position of the parties⁶⁴⁰.

In addition to Article 451(2), Russian court practice also developed another requirement for applying hardship: the impact of circumstances is such that the interested party could not and cannot eliminate the negative consequences, despite making every available effort required by a person acting reasonably and in good faith⁶⁴¹. Total loss of

⁶³⁷ KOMAROV, Alexander, *Legal Framework*, cit., p. 69; RUDOKVAS, Anton D., *Contract Formation and Non-Performance in Russian Civil Law*, in SCHULZE, Reiner – ZOLL, Fryderyk, *The Law of Obligations in Europe. A New Wave of Codifications*, Munich, Sellier, 2013, p. 165.

⁶³⁸ DOUDKO, Alexei G., *Hardship*, cit., p. 494.

⁶³⁹ Article 451 (2): “If the parties have failed to reach an agreement on bringing the contract into correspondence with the essentially changed circumstances or on its cancellation, the contract may be cancelled, and on the grounds, stipulated by Item 4 of the present Article, it may be amended by the court upon the claim of the interested party in the face of the simultaneous existence of the following conditions: 1) at the moment of concluding the contract, the parties have proceeded from the fact that no such change of the circumstances will take place; 2) the change of the circumstances has been called forth by the causes, which the interested party could not overcome after they have arisen, while displaying the degree of care and circumspection, which have been expected from it by the nature of the contract and by the terms of the circulation; 3) the execution of the contract without amending its provisions would so much upset the balance of the property interests of the parties, corresponding to the contract, and would entail such a loss for the interested party that it would have been to a considerable extent deprived of what it could have counted upon when concluding the contract; 4) neither from the customs of the business turnover, nor from the substance of the contract does it follow that the risk, involved in the change of the circumstances, shall be borne by the interested party.” The former version of item (4) of the provision referred to usages “of the business turnover”. Therefore, this requirement became wider after the amendment of 2015.

⁶⁴⁰ DOUDKO, Alexei G., *Hardship*, cit., p. 500.

⁶⁴¹ Pursuant to the Resolution of Federal Commercial Court of Volgo-Viatskii District of 24 August 2007, case No A79-9483/2006, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 284; DOUDKO, Alexei G., *Hardship*, cit., p. 497.

interest in the contract's object due to the material change is also considered by courts in applying Article 451⁶⁴².

The legal requirements, which are a mix of objective and subjective tests must be cumulatively met⁶⁴³, the same as provided by the Brazilian Civil Code. Once they are met, if the court decides for the termination of the contract, item (3) of Article 451 states that the consequences of such termination will be applied in accordance with the need for a fair distribution of the expenses borne by the parties from the conclusion until termination of the contract⁶⁴⁴.

The vagueness of this provision on fair distribution raises heated discussions in practice⁶⁴⁵ and courts generally apply the aforementioned consequence if expressly claimed by the demanding party, otherwise the general rules on contract termination will take place (the same as impossibility, with restitution and damages in case of fault)⁶⁴⁶.

Russian courts are very reluctant in applying the rule of Article 451 and the majority of the submitted claims are dismissed by the lack of legal requirements, especially considering the restrictive interpretation of the fundamental character of the change of circumstances. The objective is to protect private (business) relationships and avoid the application of hardship in cases of anticipatory breach, where the consequences are more burdensome for the debtor⁶⁴⁷. The vagueness of some requirements of Article 451, such as the necessary degree of imbalance between the parties, also contributes to such reluctance⁶⁴⁸.

There is not uniformity in Russian case law regarding the common situations that lead to the termination/revision by hardship. For instance, economic crises are usually not considered as circumstances for the application of Article 451, since they are always

⁶⁴² YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 286.

⁶⁴³ DOUDKO, Alexei G., *Hardship*, cit., p. 497.

⁶⁴⁴ Article 451 (3): “*In case of the cancellation of the contract because of the essentially changed circumstances, the court shall, upon the claim of any one of the parties, define the consequences of the cancellation of the contract, proceeding from the need to justly distribute the expenses, borne by them in connection with the execution of this contract, between the parties.*”

⁶⁴⁵ RUDOKVAS, Anton D., *Contract Formation*, cit., 167. The author discusses if the distribution shall comprise solely the restitution of performance, or whether shall comprise other damages and, in this case, if the damages would include loss of profit and/or previous costs incurred in preparation of performance.

⁶⁴⁶ Ruling of Supreme Commercial Court of 11 October 2011 No VAS-12624/11, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 287.

⁶⁴⁷ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 287; RUDOKVAS, Anton D., *Contract Formation*, cit., pp. 165-166.

⁶⁴⁸ DOUDKO, Alexei G., *Hardship*, cit., p. 496.

foreseeable⁶⁴⁹. However, some crises may entail termination of contract if their effects are specifically burdensome to a particular relationship⁶⁵⁰.

With regards to the modification of the contract due to material changes of circumstances, item (4) states that this remedy will only be applicable in exceptional circumstances, *i.e.* when the termination affects social interests or entails damages to the parties that exceed the ones deriving from modified performance⁶⁵¹. This provision is criticised by some authority due to the risk that the remedy of modification by hardship becomes dead letter, especially considering the strict requirements for its application⁶⁵².

This provision is aligned with the express provision of Article 478 of the Brazilian Civil Code (which only provides for “termination”), but substantially differs from the treatment conferred by Brazilian literature, as seen above. Likewise, the exceptionality of revision of contracts is opposed to the Chinese legal system, according to which prevalence is always given to the preservation of the contract (as detailed ahead), and also to the PICC⁶⁵³.

Finally, similar to China and to the referred Principles, but different from Brazil, the Civil Code expressly states the relevance of the previous negotiation between the parties as a first step before submitting the hardship issue in court. However, such negotiation is not systematically regulated in the system, which may cause parties to not engage in serious negotiations, but solely exchange some notices or even enter into bad faith negotiations in order to frustrate it and, subsequently, resort to Article 451 of the Civil Code⁶⁵⁴.

⁶⁴⁹ The Ruling of Moscow City Court of 29 February 2012, case No 33-6512 decided that economic crises are expected to “*occur approximately every 10 years*”, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 285.

⁶⁵⁰ Resolution of Federal Commercial Court of Volgo-Viatskii District of 16 November 2009, case No A11-847/2009, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 284. In this case, the crisis increased the market price in five time, which was considered as a material and unpredictable change.

⁶⁵¹ Article 451(4): “*The amendment of the contract in connection with an essential change of the circumstances shall be admitted by the court decision in extraordinary cases, when the cancellation of the contract contradicts the public interests, or if it entails the losses for the parties, considerably exceeding the expenses, necessary for the execution of the contract on the terms, amended by the court.*”

⁶⁵² DOUDKO, Alexei G., *Hardship*, cit., p. 504.

⁶⁵³ For instance, Article 6.2.3 of the PICC: “*(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.*”

⁶⁵⁴ DOUDKO, Alexei G., *Hardship*, cit., p. 502.

3. India

In contrast with the Brazilian and Russian legal systems, Indian contract law does not recognise situations of hardship as enabling a party to request the modification or termination of a contract due to the serious onerousness or imbalance of a contractual relationship caused by a supervening and unpredictable event. Instead, under Indian Contract Act, solely the doctrines of supervening impossibility or frustration apply.

As mentioned above, Section 56 of the Indian Contract Act, the second part, states that, if a contract becomes impossible “*by reason of some event which the promisor could not prevent*”, the contract becomes void from the date of such impossibility. Once the contract is deemed void, the parties will be subject to the consequences discussed in Chapter 2 and will be discharged from performing the contract.

Therefore, the treatment conferred by Indian contract law is very different from the other civil law systems analysed herein, which differentiates the doctrine of impossibility from hardship. This characteristic derives from the wide power and freedom granted to the parties in negotiating and performing the contracts by the Indian system, which is proper of the common law tradition.

As already mentioned, Indian contract law does not recognise the principle of good faith for the performance of contracts and, as a consequence, a party is able to terminate the contract at his or her own discretion by mere communication, unless otherwise set forth in such agreement⁶⁵⁵. Given such autonomy, the national system does not protect specific situations of extreme difficulty (hardship) as grounds for a party to terminate or modify their agreements.

Difficulty and onerousness in performing a contract, even if unexpected and substantial, are considered not enough to cause the “frustration” of the contract and the discharge of the debtor; consequently, the non-performance in these cases is generally deemed as breach of the contract⁶⁵⁶.

The only situation to be protected, and although very narrowly⁶⁵⁷, is the impossibility, which, as provided for in Section 56, is supervening and beyond the parties’ control. Under Indian law, impossibility is not restricted to physical unfeasibility of

⁶⁵⁵ BHADBHADE, Nilima, *Contract*, cit., pp. 63-64.

⁶⁵⁶ BANGIA, R. K., *The Indian*, cit., p. 250.

⁶⁵⁷ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 860.

performance, but also refers to impracticability and uselessness compared to what the parties had in mind, in cases where the object of the contract is totally upset⁶⁵⁸. This other facet of impossibility theory refers to the so-called “frustration doctrine”, which is similar and highly influenced by the English common law frustration doctrine.

The proximity to the coloniser system is so intense, that the precedents for recognising frustration in India are the same of English common law⁶⁵⁹. On the other hand, Indian practice does not refer much to the British theories of “implied terms” or “just conditions” since the impossibility and frustration are directly regulated by law (the Contract Act and also the Specific Relief Act)⁶⁶⁰.

The concept of frustration, different from the physical impossibility, was confirmed by Indian courts and, curiously similar to the analysed civil law systems, refers to the “*change of circumstances*” that strikes the root of what was envisioned by the parties at the moment of the conclusion of the contract. Literature provides for some interesting excerpts of those precedents (including reference to English ones):

“This much is clear that the word impossible has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that promisor finds it impossible to do the acts which he promised to do”.⁶⁶¹

⁶⁵⁸ NAIR, M. Krishnan, *The Law*, cit., p. 211; BANGIA, R. K., *The Indian*, cit., pp. 246-247 and 249 (quoting case *Sushila vs. Hari Singh*, AIR, 1971 SC 1756); POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 853 and 857; PATHAK, Akhileshwar, *Contract Law* cit., pp. 275-276; KHANDERIA, Saloni, *Transnational*, cit., p. 64.

⁶⁵⁹ For instance, the authors mention the famous *Taylor vs. Caldwell* and *Krell v. Henry* (coronation cases), which were de basis for the frustration doctrine and will be discussed in more detail in Part II of this study (see SINGH, Avtar, *Law of contract*, cit., p. 392; BANGIA, R. K., *The Indian Contract*, cit., pp. 244-246; PATHAK, Akhileshwar, *Contract Law* cit., p. 272).

⁶⁶⁰ SINGH, Avtar, *Law of contract*, cit., p. 415, specially by considering the illustrations of Section 56 of the Indian Contract Act. Also PATHAK, Akhileshwar, *Contract Law* cit., p. 273; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 853 and 856.

⁶⁶¹ B.K. Mukherjea J of the Supreme Court in case *Satyabrata Ghose vs. Mugneeram Bargur & Co* AIR 1954 SC 44: 1954 SCR 310, *apud* SINGH, Avtar, *Law of contract*, cit., p. 392.

*“Frustration may be defined as the premature determination of an agreement between parties lawfully entered into and in the course of operation at the time of its premature determination, owing the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what as contemplated by the parties when they entered into the agreement”.*⁶⁶²

Frustration is also related to risk allocation and foreseeability of the impossibility. If the event is foreseeable, the parties have consciously accepted that risk and, thus, the parties are not discharged. Even in case the parties have not expressly assumed the specific risk, the court will have the discretion to allocate it to one of the parties and, only if the risk cannot be allocated to any of them, the *impossibility* or frustration will be recognised, otherwise one of the parties will be held liable for the performance of the contract⁶⁶³.

Under Indian law, the concept of hardship generally refers to poor bargains, commercial difficulties, more costly performance and loss of expected profits (commercial hardship) and, as such, will never suffice to excuse performance, since it does not bring about a fundamentally different situation that frustrates the venture⁶⁶⁴. Nevertheless, as seen in the cases of Brazil and Russia (and will also be seen in the case of China), these circumstances of commercial hardship are also excluded from the (very restrict) hardship doctrine accepted in those countries. Therefore, the BRICS countries seem to be close in regard to the circumstances entailing discharge but do differ on their understanding about the concept of hardship.

Despite these similarities to other countries, the equivalence to void contracts by Indian law creates other differences as to the effects deriving from impossibility. For instance, whereas, under Brazilian and Russian law, impossibility has the main effect of discharging the party from the performance and liabilities under the contract as of the date of impossibility (*ex nunc* – except in cases of previous performance which may cause unjust enrichment), in being equated with voidance, Indian Section 65 would confer more serious

⁶⁶² *Cricklwood Property & Investment Trust Ltd vs. Leighton’s Investment Trust Ltd* 1945 AC 221 (HL), *apud* NAIR, M. Krishnan, *The Law*, cit., p. 211 and SINGH, Avtar, *Law of contract*, cit., p. 393

⁶⁶³ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 858.

⁶⁶⁴ SINGH, Avtar, *Law of contract*, cit., p. 394, by quoting case *Hurnandrai Fulchand vs. Pragdas Budhsen* (1922-23) 50 IA 9: AIR 1923 PC 54 (2). BANGIA, R. K., *The Indian Contract*, cit., p. 250; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 861.

effects, where the parties are prevented from receiving any advantage from the contract since its conclusion (*ex tunc*)⁶⁶⁵.

However, when the impossibility is subsequent, the contract “*becomes void*”, such impossibility will attack the validity of the contract only from the moment it becomes incapable of performance, excusing further performance by the parties⁶⁶⁶. This conclusion is drawn from Section 56 and the definition of section 2(j), which states that: “*a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable*”.

The discharge deriving from impossibility or frustration operates automatically regardless of the interest of the parties. The evaluation of the parties’ intention will only serve for the assessment of whether there was real frustration or not, but will not be considered for judging and applying the respective consequences⁶⁶⁷.

Therefore, the same vagueness and need to observe the concrete case will apply for quantifying restitution in cases of frustration (*quantum meruit*), and literature informs that the courts may take into account the reasonable overhead expenses and the work or services personally performed by each party⁶⁶⁸.

Continuing with the issue of the effects of impossibility and frustration, different to what was observed in the case of nullity of the contracts, the extinguishment of the contract does not entail the extinguishment of the arbitration clause, which keeps its validity and effectiveness⁶⁶⁹. This is another divergence related to the contracts that are void *ab initio*.

One final point of interest: the concept ‘hardship’ used to be recognised in India only for procedural purposes under the Specific Relief Act of 1963. Former Section 20 of this Act expressly listed hardship as a condition for the court not to grant the remedy of specific performance⁶⁷⁰. Indeed, the literature used to refer to concepts of hardship is very similar to those of civil law countries when discussing this provision, even though in a much

⁶⁶⁵ SINGH, Avtar, *Law of contract*, cit., p. 424.

⁶⁶⁶ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 857.

⁶⁶⁷ SINGH, Avtar, *Law of contract*, cit., pp. 415 and 417.

⁶⁶⁸ *Idem*, *ibidem*, p. 426.

⁶⁶⁹ UJJANNAVAR, S. S., *Law of Contract*, cit., p. 279.

⁶⁷⁰ Section 20 of the former Specific Relief Act: “*Discretion as to decreeing specific performance. (...) (2) The following are cases in which the court may properly exercise discretion not to decree specific performance: (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; (...)*”. See comments in POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 1,989-2,013.

narrower manner (mere difficulty or inadequacy would not prevent specific performance)⁶⁷¹. However, this provision was excluded from the Act after a recent amendment in 2018, according to which the specific performance - previously refused in exceptional cases including hardship - became mandatory and not subject to the courts' discretion anymore⁶⁷².

The reason for the amendment was to improve contract enforcement in the country and increase its ranking in “doing business” international evaluations – contract enforcement in India was considered inefficient and incomplete⁶⁷³. However, the amendment suffer criticism, since it may ignore legitimate situations where specific performance is not feasible, for instance, in cases of commercial hardship, such as the financial ruin of a party in order to meet the specific performance requirement⁶⁷⁴.

As observed in the case of invalidity, such differences contribute towards making the present study even more challenging. However, as will be discussed in the following chapters, there is still some room for harmonisation and contributory insights among countries.

4. China

Chinese contract law privileges the preservation of the contracts and establishes the binding nature of the contract (*pacta sunt servanda*) as one of its fundamental principles, as analysed in Chapter 1 above (item 4.2). For this reason, and also due to the influence of the former planned economy regime applicable to contracts⁶⁷⁵, neither the GPCL, the Contract Law nor even the recent GRCL provided for specific treatment of hardship situations.

Rules on hardship and even on the doctrine of frustration were substantially discussed before the enactment of the Contract Law in 1999 and the decision of the legislator

⁶⁷¹ SINGH, Avtar, *Law of contract*, cit., p. 902.

⁶⁷² Section 20 of the Specific Relief Act is currently called “*Substituted performances of contracts*”.

⁶⁷³ SRINIVASAN, Badrinath, *Harship & Substituted Performance as Defences against Specific Performance: Critique of the Recent Developments*, in *National Law School of India Review*, vol. 31, no. 1, 2019, pp. 55-56.

⁶⁷⁴ SRINIVASAN, Badrinath, *Harship*, cit., pp. 55 and 66. The author also mentions that the amendment goes on a different direction compared to English common law, where courts refused specific performance on the ground of hardship (case *Patel vs. Ali*, 1984 Ch 283 : (1984) 2 WLR 960 : (1984) 1 All ER 978).

⁶⁷⁵ JANSSEN, André – CHAU, Samuel C.K., *The Impact of the UNIDROIT Principles of International Commercial Contracts on Chinese Contract Law: Past, Present and Future*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, p. 459.

was to exclude those doctrines. The reason for the exclusion was that the doctrines would only apply to rare and exceptional cases, as well as the fact that those concepts were considered too vague and too easily subject to abuse of a party willing to evade from a contractual obligation no longer desired. The line between normal commercial risk and frustration/hardship was considered too difficult to draw in practice and would entail the risk of judges possibly abusing the doctrine⁶⁷⁶.

Despite such exclusion, the concept of hardship was recognised under judicial practice with the doctrine of *change of circumstances*. Under the ruling role of the Supreme People's Court, it has issued sets of interpretation related to the Contract Law (Interpretation on Certain Questions Concerning the Application of Contract Law), by which this doctrine was addressed. Article 26 of the Interpretation n° 2 of 2009 states the following⁶⁷⁷:

“Where any significant change in the objective environment has taken place after the formation of a contract which could not have been foreseen by the relevant parties at the time of entering into the contract, and does not belong to any commercial risk occasioned by any force majeure cause, rendering the continual performance of the contract manifestly unfair to the relevant party or rendering it impossible to realise the goal of the contract, the People's Court shall confirm whether the contract shall be varied or dissolved in accordance with the principle of justice taking into account the actual circumstance, where a relevant party petitions a People's Court to vary or dissolve the contract”

With the adoption of the new Civil Code, hardship became part of the Chinese express legislation under Article 533, which contains some distinctions from the above Interpretation according to the following text:

⁶⁷⁶ GEBHARDT, Immanuel – SCHULZ, Thomas, *Comments on the Chinese Regulations Regarding Modification and Transfer of Contracts*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003, pp. 173-174.

⁶⁷⁷ Text available at: <http://www.cmac.org.cn/wp-content/uploads/2018/08/Interpretation-of-the-Supreme-Peoples-Court-on-Several-Issues-Concerning-Application-of-the-Contract-Law-of-the-Peoples-Republic-of-China-2.pdf>. Accessed on 15 August 2021.

“After a contract is formed, where a fundamental condition upon which the contract is concluded is significantly changed which are unforeseeable by the parties upon conclusion of the contract and which is not one of the commercial risks, if continuing performance of the contract is obviously unfair to one of the parties, the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable period of time, the parties may request the people’s court or an arbitration institution to rectify or rescind the contract.

The people’s court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case.”

The most important distinctions introduced by the Civil Code were the differentiation of this doctrine to the cases of impossibility (the former wording “*or rendering it impossible to realise the goal of the contract*” was excluded) and the possible force majeure as one of the events triggering hardship (the former wording “*does not belong to any force majeure cause*” was excluded). These amendments seem to make the Chinese doctrine more aligned with other systems recognising hardship.

Firstly, the exclusion of the situations of impossibility privileges what is considered the heart of the doctrine of change of circumstances in China: the protection of the principle of fairness. Upon an unforeseeable change of circumstances, a performance may still be possible, but drastically affects the balance between the parties and represents a violation to the principle of fairness⁶⁷⁸. In this case, the doctrine of change of circumstances of Article 533 will apply, while Articles 563 and 590 of the Civil Code will apply for the cases of termination by impossibility (related to force majeure events)⁶⁷⁹.

⁶⁷⁸ ZOU, Mimi, *Chinese Contract.*, cit., pp. 169 and 171-172.

⁶⁷⁹ Article 563 of the Civil Code: “*The parties may rescind the contract under any of the following circumstances: (1) the purpose of a contract is not able to be achieved due to force majeure*”; Article 590 of the Civil Code: “*Where a party is unable to perform the contract due to force majeure, he shall be exempted from liability in whole or in part according to the impact of the force majeure, unless otherwise provided by law. The party unable to perform the contract due to force majeure shall promptly notify the other party to mitigate the losses that may be caused to the other party, and shall provide proof of the force majeure within a reasonable period of time*”.

Before the Civil Code, the former Interpretation of the Supreme People's Court used to approximate the concepts of hardship and impossibility, which was a familiar feature to the Indian system, but is different from Russian and Brazilian law which expressly distinguish the two concepts. Currently, upon the provisions mentioned above, Chinese law is more coherent, at least in part, with other civil law systems.

Secondly, force majeure, which was previously excluded from the doctrine, now can integrate the range of circumstances of Article 533. Its concept is set forth in Article 180 of the Civil Code⁶⁸⁰ and relates to unavoidable and insurmountable events, which is not required by Article 533 as a rule. Therefore, the doctrine contemplates a broader scope of unforeseen events. Since the threshold of Article 533 is the occurrence of an *obviously unfair situation*, such a situation can arise from different events, including force majeure, as already recognised and applied by courts practice⁶⁸¹. Conversely, when force majeure causes impossibility, the aforementioned other provisions will apply.

Based on Article 533 the elements for the confirmation of a hardship situation are: (i) the fundamental change of circumstances; (ii) unpredictability of the change; (iii) not pertaining to any commercial risk and (iv) unfairness. The elements are cumulative and demonstrate a high degree of exceptionality. Moreover, it is possible to note that they might have been inspired by the provisions of the UNIDROIT PICC⁶⁸².

The main issue to be analysed is the substantiality of the change of circumstances and the way it has affected the relationship between the parties (*i.e.*, if there is a cause of obvious unfairness). The change must be objectively substantial and may be related to political, economic or any other relevant condition impacting the obligations under the contract⁶⁸³. The change must also be a situation not objectively foreseeable at the time of the conclusion of the contract and beyond the risk assumed.

The text of the Civil Code (as was the Interpretation) is extremely broad and unclear with respect to which situations lead to unfairness and seems not to be restricted to substantial onerousness, as stipulated, for instance, under Brazilian law. Since the doctrine

⁶⁸⁰ Article 180 of the Civil Code: “*Force majeure*’ means objective conditions which are unforeseeable, unavoidable, and insurmountable”.

⁶⁸¹ ZOU, Mimi, *Chinese Contract*, cit., pp.170-171. The author quotes a case where the court recognized a situation as force majeure and applied the doctrine of change of circumstance, by reducing the contract price in order to turn it to be fair.

⁶⁸² JANSSEN, André – CHAU, Samuel C.K., *The Impact*, p. 459.

⁶⁸³ QIU, Xuemei, *Contract* cit., p. 172; DING, Chunyan, *Perspectives on Chinese Contract Law: Performance and Breach*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, p. 318

of change of circumstances is inspired by the principle of fairness, resort to this principle is important⁶⁸⁴. Fairness refers to the appropriate distribution of rights and duties among contracting parties and, therefore, a situation which affects such appropriateness can entail the right of one party to invoke the doctrine of change of circumstances.

Article 533 also imposes an important limitation (already provided by the Interpretation) aiming to prevent the abuse of this doctrine: the commercial risk. The commercial risk is the risk commonly related to the transaction and, as such, cannot be deemed unpredictable. The intention of the rule is to avoid court intervention in a bad bargain between the parties, who assume and are prepared for certain risks, especially those inherent in business activities⁶⁸⁵. Such a limitation is similar to what was introduced in Brazilian law after the enactment of Law No. 13,874/2019, as seen in item 1 above in this Chapter.

In defining circumstances which are beyond the parties' commercial risk, the Supreme People's Court have issued some guiding opinions about common situations giving rise to demand for revision or termination of contracts based on hardship, such as the economic crises. These situations must be carefully analysed in order to avoid undermining the certainty and stability of transactions, as well as to preserve the principle of *pacta sunt servanda*. Upon the global crisis of 2009, the Court issued the following guidance for lower courts when judging the demands:

“Commercial risks are inherent in business activities, such as changes in supply and demand and price changes not reaching the level of abnormal changes. The change of circumstances is not a risk that is inherent in the market system. It cannot be foreseen by the parties when they entered into a contract. When deciding whether a major objective change is a change of circumstances, the court shall take into account such factors as whether the type of risk is unforeseeable in the common sense, whether the degree of risk is far beyond the reasonable expectation of a normal person, whether the risk can be prevented and controlled and whether the nature of the transaction falls within the usual scope of high risk and high return, and distinguish between the change of circumstances and commercial

⁶⁸⁴ DING, Chunyan, *Perspectives*, cit., p. 317.

⁶⁸⁵ ZOU, Mimi, *Chinese Contract.*, cit., p. 172.

*risks in specific cases in combination with the specific situation of the market.”*⁶⁸⁶

The opinion above reinforces the directive that the analysis must take into account the effects of the crises in the specific case and market conditions. For instance, in one case brought by literature, the Supreme People’s Court rejected a claim of the fluctuation of prices based on the fundamental change of circumstances due to the 2009 global economic crisis. In the decision, the Court considered that the price of the discussed traded goods suffered strong fluctuation since 2004, hence, under the risk assumed by the parties, the 2009 crisis could not therefore be deemed as unpredictable⁶⁸⁷.

Once the requirements are met, Article 533 states that the aggrieved party may “*re-negotiate with the other party*” and, if this attempt fails, such party may request in court the modification of the terms of the contract or the termination and discharge of the contract. The inclusion of the preliminary negotiations was a progress compared to the previous Interpretation of the Supreme People’s Court, which differed from the PICC⁶⁸⁸ and was similar to Brazilian express law. The change brought by Article 533 approximates Chinese legislation to the international standards, in a movement towards harmonisation.

When discussing hardship, clearly inspired by the solution set forth in Section 313 of the German BGB⁶⁸⁹, Chinese practice gives strong prevalence to the modification of the contract to the detriment of termination in view of the principle of *pacta sunt servanda*⁶⁹⁰. This preference for modification and preservation of contracts is a distinctive feature of

⁶⁸⁶ Guiding Opinions of the Supreme People’s Court on Several Issues concerning Trial of cases of disputes over Civil and Commercial Contracts under the current situation, 07/07/2009, Fa Fa No. 40, Article 3, *apud* ZOU, Mimi, *Chinese Contract.*, cit., pp. 172-173.

⁶⁸⁷ Case *Shanghai Tongzai Industrial Co Ltd vs. Faz East Cabe Company Ltd.*, *apud* ZOU, Mimi, *Chinese Contract.*, cit., p. 173.

⁶⁸⁸ SCHROETER, Ulrich G., *Anticipatory Breach, Change of Circumstances and Third Party Rights: A Civil Law Perspective*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018, cit., p. 349.

⁶⁸⁹ Section 313 of the BGB: “(1) *If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.*” (translation available at: https://www.gesetze-im-internet.de/englisch_bgb/). Accessed on 15 August 2021.

⁶⁹⁰ QIU, Xuemei, *Contract* cit., p. 172.

Chinese Law and maybe the reason for it has taken too long to address doctrines of hardship, impossibility and frustration as grounds for termination.

Furthermore, this distinctive feature of China generally gives courts (whether judicial or arbitral) much more power of intervention in other situations of contract life, such as in cases discussing remedies for breach of contract, where courts usually seek for specific performance instead of termination⁶⁹¹.

This power of intervention conferred to Chinese courts in cases dealing with change of circumstances was recently strengthened in the face of the COVID-19 pandemic. Not only the Supreme People's Court confirmed that the event (as well as the measures taken towards its prevention and control) is regarded as force majeure triggering impossibility and claims for change of circumstances, but also issued new Guiding Opinions on how the courts shall proceed in those cases. The excerpt below demonstrates the large amounts of power conceded to courts in order to achieve the preservation of contracts, even if it is not the claim and the willingness of the contracting parties:

“If the epidemic situation of the epidemic prevention and control measures only cause difficulties in performing the contract, the parties may renegotiate. If the parties can continue to perform the contract, the court shall effectively strengthen its mediation work and actively guide the parties to continue to perform. If the parties request the termination of the contract based on the difficulty of performance, the court shall not support it. Where the continued performance of the contract is obviously unfair to one party, and if that party requests a change to the contract performance period, method of performance, price amount, etc. the court shall decide whether to support the request in light of the actual circumstances of the case. If, after the contract is modified in accordance with the law and the parties still claim partial or full exemption from liability for non-performance, the court will not support such a claim.”⁶⁹²

⁶⁹¹ LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 345.

⁶⁹² Guiding Opinions (Part I) on Several Issues concerning the Proper Trial of Civil Cases involving the Novel Coronavirus Pneumonia Epidemic, 16/04/2020, Fa Fa No 12, *apud* ZOU, Mimi, *Chinese Contract.*, cit., pp. 174-175.

Such an approach directly contrasts with Russian and Brazilian express provisions in the law. Even though Brazilian literature defends, and the courts also practice, the revision of contracts, as seen in item 1 above, this is not deemed as the prevailing remedy, especially when this was not requested by the parties.

Finally, although not expressly set forth in Article 533, the doctrine of change of circumstance will only apply if the change occurs before the maturity of the obligation and the breach. If the hardship takes place after the breach, the party cannot be discharged or have the contract rebalanced⁶⁹³. This is the common ground in all the legal systems analysed so far.

5. South Africa

The issue of hardship approximates South African contract law to Indian law and, on the other hand, contradicts the Russian, Brazilian and Chinese legal systems. South Africa does not recognise the possible termination or adaptation of a contract due to a substantial, supervening and unforeseeable difficulty to perform the contract, but solely in situations of actual impossibility, which is considered by an author a situation that “*lags behind other nations*”⁶⁹⁴.

The treatment of impossibility, however, is similar to the other laws analysed previously and is summarised as an unavoidable, unforeseeable supervening event that turns the performance of a contract objectively impossible. The first requirement is that impossibility must be supervening, since, as analysed in the former chapter, initial impossibility will lead to the inexistence or nullity of the contract⁶⁹⁵.

Objectivity means that the impossibility must be so serious that no other party (and not only the specific debtor) is able to perform the contracted obligation. Therefore, it is not enough that a performance has become difficult, expensive or when its purpose is frustrated, as often happens in hardship situations. The event may not always be factually impossible. For instance, if the performance becomes illegal or unfeasible⁶⁹⁶, even though

⁶⁹³ QIU, Xuemei, *Contract* cit., p. 321.

⁶⁹⁴ HUTCHISON, Andrew, *Gap Filling to Address Changed Circumstances in Contract Law - When It Comes to Losses and Gains, Sharing is the Fair Solution*, in *Stellenbosch Law Review*, vol. 21, no. 3, 2010, p. 415.

⁶⁹⁵ VAN HUYSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 171.

⁶⁹⁶ The common example is the performance to deliver an object that falls deep in the ocean. Although it is still factually possible to perform, it is unfeasible (VAN HUYSTEEN, Louis F. – LUBBE, Gerhard F. – REINECKE, MFB., *Contract*, cit. p. 183).

possible in practice, the impossibility doctrine shall apply⁶⁹⁷. Notwithstanding that, the doctrine of frustration of the English and Indian law is not considered to be fully applicable in South Africa⁶⁹⁸.

The impossibility must also be unavoidable by a reasonable person, which means that the cause of impossibility shall not be attributed to any of the parties' fault. The event must be beyond the parties' control and be unforeseeable at the time of the conclusion of the contract. If the parties could foresee the unavoidable event, the courts tend to understand that the parties assumed the risk of its occurrence⁶⁹⁹.

The effect of impossibility is the termination of the obligation and the discharge of the debtor. In this case, the impossibility must occur before the maturity date or the breach. When a debtor is already in breach, the supervening impossibility will not exempt him from liability. If the impossibility is partial or temporary, the debtor will be released only from the part that became impossible in the first case (in divisible obligation) or the performance will be only suspended (without termination) in the second case, unless the impossibility lasts for an unreasonable period⁷⁰⁰.

In contracts with reciprocal obligations, the impossibility will also discharge the other party's obligation to perform. If, however, one of the parties has already performed his or her obligation, he or she will have the right to request return of performance on grounds of unjust enrichment⁷⁰¹.

As analysed in the former Chapter, imbalance and unfair situations are generally protected on grounds of contract formation, but not in contract performance, where the parties already freely opted to assume the risks of difficulties and even began the execution of the contract. Nevertheless, it is common that parties in South Africa include hardship clauses in their contracts, expressly stipulating which situations will discharge the debtor

⁶⁹⁷ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 395; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 173.

⁶⁹⁸ HUTCHISON, Andrew, *The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Contract Law*, in *South African Law Journal*, vol. 127, no. 1, 2010, p. 104.

⁶⁹⁹ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 397; HUTCHISON, Andrew, *The Doctrine*, cit., p. 95, quoting case *Transnet Ltd t/a National Ports Authority vs. Owner of MVSnow Crystal* 2008 (4) SA 111 (SCA).

⁷⁰⁰ VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., pp. 173-174; HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 398-399; HUTCHISON, Andrew, *The Doctrine*, cit., pp. 96-97.

⁷⁰¹ HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law*, cit., p. 397; VAN HUYSSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 174.

from its performance. In these cases of express agreement, hardship situations will be protected⁷⁰².

Despite this rigidity - a heritage of the English common law -, South African practice seems to be walking on a different direction in the post-apartheid era, especially upon the attempts of the Constitutional Court to bring contract law into line with its own view of contractual justice and the incorporation of the good faith principle (as seen in Chapter 1, item 5.2), with particular attention to sectors where there is inequality of bargaining power, such as consumer contracts⁷⁰³.

This change of posture seems to be paving the way to the recognition of hardship. There was already an attempt to introduce rules on hardship by the South African Law Commission in 1998⁷⁰⁴, which, although was never formally enacted (mainly due to the controversial nature of good faith⁷⁰⁵), has created a willingness in court practice and literature to apply more flexibility in dealing with situations of hardship due to unpredictable change of circumstances⁷⁰⁶.

In fact, despite the absence of specific rules, South African literature defends that the change of circumstances is to be addressed in accordance with good faith and case law also manifested in the sense that contractual certainty had to be limited in the interests of fairness⁷⁰⁷. Since good faith and fairness have been gaining more recognition in contract law, and is now viewed as a constitutional policy, hardship situations upon an unforeseen change of circumstances are now against such public policy and must be duly addressed⁷⁰⁸.

As for the nature of these rules applicable to hardship situations, literature defends a detailed, but also more encompassing approach, such as the American impracticability theory, where discharge would also be possible when performance becomes significantly more difficult or expensive, as seen in exceptional cases in India. As for the

⁷⁰² VAN HUYSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law*, cit., p. 174.

⁷⁰³ HUTCHISON, Andrew, *Relational Theory*, cit., p. 315.

⁷⁰⁴ Project 47 - Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts, 1998, 208-18 and Annexure A (Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms), *apud* HUTCHISON, Andrew, *Relational Theory*, cit., p. 319 and HUTCHISON, Andrew, *Gap Filling*, cit., p. 419.

⁷⁰⁵ HUTCHISON, Andrew, *Gap Filling*, cit., p. 419.

⁷⁰⁶ HUTCHISON, Andrew, *Relational Theory*, cit., p. 319. The author advocates for the introduction of rules on hardship (change of circumstances) and mentions the case *Van Reenen Steel (Pty) Ltd vs. Smith NO* (97/2001) 2002 ZASCA 12.

⁷⁰⁷ HUTCHISON, Andrew, *Gap Filling*, cit., pp. 416 and 418, quoting case *Barkhuizen vs. Napier* 2007 5 SA 323 (CC); HUTCHISON, Andrew, *The Doctrine*, cit., pp. 104-105.

⁷⁰⁸ HUTCHISON, Andrew, *Gap Filling*, cit., p. 418.

requirements for considering the possibility to discharge, South African literature advocates for an approach based on the UNIDROIT PICC, similar to what happened in Russia and China, and will be detailed in Part II, Chapter 2⁷⁰⁹.

The difficulty in consolidating such an approach is that the issue of supervening change of circumstances puts opposing concepts into conflict (contractual certainty vs. fairness limitation), as it is the case in all other systems analysed herein. However, this conflict must be accurately balanced and addressed by law, as summarised by the South African author Andrew HUTCHISON: *“Both these values are said to be protected by public policy in South Africa and both need to be weighed against each other in discretion as to whether to allow discharge on the ground of changed circumstances. It is this fine balancing act which makes the threshold test as to when to permit redress for changed circumstances so important.”*⁷¹⁰

The analysis of the South African system on hardship shows - as happens with respect to the invalidity issue - a mixture of insights from the other legal systems discussed herein. At this point, there is already sufficient material for the comparative analysis towards harmonisation of contract law within the BRICS, which is the scope of Part II that follows.

⁷⁰⁹ HUTCHISON, Andrew, *The Doctrine*, cit., p. 105; HUTCHISON, Andrew, *Gap Filling*, cit., pp. 420 and 424.

⁷¹⁰ HUTCHISON, Andrew, *Gap Filling*, cit., pp. 421-422.

PART II: COMPARISON AND HARMONISATION OF CONTRACT LAW

The second part of this study comprehends its main objective: the discussion on the challenges and solutions for the harmonisation of the divergences identified in the two aspects of contract law analysed in Part I, namely, the issues of invalidity of the contracts and hardship.

Comparative analysis may be carried out in accordance with different techniques. The classic Cornell method, headed by Rudolf SCHLESINGER, purports the identification of similarities and divergences among the compared systems with respect to specific issues of law⁷¹¹.

More ambitious is the so-called functional method of Konrad ZWEIGERT and Hein KÖTZ, according to which the comparison must go beyond the rules, avoid national pre-conceptions and search for its functions, aiming at establishing flexible compromise to bridge the gaps among systems and propose harmonisation (build a system)⁷¹². For some, this search for compromise through a process of negotiations and concessions among the systems is a way in which comparative work may have better practical results⁷¹³.

Another approach focuses only on the influences of a legal system, instead of comparing individual rules and principles, for instance, the comparison of the legal traditions of common law and civil law⁷¹⁴. A fourth and flexible technique is to focus on big legal topics and demonstrate how different norms may lead to similar outcomes or, conversely, how similar norms may lead to different outcomes⁷¹⁵. Finally, there is reference to cultural comparison as a method for searching the roots of each norm or system⁷¹⁶.

⁷¹¹ FARNSWORTH, E. Allan, *Comparative*, cit., p. 6.

⁷¹² ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 34-40 and 44; MICHAELS, Ralf, *Comparative Law*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, pp. 297-298; FARNSWORTH, E. Allan, *Comparative*, cit., p. 7.

⁷¹³ ZELLER, Bruno, *The Development of a Global Contract Law. Still a Dream?*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016, p. 1181.

⁷¹⁴ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 63-65; FARNSWORTH, E. Allan, *Comparative*, cit., p. 8.

⁷¹⁵ FARNSWORTH, E. Allan, *Comparative*, cit., p. 8.

⁷¹⁶ MICHAELS, Ralf, *Comparative*, cit., pp. 297-298; KENNEDY, David, *The Politics and Methods of Comparative Law*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002, p. 143.

All these methods influenced the various comparative, harmonisation and uniformisation initiatives worldwide in the field of contract law and played different roles. After all, comparative work has multiple functions, such as law making, assisting lawyers and judges in the resolution of difficult questions, providing a basis for uniformisation and unification, increasing overall knowledge, extending awareness in legal education⁷¹⁷ or, simply inspiring a PhD thesis as the present case.

The structure of the following Chapters reveals that this study somewhat reproduces and mixes all these methods without, however, rigidly stick to one or another. As highlighted in the introduction, the present study envisages the discovery, explanation and understanding of the BRICS's countries legal systems in order to identify and evaluate similarities and divergences with the aim of dealing with the harmonisation challenges arising therefrom.

In this context, after the description and explanation of the five legal systems in Part I, the present comparative work requires, as a first step, the identification of commonalities and divergences with respect to invalidity and hardship, and, as a second step, the understanding of the divergences in order to segregate those which are merely apparent from those which, in fact, raise more concern for the purposes of harmonisation. This twofold analysis is the scope of Chapter 1 in Part II.

In addition to describing the similarities and conflicts, the criteria for defining the issues to discuss harmonisation refers mainly to their practical application. In other words, the second step of Chapter 1 comprises the selection, among all identified divergences, of those which might cause difficulties in contractual practice. For instance, divergences that might entitle the parties to different remedies and/or where the application of one national law or another might lead the parties to stand in contrasting situations. Considering the purpose to seek harmonisation, facilitate the conclusion of contracts and mitigate future litigations, such a practical cut-off appears to be the most adequate.

As can be seen from the descriptions in the Chapters of Part I, and will become clearer in Part II, Chapter 1, the substantial divergences identified mostly refer to the duality between civil law tradition on the one side (Brazil, Russia and China) and common law tradition on the other (India and partially South Africa).

⁷¹⁷ MICHAELS, Ralf, *Comparative*, cit., pp 297.

The common and civil law clash is not a particularity of the BRICS though - and is even a specific comparison technique, as just mentioned. Previous comparative studies, as well as initiatives for the uniformisation of contract law, came across the dichotomy of both traditions as the main obstacles for convergence. For this reason, the analysis of some of those initiatives is relevant for borrowing insights that will contribute to the harmonisation challenge sought for the BRICS. This is the scope of Chapter 2.

In this chapter, the selection of international initiatives was based on the relevance and acceptance of their uniformisation and harmonisation products. Therefore, the discussions and solutions under UNIDROIT and set forth in the PICC comprehend Chapter 2.

Likewise, there have been several initiatives aiming at the uniformisation of contract law within Europe that were also forced to deal with the dichotomy of common law vs. civil law. In this context, the Principles of European Contract Law (hereinafter referred to as 'PECL') and the Draft of Common Frame of Reference (hereinafter referred to as 'DCFR') were identified as also contributory to the present study.

Furthermore, reference is also made to the efforts made within the so-called Common Core of European Private Law or solely 'Common Core'. Different from the first two initiatives mentioned above, the Common Core did not envisage the uniformisation of legal provisions or the creation of a unified set of rules/principles in Europe, but rather a comparative analysis in order to identify and explore divergences and similarities among involved countries. Since the present study does not have unifying purposes, attention to the Common Core's findings may bring contributions and, consequently, they are also comprised within the second Chapter.

After the selection of the important practical divergences among the systems, and following the analysis on how other comparative initiatives dealt with similar differences, Chapter 3 will provide the demonstration of how the selected issues of invalidity and hardship can be harmonised and complemented within the BRICS context.

Chapter 3, as well as this entire study, does not purport to prove that the five systems are equal and can be uniformised. The study does not comprehend a statutory or law-making exercise with the objective to settle single rules or principles (neither through "new" uniform solutions, nor the "best" solution among the variants⁷¹⁸) to be applied to

⁷¹⁸ As pointed out as a technique for unification of law in ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 24.

contracts entered into by parties of the BRICS countries. Instead, the purpose hereto is to acknowledge the existing differences and attempt to use comparative techniques for building a bridge to harmony in contractual effects and show possible compatibilities.

Comparative harmonisation differs from uniformisation and does not connote an idea of a ‘common meeting points’ since there is no commitment to achieving equivalence (either theoretically or in practice). The divergences are discussed but not confronted, and some degree of immersion into the diverse political, historical, economic or linguistic contexts may be necessary at times⁷¹⁹. Only by acknowledging and deferring differences, a comparative and harmonisation exercise might be fairly performed⁷²⁰.

In order to achieve such a goal, the understanding of the essential elements behind each issue and a certain amount of detail is important. However, as comparativists warn, attention to details and essentialities must not be delved into too much, but solely to a certain extent, so that one can be able to explore harmonisation and form similar generalities out of the verified divergences⁷²¹.

Another disclaimer – also borrowed from the renowned comparativists – is that the possible similarities in practical effects or results must by no means be conceived as similarities in principles, methods or rules. This means that even if the equivalent outcomes can be inferred by the application of the different rules, one might not say that the method or principles are the same. Consensus as to the practical solution not always indicates a common underlying reasoning, neither a commonality of theory nor legal concepts⁷²².

Finally, even in case compatibility and harmonisation are not possible with respect to the analysed issues (even with respect to the effects), Chapter 3 also purports to demonstrate rooms for contributory divergences, *i.e.*, divergences that can complement and

⁷¹⁹ EBERLE, Edward J., *Comparative Law*, cit., p. 99.

⁷²⁰ LEGRAND, Pierre, *A Diabolical Idea*, in HARTKAMP, Arthur S. et al., *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004, pp. 266 and 272; CURRAN, Vivian Grosswald, *On the shoulders of Schlesinger: The Common Core of the European Private Law Project*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007, p. 8.

⁷²¹ COHEN, Nili, *Israeli Law as a Mixed System – Between Common Law and Continental Law*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002, p. 27.

⁷²² REIMANN, Mathias, *Of Products and Process. The first six Trento Volumes and their making*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007, p. 89; ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, p. 653.

suggest more adequate treatment for a certain type (or certain types) of situation by one country in the face of omission or improper regime applied by another country.

Such mutual complementary role among the systems is also a relevant facet of a comparative study on international private law⁷²³. As observed in Part I, all the five legal frameworks of BRICS are “living ones”, with very recent reforms of legislation and precedents, which show that they are still developing and might be open to adopting new rules or, at least, new (or partially modified) practices in order to preserve their essential principles and traditions of contract law, coupled with the search for more efficiency and reduction of costs in cross-border contracts amongst some of the current major international traders.

⁷²³ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 45.

CHAPTER 1: IDENTIFYING SIMILARITIES AND DIVERGENCES

Upon the analysis of the general principles as well as specific rules applied to the aspects of validity/invalidity of contracts and hardship by each of the five BRICS countries, it is now possible to identify many commonalities, but also important divergences, whose attempt of harmonisation comprises the object of this study.

From the very start, the five countries belong to different legal traditions, a situation that recalls the most nerve-wracking discussions for comparativists: the dichotomy between common law and civil law families. Brazil, Russia and China are declared civil law systems, whose basis for contract rules derive from positive codification. On the other hand, India is a common law country, where English contract legislation and precedents still play an important complementary role. In the middle ground, South Africa possess a mixed system, with characteristics from both common and civil law families.

The treatment conferred by South African contract law is of special importance, since it is possible to see some examples of clear compromising rules in order to adequate differences between the two traditions, which will be further discussed in this Chapter. Moreover, it is interesting to note some non-conventional features in each system that may approximate apparent distant realities. For instance, recent Chinese rules on contract law, although mostly influenced by civil law, also demonstrate some sort of compromise with common law principles which are harmonised more so with international commercial initiatives. Likewise, despite being a common law country, Indian rules on contracts is extensively ‘codified’ in accordance with the Contract Act.

Such essential divergences and convergences – which relate to the legal traditions followed by the countries - reflect in clashes since the conception of general principles of contract law until the specific rules applied to the issues of invalidity and hardship. However, there are also similarities, some of them indeed surprising, which can contribute to the harmonising work of the following chapters.

After the observation of these similarities and divergences, this chapter provides a segregation (‘cut-off’) of the issues that raise more queries and concerns in legal practice, and, consequently, this assessment will be discussed in further depth in Chapters 2 and 3.

1. Similarities and divergences among BRICS countries

1.1. General principles of contract law

By beginning with the principles that guide contract law within each BRICS country it is possible to identify not only theoretical, but also linguistic comparisons. In many instances, there are principles, rules and reasonings with different denominations that may imply the same meaning or reasoning. For example, the denomination of the principle of *pacta sunt servanda*, although recognised by all the five countries, varies from “*obligatory nature of the contract*” in Brazil, “*binding nature of the contract*” in China, “*actual performance*” in Russia, until the “*sanctity of contracts*” in India and South Africa.

The same happens with specific rules, such as the case of hardship. Each country acknowledging this doctrine defines it in a different manner: excessive onerousness (Brazil), change of fundamental conditions (China), change of circumstances (Russia), or even the frustration in India, if this is considered a broader gender encompassing both species of impossibility and hardship⁷²⁴.

This first remark is important because, throughout this study, many concepts with different denominations will be treated as comparable for the purpose of the harmonisation exercise, as well as to inform in advance, that some redundancy may be necessary in due course.

As regards the already mentioned principle of *pacta sunt servanda*, notwithstanding the fact that all countries recognise it, the degree of limitations imposed by one or another country tend to differ. While some countries face this principle as a limitation to the party autonomy principle, others treat both as complementary and confers more prominence for both. For instance, the non-recognition of hardship doctrines by India and South Africa is related to the prevalence given to party autonomy coupled with *pacta sunt servanda*, while Brazil and China tend to be more flexible with this latter principle in the

⁷²⁴ As pointed out in YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 277 and FAZILATFAR, Hossein, *The Impact of Supervening Illegality on International Contracts in a Comparative Context*, in *Comparative and International Law Journal of Southern Africa*, vol. 45, no. 2, 2012, p. 159.

face of the concurrence of the principles of good faith, social function of the contract (Brazil) and fairness (China)⁷²⁵.

The mentioned party autonomy, or freedom of contract (or also “*voluntariness*” in China), is another principle commonly accepted in the five analysed legal systems and with different levels of prevalence. As mentioned in Chapter 1 of Part I, the codification of norms, a classic feature of the civil law systems, is generally seen as a limitation to this principle with many mandatory rules on form and other requirements to be followed by contracting parties⁷²⁶. In a clear move towards freedom of contract, China has changed the wording of several provisions of former Contract Law in the new Civil Code, changing the “*shall contain*” language to the “*generally contains*” rule (as per the Article 649 quoted above).

Intrinsically linked to freedom of contract is the principle, or rather primary requirement, of consent in contract transactions, which is also unanimously recognised by the BRICS countries. For no other reason, defects in parties’ consent will lead to invalidity of contracts pursuant to the five legal systems, in spite of some distinctions to be analysed ahead.

Apart from these three principles commonly applied, there are others which raise more debate given the different treatment conferred by the national laws. The principle of good faith is probably the most controversial and the one that best illustrates the root of the divergences between common and civil law traditions. Good faith is a pillar of Brazilian and Chinese contract law, and has also been recently included in the Russian Civil Code with strong prominence⁷²⁷. In these three countries, good faith must be observed by contracting parties in all phases of the contract life, since pre-negotiations, formation, performance and even during the post-termination phase.

Contrastingly, India does not recognise good faith as a primary principle, while South African court practice has been progressively applying it as a principle to be respected by the contracting parties. As briefly introduced above, the common law tradition has a much

⁷²⁵ Pursuant to Article 421 of the Brazilian Civil Code (*see* item 1.1.2) and Article 6 of the Chinese Civil Code (*see* item 1.4.2).

⁷²⁶ *See* in Russian case SHIRVINDT, Andrey, *Russian Contract*, cit., p. 177; YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 43-44 and in Chinese case, *see* JONES, William, *Sources*, cit., p. 305.

⁷²⁷ Pursuant to Article 422 of the Brazilian Civil Code, Articles 1(3), 6(2), 10, 307(3) and 432(3) of the Russian Civil Code and Article 7 of Chinese Civil Code.

narrower concept of good faith when compared to civil law countries, and the issue was the object of several attempts to comparison within the different national laws⁷²⁸.

The reason for such discrepancy recalls the foundations of each tradition of private law. Common law was born and developed upon genuine commercial transactions with primary concern with the exchanges between the parties. On the other hand, the philosophy of civil law tradition is focused on purely private relationships and on the exchange of consents. As a consequence, the commercial and objective orientation of common law seeks certainty above all, while the civil law approach is more subjective oriented and confers stronger value to justice and protection to the aggrieved party⁷²⁹.

The adoption of good faith as a primary principle is related to such roots. Good faith and justice are vague concepts which may lead to uncertainties on the factual exchanges and, therefore, are avoided by common law followers. Conversely, civil law provides for more general rules, including behavioural ones, which in fact raise some degree of uncertainty and restrictions to the freedom of contract and *pacta sunt servanda*⁷³⁰. As will be seen ahead, the considerable divergence in adopting the good faith principle directly impacts the treatment conferred to the issues of validity and hardship.

Another principle common in some systems but absent in others is the privity of the contracts. Although it is not a principle under Brazilian law, the concept of relativity of contracts guides interpretation in this country. South Africa and India, on the other hand, conceive it as a principle. In any case, the privity of contracts suffers several types of limitations due to the rules on stipulation in favour to third parties and even the possible external effects that private contracts may cause.

Similar to the privity of the contracts, the material equivalence of the parties is also an important concept under Brazilian law, even though not regarded as a fundamental principle. In Russia, the equivalence between the contracting parties is applied as a

⁷²⁸ NICHOLAS, Barry, *The United Kingdom*, cit., p. 6. FONTAINE, Marcel, *Cause, Good Faith and Hardship. Three Issues in the Process of Harmonizing Contract Law*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016, p. 1136. For a deeper comparative study of good faith within European countries, see ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit..

⁷²⁹ SEFTON-GREEN, Ruth (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge, Cambridge University Press, 2005, p. 19; NICHOLAS, Barry, *The United Kingdom*, cit., p. 3 and 5; VOGENAUER, Stefan, *Common Law*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, p. 266.

⁷³⁰ NICHOLAS, Barry, *The United Kingdom*, cit., p. 3 and 7; RANIERI, Filippo, *Good Faith*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, p. 792.

presumption, while in China such a concept forms the principle of fairness. The principle of fairness, as previously discussed, relates to the appropriate distribution of rights and obligations between the parties and plays a relevant role to the issues analysed herein, such as the defects of consent and hardship.

Finally, noteworthy is the existence of principles and contractual requirements that are very particular to each individual legal system. This is the case of the social function of the contract under Brazilian law (a very debatable and recently relaxed principle), the equality (socialist heritage) and environmental protection in China, the consideration of India and *justa causa* of South Africa⁷³¹. Russia also provides for the concept of compensation, but analysis highlighted it is not a key requirement compared to the other BRICS countries.

Considering the foregoing, with respect to the general principles of contract law, the similarities and divergences within the BRICS countries can be summarised in the following table and lead us to the subsequent analysis regarding the issue of invalidity.

General Principles of Contract Law		
Similarities	Divergences	Particularities
<i>Pacta sunt servanda</i> (binding nature of contracts, actual performance, sanctity)	Good faith (Brazil, Russia, China and more embryonary in South Africa)	Social function of the contracts (Brazil)
Freedom of contract (party autonomy)	Material equivalence (China)	Equality and environmental protection (China)
Consent (consensus)	Privity of contracts (India and South Africa)	Consideration (India)
-		<i>Justa causa</i> (South Africa)

⁷³¹ Respectively, Article 421 of the Brazilian Civil Code, Articles 2, 4 and 9 of the Chinese Civil Code and Section 2(d) of the Indian Contract Act.

1.2. Invalidity of contracts

With respect to the issue of validity and invalidity of the contracts, Chapter 2 of Part I described several rules, principles and aspects of the five legal systems that generate a variety of convergences and divergences. The clashes begin with the express and segregated provisions on validity and invalidity existent in Brazilian, Chinese and Indian statutes⁷³², while Russian Civil Code goes directly to grounds of invalidity⁷³³ and South Africa follows a totally flexible approach. The reason for the segregated approach is to give certainty, whereas focusing directly on invalidity aims to avoid redundancy.

Based on these comprehensive provisions, it is possible to complete the first boxes of commonalities despite linguistic particularities. All five countries are closely aligned with contracts being subject to the three steps of existence, validity and effectiveness/enforcement of contracts, even though the requirements for climbing those steps may vary. Furthermore, on the step of validity, there is a clear convergence among the legal systems in dividing contracts into *voidable* (*disputable* or *contested* in Russia) or *void* in accordance with the seriousness of the defect⁷³⁴.

Voidable contracts are effective until being revoked (China), rescinded (India and South Africa), avoided (Brazil) or contested (Russia), when they become void, or until being confirmed by the affected party, when they become valid and maintain effectiveness. Void contracts, by contrast, possess no binding effect *ab initio*. Similar within all five systems, a void contract (either originally void or after being declared void) is also unenforceable *ab initio* and the declaration or decision of avoidance has *ex tunc* effect⁷³⁵.

Moreover, the common key point for the differentiation between these two species of invalidity is that voidable contracts generally refer to defects of intent/consent of the parties and, for this reason, can be confirmed or annulled by their private willingness. On the other hand, according to all analysed rules, void contracts refer to such a serious

⁷³² Pursuant to Articles 104, 166 and 171 of the Brazilian Civil Code, Articles 143 to 151, 153 and 154 of the Chinese Civil Code and Chapter II of the Indian Contract Act.

⁷³³ Pursuant to Articles 166 to 181 of the Russian Civil Code.

⁷³⁴ This is, in fact, a common point in most of the legal systems in general, including in the European experience (STORME, Matthias E., *Harmonization of the law on (substantive) validity*, in BASEDOW, Jürgen – HOPT, Klaus J. – KÖTZ, Hein, *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Tübingen, Mohr Siebeck, 1998, p. 204)

⁷³⁵ There is, however, the Russian exception to consider disputed (voidable) contracts to cease effects only for the future if required by the essence of the contract (Article 167(3) of the Russian Civil Code).

violation of law that no effect shall be taken, regardless of the intent of the parties. It is equally unanimous the possible liability of the party guilty for the avoidance (for instance, contributed to the defect of consent by acting fraudulently) to indemnify damages effectively incurred by the aggrieved party.

Moving forward with more compatibilities, all five countries recognise the partial invalidity of a contract when the invalid part can be segregated and does not affect other rights and obligations that can remain enforceable. On this matter, Indian law and the judicial practice apply two exceptions that contrast with other countries, namely: a defect in the consideration (fundamental requirement of any contract) entails the full invalidity of the contract even if the defect attacks only part of the consideration⁷³⁶, and the invalidity of the contract results in the dispute resolution clause also being invalid (for instance, an arbitration clause is not usually considered separable and autonomous from the rest of the contract).

Initial impossibility of the contract's subject matter is also a common ground among the five legal systems as a ground for the contract to be void unless such impossibility ceases at the moment of the performance and/or when the contract must be enforced⁷³⁷. Furthermore, a total lack of capacity (or competency in India) of the parties or by one of the parties leads the contract to be void, either due to non-achievement of minimal age of majority or due to a lack of cognitive discernment/comprehension.

Even though the countries are unanimous in stipulating the age of eighteen years old as the age of majority for attainment of full civil capacity, each legal system possesses its own rule on partial capacity and the effects produced by contracts in this situation. While Indian law solely refers to age of majority at eighteen years old, in Brazil, a party is partially (or relatively) capable between sixteen and eighteen years old, in Russia between fourteen and eighteen years old, in China between eight and eighteen years old and in South Africa between seven and eighteen years old⁷³⁸.

During this partial capacity phase (which also applies to partial mental capacity), contracts can only be considered valid according to some requirements, such as the participation or ratification of a tutor/representative. However, in Russia, China⁷³⁹ and

⁷³⁶ Pursuant to Section 24 of the Indian Contract Act.

⁷³⁷ Pursuant to the express reservation made by Brazilian Civil Code in Article 106 (which states about the end of impossibility upon the verification of the condition to which the contract's object is subject).

⁷³⁸ Pursuant to Section 3 of the Indian Majority Act of 1875, Article 4, I of the Brazilian Civil Code, Article 26 of the Russian Civil Code and Article 19 of the Chinese Civil Code.

⁷³⁹ Pursuant to Article 19 of the Chinese Civil Code and Articles 26, 171 and 172 of the Russian Civil Code.

South Africa contracts concluded by minors can be valid and effective, even without the representative, in the exceptional cases of contracts for their pure benefit or for their day-to-day life (adequate to their level of intelligence and cognitive capacity).

From now on, several divergences and particularities flourish upon the systematic analysis of each country's legal framework. Although they all converge in the segregation between voidable and void contracts and the potential *ex tunc* effects of each category, they differ with respect to the defects that lead a contract to be placed in the first or the second category, to the mechanism available to the parties in order to resort to avoidance, to the limitation periods applicable for such avoidance remedy and to the specific standards applicable to the retrospective effects of an avoidance declaration.

Starting with the defects of consent, not always the same vicious consent impacts the contract in the same manner. Whereas the majority of countries provide for a fixed and exhaustive list of defects and their precise consequences, South Africa follows a flexible approach, by which the consequence is attributed in accordance with the facts.

The research returned three clear alignments among the countries in this aspect. According to the five legal systems, the defects of fraud⁷⁴⁰ and coercion (or violence/threat/duress) lead the contract to be voidable⁷⁴¹ and illegality may in most cases turn the contract void *ab initio*⁷⁴². Some particularities exist though, as seen in Chapter 2, in South Africa, if the illegality impacts only the parties' private interest, the contract is instead voidable, and in China, where the decision on nullity will depend on the category of violated norm and the interests protected thereby (according to the interpretations and guidance of the Supreme People's Court⁷⁴³). The study did not detail each particular ground for illegality in the five legal systems (as it did with respect to the defects of consent), because they vary hugely in accordance with internal public policy, morals and traditions. The focus was on the consequences of illegality to the contracts.

Mistake is a very particular instance of conflicts among the countries. In Brazil, Russia (under the denomination of "delusion" or "aberration") and China (under the

⁷⁴⁰ In Brazilian case, both the fraud in general (malice) and the specific "fraud against creditors" leads to voidability.

⁷⁴¹ Pursuant to Article 171, II of the Brazilian Civil Code, Article 179 of the Russian Civil Code, Articles 148 to 150 of the Chinese Civil Code and Sections 17 and 19 of the Indian Contract Act.

⁷⁴² Pursuant to Article 166, II, III and VI of the Brazilian Civil Code, Articles 168 and 169 of the Russian Civil Code, Article 153 of the Chinese Civil Code and Section 24 of the Indian Contract Act

⁷⁴³ Pursuant to the Guiding Opinion of the Supreme People's Court on Several Issues concerning Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation, 07/07/2009, Fa Fa No. 40, Article 12.

denomination of “serious misunderstanding”) the unilateral mistake entails the aggrieved party to request avoidance of the contract⁷⁴⁴. In India, following the common law tradition of England, unilateral mistake of fact does not lead to avoidance and only a bilateral mistake deems the contract void (and not voidable)⁷⁴⁵. In South Africa, pursuant to its flexible approach, it will depend on the seriousness of the mistake: when the mistake is so substantial that consent is completely removed, the contract is deemed inexistent, if the mistake impacts external and social interests, the contract is void, and, finally, when it impacts solely the private interest of the party (not removing it), the contract is exceptionally voidable.

Gross disparity, also recognised under the denomination of “lesion” in Brazil, “obvious unfairness” in China and “unfavourable circumstances” in Russia, makes the contract voidable in these given countries⁷⁴⁶. In South Africa, gross disparity can lead a contract to become void depending on the seriousness and Indian law does not provide for this ground of invalidity. Brazil, Russia and China are also together in recognising simulated contracts as void *ab initio* (“sham” contracts in Russia, and “false expression” and “concealed acts” in China when they affront mandatory rules)⁷⁴⁷, whereas such defect is not discussed in the Indian and South African systems.

Apart from these defects that have similarities and divergences among the countries, there are also particularities of each system. This is the case of the state of danger and malice in Brazil leading a contract to be voidable; the misrepresentation in India and South Africa also leading to voidability, whose meaning is very close to mistake (but induced by the non-intentional act or omission by the other); the restraints of trade, marriage, legal procedure, uncertainty and acts by way of wager which are void in India; malicious collusion in China making the contract void; and undue influence applicable in India and South Africa as a ground for voidability⁷⁴⁸.

Considering the wide range of defects analysed, it is a common ground that voidable contracts can be confirmed by the parties or affected party either by express intent, by conduct or by the lapse of time, whereas void contracts can never be confirmed nor

⁷⁴⁴ Pursuant to Article 171, II of the Brazilian Civil Code, Article 178 of the Russian Civil Code and Article 147 of the Chinese Civil Code.

⁷⁴⁵ Pursuant to Sections 20 and 22 of the Indian Contract Act.

⁷⁴⁶ Pursuant to Article 171, II of the Brazilian Civil Code, Article 179 of the Russian Civil Code and Article 151 of the Chinese Civil Code.

⁷⁴⁷ Pursuant to Article 167 of the Brazilian Civil Code, Article 170 of the Russian Civil Code and Article 146 of the Chinese Civil Code.

⁷⁴⁸ Pursuant to Article 171, II of the Brazilian Civil Code, Sections 18, 19, 19.A and 26 to 30 of the Indian Contract Act and Article 154 of the Chinese Civil Code.

become effective with the lapse of time. Some particularities appear on this matter, as is often the case. For instance, under Article 172 of the Russian Civil Code, a contract entered into by a minor of 14, which is void in principle, can have its validity restored upon the demand of the minor's parents or guardians if deemed advantageous to the minor. This is considered an exceptional case of a void contract being confirmed even though there is no valid consent⁷⁴⁹.

Another particularity exists in China with the so-called contract "pending validity", which requires a ratification act within a short deadline in order to become valid. If not ratified, the contract is considered void. This third category, which cannot be confounded with the contracts subject to suspensive conditions (which affect the enforcement and not the validity of the contract⁷⁵⁰), applies especially in cases of partial capacity (which requires the ratification by the representative), some instances of agency (which requires the ratification of the principal) and lack of due authority to conclude the contract⁷⁵¹. Formality is also an issue that raises different degrees of concern among the countries, with emphasis to Russian detailed rules on formal requirements for contracts⁷⁵². Overall, in the BRICS systems, this is a requirement that can be surpassed by the parties on the basis of due compliance with formal obligations.

Important divergence is verified in regard to the mechanism granted to parties seeking avoidance of contracts and the resulting consequences. In Brazil, Russia and China avoidance of a voidable contract (or revocation in China) is a judicial measure to be taken by the party and decided by a judge or an arbitral tribunal⁷⁵³. Only after such a decision of avoidance has been rendered, the demanding party is allowed to refuse performance of the contract. By contrast, in India and South Africa, avoidance (referred to as "rescission") is a self-help remedy and can be unilaterally exercised through a notice issued by the aggrieved party to the other party⁷⁵⁴.

⁷⁴⁹ YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., pp. 127 and 143.

⁷⁵⁰ For instance, pursuant to Article 125 of the Brazilian Civil Code: "*As the enforcement of the legal transaction is subject to a suspensive condition, not until the suspensive condition is fulfilled, is the right aimed at by the transaction able to be acquired.*" (free translation).

⁷⁵¹ Pursuant to Articles 145, 168, 169 and 171 of the Chinese Civil Code

⁷⁵² Pursuant to Articles 159 to 165 of the Russian Civil Code. Reference is also made to Articles 108, 166, IV and 1245 of the Brazilian Civil Code which provides for form as a requirement for validity.

⁷⁵³ Pursuant to Article 177 of the Brazilian Civil Code, Articles 166, 178 and 179 of the Russian Civil Code and all Articles of the Chinese Civil Code dealing with voidability which state "*party has the right to request the people's court or an arbitration institution to revoke the civil juristic act*".

⁷⁵⁴ Pursuant to Section 66 combined with Sections 3 and 5 of the Indian Contract Act.

As for void contracts, apparently more divergences arise. Brazilian law expressly provides that nullity must be declared by the judge or arbitrators, which can be raised by any interested party or even *ex officio*. In Russia and China there is no provision imposing the need of a judicial decision of nullity, but nothing refrains the parties from seeking such decision as well as a decision on the consequences of the nullity⁷⁵⁵. In India and South Africa, the resort to court is necessary only for discussing the consequences of avoidance and in case one of the parties disputes the avoidance notice.

The analysis of the individual laws returned some curiosities. For instance, despite avoidance of the entire contract being a self-help remedy in India, the partial invalidity cannot be unilaterally communicated, but rather be decided by the courts or arbitral tribunals according to literature and practice. In China, prior to the recent Civil Code, a party discussing avoidance could also request the modification of the contract in order to make it valid and binding, and power was conferred to courts in deciding in favour to the preservation of the contract. This rule was repealed in 2020. Finally, it is interesting to note that although China is highly influenced by German private law, it has not adopted the possibility of unilateral avoidance by notice as set forth in Section 143(1) of the BGB⁷⁵⁶.

The BRICS countries also diverge considerably with respect to the limitation periods applicable for the avoidance remedy. In Brazil it is four years for cases specified in law and two years for other situations; in Russia it is one year for the declaration of avoidance and three years for the corresponding consequences; in China the limitation period is one year and five years for the extinguishment of the right (with exception to misunderstanding case with a 90-day limitation period); and in India and South Africa, there is no fixed period and the parties must declare avoidance without undue delay after the knowledge of the invalidity cause (reasonable time)⁷⁵⁷. After these lapses of time, the contract is deemed valid and maintains its enforceability. Convergence exists in relation to void contracts which are never subject to limitation.

⁷⁵⁵ Pursuant to Article 168 of the Brazilian Civil Code and Article 166 of the Russian Civil Code.

⁷⁵⁶ Section 143(1) of the BGB: “*Declaration of avoidance (1) Avoidance is effected by declaration to the opponent.*” (translation available at: https://www.gesetze-im-internet.de/englisch_bgb/). Accessed on 15 August 2021.

⁷⁵⁷ Pursuant to Articles 178 and 179 of the Brazilian Civil Code, Article 181 of the Russian Civil Code, Article 152 of the Chinese Civil Code and Section 66 combined with Sections 3 and 5 of the Indian Contract Act. However, the Indian Limitation Act provided for a three-year period for rescission as a judicial measure and for the consequences of a void contract (Sections 59 and 113, the latter being residuary).

The last issue that divides countries within the BRICS refers to the consequences of avoidance. As already mentioned, they are aligned in the way that, upon avoidance, the parties must be restored to the *status quo ante*, as though the contract has never existed, since the maxim is that a void contract may never produce the effects envisioned by the parties. Therefore, restitution of the benefits received must be performed by the parties. The divergences arise in cases where the simple restitution is not possible, for instance, in cases where the work was already executed, paid for and restitution *in natura* is not feasible.

In the face of such a situation, Brazil, Russia and China recognise the possibility of the parties being compensated by the equivalent of the rendered performances. In South Africa the restitution shall follow the rules applicable to unjust enrichment. In India, as in other common law countries, if restitution is not possible, in principle, the party has no right to rescind a voidable contract and the equivalent compensation in cases of void contracts is applied with restrictions⁷⁵⁸.

Moreover, even among the countries recognising restitution and equivalent compensation, some differences exist in what consists of the “equivalent”, especially in cases where both parties contribute intentionally to the avoiding defect. In accordance with the Brazilian system, the improper/atypical effects of the contract are recognised, and compensation must occur (excluding the damage indemnification in case of mutual malice)⁷⁵⁹, however, there is no standard for calculating the value of the performances to be restored.

In Russia, the treatment is comparable to Brazil, with a focus on avoiding undue enrichment, and there is no clarity of which parameter applies to the “cost” to be compensated (“*fair price*” was considered in practice). However, in special cases defined by law, the benefits derived from a contract void for illegality may be recovered by the Russian Federation. Such “confiscation” remedy was automatic until 2013, when the amendment restricted the wording of Article 169 of the Russian Code. The same remedy used to apply in China, where the law, currently repealed by the 2020 Civil Code, used to stipulate the possibility of the recovery of all benefits of the illegal void contract to the State, collectively or to the affected third parties.

⁷⁵⁸ Pursuant to Article 182 of the Brazilian Civil Code, Article 167 of the Russian Civil Code, Article 157 of the Chinese Civil Code and Sections 64, 65 and 75 of the Indian Contract Act.

⁷⁵⁹ Pursuant to Article 150 of the Brazilian Civil Code.

Differently from Brazil and Russia, Chinese practice has developed more precise rules on measuring the compensation in such scenarios of bilateral contribution for the avoidance and illegality of contracts pursuant to recent guidance issued by the Supreme People’s Court⁷⁶⁰. Also, China is the only system which expressly prescribes that when both parties are at fault, their liability for compensation must be proportionally shared.

In India and South Africa, when a contract is illegal or the parties contributed intentionally for its nullity, the consequences are summed up in two doctrines defined in the Latin maxims: *ex turpi causa non oritur action* (no disgraceful matter can ground an action) and *in pari delicto potior est conditio defenditis* (where the guilt is shared the position of the defendant is the strongest). As discussed in Chapter 2 of Part I, the application of these doctrines prevents parties from obtaining any remedy under the contract or its avoidance: no claim, no restitution or compensation, in a movement towards the discouragement of this type of behaviour. However, both systems provide for exceptions to those rules in order to avoid unjust enrichment and other irregularities, which are significant for the purposes of the harmonisation and contributory exercise sought in this study.

After the indication of all similarities and divergences related to the issue of validity, summarised in the table below, the following section will highlight the comparisons with respect to the issue of hardship.

Invalidity of Contracts	
Similarities	Divergences
Steps of existence, validity and effectiveness	Acts pending validity (China)
Distinction between void and voidable	Mistake voidable (Brazil, Russia and China)
Avoidance operates retrospectively (<i>ex tunc</i>)	Bilateral mistake void (India)
Voidable acts can be confirmed or rescinded	Mistake either void or voidable (South Africa)
Void acts can never be confirmed	Gross disparity voidable (Brazil, Russia, China and South Africa)
Defects on consent - voidable	Simulation void (Brazil, Russia and China)
Fraud and coercion/duress/violence - voidable	Misrepresentation and undue influence voidable (India and South Africa)

⁷⁶⁰ Minutes of the National Court’s Civil and Commercial Trial Work Conference, issued by the Supreme People’s Court on 08/11/2019, No. 254, §32, 33 and 34.

Illegality - void	Malicious collusion void (China)
Impossible object matter - void	State of danger voidable, malice fraud against creditors (Brazil)
Partial invalidity recognised when separable	Formality void or voidable (Brazil and Russia)
Lack of capacity - void	Valid acts with partial capacity (Russia, China and South Africa)
Capacity at the age of 18 years old	Partial capacity at 16 (Brazil), 14 (Russia), 8 (China) and 7 (South Africa) years old.
Demand for the consequences of avoidance as a judicial remedy	Avoidance as judicial remedy (Brazil, China and Russia)
Original nullity may be declared <i>ex officio</i>	Avoidance as self-help remedy (India and South Africa)
Consequence of avoidance: <i>status quo ante</i> and restitution	Possibility to demand only the declaration of void contract in court (Brazil and Russia)
Liability of the guilty party to indemnify damages	Impossibility of restitution prevents avoidance (India and South Africa)
Limitation periods apply to voidable contracts	Restitution in case of illegal contract and bilateral contribution to the avoidance (Brazil, Russia and China)
Void contracts not subject to limitation periods	Restitution to the State (Russia)
-	Proportional distribution of fault for damage compensation (China)
-	<i>In pari delicto</i> prevents restitution (India and South Africa with exceptions)
-	Limitation periods for avoidance: 4 or 2 years (Brazil), 1 or 3 years (Russia), 1 year (China) and reasonable time (India and South Africa)

1.3. Hardship

The conflicts involving hardship differ from what was seen in the case of invalidity - where the discrepancies hit specific grounds, mechanisms and consequences -, and are much deeper since they affect the very recognition and acceptance of the doctrine.

The doctrine is widely accepted and applied in Brazil, Russia and China where the law clearly separates the instances of impossibility and hardship. Based on different

denominations (excessive onerousness, change of circumstances and change of conditions, all of them herein summarised as hardship), these three legal systems recognise termination of contracts and discharge due to extreme difficulty - which is also a basis for possible modifications -, but also due to impossibility. Contrastingly, the Indian and South African systems only recognise the possible discharge in cases of unavoidable and objective impossibility. In India, the impossibility can be either physically or not, pursuant to the doctrine of frustration. South Africa is slowly moving towards the recognition of an approach more similar to hardship, as advocated by literature.

The doctrine of frustration is more related to the uselessness or impracticability of the performance of the contract due to an unpredictable event. As seen above, the result of the contract upon such an event must significantly differ from what the parties expected from the contract and, more importantly, from the assumed risks.

Therefore, the first (and only) similarity inferred by the studies of Chapter 3 Part I is that the five countries are unanimous in accepting the discharge of the parties in the face of impossibility, whose application is very close by considering not only physical impossibility, but also the liability of the party if either the impossibility was caused by his/her act/omission, or if the party was already in breach before the event causing impossibility to take place.

With regards to hardship, upon a first and more superficial look, the comparison only involves Brazil, Russia and China⁷⁶¹. According to the three legal systems discharge or modification are remedies to be conferred only by judicial or arbitration decisions. In none of these countries, can a party unilaterally evade from his/her contractual obligations based on extreme difficulty, unless it is expressly provided for in the contract.

Furthermore, in these countries a discharge or modification by hardship is an exceptional remedy, where the law contains requirements with considerable details in order to preserve the principles of *pacta sunt servanda* and freedom of contract, in addition to control the court's intervention into private contracts. Although seen as a limitation to the mentioned principles, literature of these countries converges that the acceptance of hardship (in a very exceptional and controlled manner) in fact privileges party autonomy and the

⁷⁶¹ In the present item, the information is drawn upon the detailed analysis made in Chapter 3, Part I, with regard to the following provisions: Articles 478 to 480 of Brazilian Civil Code, Article 451 of the Russian Civil Code and Article 533 of the Chinese Civil Code.

binding nature of contracts (especially in cases of contract modification) by allowing the parties to amend or escape from a contract that does not represent their willingness anymore.

Along with this significant convergence, the countries have close points of contact regarding the requirements and remedies of the application of the doctrine and the effects deriving therefrom. However, some contrasts are also observed. Beginning with the commonalities, Brazilian, Russian and Chinese legal systems require that the extreme difficulty be supervenient to the conclusion of the contract, meaning that there must be a “change” in the circumstances or conditions that affect the performance of the contract. If the problem recalls the conclusion of the contract, validity issues take place (gross disparity or impossibility). Likewise, the supervenient event (or effect) must be objectively serious and unpredictable at the time of the conclusion of the contracts.

Aligned with unpredictability, Russian and Chinese law expressly provides that the event (or effects) must be beyond the parties’ risk (or commercial risk, as the Chinese Civil Code states), whose criteria are generally the nature of the contract and of the parties, as well as the usages and the context in which the contract is inserted. In Brazil this is also a long-standing requirement recognised by courts and literature and, as of 2019, it is also expressly provided by the Civil Code⁷⁶². Therefore, the vagueness of those criteria prevents the fixation of precise events for the application of the doctrine. As observed, a financial crisis, for example, was judged either in favour to apply hardship or to deny it, showing regard towards the particular circumstances.

The systems also converge with respect to the requirement of substantial imbalance between the parties, though with some specific details. For instance, Brazilian law focuses on the serious onerousness of the performance to one party, compared to the other, while China provides for a broader scope, by requiring an unfair situation in general.

Not technically a divergence, but there are some requirements that are particular of each legal system. This is the case of the Brazilian requirement for a contract to be of duration (continued performance), as well as the loss of interest and impossibility to eliminate the negative effects of the supervenient event required in Russian practice. Although not provided by express law, these requirements are complementary to the others and can be perfectly accepted within the three countries.

⁷⁶² Pursuant to Article 421-A, item II, introduced to the Brazilian Civil Code by Law No 13,874/2019, which provides for limitations to the principle of social function of the contract.

Very few are de divergences of the three systems that significantly relate to traditional aspects of each country. With regards to the requirements, China and Russia expressly require previous negotiations (or at least an attempt) in order for a party to submit a claim for the termination or modification based on hardship, while Brazilian law does not refer to such a requirement. In Russia's case, this first step is a clear influence of the PICC⁷⁶³. In China, the previous negotiations are at the centre of the country's litigation culture. Actually, Chinese traders are usually dispute-averse, and most disputes are settled through negotiation, which is a requirement for any judicial procedure in the country⁷⁶⁴.

This divergence is merely formalistic though, since it is very common in Brazil for example, that the parties discuss any previous hardship situations of the contract in order to achieve an agreement, especially considering the lengthy and costly judicial system in Brazil. Only after the non-achievement of a common ground, does the aggrieved party resort to court or arbitration. Hence, the distinction among the countries does not raise much concern⁷⁶⁵.

As for the remedies, some sensible discrepancies and commonalities are verified, especially because they do not derive directly from the express text, but rather from practice. Based on the codified norms analysed in Chapter 3, Part I, Brazilian law only provides for the termination requested by the debtor, while modification is only a faculty conferred to the creditor in response to the claim for termination. Russian law also prioritises termination, by making express conditions for courts to proceed to the modification of contracts. Chinese Article 533 provides for both remedies without giving prevalence to one in detriment to the other (in accordance with the *actual circumstances*).

In practice, nevertheless, there are some changes. While the Russian practice applies more regularly to the codified provisions, case law research in Brazil returned cases of modification of contracts in favour to the debtor's request, not only termination. Brazilian

⁷⁶³ Pursuant to Article 6.2.3 of the PICC: "(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium."

⁷⁶⁴ JONES, William, *Sources*, cit., p. 316.

⁷⁶⁵ The same conclusion was reached under the comparative study within European countries, since there are also national laws and uniformising instruments that diverge with respect to the need for previous negotiation (RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018, p. 909).

literature strongly endorses this path⁷⁶⁶. In China, there is a clear preference for modification and maintenance of the contracts, with a considerable degree of intervention by the courts as a reflection of the principles of *pacta sunt servanda*, good faith and fairness⁷⁶⁷. Consequently, even though the codified law approximates Brazil and Russia, the practice approximates Brazil to China, except for the much stronger intervention of the Chinese judicial system.

Once the convergences and similarities are separated, and summarised pursuant to the table below, it is possible to reach the second step of the comparative analysis: the selection of issues to be (or attempted to be) harmonised.

Hardship		
Similarity	Divergences	
Discharge due to impossibility of performance	Discharge due to hardship (Brazil, Russia and China)	
Liability of the faulty party		
-	Similarities	Divergences
-	Supervenience	Contracts of duration (Brazil)
-	Imbalance	Loss of interest and impossibility to eliminate harms (Russia)
-	Unpredictability/seriousness	Previous negotiations (Russia and China)
-	Beyond parties' risk	Prevalence to termination (Russia and Brazilian codified law)
-	Remedy of termination	Prevalence to modification (Chinese practice and acceptance in Brazil)

⁷⁶⁶ As mentioned before, with the approval of Statement 176 of the III Journey of Civil Law: “*In attention to the principle of contract preservation, article 478 of the Civil Code od 2002 shall conduct, whenever possible, to the judicial revision of the contracts and not to the termination*”

⁷⁶⁷ QIU, Xuemei, *Contract* cit., p. 172; LENG, Jing – SHEN, Wei, *The evolution*, cit., p. 345.

2. Necessary cut-off

The research made in Part I and summarised in this first chapter returned a wide range of commonalities and divergences among the BRICS countries with respect to the issues of invalidity of contracts and hardship. Some of the differences can be surpassed by a closer and more detailed look, while others entail more practical concerns when envisioning the stimulation of private contracts within the BRICS. These more concerning issues must be selected for the next step of the comparative work.

Initially, the research highlighted divergences and particularities in the legal systems related to general principles applicable to contracts. Among those divergences, the concepts of privity of contracts and material equivalence does not raise much concern. Firstly because, as seen above, these two concepts are rarely conceived as fundamental “principles”. Secondly because, with respect to privity, all systems provide for limitations that amount to more convergence. Thirdly because, in case of material imbalance, even in the sole country not recognising it (India), there is room for discussing contract invalidity based on the disruption of parties’ symmetry under the concept of undue influence⁷⁶⁸.

Conversely, relevant divergence is found in regard to the principle of good faith, since it is a fundamental principle under three legal systems (Brazil, Russia and China), a recently recognised principle in practice by one of them (South Africa) and an unapplied principle in another (India). Despite such divergence, which retraces the common law *vs.* civil law dichotomy, the present study opted to not discuss the principle of good faith autonomously, but rather in the context of the issues of invalidity and hardship.

The reason for this option is threefold. Firstly, because the objective of this study is to discuss possible harmonisation of the issues of invalidity and hardship in practice, whereas discussing good faith would require a much more theoretical approach. Secondly, research revealed that the comparative study of good faith can be better understood when discussing the specific issues, facts and the given context where this principle actuates⁷⁶⁹. Good faith, alone considered, does not say much about comprehending the legal systems, a

⁷⁶⁸ Whose concept of Section 16 of the Indian Contract Act comprises the dominant position of one party opposed to the other.

⁷⁶⁹ Reference is made to the already mentioned comparative works: ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000; SEFTON-GREEN, Ruth (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge, Cambridge University Press, 2005; SCHMIDT, Jan Peter in JANSSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 102.

work that requires analysis of the deeper values embraced, as well as the policies pursued by each one of them⁷⁷⁰.

In the present study, for instance, the divergence in adopting the good faith principle directly impacts the consideration of a unilateral mistake as a ground (or not) for avoidance of a contract. Similarly, the acceptance of pure hardship, typical of civil law countries – a modification or termination of a contract –, entails some ground of uncertainty and is seen as a “daughter” of good faith. Hence, good faith is also in the background as part of the reason why India and South Africa (to some extent) do not recognise hardship⁷⁷¹. Notwithstanding that, the relevant divergences (as the harmonies) are extracted from the specific norms, without the need to resort to the principle of good faith⁷⁷².

Thirdly, a negative analysis of good faith can approximate the legal systems. Despite the theoretical conflict related to this principle, in none of the five countries the contracting parties are allowed to act in bad faith and deceive the other. Indeed, as seen above, Indian law (as well as its influencer English common law⁷⁷³) provides for several instances where the parties must act reasonably, such as the well-known duty to mitigate the loss. Hence, for the purposes of a comparative study in this field and an attempt to build the harmony bridge, the focus must be on the negative aspects of good faith (avoid bad faith) and not forcing its full recognition within the different countries⁷⁷⁴.

Based on the foregoing, the autonomous analysis of the divergent and particular⁷⁷⁵ principles of contract law within the BRICS, including the controversial good faith, will not comprise the harmonisation work of the following Chapters 2 and 3.

Regarding the issue of invalidity, the various divergences can be categorised within four groups: (i) purely technical divergences, which comprehends disparities related to the defined ages of partial majority and limitation periods; (ii) grounds for avoidance

⁷⁷⁰ ZIMMERMMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., pp. 668-669; SCHMIDT, Jan Peter in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 128.

⁷⁷¹ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship and Modification (or 'Revision') of the Contract*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011, p. 664; TALLON, Denis, *Hardship*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004, p. 503; ZIMMERMMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 678.

⁷⁷² ZIMMERMMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 683.

⁷⁷³ English contract law protects the “reasonable expectations of honest men” (see HUTCHISON, Andrew, *Relational Theory*, cit., p. 313).

⁷⁷⁴ ERP, J.H.M. van, *The Pre-Contractual Stage*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011, p. 513.

⁷⁷⁵ For instance, the social function of the contract in Brazil, consideration in India, *justa causa* in South Africa and environmental protection in China.

related to the defects of consent; (iii) mechanism for avoidance and (iv) consequences of avoidance. Some particularities of each system⁷⁷⁶ were not considered in such a grouping since they do not cause much practical concern for the harmonisation process.

Beginning with the group of purely technical divergences, any harmonisation attempt appears to be frustratingly impossible. They mostly refer to fixed terms provided by law (ages and time limits) and not to “concepts” feasible to be specified in practice for assessing similarities⁷⁷⁷. The exception is the limitation periods imposed by India and South Africa, which are open and could be discussed at length. However, restricting the analysis to only two countries would escape from the purpose of this study.

Moreover, these provisions are generally conceived as mandatory rules or public policy which by no means could be relaxed. Few concessions are seen in soft law instruments with a very precise scope, such as the PICC⁷⁷⁸, applicable to contracts marked by a commercial and international character. Consequently, the first group of divergences is excluded from the harmonisation analysis to be followed in this study.

The second group relates to the defects entailing avoidance and also does not deserve to be carried across the following chapters. Despite the existence of apparently important clashes, a closer look demonstrates that they can be compromised in practice without further dedication. Additionally, the aim of the study is also to gather contributory insights from divergences, which cannot be inferred from the analysis of this group.

The most controversial issue of the group is undoubtedly the defect of mistake, since it entails different effects according to each legal system. In Brazil, Russia and China, serious mistake, either bilateral or unilateral, is a ground for avoidance by the mistaken party, while Section 20 of the Indian Contract Act states that the contract is void when both parties are under mistake and Section 22 is unequivocal in stating that: “*A contract is not voidable*

⁷⁷⁶ For instance, the defects of state of danger and malice in Brazil, the several formality requirements in Russia, or the category of contracts “pending validity” in China, among others.

⁷⁷⁷ The issue of lack of capacity, for instance, was expressly excluded from the PICC pursuant to Article 3.1.1: “*This Chapter does not deal with lack of capacity*”. The reasons expressed in the official comment are: “*The reason for its exclusion lies in both the inherent complexity of questions of status and the extremely diverse manner in which these questions are treated in domestic law*”.

⁷⁷⁸ Article 10.2 provides for harmonised limitation periods from three to ten years: “(1) *The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised. (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.*”. However, national mandatory rules shall prevail (see Comment 3 to Article 10.3 of the 2016 edition of the PICC available at: <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>).

merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". Regarding South Africa, the consequences will depend on the individual case.

The divergence recalls the duality of common law *vs.* civil law. As mentioned above, when discussing the general principles in item 1.1, such duality is intrinsically linked with the contrast between the more objective approach of common law *versus* the subjective approach of civil law and the acceptance of good faith as a major principle⁷⁷⁹. Therefore, the weight conceded to defects of consent is usually much higher in civil law countries, such as Brazil, Russia and China, compared to common law nations, such as India and, in part, South Africa. This reflects in the treatment of mistake.

By privileging objectiveness, certainty and sanctity of contracts, only a more serious defect of consent will have the power to undermine the validity of a contract under common law tradition. Moreover, the recognition of unilateral mistake as ground for avoidance would allow a party to benefit from its own error and harm the other non-culpable party (with the recovery of the performance received)⁷⁸⁰. For this reason, only the common or shared mistake is serious enough to raise voidance in India. Nevertheless, there are two main aspects that approximate those systems on this issue of mistake.

Firstly, even though the civil law countries refer to a more subjective approach and provide for unilateral mistake as ground for avoidance, the rules provided for such application are both exceptional and very strict. For instance, Brazilian Civil Code states that a mistake must be substantial with respect to the party, to the nature of the contract, to the subject matter or to its essential qualities. The mistake must be so serious for the influenced relevant party to enter into a contract. The same threshold is provided for Russian Civil Code, whose Article 178, apart from setting several exceptions, states that the contract is only voidable if it can be proved that if the party had known about the mistake, he or she would never have entered into such a contract. Also in China, the law provides for serious misunderstanding and, as seen above, the Supreme People's Court interpreted this ground very restrictively, stating that the mistake must strongly affect the party and even cause him or her damages⁷⁸¹.

⁷⁷⁹ NICHOLAS, Barry, *The United Kingdom*, cit., p. 6; SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 19.

⁷⁸⁰ PATHAK, Akhileshwar, *Contract Law*, cit., p. 123; SWADLING, William John, *Restitution*, cit., p. 279; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 423.

⁷⁸¹ Respectively, pursuant to Articles 138 and 139 of the Brazilian Civil Code, Article 178 of the Russian Civil Code, Article 147 of the Chinese Civil Code and Opinion (for trial use) of the Supreme People's Court on Questions Concerning implementation of the General Principles of Civil Law, 26/01/1988, Article 71.

Secondly, Indian law provides for the defect of misrepresentation as a ground for a contract to be voidable. By the definition of misrepresentation in the Indian Contract Act (herein transcribed again), it is possible to identify its closeness to mistake: “*Misrepresentation*” means and includes - (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.”

In general terms, misrepresentation is nothing but a unilateral mistake, with the requirement that it must have been caused by an assertion, act or omission, and not spontaneously by the aggrieved party. Hence, cases where a party mistakenly conclude a contract due to a non-intentional assertion, breach or any other cause, will it entail voidability under Indian law. Although not a precise requirement stipulated by law, cases of mistake under Brazilian, Russian or Chinese systems are generally based on a wrong (although innocent) assertion either by the other party, or contained in the contract, or inferred by the circumstances. This shows that the systems are not so divergent as appeared at first glance.

This conclusion is not only drawn by the analysis of the plain language of the provisions in the BRICS countries, but was also exhaustively analysed in other comparative studies related to common law vs. civil law discrepancies. According to the hypothetical cases discussed under the Common Core project, related to comparative analysis in Europe, the existence of a statement (either intentional or not) that causes the mistake is enough to equal the treatment of voidability in all analysed systems. Most of the discussed cases in the project of voidable contracts due to mistake in civil law countries falls under the concept of misrepresentation in common law tradition⁷⁸² and, in those cases, it is interesting to note that there has been more court intervention in contracts under common law than in civil law countries⁷⁸³.

⁷⁸² BAR, Christian von – CLIVE, Eric (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, full edition, vol. I, Munich, Sellier, 2009, p. 464; SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., pp. 169-171, 199-201 and 221-222; CARTWRIGHT, John, *Defects of Consent in Contract law*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011, 549.

⁷⁸³ ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 372.

Furthermore, the concept of unconscionable bargain, an aspect of the defect of undue influence, was also used in the European project to approximate to the civilian concept of mistake⁷⁸⁴. Only few cases based on the assumption that there was a total absence of statement inducing the party to be mistaken, did the systems reach different results in considering a contract voidable⁷⁸⁵.

Clearly, the flexible approach adopted by South African law in considering the concrete case for the declaration of avoidance by mistake, despite bringing some uncertainty, is the one most suitable to address such small differences existent in the systems. If the mistake is not so serious or spontaneous, it will likely not be considered as grounds of avoidance (error in motive), opposed to substantial mistakes (*justus error*) directly caused by some kind of assertion, act, omission or circumstances.

The other defects that entail avoidance equally do not raise fundamental divergences. Gross disparity is widely recognised in Brazil, Russia, China (unfairness) and South Africa, while in India, although not expressly provided, is a concept that can be inferred from the defect of undue influence⁷⁸⁶ set forth in Section 16, where the voidability relates to the imbalance of power between the parties at the time of the contracting, creating an unfair advantage to the dominant party to the detriment of the weaker party.

The same approximation can be made with regard to simulated acts, concealed acts and malicious collusion (particularity of China). These types of defects can be considered as species of illegality or even bilateral mistakes and can entail nullity in all five legal systems. Simulated are those contracts fraudulently concluded, while malicious collusion refers to a contract concluded when both parties intentionally aim to cause harm to others' interests. Either way and which box it is placed in, these acts are all reprehensible by law and, therefore, shall not have a binding effect.

Still regarding the issue of the defects of consent, there is the particularity of the Indian and South African systems in recognising the misrepresentation and undue influence as grounds for avoidance, which is absent in the other three civil law countries. Needless to say that, as seen above upon the examples of mistake and gross disparity, these two defects are clearly harmonised with the others provided for in Brazil, Russia and China. Actually,

⁷⁸⁴ SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 161.

⁷⁸⁵ ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., pp. 372 and 656; SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., pp. 190 and 263-267.

⁷⁸⁶ The same approximation of the common law undue influence to the Chinese obvious unfairness is made by ZHANG, Mo, *Chinese*, cit., pp. 190-191.

misrepresentation and undue influence are broader concepts, which comprise of instances of mistake, malice and gross disparity, but with stricter requirements.

Borrowing again the European comparative experience, the harmonisation of the systems with regards to the defects leading to avoidance is achieved by focusing on the following key points assessed either cumulatively or alone: protection of the quality of the contractors' consent; sanction to the party's (or parties') wrongdoing; assessment and avoidance of the substantive unfairness of the result for one of the parties; or, in civil law countries, the observation of good faith⁷⁸⁷.

For the above reasons, the second group of divergence does not require further assessment to be harmonised either. However, this is not the case of the third and fourth groups of divergences identified for the issue of invalidity.

Regarding the mechanism for avoidance, the comparative analysis isolates those countries which require a judicial or arbitral demand from those providing for unilateral avoidance by mere communication. This is another feature of the dichotomy of common law and civil law that, differently from what is seen in the case of the defects of consent, lead the parties to act in quite different ways in practice. Moreover, such divergence adds relevant uncertainty to the trade practice since a contract can become void in one country within a few days (time for the communication is deemed effective), whereas, in another country, only after years of judicial/arbitral dispute.

The possible harmonisation on this issue is not so easily observed as happened with the grounds for avoidance. In fact, this seems to be an unbridgeable divergence and the finding of compatibility or, at least of contributory insight among these distinct rules, requires deeper assessment of their roots, values, policies and even traditions that led each legal system to adopt such a different approach, in order to, perhaps, extract familiar aspects that can promote harmonising results in practice. The issue of *how* to validly avoid a contract had to be faced with concern by international and European uniformising projects⁷⁸⁸ and, hence, the research on them may help to elucidate these familiar aspects not observed upon a superficial analysis.

⁷⁸⁷ ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 234.

⁷⁸⁸ HELLWEGE, Phillip, *Invalidity*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012, p. 990.

Considering the relevance of this divergence, this is the first issue for the harmonisation exercise of the next chapters.

The same happens with the fourth group of divergences encountered when assessing the issues of invalidity. The consequences of avoidance, related to the aspects of restitution, apart from hugely varying from one country to another, entail relevant hurdles to the contractual practice. The most concerning point refers to the preclusion of avoidance stipulated by some systems in case restitution is not possible (India) or, when both parties contribute to the vitiated contract (*in pari delicto* doctrine – India and South Africa).

For those situations Brazil, Russia and especially China provide for alternative remedies that may bring positive insights for the harmonisation and contributory exercise. The more detailed alternatives provided by civil law countries are important to analyse in combination with the exceptions provided by common law in order to avoid undue behaviour on contractual practice, such as the parties basing their claims on avoidance with the real interest to escape from performance, since they will not be obliged to restitution (typical cases of construction works concluded, but the other party refuses to pay based on invalidity), as well as the situation of parties remaining with an unlawful object.

This divergence was also appointed with concern under comparative initiatives as a serious clash among systems⁷⁸⁹ and, considering its practical relevance, will also be included in the harmonisation exercise.

Finally, we arrive at the issue of hardship. From the table included at the end of item 1.3 above, it is possible to see that the divergence affects the very basis of the treatment conferred by BRICS countries to the situations of hardship. The civil law countries adopt the pure hardship doctrine, which entails termination and modification of contracts in face of extreme supervenient and unpredictable difficulty, while common law only recognises termination (discharge) in cases of impossibility/frustration.

This clash between the Brazil/Russian/China *vs.* India/South Africa is, in itself, worthy of deeper comparative work, without the need or utility to dive into specific requirements and effects of the doctrines of hardship and impossibility within the common grounded countries, *i.e.*, it is not useful to discuss negotiation as a requirement within Brazil, Russia and China, since the systems are extremely aligned in practice, as seen above.

⁷⁸⁹ SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 162; ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 230 and 372-374.

However, the fact that some countries admit a mechanism that allows to modify or extinguish contracts in case of hardship (civil law) and others reject (common law) can be detrimental to the economic competitiveness and to the quality/seriousness of payers and contractual fairness⁷⁹⁰. Even if common law parties generally conclude very long and detailed contracts in order to comprise all possible hardship scenarios⁷⁹¹, there will inevitably be situations that fall outside all parties' predictability horizon (the human cognitive capacity to foresee the future is limited) and that will strongly impact performance, although not making such performance impossible or completely frustrated. The pandemic of COVID-19 is there to show this to the world.

Therefore, for the achievement of a useful harmonisation and mutual contribution, points of consensus in relation to these distinct doctrines and their implementation must be sought, or at least attempted. And this is why the following chapters of this study will also focus on the issue of hardship in general terms.

As a conclusion to this first chapter of Part II, the segregation of issues into the boxes of similarities and divergences, followed by the breakdown of the identified divergences, resulted in three aspects to be more deeply compared for the purposes of finding harmonisation and contributory grounds within the BRICS: (i) the mechanism of avoidance; (ii) the consequences of avoidance related to restitution and (iii) hardship.

These three aspects were confronted in other comparative and uniformising initiatives comprising other sets of countries and, hence, the deriving insights will be discussed in Chapter 2 below. In Chapter 3, the objective is to reach, as much as possible, the same approximation encountered in relation to the other aspects of invalidity (*e.g.*, defects of consent) and hardship (specific common issues within civil law countries) that caused us to readily cut them off from the outset.

⁷⁹⁰ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 654; HARMATHY, Attila, *Hardship*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016, p. 1041.

⁷⁹¹ PERILLO, Joseph M., *Hardship and its impact on Contractual Obligations: a comparative analysis*, in Saggi, Conferenze e Seminari, vol. 20, Roma, Centro di Studi e ricerche di diritto comparato e straniero, 1996, p. 2; PUELINCKX, Alfons H., *Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances :A Comparative study in English, French, German and Japanese Law*, in *Journal of International Arbitration*, Kluwer Law International, vol. 3, Issue 2, 1986, p. 48.

CHAPTER 2: HARMONISATION INITIATIVES – COMMON LAW AND CIVIL LAW DIVERGENCES

Subsequent to the analysis made in Part I as well as in the former chapter, the challenging issues that this study purports to compare and harmonise are: the mechanism for avoidance of the contracts, the consequences of avoidance - with focus on the different norms applied to the restitution of performances rendered - and, finally, the different doctrines and levels of recognition applied to hardship situations affecting contract performance.

The assessment of the treatment conferred by each legal system within BRICS to those selected issues demonstrated that the divergences mostly derive from the different legal traditions by which they are influenced. In all the three selected issues, there is a clear polarisation of civilian countries, Brazil, Russia and China on one side, and India and South Africa on the other, mostly inspired by common law tradition. Even though South Africa is conceived as a mixed system, when discussing the given three issues, the applicable guidance seems much more aligned with the common law mindset than to the civilian one. Nevertheless, the exceptions and flexibilities recognised by this system tend to be useful for the approximation of the countries.

Prior to taking this step, it is remarkable that the clashes between civil law and common law traditions were subject to heated debate within initiatives for comparative and uniformisation of contract law, especially those comprising European countries. Indeed, such dichotomy is widely seen as the major obstacle to legal unification of contract law⁷⁹² and claimed for the construction of uniform principles and model rules addressing the compromise between both traditions in order to obtain a certain degree of acceptance. Not only the “big villain”, but also the reason for contract law being the core subject of comparative law in general (when compared to other fields) lies on such duality⁷⁹³.

The present study, despite encompassing a very particular group of countries, must not ignore those initiatives. On the contrary, the borrowing of the discussions and decisions taken therewithin may be useful for addressing divergences among BRICS countries. Therefore, the first important legal instrument to be considered is the PICC.

⁷⁹² VOGENAUER, Stefan, *Common Law*, cit., p. 265.

⁷⁹³ FARNSWORTH, E. Allan, *Comparative*, cit., pp. 4-5.

The PICC, together with the CISG, is deemed as one of the most important and pioneering instruments for the uniformisation of contract law under the auspices of the renowned and traditional International Institute for the Unification of Private Law (UNIDROIT) in Rome, whose drafting counted with the intense participation of national delegations from all five continents and the most diverse legal traditions⁷⁹⁴. The first edition of the PICC was published in 1994, after a long-standing work initiated back in 1968 upon the proposal by the UNIDROIT General Assembly⁷⁹⁵, being revised in 2004, 2010 and 2016, when the rules have undergone modifications, updates and inclusion of new norms.

The PICC is a soft law instrument, according to the purpose set in its Preamble⁷⁹⁶, which differs from the purposes of CISG, a convention conceived to be ratified and adopted as national law of the countries⁷⁹⁷. The PICC's drafters avoided this traditional approach of public international law, but, at the same time, were not comfortable with the diverse treatment conferred by national legislations to contract law⁷⁹⁸. Despite this important issue and the massive adoption of the CISG⁷⁹⁹, as already mentioned, the issues of invalidity of contracts are expressly excluded from its scope, while hardship is very debatable and generally is inferred from the provision related to exemption of liability⁸⁰⁰. For those reasons, the focus on the PICC is more appropriate for the present study.

⁷⁹⁴ The participants of the successive working groups for the drafting of the PICC four editions can be accessed at their website (<https://www.unidroit.org/>), which contains specific link for "Instruments" > "Commercial Contracts" that provides for the official drafts and commentaries published.

⁷⁹⁵ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 483.

⁷⁹⁶ "PREAMBLE (Purpose of the Principles): *These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.*"

⁷⁹⁷ Pursuant to Article 91 of the Convention, combined with Article 1 which provides for its direct and autonomous application of the CISG.

⁷⁹⁸ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 481.

⁷⁹⁹ The CISG was adopted by 94 countries. Information available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

⁸⁰⁰ Pursuant to Articles 4 and 79(1) of the CISG: Article 4 "*This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.*"; Article 79: "*(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*" For some authors, the word "impediment" would include hardship and economic difficulties (see FAZILATFAR, Hossein, *The Impact*, cit., p. 171 and KHANDERIA, Saloni, *Transnational*, cit., p. 51, quoting Ingeborg SCHWENZER and John HONNOLD).

Furthermore, the pioneerism of the PICC lies on its autonomy from the national governments. The drafters did not carry a political mission, which could lead to a more conservative attitude towards new and uniform rules, but rather were formed by distinguished academics and lawyers carrying the objective of rationalising contract law through practical research targeted to address the special needs of the international trade⁸⁰¹.

Differently from the other international rules generated at UNIDROIT, the PICC, as a non-binding and soft law instrument, does not need to be accepted or signed by the organisation's Member States represented in the Governing Council. This organ merely authorises the publication of the PICC in the official languages, which gives a more autonomous character to this initiative⁸⁰².

The PICC was conceived to be a “restatement”, an American terminology that suggests that the instrument primarily articulates solutions that are common to all of the national legal systems across the world. However, the establishment of a common core was not the objective of the PICC, whose Working Groups worked to adopt what was considered to be the “best solution” from among the various models available in national laws⁸⁰³, even if it is far from being universally accepted. Therefore, the provisions under the PICC cannot be considered to comprise a common accepted rule by the nations involved, but played an important role in several recent law reforms⁸⁰⁴.

Similar initiatives flourished within the European continent, but with different and mixed purposes, and most of them supervised by European Commission in an enterprise aimed to construct a uniform contract law or, more ambitiously, a single civil code to be adopted inside the European Union. Even though this long shot did not properly succeed until now, these instruments contain important debates and are comprehensive enough to discuss the issues of invalidity of contracts and hardship, and the duality between civil law and common law clashes.

In this European endeavour, several working groups laboured to promote comparison, harmonisation and uniformisation by adopting different techniques and methods adequate to each different purpose. Contemporary to the PICC, the PECL can be

⁸⁰¹ DOUDKO, Alexei G., *Hardship*, cit., p. 484; VOGENAUER, Stefan (ed.), *Commentary on the UNIDROIT Principles of the International Commercial Contracts (PICC)*, 2nd, Oxford, Oxford University Press, 2015, pp. 8-9.

⁸⁰² VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 483-484.

⁸⁰³ In accordance with the uniformisation/unification technique discussed at ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 24.

⁸⁰⁴ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 485 and 488.

considered the first initiative drafted by the so-called Lando Commission, in a tribute to Ole Lando who chaired the project in the Commission on European Contract Law⁸⁰⁵.

The PECL differs from the PICC since its focus is not only on international contracts, but rather all types of contracts. However, since the PECL provisions are strongly related to business transactions, another group was empowered with the mission to incorporate common rules on consumer contracts, forming the research Group on the Existing EC Private Law, the so-called Acquis Group, or *Acquis Communautaire*, which produced the Acquis Principles or just ACQP⁸⁰⁶. More recently, a new attempt to revise both instruments was carried out with the preparation of the DCFR, already defined.

The DCFR was strongly based on the PECL in the issues of contract law, but with a wider scope. For instance, its provisions are not limited to “contracts”, but rather concern “juridical acts”. The DCFR emerged as an idea to bring another optional regime on contract law within Europe. The draft was prepared by the “Study Group on a European Civil Code”, which was financed by the European Commission and considered as a successor of the former Lando Commission. The work was conducted between 2005 and 2009, when the DCFR was fully edited and published, and concentrated in the revision of PECL and ACQP, but gathering inputs also from the PICC and the CISG⁸⁰⁷.

The DCFR contemplates three parts: the Model Rules, a list of definitions and a discursive section devoted to the instrument’s underlying principles of freedom, security, justice and efficiency. The most important is definitely the part comprising the Model Rules, which has been detailed across ten books drafted with the purpose to possibly comprehend a European Civil Code in the future⁸⁰⁸.

Despite the great effort and comprehensive set of uniform rules, the DCFR did not either succeed in achieving the status of a Civil Code and was then revised in 2010. In

⁸⁰⁵ JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 3 and 5. The draft PECL is available at: <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf>. Accessed on 15 August 2021.

⁸⁰⁶ *Idem, ibidem*, pp. 6-11.

⁸⁰⁷ ZIMMERMANN, Reinhard, *Common Frame of Reference (CFR)*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, pp. 261-263; BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., pp. 2 and 15-16; JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 6-10; HONDIUS, Ewoud, *Towards a European Civil Code*, in HARTKAMP, Arthur S. *et al.*, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011, p. 5; BEALE, Hugh *et al.* (eds.), *Cases, Materials and Text on Contract Law*, 2nd ed., Oxford, Hart Publishing, 2010, p. 19.

⁸⁰⁸ ZIMMERMANN, Reinhard, *Common Frame*, cit., p. 261; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., pp. 11-12.

contradiction with its initial goal, the new revision was focused in “re-contractualisation” of the DCFR with the removal of provisions that are not relevant for the unification on the law on contracts for consumer and business relationships⁸⁰⁹. The main critics made to the DCFR comprised the erosion of private autonomy, that the draft went far beyond the modern tendencies to materialise contract law, the abundance of blanked provisions and open legal concepts, which leads to expansion to judicial discretion, the lack of coordination among the rules, especially with the consumer part, and, finally, the obscure boundary between a textbook and a legislation⁸¹⁰.

As a result of the revision of the DCFR, other sets of rules were drafted in Europe, such as the Common European Sales Law (CESL). However, similar to the CISG, this set of rules is more focused on sales contracts and lacks provisions on the issues of invalidity⁸¹¹, being of minor contribution to the present work.

Notwithstanding the critics on the European unifying initiatives, the discussions and principles originated from the drafts of the PECL and the DCFR are extremely useful when it comes to understanding the rationale adopted for addressing the issues of the mechanisms of avoidance, consequences of avoidance and hardship in the clash between common law and civil law approaches. Therefore, their provisions will be discussed in this chapter, while other instruments, such as CESL and ACQP are excluded due to their limited focus.

Still in the European enterprise, an important comparative effort was raised by the Trento Common Core, coordinated by Professors Mauro BUSSANI and Ugo MATTEI, which already contributed to this study in the analysis and comprehension of issues of invalidity discussed in Chapter 1 above. Differently from the PICC, PECL and DCFR, the Common Core was not conceived as a unifying work, for the drafting of a set of common rules or principles, but rather a deep comparative work with the objective to analyse the commonalities and divergences among European countries based on the solution of hypothetical cases⁸¹².

⁸⁰⁹ JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 10-11; ZIMMERMANN, Reinhard, *Common Frame*, cit., p. 264; ZIMMERMANN, Reinhard, *The Unwinding of Failed Contracts in the UNIDROIT Principles 2010*, in *Uniform Law Review* vol. 16, No. 3, 2011, p. 586; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 21.

⁸¹⁰ ZIMMERMANN, Reinhard, *Common Frame*, cit., pp. 263-264; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., pp. 29-30.

⁸¹¹ JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 11.

⁸¹² REIMANN, Mathias, *Of Products*, cit., pp. 84-86; CURRAN, Vivian Grosswald, *On the shoulders*, cit., p. 2; SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 15.

The idea behind the project was precisely to escape from pushing and forcing similarities from different realities in order to create common norms. The work privileged the theoretical comparison based on practice and, upon this, permits the identification of common cores within Europe, but also irremediable divergences⁸¹³. The result was not a set of fixed guidance, but instead the publication of ten comprehensive books (the Trento Volumes) which detailed the indication of the treatments conferred by each participating legal system and comparative commentary on the issues of: good faith, defects of consent, causa and consideration, pre-contractual liability, property and torts⁸¹⁴.

The Common Core stems from a comparative work declaredly based on two methods: the already mentioned Cornell method of Rudolf SCHLESINGER, which uses problems and questionnaires in order to evaluate the reactions of each legal system and proceed to the comparison, combined with and the legal formants methodology of Rodolfo SACCO, which examines all the formative elements of the system (statutory rules, scholarly commentaries and doctrines and case law)⁸¹⁵.

Therefore, this project plays a relevant role for legal harmonisation in Europe, by providing reliable information to be used for the devise of common solutions⁸¹⁶. Nonetheless, such devise is not within the scope of the project. With the findings on commonalities and divergences, the project could not always reach a real common core in all aspects of contract law and some issues were not so deeply detailed in the published volumes. Moreover, the project is comprehensive in identifying divergences but, at times, does not move to a further step to work on these divergences and promote possible solutions for harmonisation⁸¹⁷. Such enterprise was left for the uniformising initiatives.

Based on the foregoing, the present study considered some aspects of the Common Core project in the past Chapter and when discussing previous efforts for harmonisation of the issues of invalidity and hardship. This second cut-off of the instruments to be analysed is also necessary considering the variety of harmonisation and uniformisation

⁸¹³ FRANKENBERG, Günter, *How to do projects with Comparative Law. Notes of an expedition to the Common Core*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007, pp. 27 and 32; REIMANN, Mathias, *Of Products*, cit., pp. 84-86.

⁸¹⁴ For an introduction of the Common Core and the published works, see BUSSANI, Mauro – MATTEI, Ugo, *The Common Core Approach to European Private Law*, available at: [The Common Core Project \(unitn.it\)](https://www.unitn.it/en/research-and-projects/the-common-core-project). Accessed on 15 August 2021.

⁸¹⁵ FRANKENBERG, Günter, *How to do projects*, cit., pp. 24-25; BUSSANI, Mauro – MATTEI, Ugo, *The Common Core*, cit.; HONDIUS, Ewoud, *Towards a European*, cit., p. 16; FARNSWORTH, E. Allan, *Comparative*, cit., p. 6.

⁸¹⁶ FRANKENBERG, Günter, *How to do projects*, cit., p. 27.

⁸¹⁷ MICHAELS, Ralf, *Comparative*, cit., p. 299.

projects developed worldwide. The multiple initiatives and the lack of coordination among them cause the existence of different isolated discourses, that hardly consider other similar projects, leading to incompleteness and the drafting of concurrent sets of principles and concepts⁸¹⁸.

This problem leads to the option for the PICC, more universally, and PECL and DCFR in Europe, which are historically related to each other and reveal some sort of “progression” from one to another, with insights from the more independent Common Core. Common ground among all of them? They open up the duality between common law and civil law traditions in the three issues to be analysed and work on their harmonisation.

If they were successful in addressing the issues in face of such dichotomy, the next items of this chapter will show.

A final disclaimer. With respect to other initiatives of harmonisation of private law outside the European context, reference is made to the importance of the Organisation for the Harmonisation of African Business Laws (*Organisation pour L’Harmonisation en Afrique du Droit des Affaires* – “OHADA”), established in 1993 with the objective to implement a modern and harmonised legal framework in the area of business law, for the promotion of investment and development of economic growth among African countries. Despite its relevance and success achieved, OHADA is only formed by civil law countries (with the exception of some provinces in Cameroon) which are strongly aligned in many issues of contract law⁸¹⁹. Therefore, the work developed under the auspices of this Organisation has less to contribute to the present study, in addition to the fact that South Africa (the African member of the BRICS) is not part of the OHADA. For those reasons, the present Chapter will not consider the OHADA harmonising initiative.

1. Mechanism of avoidance

The first issue of the cut-off made in Chapter 1 of this Part II refers to the mechanism of avoidance in case of voidable contracts, which considerably differs from the

⁸¹⁸ JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 14; ZELLER, Bruno, *The Development*, cit., p. 1183. The author criticises the fact that every attempt to uniform European legislation, the European Commission, instead of analysing why previous attempts failed, has embarked upon ever more complex and more far-reaching harmonization than before, and somehow ignoring the existing instruments.

⁸¹⁹ MANCUSO, Salvatore, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, in *Annual Survey of International & Comparative Law*, vol. 14, Issue 1, Art. 4, 2008, pp. 40-41.

necessity to file a judicial relief to the mere communication. Beginning with this antagonistic divergence (pardon for the redundancy), it is possible to demonstrate how difficult is the task of harmonising and uniformising rules on invalidity in general.

The issue of invalidity is considered one of the most complicated when discussing contract law. The national legal systems substantially vary from one to another, even among those following the same legal tradition, in many respects, such as the grounds for invalidity, grounds for illegality and its impact on invalidity, mechanism of avoidance, consequences, damages and quantification. The reason for such a variety is because invalidity deals directly with the particular principles, usages and morals of each nation, and then refer to cultural and traditional aspects that extrapolates the widely recognised norms. This was, indeed, one of the reasons why invalidity was excluded from the CISG⁸²⁰.

Compared to other areas of contract law, such as formation, breach and damages, where convergence is more easily achieved, the issue of invalidity is where the studies reach the minor level of harmony, as indicated by the Common Core project based on the European experience⁸²¹. Indeed, the room for harmonisation was so little in this field, that the project in general, merely illustrates the divergence, but does not suggest any approximation measure or technique. This situation happens with respect to the mechanism of avoidance of the contract.

Therefore, the analysis on this first issue begins with the other uniformising initiatives. Based on the provisions of the PICC, PECL and DCFR⁸²², the subject seems not to raise much concern, since all are convergent in adopting the effective communication as sufficient for avoiding a contract:

PICC: Article 3.2.11: *“The right of a party to avoid the contract is exercised by notice to the other party”*

⁸²⁰ MACQUEEN, Hector L., *Illegality and Immorality in Contracts: Towards European Principles*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011.

⁸²¹ ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 653-655; SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 162.

⁸²² For the purpose of this study reference is made to the 2016 edition of the PICC available at: <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>; to the text of the PECL available at: <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>; and to the text of the DCFR available at: [PRINCIPLES, DEFINITIONS AND MODEL RULES \(ccebe.eu\)](https://www.ccebe.eu/) and in the book BAR, Christian von – CLIVE, Eric (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, full edition, vol. I, Munich, Sellier, 2009. All links accessed on 15 August 2021.

PECL: Article 3:112: “Avoidance must be by notice to the other party”

DCFR: II-7:209: “Avoidance under this Section is effected by notice to the other party”

The official comments on these provisions, as well as on other provisions analysed in this Chapter, are not of great support in identifying the divergences existing among the various involved systems and how the uniform solution was reached. This is mainly due to the lack of reference to the *travaux préparatoires* in the official comments. Their purpose is to explain what a specific rule or concept is intended to mean, accompanied by illustrations, but not why such a rule was adopted⁸²³, which makes it necessary to resort to legal scholarship.

However, even when specifically dealing with the issue of the mechanism for avoidance, the commentaries and analyses are very limited. In general terms, all of the initiatives take into consideration the conflict between mere communication *vs.* judicial relief, but adopted the first mechanism as a way to bring efficiency to contractual practice.

As regards the PICC, the objective of Article 3.2.11 was precisely to avoid the cultural clash among the systems by providing a wider concept which is better for the international commercial relationships (without the need for court intervention), and, at the same time, to prevent the avoidance from occurring *ipso facto*. The notice according to the PICC does not need to detail the reasons for avoidance (although recommendable), but it must unequivocally indicate the intention to avoid the contract⁸²⁴.

Since the official comments refer to Article 1.10(1) of the PICC, there is no formal requirement for the notice, which must be given by any means appropriate to the circumstances⁸²⁵. Furthermore, there is no requirement for the addressee to reply to the notice, which means that it retains the right to possibly challenge the avoidance in court even in case of silence⁸²⁶.

⁸²³ JANSSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 13.

⁸²⁴ BRÖDERMAN, Eckart J., *UNIDROIT Principles of International Commercial Contracts. An Article-by-Article Commentary*, Alphen aan den Rijn, Kluwer Law International BV, 2018, p. 96; VOGENAUER, Stefan (ed.), *Commentary*, cit., pp. 530-531.

⁸²⁵ Pursuant to the Official Comment to Article 3.2.11: “No provision is made in this article for any specific requirement as to the form or content of the notice of avoidance. It follows that, in accordance with the general rule laid down in article 1.10(1), the notice may be given by any means appropriate to the circumstances”. Article. 1.10: “(1) Where notice is required it may be given by any means appropriate to the circumstances.”

⁸²⁶ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 531.

The same reasoning applies to the PECL and DCFR, which also refer to the word “notice”. However, when analysing the applicable rules on notice and further official comments, these instruments are clearer in providing that it can be “*in writing or otherwise*”, which accepts the possible avoidance even by mere conduct⁸²⁷. This wide range of possibilities and lack of requirements with respect to the notice for avoidance, although positive for a compromise rule, leaves some room for uncertainty, especially considering that the majority of countries - in particular those participating in PICC and encompassed by PECL and DCFR - requires a judicial measure for avoidance⁸²⁸.

Such a concern was not ignored by the drafters of these instruments. As already mentioned, the drafters and literature recognise the absence of common core with respect to the question of the mechanism of avoidance and that the prevailing international option is a measure that, in principle, affronts most of the national legal systems⁸²⁹. However, they indicate the roots of the existent divergences and the reason for such adoption.

The requirement for a judicial request and subsequent decision for effecting avoidance stems from the historical background of the majority of civil law countries based on Roman law and followed by the *ius commune* tradition. According to such tradition, an aggrieved party when sued by a party with respect to a contract affected by fraud or threat could resort to the defence *exceptio doli* or *exceptio metus causa*, or even sue the other party for damages deriving from that defective contract. Therefore, discussing avoidance has been historically a judicial issue. Since the mistake and other defects of consent affected the validity of the contracts in a similar manner as fraud and threat, historically, the same approach was transferred to them and extended in a way that the mere declaration of invalidity is also subject to court appreciation⁸³⁰.

However, upon the reform of some civil law codifications (such as the German and the Dutch) and the rethinking of rules based on efficiency, the requirement of court request has been losing force, while the unilateral avoidance has been gaining prevalence⁸³¹.

⁸²⁷ Article 1:303 of the PECL: “(1) Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.”. Official Comment on DCFR II-7:209: “Under the normal rules on notice, the notice may be given by any means appropriate to the circumstances. In informal circumstances it need not be in writing and need not use technical legal terms.”.

⁸²⁸ CRISTOFARO, Giovanni de, “Invalidity” of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law, in SCHULZE, Reiner – STUYCK, Jules, *Towards a European Contract Law*, Munich, Sellier, 2011, p. 103.

⁸²⁹ LOHSSE, Sebastian in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 714.

⁸³⁰ HELLWEGE, Phillip, *Invalidity*, cit. p. 992; LOHSSE, Sebastian in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 715.

⁸³¹ HELLWEGE, Phillip, *Invalidity*, cit. p. 992.

And, in the case of the uniform instruments, the choice for a self-help remedy was much more inspired by practical reasons: the need to resort to court, as mandatory for extinguishing contracts for invalidity, would cause excessive burden for the parties, for the court system, and would jeopardise the efficiency of the international commercial transactions⁸³².

As a conclusion, the analysis of the uniform rules on the mechanism of avoidance and the underlying reasons demonstrates that the existent divergence between the two opposing approaches was not solved, but instead compromised⁸³³. They identify no theoretical common core among the relevant systems, but a *common interest* towards efficiency to the contractual practice by agreeing on the adoption of a self-help remedy for the purposes of avoidance and, at the same time, without imposing any obstacle or preclusion for possible judicial measure.

The search for this common interest particularly manifested in cases of commercial contracts was the core stone for addressing this first issue and led the participating countries (from civil law and common law families) to accept to waive part of their domestic rules in order to bridge harmony on apparently unbridgeable discrepancy.

2. Consequences of avoidance – unwinding contracts and restitution

The same uniform success in PICC, PECL and DCFR presented in the issue of the avoidance mechanism is though not verified with respect to its consequences and the particularities applicable to restitution when it is not possible to be made in kind (*in natura*) or when it derives from illegality.

The treatment on how to unwind contracts (terminology used by comparativists for the consequences of failed contracts⁸³⁴) appears in three main scenarios in the uniformising instruments of contract law: in cases of avoidance, illegality and termination (either by breach of contract, impossibility or hardship). Despite some advocacy in favour

⁸³² LOHSSE, Sebastian in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 714-715.

⁸³³ CARTWRIGHT, John, *Defects*, cit., p. 552.

⁸³⁴ For instance, see ZIMMERMANN, Reinhard, *The Unwinding*, cit., *passim*; HELLWEGE, Phillip, *Unwinding Contracts*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012 (1751-1755); HELLWEGE, Phillip, *Unwinding mutual contracts: restitutio in integrum v. the defence of change of position*, JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, *passim*; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., item 4.

to a unifying approach to all scenarios⁸³⁵, the PICC, PECL and DCFR preferred the segregation, especially due to the retrospective effects in case of avoidance and illegality (when applicable) and the prospective effects in case of termination.

For the present Chapter, and for the further discussion on the BRICS reality, the rules applicable to the cases of invalidity and illegality are the most relevant and will follow beginning with the rules on general invalidity.

2.1. Invalidity in general

The provisions of the analysed unifying initiatives which are applicable to the consequences of general invalidity are the following:

PICC: Article 3.2.15: “(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that such party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided. (2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable. (3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party. (4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.”

PECL: Article 4:115: “On avoidance either party may claim restitution of whatever he has supplied under the contract or the part of it avoided, provided he makes concurrent restitution of whatever he has received under the contract or the part of it avoided. If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.”

⁸³⁵ HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., pp. 267 and 270; HELLWEGE, Phillip, *Unwinding*, cit., p. 1752 and the same author in JANSSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1397.

DCFR: II- 7:212: “*Effects of avoidance (1) A contract which may be avoided under this Section is valid until avoided but, once avoided, is retrospectively invalid from the beginning. (2) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment. (3) The effect of avoidance under this Section on the ownership of property which has been transferred under the avoided contract is governed by the rules on the transfer of property.*”

Based on the provisions above it is possible to infer that the issue entails more complexity than the previous one and that the instruments, at first glance, seem not to follow the same path, forcing their individual analysis in order to, subsequently, try to find their roots and reasonings as it was done in the case of the avoidance mechanism.

The PICC provision (Article 3.2.15) details the consequence stated in the previous Article 3.2.14 in the sense that the avoidance of a contract, pursuant to the grounds referred in Chapter 3 of the PICC, will always take effect retrospectively. The question as to whether the contract is void *ab initio* or voidable is of little relevance here, since this is only a procedural issue leading to the same result of a contract to be retrospectively ineffective from the beginning⁸³⁶.

The underlying rule applicable is that the parties may claim the restitution of the supplied performance, provided that this party makes the concurrent restitution of the received performance, restoring the parties to the *status quo ante contractum*. When such restitution is not possible or appropriate to be done in kind (*restitution in integrum*) due to none of the parties' fault, the provision refers to an “*allowance in money whenever reasonable*”.

According to the official comments to this provision, the substitutive restitution is not only limited to cases of impossibility, but also to inappropriateness, which covers the circumstances where restitution in kind would cause an unreasonable effort or expense. The

⁸³⁶ ZIMMERMANN, Reinhard, *The Unwinding*, cit. p. 565.

illustration is of that classic situation where the subject matter of the contract sinks in the ocean and recovery would vastly exceed the value of such subject matter⁸³⁷.

The background of Article 3.2.15 reveals that the drafters of the PICC considered to leave the specific rules on restitution to the applicable national law, by virtue of the substantial disparities among the various jurisdictions, especially considering that, in some of them (common law countries), the avoidance can be even precluded when restitution is not possible. However, the idea was abandoned in an effort to provide for an autonomous and harmonising regulation⁸³⁸.

For such harmonising purpose, the drafters opted for the soft and open wording “*allowance in money whenever reasonable*” in order to guarantee sufficient room for the most suitable solution to the given circumstances of the case. This was a preferable middle ground approach rather than leaving the parties with the effects of a contract tainted by invalidity grounds (by preventing restitution), as provided in some jurisdictions of common law tradition⁸³⁹.

The wording “*allowance in money*” is obscure though, and almost no guidance can be obtained as to how to interpret it isolated from the concrete situation. The official comments state that the allowance will “*normally amount to the value of the performance received*”⁸⁴⁰, but is silent about how this normal amount is determined and which criteria should apply. The vagueness, despite being criticised for raising uncertainty, was in fact intentional considering the flexible scope of this soft law instrument⁸⁴¹ and after several discussions of the most appropriate wording⁸⁴².

By adopting a “*normal amount of the value*”, the provision seems to refer to objective or external criteria, such as a market measure or market price applicable to the given performance. However, the limitation of “*whenever reasonable*”, combined with the Illustrations of the official comments, suggests that subjective criteria shall be considered in order to correct possible distortions caused by the objective criteria and provide for more

⁸³⁷ PICC official Comments, item 2, illustration 3; HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1407.

⁸³⁸ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 541.

⁸³⁹ BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 101; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 543; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 509.

⁸⁴⁰ PICC official comments, item 2, illustration 2.

⁸⁴¹ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 509-510.

⁸⁴² ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 571. The author mentions that it was raised the substitution for the word “compensation for value”, but the term “allowance” was wider and aligned with common law terminology.

flexible or even equitable approach (consideration to what the parties have indicated in the contract, or the specific context involved in the exchanged performances)⁸⁴³.

The moment for the quantification of the allowance is neither precisely defined nor indicated by the official comments. Reference is made to the time when the avoidance gave rise to the duty to restitution, and the risk of possible deterioration of the subject matter lies with the party in its control (except where the deterioration was caused by the other party)⁸⁴⁴. The official comments, when discussing deterioration or destruction after this moment of the avoidance, state that the recipient is under the duty to return the performance received subject to the payment of damages instead, pursuant to Article 7.4.1 PICC⁸⁴⁵.

The PICC provision includes the reasonable expenses incurred for preserving the received performance as part of the restitution in case of avoidance. However, despite being an apparently obvious counterpart, there is no accounting for benefits or fruits deriving from the received performance⁸⁴⁶. Such a choice aims to avoid even more complexity and litigation on the matter of avoidance and restitution (which is already very complex), due to the difficulty in measuring the parties' benefits and to the focus of the provision on the actual loss of the aggrieved party (which must be restored) and not on the other party's gain (which would not always matter for leading the aggrieved party to the *status quo ante*)⁸⁴⁷. Only in cases of more serious defects of the contract, does the argument for requesting benefits gain greater force⁸⁴⁸.

Finally, the PICC's frame also does not exclude the possibility of the aggrieved party to claim additional damages in cases where the other party acted intentionally for the avoidance and being aware of its existence. However, such recovery of damages is limited to the necessary amount to put the party in a situation without a contract, and thus, loss of profits and loss of change (applicable in case of breach) are hardly comprised. Restitution

⁸⁴³ VOGENAUER, Stefan (ed.), *Commentary*, cit., pp. 545-546; ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 572.

⁸⁴⁴ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 511; ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 573; VOGENAUER, Stefan (ed.), *Commentary*, cit., 548.

⁸⁴⁵ PICC official comments, item 3, illustration 8. Article 7.4.1 PICC: "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles."

⁸⁴⁶ PICC Official Comments, item 5; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 511; ZIMMERMANN, Reinhard, *The Unwinding*, cit., pp. 579-582.

⁸⁴⁷ BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 99-100; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 542; ZIMMERMANN, Reinhard, *The Unwinding*, cit., pp. 582-583.

⁸⁴⁸ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 542.

and damages must be understood systematically together, as one unit of the overall economic goal of contract avoidance (restoration to the *status quo ante*)⁸⁴⁹.

Comparing the PICC Article 3.2.15(2) to the PECL Article 4:115, the difference lies on the wording “*reasonable sum*” of the latter confronted with the “*allowance in money whenever reasonable*” for the former. Here, again, an open statement was chosen which does not provide for more details on what, how and when the appraisal of the reasonable sum is to be made. Resorting to the rules on termination will not help either, since the same notion of “*reasonable amount for the value*” is set forth therein⁸⁵⁰.

The reason for such vagueness and lack of criteria? Again, the substantial disparity among the involved legal systems that vary from full restitution to the total preclusion in particular cases of impossibility of restitution in kind or failure of consideration, typical from common law traditions⁸⁵¹. Despite the wide divergence, it is possible to infer that the drafters’ choice was to privilege a compensatory model for unwinding contracts even in cases of impossibility, instead of the preclusion.

The background of the preparation of the European Principles reveals that the argument in favour of preventing restitution in cases where restitution *in natura* is impossible was to avoid the difficulties in assessing the value of the performance⁸⁵² – precisely the difficulty faced by the vague provisions on restitution. This was, for instance, the underlying reason for the rule stipulated in Article 82(1) of the CISG⁸⁵³, applicable to termination (a clear common law-oriented provision⁸⁵⁴).

Nonetheless, the drafters of the PECL, like those of the PICC, understood that such difficulty should not prevail in situations where the parties are bound by a void contract,

⁸⁴⁹ Article 3.2.16 PICC: “*Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract*”; BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 102.

⁸⁵⁰ See, for instance, Article 9:309 of the PECL: “*On termination of the contract a party who has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party.*”

⁸⁵¹ STORME, Matthias E., *Harmonization*, cit., p. 202; HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1397 and 1407.

⁸⁵² HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1407. With respect to this common law argument, see also: CHEN-WISHART, Mindy, *In defence of unjust factors: a study of rescission for duress, fraud and exploitation*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, p. 182.

⁸⁵³ Article 82 of the CISG: “*(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.*”

⁸⁵⁴ ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 573.

and thus, adopted the compensatory model. This model of restitution will apply in several circumstances, such as when the received performance is subsequently lost, or can by its very nature not be returned (*e.g.*, services performed), or when the recipient is unable to return the received performance in the same condition of the time of the receipt (*e.g.*, deterioration of the subject matter)⁸⁵⁵.

Given the vagueness and absence of criteria of the PECL provision, as in the PICC case, both objective and subjective approaches are put in place for measuring what constitutes the “*reasonable sum*”, and both have pros and cons. The objective approach considers the value of the performance in general terms (reference to usages, to the market), while the subjective approach considers the price contracted by the parties. However, the application of the objective approach may lead a party to escape from a poor bargain and unjustly enrich from the avoidance, although not always the case there is subjective measure provided for in the contract or such measure may be even vitiated⁸⁵⁶.

Based on these clashes, literature advocates that, for cases of avoidance, the objective approach would be more suitable. The argument is that it would not be plausible to consider the contract price of a void contract as the measure for restitution, especially because the parties must be restored to a situation *without* that contract. As for the downside related to a party evading bad bargains, this would also happen with the restitution *in natura* (when it is possible) without raising concerns and, therefore, this downside cannot be used as a way to exclude the objective approach⁸⁵⁷. In any case, the language of the PECL is wide enough to comprise both approaches and adjust in accordance with the circumstances, since it will not be possible, nor desirable, to apply a single approach to all cases⁸⁵⁸.

The PECL also does not provide for the time in which the appraisal of the reasonable sum is to be completed. Differently from the opinion exposed about the PICC (time when the avoidance give rise to restitution), the commentators refer to the time when the performance is to be made, since the reasoning is that the parties must return to the position before such a performance took place⁸⁵⁹. Divergences due to devaluation are to be

⁸⁵⁵ HELLWEGE, Phillip *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1407. Also in defence of the compensatory model, see: CHEN-WISHART, Mindy, *In defence*, cit., p. 182.

⁸⁵⁶ HELLWEGE, Phillip, *Unwinding*, cit., p. 1753; HELLWEGE, Phillip *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1408-1409.

⁸⁵⁷ *Idem*, *ibidem*, p. 1753; *Idem*, *ibidem*, p. 1409.

⁸⁵⁸ CHEN-WISHART, Mindy, *In defence*, cit., pp. 183 and 192.

⁸⁵⁹ HELLWEGE, Phillip, *Unwinding*, cit., p. 1753; HELLWEGE, Phillip *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1410; CLIVE, Eric, *Restitution and Unjustified Enrichment*, in HARTKAMP,

analysed in face of the circumstances in a restrictive way, since the recipient usually bears the risk of deterioration unless the party deserves special protection (for instance, fault of the other party, or in cases of avoidance in which the party is a minor, among others)⁸⁶⁰.

Similar to the PICC, the PECL does not provide for the obligation to return benefits and fruits accrued upon the performance. On the other hand, the PECL does not provide for the return of reasonable expenses incurred with the preservation of the subject matter either, which differentiate it from the PICC (item (4) of Article 3.2.15).

In principle, when considering that the parties must be restored to the *status quo ante contractum* and the time of appraisal is the time of performance, neither the fruits, nor the expenses should be considered, because none of them would have occurred at the time of performance. This is different from the PICC, where the time question relates to the time of avoidance and these additional sums may be already incurred or gained.

Further to this question of the time of appraisal, a mandatory provision to return fruits or expenses could have the detrimental effect of discouraging parties to discuss avoidance and its consequences. Therefore, the approach adopted by the PECL, excluding the restitution of expenses and fruits as a mandatory requirement, seems to be the most adequate⁸⁶¹. In any case, the language of the PECL is wide enough to consider possible restitution of these additional amounts, when the specific case requires.

Finally, with regards to damage compensation, the PECL provides for a similar approach to the PICC, where this remedy has a supplementary function for a party who is still uncovered (was not put in the position if no contract was concluded) even after receiving the restitution and, as long as the other party knew about the avoidance⁸⁶².

Arthur S. *et. al*, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998, pp. 389-390.

⁸⁶⁰ HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1410.

⁸⁶¹ HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1419-1420.

⁸⁶² Pursuant to Article 4:117 of the PECL: “(1) A party who avoids a contract under this Chapter may recover from the other party 278 damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage. (2) If a party has the right to avoid a contract under this Chapter, but does not exercise 279 its right or has lost its right under the provisions of articles 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The same measure of damages shall apply when the party was misled by incorrect information in the sense of article 4:106. (3) In other respects, the damages shall be in accordance with the relevant provisions 280 of Chapter 9, Section 5, with appropriate adaptations.”

The DCFR, in turn, provides for an apparently different approach in Article II-7:212. By recognising the retrospective effect of avoidance, the provision then transfers the treatment of restitution in general (of goods, services or properties) to a specific set of rules governing unjustified enrichment and transfer of property, a similar approach to the German system of unwinding contracts⁸⁶³.

With the purpose to revise and update the PECL, and by gathering inputs also from the PICC, the drafters of the DCFR had to rethink the former provisions in view of the deep discrepancies that jeopardises uniformisation within Europe. In doing so, the option was to achieve the root and common ground of all involved systems: the benefits obtained or retained by a party at the expense of the other party as a result of a void contract is deemed to be an unjustified enrichment and, therefore, the aggrieved party will have the right to have this undue enrichment reversed⁸⁶⁴. Resort to unjustified enrichment is normally a subsidiary measure provided when no specific rule on restitution is established, and this is an alignment even between common law and civil law⁸⁶⁵.

Although emptying the proper provision of avoidance (Article II-7:212) and creating some difficulty with the cross reference to other norms, the DCFR attempted to reach a compromise rule between the general rules on restitution provided in other instruments and national laws and those commonly discussed obstacles provided in some common law jurisdictions when restitution in kind is not possible or appropriate⁸⁶⁶. Such absence left in the proper provision is considered with little relevance though, provided that the rules on unjustified enrichment address the parameters for the restitution appraisal (what, how and when it must be assessed)⁸⁶⁷.

The structure adopted by the DCFR raises the question of which is the best form to present rules on restitution, whether under a unified set of rules or segregated among the different issues (avoidance, illegality and termination). Despite minimal relevance, authority

⁸⁶³ ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 565.

⁸⁶⁴ BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 524; CLIVE, Eric, *Restitution*, 2nd ed., p. 386 (according to which the enrichment encompasses the acquiring money or other property, having value added to property, being freed from obligation or saved from a loss or expenditure, always at the expense of another)

⁸⁶⁵ SWADLING, William John, *Restitution*, cit., p. 277; JOHNSTON, David – ZIMMERMANN, Reinhard, *Unjustified enrichment: surveying the landscape*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, pp. 28-30. Even though some common law countries do not contain specific judicial actions on unjustified enrichment (see, SWADLING, William John, *Restitution*, cit., p. 268 and 282).

⁸⁶⁶ CARTWRIGHT, John, *Defects*, cit., p. 553; BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 536.

⁸⁶⁷ HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1416.

discuss that the DCFR approach avoids repetition, but is not as user-friendly as the PICC and PECL, where the rules on consequences are directly linked to the behaviour prescription⁸⁶⁸.

Regarding the appraisal parameters, the official comment on Article II-7:212 has the open language of the “*monetary equivalent, or monetary remuneration of services rendered*”⁸⁶⁹, as opposed to the “allowance in money” of the PICC and “reasonable sum” of the PECL. The same wording is established in Articles VII-5:101 and VII-5:102, of the unjustified enrichment chapter, related to the cases where the return of the enrichment is not possible or causes unreasonable effort or expenses, as well as considering the nature of the asset to be returned:

DCFR: VII-5:101: “(2) *Instead of transferring the asset, the enriched person may choose to reverse the enrichment by paying its monetary value to the disadvantaged person if a transfer would cause the enriched person unreasonable effort or expense. (3) If the enriched person is no longer able to transfer the asset, the enriched person reverses the enrichment by paying its monetary value to the disadvantaged person*”.

DCFR: VII-5:102: “(2) *Where the enrichment does not consist of a transferable asset, the enriched person reverses the enrichment by paying its monetary value to the disadvantaged person.*”

Whereas PICC and PECL leave open the choice for an objective or subjective approach for the appraisal of the “monetary value”, in the DCFR the option varies in accordance with the situation with an apparent search for balance. When defining what is the “*monetary value*”, Article VII-5:103 states that it is “*the sum of money which a provider and a recipient with a real intention of reaching an agreement would lawfully have agreed as its price*”. Despite the use of the word “price”, which recalls the subjective approach, the language does not refer to the real parties and price involved in the contract, but to

⁸⁶⁸ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 509; ZIMMERMANN, Reinhard, *The Unwinding*, cit., pp 585-586.

⁸⁶⁹ DCFR official comment B.

hypothetical parties, leading to the objective approach of the market price confirmed by the official comments on this Article⁸⁷⁰.

Nevertheless, the DCFR also provides for the subjective approach in the specific instance related to the non-transferable asset when the parties expressly agreed on a price, according to item 3 of the VII-5:102: “(3) *However, where the enrichment was obtained under an agreement which fixed a price or value for the enrichment, the enriched person is at least liable to pay that sum if the agreement was void or voidable for reasons which were not material to the fixing of the price*”.

In this case, the price agreed by the parties is a minimum sum to be restored, with the exception of cases where defects related to the price are the reason for the avoidance. The official comments provide for another limitation to this subjective approach, which is the market price: “*If the price or value agreed was more than the market value of the enrichment (representing its monetary value), the enriched person will not be liable to pay the agreed price*”⁸⁷¹. Therefore, the comparison of these provisions demonstrates that the DCFR provides for the objective approach as a general rule, except for particular cases where the parties have fixed the price (subjective approach) and to extend that this price does not surpass the market price⁸⁷².

The issue of the time of the appraisal is also absent in the provisions of the DCFR. Even though the better approach would be the time of the performance⁸⁷³, the other rules contained in the DCFR approximates it to the moment of the avoidance. This is because the DCFR, differently from the PICC and PECL, recognises the return of fruits and use deriving from the invalid contract (unjustly enriched) which is only possible after the performance of first exchange under the contract. Therefore, it seems that the time of the avoidance would be a parameter accepted under the DCFR. Upon this conclusion, it would be also possible to infer that the expenses for the preservation of the subject matter are also recoverable, even though not expressed in the DCFR provisions.

⁸⁷⁰ DCFR official comment: “*Monetary value. The definition of monetary value in paragraph (1) takes as its bench mark the objective value of the enrichment determined as the price which would be agreed in a hypothetical sale as the outcome of negotiations between parties genuinely interested in a sale. Where there is a market for the asset or service concerned, there will be mechanisms for determining what that market value is – whether by resort to price listings or similar data or expert valuations*”.

⁸⁷¹ DCFR Official comment: “*If the price or value agreed was more than the market value of the enrichment (representing its monetary value), the enriched person will not be liable to pay the agreed price*”.

⁸⁷² HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1408-1409.

⁸⁷³ *Idem*, *ibidem*, p. 1410.

With regards to the liability for damages, the DCFR provides for similar treatments encountered in the PICC and PECL, *i.e.*, this liability plays a supplementary role whilst necessary for the parties return to the *status quo ante*⁸⁷⁴.

Still on the issue of restitution as a consequence of avoidance of the contract, it is interesting to note that the DCFR, when revising the PECL, introduced additional standards related to substitutive performance, which is absent in both PECL and PICC. The issue refers to the situations where a party to a void contract has already received an amount regarding the subject matter therefrom (for instance, it sold the subject matter to a third party or received an amount from the insurance company due to the destruction of the subjective matter). The DCFR allows the restitution of the substitute performance (*e.g.*, price obtained with the sales to the third party) at the discretion of the enriched person when it is in good faith. If it is in bad faith, the choice lies with the other party⁸⁷⁵.

The analysis of the applicable rules related to restitution in case of avoidance of the contract shows that the instruments (PICC, PECL and DCFR) searched for compromise and vague rules in order to accommodate the intense variety of solutions and challenges imposed by the legal systems. In general, there is a preference for a compensatory model, which allows the avoidance and restitution even when its performance in kind is not possible or unreasonable.

Even though this conclusion may clash with the common law perspective, the assessment made under the Common Core project – although confirming the existence of the clash – returned specific instances where compensation in money was granted in cases where the traditional restitution was not appropriate. In these cases, the courts possess an even wider discretion to render an order appropriate to achieve an equitable readjustment of

⁸⁷⁴ Pursuant to Article II-7:214: “(1) A party who has the right to avoid a contract under this Section (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for any loss suffered as a result of the mistake, fraud, coercion, threats or unfair exploitation, provided that the other party knew or could reasonably be expected to have known of the ground for avoidance. (2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded, with the further limitation that, if the party does not avoid the contract, the damages are not to exceed the loss caused by the mistake, fraud, coercion, threats or unfair exploitation. (3) In other respects the rules on damages for non-performance of a contractual obligation apply with any appropriate adaptation.”

⁸⁷⁵ Pursuant to DCFR Article VI-5:101: “(4) However, to the extent that the enriched person has obtained a substitute in exchange, the substitute is the enrichment to be reversed if: (a) the enriched person is in good faith at the time of disposal or loss and the enriched person so chooses; or (b) the enriched person is not in good faith at the time of disposal or loss, the disadvantaged person so chooses and the choice is not inequitable.”

the parties' interests⁸⁷⁶. Therefore, the choice for an open mechanism, with regard to reasonability and balance of objective and subjective approaches, seems to be the common ground encountered to deal with this divergence on the consequences of avoidance.

2.2. Illegality

Intrinsically related to the restitution due to avoidance is the issue of restitution in case of illegality. Before going through the relevant provisions, it is worth saying that these provisions were included in the analysed instruments at a later stage. The PICC incorporated those provisions in the 2010 Edition and, in previous Editions, this was a matter expressly left to domestic applicable law⁸⁷⁷, while the PECL incorporated in the 2002 Edition with the inclusion of the Part III. The DCFR was edited afterwards and kept the special treatment to the illegality issue from its start given its relevance⁸⁷⁸.

Despite such practical importance of the issue, again, the reason for such delay was the deep divergences in national laws, especially the duality of common law vs. civil law, as well as the sensitivity of the subject which involves national and international principles, mandatory rules and public policies⁸⁷⁹. The theme was previously conceived as resisting harmonisation, obstructed with so many individual and distinct approaches⁸⁸⁰. However, after the innovation brought by the PECL, illegality was one of the most supported topics to be addressed by the PICC in the reform initiated in 2005⁸⁸¹.

The result of this difficult task is contained in the provisions indicated below:

PICC: Article 3.3.1: “(1) *Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable*

⁸⁷⁶ ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., pp. 285-286 and 372-374.

⁸⁷⁷ Pursuant to former Article 3.1 of the former Editions of the PICC: “*These Principles do not deal with invalidity arising from (a) lack of capacity; (b) immorality or illegality*”.

⁸⁷⁸ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 493.

⁸⁷⁹ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 558; MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1889; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 492 and 507; BONELL, Michael Joachim, *The New Provisions on Illegality in the UNIDROIT Principles 2010*, in *Uniform Law Review*, vol. 16, No. 3, 2011, 517; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 608. Also the official comment on former Article 3.1 confirmed this difficulty: “*The reason for their exclusion lies both in the inherent complexity of questions of status and of public policy and the extremely diverse manner in which they are treated in domestic law*”.

⁸⁸⁰ STORME, Matthias E., *Harmonization*, cit., p. 195

⁸⁸¹ BONELL, Michael Joachim, *The New Provisions*, cit. p. 519; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 492; ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 568.

under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule. (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable. (3) In determining what is reasonable regard is to be had in particular to: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether one or both parties knew or ought to have known of the infringement; (f) whether the performance of the contract necessitates the infringement; and (g) the parties' reasonable expectations."

PICC: Article 3.3.2: "(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances. (2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3). (3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations."

PECL: Article 15:101: "A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union".

PECL: Article 15:102: "(1) Where a contract infringes a mandatory rule of law applicable under Article 1:103 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule. (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the contract may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification. (3) A decision reached under paragraph (2) must be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the

rule infringed; (d) the seriousness of the infringement; (e) whether the infringement was intentional; and (f) the closeness of the relationship between the infringement and the contract.”

PECL: Article 15:104: *“(1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received. (2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102 (3). (3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness. (4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.”*

DCFR: II-7:301: *“A contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.”*

DCFR: II-7:302: *“(1) Where a contract is not void under the preceding Article but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule. (2) Where the mandatory rule does not expressly prescribe the effects of an infringement on the validity of a contract, a court may; (a) declare the contract to be valid; (b) avoid the contract, with retrospective effect, in whole or in part; or (c) modify the contract or its effects. (3) A decision reached under paragraph (2) should be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether the infringement was intentional; and (f) the closeness of the relationship between the infringement and the contract.”*

DCFR: II-7:303: “(1) *The question whether either party has a right to the return of whatever has been transferred or supplied under a contract, or part of a contract, which is void or has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment. (2) The effect of nullity or avoidance under this Section on the ownership of property which has been transferred under the void or avoided contract, or part of a contract, is governed by the rules on the transfer of property. (3) This Article is subject to the powers of the court to modify the contract or its effects.*”

DCFR: VII-6:103: “*Where a contract or other juridical act under which an enrichment is obtained is void or avoided because of an infringement of a fundamental principle (within the meaning of II.– 7:301 (Contracts infringing fundamental principles)) or mandatory rule of law, the enriched person is not liable to reverse the enrichment to the extent that the reversal would contravene the policy underlying the principle or rule.*”

The provisions show that, if the problem is the multiplicity of national mandatory divergent rules, the formula for uniformising is to provide broad rules and give prevalence to the remedies and consequences provided therein, and, in case of absence, refer to the general rules applicable to the cases of avoidance.

This was the approach selected by the PICC. Upon the beginning of the drafting procedure in 2005, the grounds for illegality and its effects were the main questions to be solved by the Working Group⁸⁸². The instrument prioritises the rules and effects provided for in national or international mandatory rules and, in case of silence with respect to the effects, flexibility is granted to the parties and to the courts to apply the most suitable effects considering the circumstances and reasonableness. In order to assess such reasonableness, the PICC provides for non-exhaustive criteria⁸⁸³.

The formula is sufficiently and intentionally broad to permit a maximum of flexibility and comprises not only the contractual remedies, but also all other possible remedies. The drafters endorsed this wide scope of the provision, without fixing the

⁸⁸² BONELL, Michael Joachim, *The New Provisions*, cit. p. 520.

⁸⁸³ BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., pp. 104-105; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 560.

consequence of invalidity or ineffectiveness, and the focus on the parties was intended to avoid full discretion to courts in applying remedies *ex officio*, which would be detrimental to the international practice⁸⁸⁴.

During the conception of this new set of rules, there was a debate as to whether the PICC should consider a different treatment conferred to violations to fundamental principles other than to mandatory rules, such as provided for the PECL (as will be seen). However, the majority of the drafters opted to solely state “*mandatory rules*”, which encompasses general principles by making reference to Article 1.4⁸⁸⁵⁻⁸⁸⁶.

If the restitution is granted in accordance with mandatory rule or with the suggestive criteria posed by the PICC, the rules of Article 3.2.15 analysed in the case of avoidance will apply with appropriate adaptations. By doing so, the PICC drafters opted to establish a default rule, meaning that only when specific mandatory provision does not exist, the PICC rules on restitutions will apply⁸⁸⁷. Such an option envisioned the creation of an innovative balance: not entering the obscure world of providing an autonomous doctrine to sanction illegality and, at the same time, move beyond the traditional and rigid approach that nothing is recoverable under an illegal contract⁸⁸⁸.

Therefore, the approach goes into a different direction to the traditional mindset, in both common and civil law countries, that the parties, in principle, shall not be entitled to any remedy or restitution from the illegality, except for the party not *in pari delicto*⁸⁸⁹. It reflects the modern trend applied in many recent national legislations with regard to current public law, in favour to apply a flexible approach to allow restitution even for contracts

⁸⁸⁴ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 560; BONELL, Michael Joachim, *The New Provisions*, cit. p. 526-527; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 494-495.

⁸⁸⁵ BONELL, Michael Joachim, *The New Provisions*, cit. pp. 522-523; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 493-494.

⁸⁸⁶ Article 1.4: “*Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law*”. According to the official comment on Article 1.4 of the PICC: “*For the purpose of this article the notion of “mandatory rules” is to be understood in a broad sense, so as to cover both specific statutory provisions and general principles of public policy*”.

⁸⁸⁷ BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., pp. 104-105; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 565; BONELL, Michael Joachim, *The New Provisions*, cit. p. 527 and 536.

⁸⁸⁸ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 566.

⁸⁸⁹ BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 329, which make reference to the English precedent *Kiriri Cotton Co vs. Dewani* (1960) AC 192; BONELL, Michael Joachim, *The New Provisions*, cit. p. 532; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., pp. 607-646; DANNEMANN, Gerhard, *Illegality as a defence against unjust enrichment claims*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, pp. 310 and 313.

tainted by illegality, and not to leave the parties as they are⁸⁹⁰. Indeed, the official comments on Article 3.3.1 expressly segregates the general contractual remedies from restitution, stating that, even though contractual remedies may not be available to the party(ies) who acts intentionally for the illegal purpose (*ex turpi causa*), “*This is without prejudice to any restitutionary remedy that may exist*” under Article 3.3.2⁸⁹¹.

Furthermore, the Illustrations of Article 3.3.2 clearly demonstrate this more flexible approach by providing for restitution in cases of mutual corruption by the parties⁸⁹², which, despite raising an element of surprise, it was considered by the drafters (with much less controversy) as the correct way to avoid a situation where one of the parties benefits from such illegality and escape performance of the contract⁸⁹³. However, by considering the “*appropriate adaptation*” under Article 3.3.2, the granting of restitution is exceptional and the courts tend to be reluctant to award it (and then not apply the parameters of Article 3.2.15) depending on the seriousness of the infringement and when one party (or parties) were aware of the infringement⁸⁹⁴.

Since reference has been made to the already analysed Article 3.2.15, the same considerations above will apply, and it is possible to enter the European experience.

The PECL contains very similar provisions to the PICC. Indeed, they inspired the PICC’s formula to stipulate a general and open rule on illegality related to infringement of principles and mandatory rules, setting reasonable parameters for conceiving the effects arose out of illegality in order to avoid uncertainty (Article 15:102) and providing for a general rule on restitution (Article 15:104), while conceding priority to the national systems⁸⁹⁵. There are three particularities though.

⁸⁹⁰ BONELL, Michael Joachim, *The New Provisions*, cit. pp. 522, 532 and 532; REMIEN, Oliver, *Public Law and Public Policy in International Commercial Contracts and the UNIDROIT Principles of International Commercial Contracts 2010: A Brief Outline*, in *Uniform Law Review*, vol. 18, No. 2, 2013, p. 271; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 496.

⁸⁹¹ Illustration 17 of the PICC official comments to Article 3.3.1.

⁸⁹² See Illustration 2 of comment 2 to Article 3.3.2 PICC, regarding a case where a contractor paid a requested unlawful “commission” to a State representative and, after the completion of the works, the new government invokes illegality and refuses to pay for the work. The conclusion of the comments was in favour to restitution: “A [the constructor] may be granted an allowance in money for the work done corresponding to the value of the infrastructure project”.

⁸⁹³ BONELL, Michael Joachim, *The New Provisions*, cit. pp. 522 and 534-535.

⁸⁹⁴ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 566; BONELL, Michael Joachim, *The New Provisions*, cit. p. 531; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., 647.

⁸⁹⁵ HELLWEGE, Phillip and MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., respectively in p. 1399 and 1906.

The first one refers to the more serious consequence applied to contracts that infringe the fundamental principles of the laws of the Member States of the European Union. According to Article 15:101, those contracts are of “*no effect*”, which implies a more rigid approach – the judges have no way out or discretion to apply contractual remedies – when compared to the PICC, that leaves the issue open and does not specifically address violation of principles⁸⁹⁶. Additionally, the provision of “no effect” aims to avoid national discrepancies among doctrines of invalidity and enforcement⁸⁹⁷.

However, such rigidity is relaxed by the expression “*to the extent that*”, meaning that courts may have some margin to evaluate the contract in order to give some type of effect. The general example is the non-compete clauses with a very broad scope and long duration (unlawful), about which the remedy may be the reduction of the scope/duration instead of declaring the contract with no effect⁸⁹⁸.

Secondly, with regards to the infringement of other mandatory rules, the effects of such illegality will depend on the relevant circumstances and the PECL openly provides that the contract “*may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification*”, differently from the PICC which does not fix such effects and leaves the choice of the proper remedy to the parties’ exercise. This approach is a clear compromise, since the national laws provide for different effects and remedies to the parties upon illegality, including the denial of any remedy in common law countries⁸⁹⁹.

The third particularity of the PECL refers to the express provision that a remedy for restitution may be refused in case the party knew or ought to have known about a reason of illegality (Article 15:104(3)). This is a common law inspired provision, but conceived as superfluous since the refusal is not mandatory (“*may be*”) and restitution in cases of illegality have been recognised in order to prevent parties to keep the effects of an illegal contract⁹⁰⁰. As mentioned above, this is aligned with the flexible approach adopted by modern legislations and with exceptions provided by common law countries, such as to permit

⁸⁹⁶ KÖTZ, Hein, *Illegality of Contracts*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, p. 849; MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1896 and 1926; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 495-496.

⁸⁹⁷ MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., pp. 169-170.

⁸⁹⁸ KÖTZ, Hein, *Illegality*, cit., p. 849.

⁸⁹⁹ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1906 and 1909.

⁹⁰⁰ *Idem, ibidem*, pp. 1383 and 1926-1927.

restitution where that party withdraws from the contract before illegality is achieved, or where denial would cause that party a disproportionate forfeiture⁹⁰¹.

Except for this rule, the other provisions on restitution are the same as discussed in the cases of general invalidity, according to which, when the restitution cannot be made in kind for any reason, the notion of “*reasonable sum*” applies. Therefore, similar to what happens to PICC, the details discussed above in item 2.1 are also of value for illegality cases.

Moving to the DCFR, more similarities mixed with differences appear. The instrument keeps the PECL segregation between fundamental principles and mandatory rules, but provides that, in the violation of the former, the contract is void. The same occurs in cases where the nullity of the contract is required for giving effect to such fundamental principles (Article II-7:301). With wording of “*void to the extent that*”, the rule entails a more flexible approach than the one observed in PECL (“*no effect*”)⁹⁰².

When discussing mandatory rules, the DCFR approach is very similar to the PECL: prevalence to the effects stipulated in the violated mandatory rules and, in case of omission, the possibilities to keep validity of the contract, avoid the contract or modify it or its effects, in accordance with the parameters set forth in the same rule (variation of the seriousness and purposes of the mandatory rule) (Article II-7:302). The decision was to keep the compromise rule that respect the different degrees and effects provided for the different national laws involved, but leaving such decision to the court (and not to the parties as in the PICC), who is deemed to be in a better position to apply the appropriate and proportional response to the infringement in face of the circumstances⁹⁰³.

Similar to PICC and PECL, when the contract is unwound due to illegality and restitution is possible, the DCFR refers to the same rules applied to restitution in cases of avoidance. As seen above, the DCFR does not contain proper provisions on restitution and innovates by making a cross reference to the rules on unjustified enrichment, which is repeated in the section comprising illegality (Article II-7:303). The choice was for a compromise rule that is even more harmonic than the rule observed in the PECL. In cases of illegality, despite the discrepancies among systems, the recognition of the possibility to

⁹⁰¹ BONELL, Michael Joachim, *The New Provisions*, cit. p. 532.

⁹⁰² MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1896; REMIEN, Oliver, *Public Law*, cit., p. 269.

⁹⁰³ BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 550; DCFR Official comment D.

proceed to restitution under the doctrine of unjustified enrichment is of great importance in order to avoid the standing of the effects of the illegal contract⁹⁰⁴.

Even though the DCFR does not contain a similar limitation as the PECL indicating that the court may refuse restitution in cases of awareness of the illegality⁹⁰⁵, in the specific chapter of unjustified enrichment and restitution, the DCFR provides for a particular exception: in cases of illegality, the reverse of the enrichment (restitution) will not be performed to the extent that it would contravene the policy underlying the principle or rule (Article VII-6:103)⁹⁰⁶.

The objective of the rule is to keep the integrity of the violated principle or rule and prevent the reversal itself producing a new infringement of such a rule. An example where restitution would be forbidden pursuant to this approach is an illegal contract entered into by a minor. Despite the illegality and nullity of such a contract (which entails the restoration to the *status quo ante*), an obligation of the minor to make full redress would frustrate the policy of protecting minors from their own inexperience (precisely the underlying reason of the rules stating nullity of contracts executed by minors)⁹⁰⁷.

The other rules and parameters applicable to restitution in cases of illegality are the same as analysed above for avoidance of contracts, which dispenses further repetition.

A final remark in the comparison of the instruments with respect to illegality is that the European instruments have specific rules on damages in a very similar approach adopted in the cases of invalidity (Article 15:505 PECL and II-7:304 DCFR⁹⁰⁸). The idea is the same: damages with a supplementary function to complete the restoration to the *status*

⁹⁰⁴ MACQUEEN, Hector L., *Illegality*, cit., pp. 565-566.

⁹⁰⁵ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1927.

⁹⁰⁶ MACQUEEN, Hector L., *Illegality*, cit., p. 566; CLIVE, Eric, *Unjustified Enrichment*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004, p. 600; HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1396.

⁹⁰⁷ CLIVE, Eric, *Unjustified*, cit., p. 600; CLIVE, Eric, *Restitution*, 2nd ed., p. 390-391.

⁹⁰⁸ Article 15:105 PECL: “(1) A party to a contract which is rendered ineffective under articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness. (2) When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in article 15:102(3). (3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness.”; Article II-7:304 DCFR: “(1) A party to a contract which is void or avoided, in whole or in part, under this Section is entitled to damages from the other party for any loss suffered as a result of the invalidity, provided that the first party did not know and could not reasonably be expected to have known, and the other party knew or could reasonably be expected to have known, of the infringement. (2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded or the infringing term had not been included”.

*quo ante*⁹⁰⁹. The difference between them is that whereas the PECL treats the denial of damages in case of knowledge of the illegality as discretionary (“*may be*”), in the DCFR such denial is mandatory (“*provided that*”). Commentators consider the DCFR approach a retreat, since a fixed rule excluding damages is not advisable for a uniformising instrument dealing with deep heterogeneity among legal systems. Since the PICC refers only to Article 3.2.15 and not to Article 3.2.16 (related to damages), the consideration to damages is not automatic, but a denial could be inferred, in principle, by reference to Article 1.8⁹¹⁰ where a party cannot be inconsistent with its behaviour (claim damages based on its intentional illegality)⁹¹¹.

The analysis of the issue on the consequences of avoidance and illegality with respect to the restitution remedy demonstrates how hard was the task for reaching minimum common ground for harmonisation. Regarding the clashes imposed by some domestic laws (either from civil or common law jurisdictions) that prevent restitution, the instruments clearly privileged a more flexible approach to allow restitution (compensatory model) and provide wide parameters for appraisal of such reversal in order to protect the parties (and the society in general) from the maintenance of a contract tainted by invalidity grounds or illegality.

Such a flexible model may appear as a disruption of traditional paradigms with power to create even more complexity. However, they demonstrate a contemporary trend observed in many jurisdictions and even codified with more details in recent legislation, such as the Chinese rules on restitution (*see* item 4 of Chapter 2, Part I).

In the case of illegality, the divergences are so intense that the drafters clearly opted to stipulate a *uniform structure*, instead of defining the uniform grounds and consequences. The tactic was to refer to specific mandatory rules and principles (national or international) as prevailing, at the same time that did not fix a final and mandatory effect to all cases⁹¹².

The effort to conceive uniform material rules was more concentrated (and much more successful) in the field of the grounds for invalidity (*e.g.*, defects of consent), since the

⁹⁰⁹ MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 169.

⁹¹⁰ Article 1.8 PICC: “A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.”

⁹¹¹ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1930.

⁹¹² Such strategy of uniformizing only the structure of rules was anticipated as a solution even before the first rules of the PECL (*see* STORME, Matthias E., *Harmonization*, cit., p. 207).

drafters considered that the core of the rules is the protected person/party, and not the procedural mechanism and consequences deriving from their behaviour. The “*who may rely upon invalidity*” was considered the most important test (and easier) to harmonise than the “*how*” and “*what the consequences*”⁹¹³. Maybe this is one additional reason why the present study did not involve a deep analysis on the invalidity grounds, and changed focus.

The downside of the adoption of widely compromised rules in the field of consequences of invalidity is the least practical uniformisation. Even though the rules (structure and guidelines) are uniformed, each legal system will be free to adopt a different solution to the cases without violating such uniforming rules⁹¹⁴. This would lead to the conclusion that the success apparently reached with the harmonisation in the black letter rules could not be as successful in practice.

3. Hardship

The third and last subject to be analysed under the perspective of uniformising instruments and initiatives is the controversial hardship. The research so far demonstrated the opposite treatment conferred to hardship situations by the common law and civil law jurisdictions. In spite of such divergence, the three analysed instruments PICC, PECL and DCFR contain provisions recognising the possible modification or termination of the contract in the face of extreme difficult and exceptional circumstances.

The adoption of positive rules on hardship is quite recent in civil law codifications, notwithstanding the medieval doctrine of *clausula rebus sic stantibus*, according to which the validity of a contract depends on the continuance of the circumstances at the time of its formation⁹¹⁵. The modern civil legislations had abandoned such doctrine by privileging the *favor contractus*, but the scenario was gradually altered due to the drastic economic changes experienced during the twentieth century. Therefore, the rescue of the doctrine occurred in practice before becoming codified law, especially in the

⁹¹³ STORME, Matthias E., *Harmonization*, cit., pp. 202-203.

⁹¹⁴ MACQUEEN, Hector L., *Illegality*, cit., p. 570.

⁹¹⁵ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 518.

famous cases of hyperinflation affecting Germany in the Post-War period, which are deemed the origin of contemporary hardship doctrine⁹¹⁶.

The doctrine then gained more acceptance in other civil law countries impacted on by the economic changes and, since the German legal system influenced several other codifications in Europe, Asia and Latin America, the doctrine has spread globally from the 1940s⁹¹⁷. The same did not happen in common law countries and maybe one of the reasons is, in addition to the primacy of certainty in commercial relationships applied in centuries of history, precisely the fact that the most important common law countries have neither suffered from unmanageable inflation nor had the ravages of wars directly affecting the performance of commercial contracts in those countries⁹¹⁸.

Therefore, while the doctrine begun to flourish in the civil law countries in practice and, at a later stage, in positive codifications, in common law countries the hardship was kept as not a juridical concept and little compassion for situations of extreme difficulty is given to contractual relationships. These countries follow an “all-or-nothing” approach, and only cases of impossibility and frustration are recognised and yet only with the consequence of entire contract termination (neither partial nor temporary)⁹¹⁹.

Considering this background, the hardship regulation present in the international and European instruments was constructed at the same time or even before its adoption by national legal systems⁹²⁰, being the PICC one of the very first set of rules in this regard since the first 1994 Edition. The PICC is then conceived as a step ahead and an important influencer to the national laws⁹²¹ (as seen in the cases of Russia and China).

⁹¹⁶ RÖSLER, Hannes, *Change of Circumstances*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, pp. 163-164; DOUDKO, Alexei G., *Hardship*, cit., p. 493; FARNSWORTH, E. Allan, *Comparative*, cit., p. 31; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 520; BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 631, which mentions the case RGZ 103.328, 3 February 1922 (The 1919 inflation).

⁹¹⁷ BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1146.

⁹¹⁸ PERILLO, Joseph M., *Hardship*, cit. p. 12; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 534.

⁹¹⁹ RÖSLER, Hannes, *Change*, cit., p. 165; PERILLO, Joseph M., *Hardship*, cit. p. 1; PUELINCKX, Alfons H., *Frustration*, cit., p. 51; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1106.

⁹²⁰ For instance, Germany adopted hardship in the BGB after the reform of 2002, even if already applied in practice for many years (see HELDRICH, Andreas – REHM, Gebhard M., *Modernisation of the German Law of Obligations: Harmonisation of Civil Law and Common Law in the Recent Reform of the German Civil Code*, in COHEN, Nili – MCKENDRICK, Ewan, *Comparative remedies for breach of contract*, Oxford, Hart, 2005). Same occurred with the BRICS civil law countries (Brazil 2002, Russia 1996 and China 2020).

⁹²¹ VOGENAUER, Stefan (ed.), *Commentary*, cit., pp. 808-809; DOUDKO, Alexei G., *Hardship*, cit., p. 485; VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 488; FONTAINE, Marcel, *Cause, Good Faith*, cit., pp. 1142 and 1145.

The provisions of the three instruments are very similar and stem from the pioneerism of the PICC, as observed below:

PICC: Article 6.2.1: *“Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”*

PICC: Article 6.2.2: *“There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.”*

PICC: Article 6.2.3: *“(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.”*

PECL: Article 6:111: *“(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been*

taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.”

DCFR: III-1:110: “(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred, (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.”

The provisions have a similar structure (not necessarily in this order): reinforce the principle of *pacta sunt servanda*, state the requirements for considering hardship and the options to the parties/courts as for the consequences of recognising hardship (termination or modification of the contract).

Seemingly redundant, the first express statement on the obligation of the parties to perform the contracts even in distressed situations is of significant importance to guide judges and arbitrators for the exceptional nature of this remedy and not put contractual stability at risk in the face of more onerous obligations⁹²². The PECL and the DCFR go further by specifying that the increase of costs and/or the reduction of return are not grounds for applying hardship remedies⁹²³. Although absent in PICC black letter, the official comments adopt a very similar approach in clarifying Article 6.2.1 by stating that: “*even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected*”⁹²⁴.

The general and cumulative requirements for the application of the doctrine – factual issues to be evaluated by the judge or arbitrator – are also very similar. The three instruments consider that fundamental change of circumstances must be supervenient⁹²⁵, unforeseeable and out of the parties’ risk. The PICC provides for the “*beyond the control*” test, but this difference raises minor concerns, since it is linked to the tests of unpredictability and risk assumption. By doing so, the rules stand on a middle ground where, on the one hand, are not so vague as to cause instability and swallow *pacta sunt servanda*, but, on the other hand, are not so narrow as to the point of preventing its application⁹²⁶. Additionally, some degree of vagueness in the provisions’ wording was important to incorporate the differences among legal systems⁹²⁷.

There is a slight difference among the instruments in the concept of the imbalance caused by the supervening situation. The PECL and DCFR speak about onerousness (common in civilian jurisdictions), while the PICC provides for a wider scope by addressing the disequilibrium (“*alters the equilibrium*”), which can encompass not only the onerousness of the obligation, but also other changes and imbalances of the relationship

⁹²² MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 655; RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 909; BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 178; VOGENAUER, Stefan (ed.), *Commentary*, cit., pp. 811 and 813.

⁹²³ BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 713.

⁹²⁴ PICC official comment 1 on Article 6.2.1.

⁹²⁵ For the PICC the “supervenient” requirement may be applicable to the knowledge of the change by the parties and not only to its effective occurrence (In this regard, see TALLON, Denis, *Hardship*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998, p. 331).

⁹²⁶ RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 900; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., pp. 657-658.

⁹²⁷ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 658

including instances of frustration⁹²⁸. However, the total loss of purposes and interest by the parties – a typical test for the common law frustration doctrine – seems not to be considered as a requirement in any of the instruments⁹²⁹. The focus is on the unjust onerousness and imbalance which must be extremely detrimental, fundamental and also assessed by courts with exceptionality, prudence and extra care in order to preserve stability⁹³⁰.

Another commonly mentioned requirement is that the doctrine affects only contracts of duration. Although this happens in the huge majority of cases, it was not considered by the drafters as a requirement since not all the systems recognising hardship provide for this limitation⁹³¹.

Furthermore, all instruments regard the rules applicable to hardship as with dispositive character and, therefore, can be ruled out by the agreement of parties who may also define which circumstances will and will not entail modification or termination by hardship. This reflects the party autonomy principle as expressly indicated in the DCFR⁹³².

A noteworthy difference among the three instruments refers to the requirement of previous negotiations. The PECL contains a stricter approach, by stating that the parties “*are bound to enter into negotiations*” cumulated with the possibility of awarding the party refusing negotiation to pay damages to the other. Differently, under the PICC, the approach chosen was not to oblige parties to previous negotiate, it is rather a faculty on the aggrieved party which reflects international commercial practice⁹³³. The DCFR followed a similar path after criticism to the PECL’s approach and requires an attempt to negotiate, but no obligation for the other party agree to negotiate. This leads to the conclusion that, according to both instruments (PICC and DCFR), there will be, in principle, no liability for damages from the party refusing to negotiate⁹³⁴.

⁹²⁸ DOUDKO, Alexei G., *Hardship*, cit., p. 495; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 817.

⁹²⁹ RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 910.

⁹³⁰ BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 713-715; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 814; TALLON, Denis, *Hardship*, 2nd ed., cit., p. 332.

⁹³¹ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 810.

⁹³² DCFR Article II-1:102: “*Party autonomy (1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules. (2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided. (3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.*”; BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 47.

⁹³³ FONTAINE, Marcel, *Cause, Good Faith*, cit., p. 1142.

⁹³⁴ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 819; BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 712-713; RÖSLER, Hannes, *Change*, cit., p. 167; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1128.

Nonetheless, commentators indicate that such difference is of minor importance in practice since it is assumed that the parties will always negotiate before bringing a hardship claim to court and, as the three instruments recognise the principle of good faith, pursuant to all of them a party can be held liable for damages if it can be proved there was a violation of the duties to cooperate in the contractual relationship⁹³⁵.

As for the consequences to the contract when a hardship situation is proved and recognised, the instruments provide for the modification/adaptation or the termination of the contract without indicating any prevalence between them. The choice to leave it open is justified by the differences existent among the diverse legal systems⁹³⁶ and because it would be illusory to bind a judge to attempt adaptation in every case, since the core of the doctrine is the distribution in a just and equitable manner of the losses and gains resulting from the change of the circumstances⁹³⁷.

The preference for either termination or adaptation of contracts is also observed in literature, with authors defending modification⁹³⁸ (inspired by the *favor contractus*) and others more prone to termination⁹³⁹ (assures certainty). In any case, adaptation must be done restrictively and be guided by reasonableness, equitable distribution of unexpected losses and maintenance of contractual equilibrium, which must not be a perfect equilibrium, but solely the mitigation of the excessive disequilibrium⁹⁴⁰.

The assessment of the three uniformising instruments of contract law reveals a high degree of convergence with respect to the acceptance of the hardship doctrine, its requirements and consequences. However, this convergence was not enough to mean a conciliation among the civil law and common law traditions.

The common law countries still do not adopt hardship as a legal concept and are very reluctant to apply the analysed provisions⁹⁴¹. Since these international instruments also provide for the discharge of obligations due to impossibility - a narrower situation

⁹³⁵ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 819; RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 909.

⁹³⁶ RÖSLER, Hannes, *Change*, cit., p. 167.

⁹³⁷ TALLON, Denis, *Hardship*, 2nd ed., cit., p. 331.

⁹³⁸ VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 821; RÖSLER, Hannes, *Change*, cit., p. 167; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., *passim*.

⁹³⁹ RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 911.

⁹⁴⁰ DOUDKO, Alexei G., *Hardship*, cit., p. 505; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 675.

⁹⁴¹ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 652; BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 176; TALLON, Denis, *Hardship*, 2nd ed., cit., p. 328.

encompassing even not physically impossible situations -, the common law lawyers will mostly resort to these set of rules and not to the hardship ones, which are clearly civil law inspired⁹⁴². The common law approach is strongly based on the risks assumed by the parties under the contract in advance (what is not specified in considered as assumed risk) and, hence, the court sets extremely higher burdens in order to allow discharge and, in very exceptional cases, adaptation based on equity⁹⁴³.

Even among civil law countries the practical application of the hardship provisions will vary. The answer as to when a change of circumstance is fundamental enough to disrupt the contractual balance remains vague from the requirements encountered in PICC, PECL and DCFR, and such uncertainty will keep common law jurisdiction distant from harmonisation⁹⁴⁴. Such discrepancy was also a result of the Common Core assessment. Each legal system has its own range of mechanisms to, in the face of concrete circumstances, find the need to strike a balance between party autonomy and wider considerations of fairness, and also between the certainty of the law and individual justice⁹⁴⁵.

Notwithstanding that, two main aspects lead to the direction that the divergences are not irreconcilable. Firstly, the working groups on the drafting of the analysed instruments were formed by representatives from both common law and civil law traditions, which means that the adopted rules are not contrary to their internal system and there is margin for acceptance⁹⁴⁶. Indeed, the PICC 2004 Edition was formally approved by the Governing Council composed by members of the United Kingdom and India⁹⁴⁷. Secondly, even in common law countries there are few precedents applying the remedies of either termination or adaptation of contracts in order to avoid unduly harsh or unfair consequences caused by changes in circumstances, especially in long-term contracts⁹⁴⁸.

⁹⁴²BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 176; VOGENAUER, Stefan (ed.), *Commentary*, cit., p. 810; RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 909; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 652; ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 567.

⁹⁴³ DOUDKO, Alexei G., *Hardship*, cit., p. 496; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 664; HARMATHY, Attila, *Hardship*, cit., p. 1042.

⁹⁴⁴ RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 909.

⁹⁴⁵ ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 700.

⁹⁴⁶ BRÖDERMAN, Eckart J., *UNIDROIT Principles*, cit., p. 177; PERILLO, Joseph M., *Hardship*, cit. p. 14; TALLON, Denis, *Hardship*, 2nd ed., cit., p. 330.

⁹⁴⁷ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., p. 487. Information on the members of the Governing Council available at: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004>. Accessed on 15 August 2021.

⁹⁴⁸ This is another conclusion observed in the Common Core project (ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 567); BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p.

Based on the foregoing, the conclusion related to hardship is a middle ground compared to what was observed with respect to the issues of invalidity. It is a fact that practical harmonisation was not successful (as in case of restitution); on the other hand, the uniform approach seems to be the most coherent to international contracts and the countries seem to be ready to accept it pursuant to the specific circumstances and each internal limitation (as in case of the mechanism of avoidance).

The dichotomy of common law *vs.* civil law is in the heart of the hurdles faced by the initiatives for harmonisation and uniformisation of contract law. Reaching and drafting common grounds among disparate traditions entails risks and, invariably, failures. The objective of analysing the uniform initiatives was not to discover these common grounds and apply them to BRICS reality, since, as mentioned, they do not correspond to a real “restatement”. Although practitioners in each country will be familiar with the PICC rules (and with the PECL and DCFR rules), they will frequently privilege and not except internal rules in cases of clashes⁹⁴⁹. Therefore, the purpose for the present study was to evaluate and understand how the drafters discussed and worked on the divergences encountered.

The adoption of one or another single approach (and not a common ground) to deal with the issues of invalidity and hardship appears to “force” one tradition to accept the other, which can lead to the suppression of rules applied by the majority to the detriment of the minority. This happens, as observed above, with the provision for a simple mechanism for avoiding the contracts, according to which any civil law countries are “forced” to accept a guidance (common law guidance) different from those applied internally. The same is true with the rules on hardship, a clear example of the uniform adoption of civil law doctrine to the detriment of common law theories and practice.

Not for any other reason, the attempt of unifying contract law, as searched for over the years in the European continent for the conception of a single civil code, has not

718 and BEALE, Hugh et al. (eds.), *Cases*, cit., pp. 621 and 630, both mentioning the English case *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* 1978 1 WLR related to the strong drop in value currency over a long period.

⁹⁴⁹ VOGENAUER, Stefan, *The UNIDROIT Principles*, cit., pp. 485-486. For instance, depending on the concrete case, a lawyer or a court of a civil law country such as France will hardly accept a mere notification a sufficient for avoidance.

entirely succeeded and has even once been qualified as a “*diabolical idea*”⁹⁵⁰. The mere conception of detailed general rules and principles related to all aspects of contract law in one single instrument (such as a civil code) could be understood, in itself, as a certain suppression of the common law tradition in favour of the civil law majority (with general and vague rules centred in justice rather than certainty)⁹⁵¹.

The research of this second Chapter, however, shows that the idea of an unbridgeable gap is not one hundred percent certain. The modern and continuous development of national laws and case law, greatly inspired by the assessed uniformising initiatives, tends to reduce gaps by the search for compactible solutions⁹⁵².

It is true that both traditions have their own mentalities, procedural approaches and theories that differ substantially at time. However, when it comes to the ultimate purposes and practical relevance of the rules, such differences diminish at a point where the conception of common open principles and model rules (PICC, PECL and DCFR) are acceptable by both traditions as a better solution. After all, both mentalities have always coexisted and are familiar to each other (with several common roots of Western legal concepts, indeed)⁹⁵³. Such coexistence and lack of uniformity has not prevented cross-border commercial relationships among parties pertaining to these different jurisdictions⁹⁵⁴.

The point is that, despite such long-standing convivence, the lawyers and academics were trained and got used to associate only one mentality and to see the other as the “different”, the “unknown” and, at a first glance, “unacceptable”⁹⁵⁵. Moreover, the work developed in Europe upon the Common Core project also demonstrates that the division between common law and civil law is neither the most accurate, nor solves all comparative problems. On the levels of practical outcomes, theories and techniques, the uniformities and differences cut across all sorts of lines and group different legal systems in all sorts of ways⁹⁵⁶.

⁹⁵⁰ LEGRAND, Pierre, *A Diabolical Idea*, cit., *passim*. Also mentioned in BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 28.

⁹⁵¹ FONTAINE, Marcel, *Cause, Good Faith*, cit., p. 1136; LEGRAND, Pierre, *A Diabolical Idea*, cit., pp. 254-255 and 258.

⁹⁵² FARNSWORTH, E. Allan, *Comparative*, cit., p. 37.

⁹⁵³ MANCUSO, Salvatore, *The New African Law*, cit. p. 44; VOGENAUER, Stefan, *Common Law*, cit., pp. 266-267; ZIMMERMANN, Reinhard, *Roman Law*, cit., items 8 und 9.

⁹⁵⁴ ZELLER, Bruno, *The Development*, cit., p. 1180.

⁹⁵⁵ CURRAN, Vivian Grosswald, *On the shoulders*, cit., pp. 8-9.

⁹⁵⁶ REIMANN, Mathias, *Of Products*, cit., p. 91.

Based on those findings, the uniformisation experiences, especially the ones developed in Europe, give some useful insights for the harmonisation attempt to be searched within the BRICS countries. Although the objective of the present study is to try to move away from the only European centred perspective and shift to a different reality of countries and legal systems (whose economic, political and cultural background is far distant from the European scenario), it is an undeniable fact that major comparative efforts on the field of contract law were carried out in Europe and have a European mindset – a limitation that was already subject to some critics⁹⁵⁷. Moreover, it is equally undeniable that the five BRICS legal systems, particularly with respect to contract law, are all strongly influenced by European legislation.

Therefore, the borrowing and cross reference to the European experience will inevitably continue in the next and final Chapter of the present study. As previously announced, the objective of the next Chapter (and this entire work) is not to identify uniformity, but rather proceed to a fair comparison and indicate possible room for harmonisation and mutual contribution on very challenging issues. Therefore, the present work goes much closer to the Common Core project, than to the PICC, PECL and DCFR, by highlighting the differences, reflecting and reaching a conclusion of possible harmony.

In order to achieve such an objective, the guideline must be the purpose of the rules combined with their practical effects, and not only the pure theories and concepts⁹⁵⁸. The understanding of the legal and practical goals of the systems is a suitable approach to find a way to identify protected values and, perhaps, reach harmonisation upon divergences.

⁹⁵⁷ MICHAELS, Ralf, *Comparative Law*, cit., pp. 298-299.

⁹⁵⁸ FIKENYSCHER, Wolfgang, *Closing Remarks: Harmonizing National and Federal European Private Laws, and a plea for a Conflicts-of-Law Approach*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002, p. 46.

CHAPTER 3: HARMONISATION AND CONTRIBUTION OF CONTRACT LAW AMONG BRICS COUNTRIES

This third and final chapter concludes the thesis to be defended. Based on the study of each BRICS legal systems, its general principles, specific provisions, followed by the analysis of previous relevant harmonising and uniformising initiatives that addressed the issues of invalidity and hardship, the following questions remain to be answered: are the BRICS systems compatible and capable of being harmonised with respect to the issues of invalidity and hardship? Are the identified differences insuperable obstacles or are they able to be overcome for practical purposes? Are their roots and purposes different in fact? And, if the differences are unbridgeable, are there lessons to be learned from the distinct experiences? Might contributions be inferred from those different experiences?

These are the questions that the present study aimed to answer throughout the former chapters and will be summarised in this concluding one. As previously mentioned, the comparative and harmonisation work encompass the identification of concerning divergences among different systems and the attempt to overcome seemingly insuperable obstacles through the analysis of social, economic and other practical factors that are relevant to each legal system⁹⁵⁹. Upon such an analysis, it is possible to verify which rules are strict and unwavering, and those which can be harmonised.

In order to achieve this ambitious goal of harmonisation, and to affirmatively answer the questions posed above, the present work had to be hypersensitive to the differences encountered, but, at the same time, fearless of the cross-cultural judgement that could lead to the failure of the intent of harmonisation and contribution. The divergences cannot be faced solely as obstacles, but rather as opportunities to understand the other side and, why not, to better understand and question our own system. In other words, comparison may also function as a “window” to our own society’s perceptions and institutions, which enables legislators, academics and practitioners to find ways among divergences to build a better or more suitable system to be applicable to each subject under assessment⁹⁶⁰.

This mutual contribution and development through comparison may be particularly useful in the context of the BRICS countries. All of them pursue evolving legal

⁹⁵⁹ ERP, J.H.M. van, *The Pre-Contractual*, cit. p. 513.

⁹⁶⁰ Regarding this utility of harmonisation, see: CURRAN, Vivian Grosswald, *On the shoulders*, cit., p. 6; FIKENYSCHER, Wolfgang, *Closing Remarks*, cit., p. 46; EBERLE, Edward J., *Comparative Law*, cit., p. 93.

frameworks in the field of contract law, with recent codifications, reforms and many rules that are still under construction or being developed by case law and literature. In this context, it is possible that each system, with due caution, can benefit from the external experiences in order to optimise its legal framework.

Despite this common evolving characteristic of the five countries, generally the influences for shaping internal contract law come from the developed and traditional European countries. While Brazil, China and Russia are hugely inspired by the German and Italian traditions, Indian law is based on the English system and South Africa follows a mixture of Roman-Dutch law and English law. Not for any other reason, the former chapter of this study relied upon European initiatives of comparative work and harmonisation.

Such a link with the European experience is indissociable and, consequently, will continue to appear throughout this third chapter. However, would it be possible to disrupt this paradigm and also extract valuable influences and experiences outside this European centred legal world? In other words, can the selected countries be also inspired by the experience of other countries with a similar level of development and similar background of either former colonisation (Brazil, India and South Africa) or former drastic change of economic and political regime (Russian and China)? If the present study has a minimum contribution that demonstrates the benefits of this experiences' exchange, breaking away from the classic "north-to-south" dominance, it may achieve its objective.

For such a purpose, an element of caution is necessary though. As inferred from previous chapters, the identified distinctions among BRICS countries with respect to the issues of the mechanism of avoidance, consequences of avoidance and hardship recall the duality of common law *vs.* civil law traditions. In order to enable a neutral harmonisation, some preconceptions of both traditions must be therefore set aside⁹⁶¹.

On the common law side, the intense reluctance to change contract legal patterns is advised to be somewhat relaxed. The common law practitioners (lawyers, judges, lawmakers and academics) are traditionally reluctant to conceive new rules and standards deviating from the millenary principles and doctrines applied by their precedents. Also, on the issue of contract law, the English legal standards are traditionally respected worldwide, being commonly chosen as the applicable law to many international contracts (in commodity

⁹⁶¹ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 35.

trade particularly)⁹⁶². There is a sense of “pride” involved in having the traditionally conceived “best” and most recognised standards for contract practice.

Such reluctance may be the reason, for instance, for the United Kingdom not ratifying the CISG and influencing India in this path. However, as previously mentioned and will become even clearer in this chapter, the common law solutions not always are the best for contract experience, especially when reproduced in countries with very diverse backgrounds compared to the English experience. Therefore, flexibility on such traditional standards is advisable for reaching harmonisation and providing a better equipped system.

Accordingly, on the civil law side, there must be no fear in accepting possible common law solutions as the most suitable for a given contract legal issue. The common law rules and standards are generally viewed as unknown, confusing or even incomprehensible by civilians⁹⁶³, who are accustomed to finding the answers to life problems in general fixed rules and to apply them differently in accordance with the practical case and justice - the typical clash between certainty and justice mentioned before. This fear and incomprehension lead civilians to either treat some common law rules as “exceptions”, minimising their impact, or to reproduce civil law concepts on the common law rules in an effort to prove that they are the same or have the same civilian roots⁹⁶⁴.

This behaviour from civilians recalls lessons from cognitive psychology, according to which the divergences will be better accepted if they allow the enhancement of the individual in his/her own eyes. In this path, a civilian better accepts the idea that common law practice belongs to his/her world, rather than to admit that he/she has something deriving from common law. For the harmonisation purpose, this bias is better to be avoided. As well as the common law practitioner is advised to relax reluctance, the civilians should have extra care and avoid viewing other rules through the lens of their own cultural and legal perspective⁹⁶⁵.

The above advice is especially applicable to the present study, since its author belongs to one of the five BRICS system (Brazil), and reference or preference to a civil law

⁹⁶² NICHOLAS, Barry, *The United Kingdom*, cit., pp. 2-3; ZELLER, Bruno, *The Development*, cit., p. 1185.

⁹⁶³ The civilians’ discomfort with respect to common law is illustrated by Konrad ZWEIGERT and Hein KÖTZ: “*One should be frank enough to say, however, that though the English system has a certain antiquarian charm about it, it is so extremely complex and difficult to understand that no one else would dream of adopting it*” (in *Introduction*, cit., p. 37).

⁹⁶⁴ LEGRAND, Pierre, *A Diabolical Idea*, cit., pp. 253-255; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 35 and 181.

⁹⁶⁵ EBERLE, Edward J., *Comparative Law*, cit., p. 93; LEGRAND, Pierre, *A Diabolical Idea*, cit., p. 253.

solution, or even to a particularly Brazilian solution, may be at times unavoidable. For this author, the other four systems are “alien bodies” and recourse to the Brazilian system and its influences is generally necessary to understand the others. However, as much as possible, the dissociation from homeland concepts will be attempted, especially when confronting the diverse common law rules and solutions.

As will be also observed, the comparative work of this Chapter will be developed by focusing on the dissonant treatment conferred to the selected issue by the systems. In other words, when an issue is accepted by the majority of systems and the divergence is concentrated in one system, the focus will turn to this latter in order to understand the reasons for such discrepancy and possible room for compatibility.

Following this introduction and qualifications, it is possible to move onto the specific issues of invalidity and hardship. In addition to the reference to national literature and case law of the BRICS countries, the following items will also inevitably consider, as alerted, insights from the European systems that influenced and still inspire the contract law in those countries, with caution and attention to the countries’ reality and particularities (when possible to assess). After all, as already referred to South Africa⁹⁶⁶, the BRICS systems are indeed examples of Western European law prevailing outside Western Europe.

1. Mechanism of avoidance – judicial vs. self-help remedy

The issue of invalidity of contracts is one of the most complex when discussing harmonisation. Its pure concept does not entail much debate, since invalidity can be defined as “*a response whereby a contract is understood as either failing (fully or partially) to create its intended effects or as losing them subsequently*”⁹⁶⁷, while the particular issues of voidability, absolute nullity, enforceability are understood as degrees of invalidity, which can vary from country to country.

Despite a general common denominator with respect to legal validity and invalidity⁹⁶⁸, as well as with the general concept of invalidity as preventing a contract from producing the desired effects, the rules on *who* can invoke, *how* to invoke, based on *which*

⁹⁶⁶ ZIMMERMANN, Reinhard, ‘*Double Cross*’, cit., p. 4. The author refers to South African system as an example of “*truly European Law prevailing outside Europe*”.

⁹⁶⁷ HELLWEGE, Phillip, *Invalidity*, cit. p. 991

⁹⁶⁸ KÖPCKE, Maris, *A Short History*, cit., p. 2.

circumstances and *which* consequences derive from invalidity, vary among the BRICS experiences and claim for deeper comparison. Adding the ingredient of illegality to invalidity, even stronger discrepancies arise.

When the analysed uniform initiatives ventured into the harmonisation and unification of rules on invalidity and illegality, they were considered overambitious⁹⁶⁹. Accordingly, the present attempt to do the same inside the BRICS context - with the assessment of legal systems which are not familiar with being in the spotlight of comparative works - is certainly super overambitious and, as such, entails several risks of failure.

The awareness of such a risk, however, does not prevent the comparative exercise to insist on the issues of invalidity. The identification of the reasons and purposes of the different treatments helps to understand the deviations, their coherence with the national context or even their susceptibility to welcoming changes and contributions. This (risky) enterprise starts with the mechanism available for a party to avoid a contract.

Based on the research undertaken in Part I, and summarised in Chapter 1 of this Part II, the divergence encountered with respect to the mechanism for avoidance (hereinafter, “avoidance” will be used as a synonym for rescission, dispute or revocation) separates the BRICS countries between those where avoidance is a judicial measure (Brazil, Russia and China) and where it is a self-help remedy (India and South Africa).

The different treatment on *how* to avoid places the contracting parties of the BRICS countries in distinct positions upon the discovery of the defect in the contract that makes it voidable: in one case, the annulment of the contract will require a litigation procedure, while in the other case, the simple communication (without higher formality requirements) will be sufficient. However, is this divergence effective or merely apparent?

When it comes to analysing the involved rules, there is no doubt about the conceptual divergence. Article 177 of the Brazilian Civil Code is clear to state that avoidance will not be effective before being “*judged by an award*”. The same happens with the several provisions of the Chinese Civil Code applicable to voidable contracts, according to which the party “*has the right to request the people’s court or an arbitration institution to revoke the civil juristic act*”, and even the concept of disputable contracts as those declared invalid by a court, pursuant to Article 166 of the Russian Civil Code. Conversely, Section 66 of the Indian Contract Act states that rescission may be communicated “*in the same manner, and*

⁹⁶⁹ BONELL, Michael Joachim, *The New Provisions*, cit., p. 535.

subject to the same rules, as apply to the communication or revocation of a proposal”, that is, without the need to resort to court. Similar to India, South Africa also considers avoidance valid upon effective notification.

The reasons for the adoption of one or another approach are rarely discussed in the analysed literature in the present study (which, it is important to remember, has its limitations due to linguistic barriers). The authors generally describe the measure, its requirements and consequences, but hardly its rationale and comparison to other different approaches. This absence of discussion (even if superficially) makes the harmonisation of this issue extremely difficult, and any assumption has the risk to be improper.

Nevertheless, there are some internal and external insights that might be helpful when trying to untie this knot. Research revealed that the different mechanism adopted by the countries is far more related to their external influence than to the national issues of the BRICS countries. In other words, the adoption of a court-supervised approach by the BRICS civil law countries derives from the influence of the continental traditional civil law guidance on the mechanism for avoidance. Contrastingly, the Indian and South African systems inherited the flexible rescission approach from the English colonisation.

According to what was discussed in the European initiatives (analysed in Chapter 2 above), the rationale of the civil law countries stems from a historical background rather than from practical, cultural or conceptual concerns. The origin of judicial measures in these countries recalls the Roman law institutions of *actio* and *exceptio doli causa* or *metus causa* (primarily applied in claims for damages or to exempt liability due to fraud and coercion), which were expanded to all causes of voidability of contracts, reinforced throughout the years and influenced colonised law systems⁹⁷⁰. Moreover, the more protective and subjective feature of the civil law traditions may also contribute towards the maintenance of such an approach (more control over the private relationships).

On the contrary, common law tradition is focused on objectiveness, certainty and efficiency of commercial relationships. Consequently, the parties are granted with the same freedom and power to decide on the future of the contracts upon the presence of a ground for avoidance, as they had at the moment of the formation of the contract. If the parties can

⁹⁷⁰ LOHSSE, Sebastian in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 714-715; HELLWEGE, Phillip, *Invalidity*, cit. p. 992.

contract by mere exchange of unequivocal communication, there would be no reason to prevent them from adopting the same approach for its extinction.

National discussions on the issue are almost absent. In the Chinese case, Bing LING suggests that the rationale to keep the maintenance of the judicial measure “*is that rescission of a voidable contract usually involves controversies over the facts and the law, and to maintain the certainty and sanctity of contracts, a contract should remain effective until it is set aside by the court or arbitral tribunal*”. However, the same author recognises that the rule can be mischievous to the efficiency of transactions, especially when the facts and the law are clear about the invalidity⁹⁷¹.

This justification, which could also be applicable to other civil law countries, does not appear to be convincing, since China recognises the self-help remedy in cases of termination of contracts due to non-performance⁹⁷², where “controversies over the facts” also exist and the burden of proof may be even higher than in the cases of invalidity. Most probably, the maintenance of a court-supervised measure in invalidity cases could be related to a stronger supervision and control of the Chinese government on the country’s economy and private transactions (as well as on the autonomy of the parties) in general, as a heritage of the planned economy⁹⁷³. Therefore, the disruption of these transactions should be controlled by the State through court practice.

⁹⁷¹ LING, Bing, *Contract Law*, cit., p. 210.

⁹⁷² Pursuant to Article 563 combined with Article 565 of the Chinese Civil Code. Article 563: “*The parties may rescind the contract under any of the following circumstances: (1) the purpose of a contract is not able to be achieved due to force majeure; (2) prior to expiration of the period of performance, one of the parties explicitly expresses or indicates by his act that he will not perform the principal obligation; (3) one of the parties delays his performance of the principal obligation and still fails to perform it within a reasonable period of time after being demanded; (4) one of the parties delays his performance of the obligation or has otherwise acted in breach of the contract, thus makes it impossible for the purpose of the contract to be achieved; or (5) any other circumstance as provided by law. For a contract under which the debtor is required to continuously perform an obligation for an indefinite period of time, the parties thereto may rescind the contract at any time, provided that the other party shall be notified within a reasonable period of time*”. Article 565: “*Where one of the parties requests to rescind the contract in accordance with law, the other party shall be duly notified. The contract shall be rescinded at the time the notice reaches the other party, or, where the notice states that the contract shall be automatically rescinded if the debtor fails to perform his obligation within a specified period of time, the contract shall be rescinded when the debtor fails to perform the obligation upon expiration of such specified period of time. Where the other party has objections to the rescission of the contract, either party may request the people’s court or an arbitration institution to determine the validity of the rescission.*”

⁹⁷³ On the general premise of the supremacy and dominance of the State interest and supervision on Chinese economy, see ZHANG, Mo, *Chinese*, cit., p. 183 and FU, Junwei, *Modern European and Chinese Contract Law. A Comparative Study of Party Autonomy*, Alphen aan den Rijn, Kluwer Law International, 2011, pp. 106 and 109.

Brazilian literature also does not bring deeper conceptual explanations⁹⁷⁴. For the author, the court-supervised measure is a heritage and shares common ground with other Latin systems such as in France, Italy and Spain, and could be justified by a “presumption of validity” applied to all contracts and that can only be removed by the court. Therefore, an individual person cannot intervene in this judicial authority, which relies on the adversarial procedure and the submission of proofs in order to declare a contract void⁹⁷⁵.

Considering the above, there seems to be no clear (and uniformly accepted) conceptual obstacle for a civil law country to accept the avoidance by mere notification, as well as for a common law country to adopt a judicial approach. And this is verified, though exceptionally, in the BRICS reality.

For instance, although the Indian Contract Act providing for the effective communication as a mean for rescission, the Indian system deviates from English law by expressly recognising the rescission as also a judicial measure in Section 27 of the Specific Relief Act, subject to a three-year limitation period counting from the time when the facts entitling the party to have the contract rescinded became known to him/her (Section 59 of the Limitation Act). By stating that “*any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely: (a) where the contract is voidable or terminable by the plaintiff*”, the Indian system clearly approximates the mechanism of avoidance to the other BRICS civil law countries (indeed, it is particularly akin to the Chinese provision).

Therefore, differently from what happens in England, in India, cases of automatic loss of rights to avoidance by the lapse of an undetermined period of time are more uncommon, revealing a more protective system. Another point of contact, as mentioned in Part I, the declaration of partial invalidity of a contract is necessarily a judicial measure and cannot be done through unilateral communication. One of the causes for these

⁹⁷⁴ Among the consulted authorities: PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado*, cit.; PEREIRA, Caio Mário da Silva, *Instituições*, cit.; GOMES, Orlando, *Contratos*, cit.; MELLO, Marcos Bernardes de, *Teoria*, cit.; MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit.; JUNIOR, Humberto Theodoro, *Livro III-Dos fatos*, cit.; BEVILÁQUA, Clóvis, *Código Civil dos Estados unidos do Brasil*, Rio de Janeiro, Ed. Rio, 1979; SANTOS, J. M. de Carvalho, *Código Civil Brasileiro Interpretado*, vol. III, Rio de Janeiro, Calvino, 1934; LACERDA, Paulo de, *Código Civil Brasileiro*, 15 ed., Rio de Janeiro, Livr. Jacintho, 1933; BUSSADA, Wilson, *Código Civil Brasileiro. Interpretado pelos tribunais*, vol. 1, t. 2, Rio de Janeiro, Liber Juris, 1980; VENOSA, Sílvio de Salvo, *Direito Civil, Parte Geral*, vol. I, 5th ed., São Paulo, Atlas, 2005; RODRIGUES, Sílvio, *Direito Civil. Parte Geral*, vol. I, 34th ed., São Paulo, Saraiva, 2003).

⁹⁷⁵ VELOSO, Zeno, *Invalidez*, cit., pp. 266-267 and 273. The author refers to the “presumption of validity” as a stated rule in Chile, but is not clear that the same presumption applies under Brazilian law.

slight deviations from classical common law remedies may be a strong procedural characteristic of the Indian system⁹⁷⁶, which is indeed closer to the Brazilian reality.

In fact, the Brazilian system is known by its extremely judicialised nature and the rules contained in the Civil Code, delegating to the judge many acts of private life (such as the decision to avoid a contract), reinforces this feature. A renowned Brazilian author, when analysing the evolution of Brazilian civil law over the years, refers to the first paradigm of the law (which had to be applied strictly), as moving to a paradigm of the judge (which has the power to interpret and apply the posed norms) and that, currently, there is a paradigm of the “escape from the judge” (*fuga do juiz*), *i.e.*, a general claim for more efficient and faster solutions to civil relationships. He regrets, nonetheless, that the recent reform of the Civil Code in 2002 did not follow this change of paradigm, and insisted on the presence of the “swollen judge”, exclusively competent to deal with ordinary issues, such as the avoidance or termination of contracts due to breach⁹⁷⁷. However, similar to Indian case, the Brazilian system also shows recent signs towards compatibility.

As already mentioned in the Introduction, Brazil has ratified the CISG and was represented in the Working Group for the drafting of the PICC. Both initiatives provide for a private unilateral approach for the cases of avoidance and termination of contracts⁹⁷⁸. The CISG does not cover the issue of invalidity, but establishes that, when a party is entitled to terminate a contract due to non-performance, such termination may be effectuated by notice. The PICC provides the same approach to instances of avoidance and non-performance. This illustrates that the Brazilian system, despite its internal norms, would be open to accept more flexible and non-judicial rules with respect to international contracts.

Before advancing in this direction, which would be also applicable to Russia and China (both ratified the CISG and were represented in the PICC), it is important to remember that the PICC is a soft law instrument and reflects the “best solutions” in the opinion of its drafters, and not the commonly accepted rules of the involved countries. Therefore, the mere fact that these countries were part of the PICC or ratified the CISG shall not lead to the

⁹⁷⁶ BHADBHADE, Nilima, *Contract*, cit., p. 70.

⁹⁷⁷ AZEVEDO, Antônio Junqueira de, *Insuficiências*, cit., *passim*.

⁹⁷⁸ Pursuant to Articles 3.2.11 and 7.3.2 (1) of the PICC: “*The right of a party to avoid the contract is exercised by notice to the other party*”, “(1) *The right of a party to terminate the contract is exercised by notice to the other party*.”. Also, Article 26 of the CISG: “*A declaration of avoidance of the contract is effective only if made by notice to the other party*.”

automatic conclusion that they would accept the unilateral avoidance of a voidable contract by means of communication and exclude the judicial approach.

However, this may pave some way towards harmonisation or, at least, the contribution between the different approaches. Brazil had to face this clash of self-help remedy *vs.* judicial measure in the issue of termination due to fundamental non-performance (or fundamental breach) when ratified the CISG, since Article 474 of the Brazilian Civil Code⁹⁷⁹ refers to termination as a judicial measure (when the cause of termination is not expressly set forth in the contract), similar to what occurs with the issue of avoidance. Since the Convention enters the system as national law, this clash was discussed as a great impact and conflict of the CISG's adoption by Brazil⁹⁸⁰.

Following more in-depth research on this issue, it was demonstrated, in another comparative study, that the CISG impact was rather a myth instead of a concern. Since the Convention has its application limited to international sales contract, its adoption would not have the effect to modify internal regulation applicable to all contracts. Furthermore, the “escape” from the judge is beneficial and more suitable to international trade, since it brings efficiency and reduction of transaction costs in relationships where time is of the essence. Hence, the CISG did not confront national law, but rather introduced better rules to deal with the specific environment and had a contributory function to modernise the Brazilian system (which was a previous claim not addressed in the reform of 2002)⁹⁸¹.

Such an experience may, with due caution, be reproduced in the case of invalidity. After all, if the current law accepts (for international contracts) that a termination act based on contractual breach may occur without the supervision of a judge or arbitral tribunal, why could not a decision to invalidate operate in the same manner? The existence of a contract which is vitiated in its origin is significantly more serious than the existence of a valid contract, validly performed, but breached by one of the parties at a later date. If this is so, why, for the latter case, is it acceptable that the parties escape from litigation and communicate termination, while, for the former, such an escape would not be allowed?

In other words, under Brazilian law, a breached international contract can be discharged with celerity, whereas a voidable contract - concluded with malice or through

⁹⁷⁹ Article 474 of the Brazilian Civil Code: “*The express termination clause operates automatically; the tacit clause depends on judicial interpellation.*” (free translation).

⁹⁸⁰ See in this regard, VERONESE, Lígia Espolaor, *A Convenção de Viena e seus reflexos no direito contratual brasileiro*, São Paulo, Almedina, 2019, pp. 117-118.

⁹⁸¹ VERONESE, Lígia Espolaor, *A Convenção*, cit., Part II, Chapter 2, item 4 (*passim*).

coercion, for instance -, which is more detrimental to the system and to the society, must wait years for a court decision in order to discharge the aggrieved party suffering from its effects. Considering legal practice, and setting aside theories, historical background and posed norms, such a situation is clearly not desirable for the international contract experience. Moreover, even if considering the *favor contractus* concept (that guides all systems), it does not make legal sense to allow the easier termination of a valid contract, but not the easier avoidance of a vitiated contract.

For those reasons, even though not expressly provided, there seems to be no practical obstacles, with respect to international contracts (which is the focus of this comparative study), for the acceptance of a self-help remedy for contract avoidance by the civil law countries of the BRICS. Indeed, the same rationale would be applicable to Russia and China, where, as indicated above, no other conceptual compelling ground was observed in literature for defending the preservation of the judicial measure in all circumstances. On the contrary, the reason that invalidity “involves controversies of facts and law” and would require judicial appreciation, does not explain why China adopted another approach (self-help remedy) for cases of contract termination.

Therefore, just as India would be ready to adopt avoidance as a judicial measure, Brazil, Russia and China, would be so with respect to the self-help measure (again, in an international commercial experience). South Africa, in turn, does not contain provisions on the judicial request and procedure of avoidance. The general rule is the self-help remedy and litigation will take place if the parties do not agree on the avoidance terms, or if the party receiving communication contests such avoidance.

The choice made by the South African system is the same as consistently adopted by the international and European uniformising initiatives analysed in Chapter 2 above. What is the reason for this? The least burdensome approach for international contract practice may be the best solution for uniformisation. In this case, the common law solution was chosen. Furthermore, the self-help mechanism is a measure that best privileges the party autonomy and freedom of the parties in contractual relationships.

Moreover, the clash between the two approaches should not be as overestimated as it appears. After all, if both parties agree on the invalidity of a contract, in any of the BRICS countries, they will peacefully proceed to corresponding communications and consequences, without resorting to a court, in an exercise of the party autonomy principle

(common in the five countries)⁹⁸². Conversely, in case of misunderstanding between the parties, also in any of the BRICS countries, the parties will inevitably end up in court litigation.

As a consequence, it is possible to affirm that this first compared issue is naturally harmonised in practice and fits in with the functional comparative theory that the different legal systems and rules may offer the same or very similar practical solution to the problems⁹⁸³. This was, indeed, the reason for drafters of the uniformising initiatives giving little relevance to this issue, since the adoption of the most beneficial approach (a common law self-help approach), even contrary to the majority of the civil law countries involved, would hardly be problematic in practice⁹⁸⁴.

In order to sum up and conclude, the research and reflections on the divergence related to the mechanism of avoidance demonstrate room for both harmonisation and contribution among the BRICS systems. Firstly, the exceptions provided in the Indian system for a judicial measure, combined with the exceptions and possibilities for Brazil, Russia and China to accept a self-help remedy in the international field, leads to the conclusion that the systems are not totally incompatible. Secondly, the lack of relevant concepts and theoretical basis to stick to one or another approach also leads to compatibility and to the conclusion that there are no unbridgeable obstacles. Thirdly, the adoption of one or another remedy leads to the same practical results: extrajudicial measures when the parties agree and litigation upon disagreements.

The above three grounds demonstrate the rooms for harmonisation and compatibility among the systems. However, the analysis of this issue of invalidity also reveals a contributory function of the comparison among the BRICS. It is undeniable that the more flexible approach existent especially in South Africa is better for the economic exchanges and the civil law countries can clearly take account of such experience (as they have been benefiting from the CISG in case of termination).

⁹⁸² Reservation is made, however, to the resistance demonstrated by some Brazilian authors with respect to the literal wording of Article 177 of the Civil Code. According to them, not even the bilateral agreement for the adjustment of the nullity of the contract would escape from court supervision (see MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários*, cit., p. 285 and VELOSO, Zeno, *Invalidade*, cit., p. 266).

⁹⁸³ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 39.

⁹⁸⁴ LOHSSE, Sebastian in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 716.

In the issue of avoidance, therefore, the common law presents a more suitable and enriching alternative to the civilians, and the exercise to set aside preconceptions (as introduced in this chapter) is hereby beneficial to all countries.

This is the quest of the legal comparison. It is not contented with the fixed dichotomy, but rather aims at discussing divergences and searching for compatibility. It is not a quest for defending which approach is the best or the worst, and isolating legal systems which do not comply with it. It is a quest for complementarity, enriching and self-reflection in order to discover different point of views and allow development⁹⁸⁵. The BRICS countries have much to contribute and benefit from each other, and the possibility to adopt a flexible approach for the avoidance mechanism is definitively one of these contributions.

2. Consequences of avoidance – unwinding contracts and restitution

The second issue that has been comparatively analysed refers to the consequences of the avoidance and the rules applicable for unwinding invalid contracts. The consequences are presumably the same whether the contract is void *ab initio* or voidable at the option of the affected party, since the difference refers solely to the process which results in the contract being retrospectively unenforceable⁹⁸⁶.

Upon the declaration (or decision) confirming the avoidance, the unwinding process must start. After all, if a valid act is the one that results in changing normative positions of the parties (legal rights, duties and/or powers)⁹⁸⁷, the invalidation of an act must cancel this change of positions retrospectively, as if they never once “changed”.

The five legal systems are, therefore, convergent in stating that the avoidance of a contract operates retrospectively and, as a consequence, the general rule of *restitutio in integrum* shall apply. *Restitutio in integrum* is conceptualised as the return of the party to the *status quo ante*, or to put the parties into the position in which they would have been, had the contract not been concluded⁹⁸⁸. Given the seriousness of the invalidity, the laws require that the parties return all the performances and benefits received under the invalid

⁹⁸⁵ EBERLE, Edward J., *Comparative Law*, cit., p. 101; LEGRAND, Pierre, *A Diabolical Idea*, cit., pp. 256 and 269.

⁹⁸⁶ ZIMMERMANN, Reinhard, *The Unwinding*, cit., p. 565.

⁹⁸⁷ KÖPCKE, Maris, *A Short History*, cit., p. 14.

⁹⁸⁸ MILLER, Saul, *Unjustified Enrichment*, cit., p. 462; HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., 282.

contract. Therefore, the Latin expression is generally used to qualify not only the restitution itself, but also the requirement for the avoidance of a contract⁹⁸⁹.

According to the research on the five legal systems, all of them provide for this general rule either by means of specific regulation (such as Brazil, China, Russia and India⁹⁹⁰) or by resorting to regulation on unjustified enrichment and property recovery (South Africa). There is some discussion as to whether the restitution would be a contractual remedy or understood as a method comprised by the unjustified enrichment doctrine (quasi-contractual remedy), especially in South Africa where there is no independent provision on restitution⁹⁹¹. Both rules seek the same objective to prevent a party from improperly enriching at the expense of the other⁹⁹², and, in the case of avoidance, the receipt of a performance under an invalidity contract enriches the party without a valid ground.

Given this proximity, it is common to treat both remedies (restitution and unjustified enrichment) as synonyms in practice. In some passages in Part I, assertions can be found where the restitution to the *status quo ante* in case of invalidity is necessary “in order to avoid unjustified enrichment”⁹⁹³. In fact, Chapter 2 above demonstrated that the DCFR initiative adopts a unified approach, directing all rules on restitution in cases of invalidity (and illegality) to the unjustified enrichment chapter⁹⁹⁴.

However, in the particular case of contract invalidity, there are some nuances that privileges an independent approach of restitution. Since the contract must be unwound, there must be a complete return of the performances, while the unjustified enrichment rule usually requires the return of just the enriched part (the lesser of the enrichment of the one party and the loss or detriment of the other), which may lead to different practical consequences⁹⁹⁵. In any case, the doctrine of unjustified enrichment plays an important,

⁹⁸⁹ HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., pp. 281-282. The author also mentions two other meanings for *restitutio in integrum*: a proper action and/or a plaintiff’s aim in bringing the action.

⁹⁹⁰ Pursuant to Article 182 of the Brazilian Civil Code, Article 167 of the Russian Civil Code, Article 157 of the Chinese Civil Code and Sections 64 and 65 of the Indian Contract Act.

⁹⁹¹ See, CLIVE, Eric, *Unjustified*, cit., p. 586; VISSER, Daniel, *Unjustified Enrichment*, cit., pp. 536-537; MILLER, Saul, *Unjustified Enrichment*, cit., pp. 461-464; DU PLESSIS, Jacques, *Fraud*, cit., p. 203. Also in India, the rules on restitution are based on the avoidance of unjustified enrichment and the remedy is appointed as of quasi-contractual nature (POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 970). In China, in turn, the remedy is not conceived as a quasi-contract, but an autonomous remedy of restitution or equivalent compensation (ZHANG, Mo, *Chinese*, cit., p. 194).

⁹⁹² ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 44.

⁹⁹³ See, among others, items 2 and 4 of Chapter 2, Part I.

⁹⁹⁴ Pursuant to Article II-7:212 and II-7:303

⁹⁹⁵ MILLER, Saul, *Unjustified Enrichment*, cit., p. 464; CLIVE, Eric, *Restitution*, cit., p. 389.

though subsidiary, role in treating the consequences of invalidity and is an important tool for harmonisation, as will be evident ahead.

Notwithstanding the convergence with respect to the necessary restitution in case of invalidity, the systems differ in conferring exceptions to this general rule. The two main exceptions identified mark the duality between common law *vs.* civil law. The first refers to the preclusion of the restitution remedy, and the rescission as a whole, when the party entitled to avoid a contract is not able to return the performance as it was received (*in natura*) without the fault by the other party, while the second exception refers to the impossibility to claim restitution in case of equal faults or illegality, in accordance with the maxim *in pari delicto potior est conditio possidentis*. Both are common law applied exceptions and, therefore, they distinguish BRICS countries.

Such divergences were already identified with concern in the European context⁹⁹⁶ and may raise the same problems to the harmonisation within the BRICS scenario, where a party exercising the right of avoidance in one country, may be prohibited to do so in another country. Therefore, a quest for possible compatibilities is pertinent.

2.1. Inability to restore

With respect to the first exception, the divergence seems to isolate Indian law in comparison to the other four systems. Even South African law deviates from the classic common law rule and does not consider the previous inability to substantially restore as a bar to rescission⁹⁹⁷. In this country, restitution may be performed by means of equivalent compensation (compensatory model or approach), which approximates it to Brazil, Russia and China. The provisions of the Indian Contract Act and Specific Relief Act, however, seem not follow the same flexible approach. Therefore, in order to attempt compatibility and harmonisation in this first exception, regard to this system is recommendable.

Indian law clearly distinguishes the treatment of the consequences deriving from the circumstances where a contract is void, from those voidable (which, in fact, represents an exception to the above referred presumption that voidability and nullity have the same effects). The divergence is subtle. While Section 65 of the Indian Contract Act states that,

⁹⁹⁶ SEFTON-GREEN, Ruth (ed.), *Mistake*, cit., p. 162.

⁹⁹⁷ Case *Extel Industrial (Pty) Ltd. V. Crown Mills* 1999 SA 719 SCA, *apud* DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., p. 139.

for void contracts, a party “*is bound to restore it, or to make compensation for it to the person from whom he received it*”, Section 64 states that a party to a voidable contract “*shall*” restore the received benefit. This latter requirement is reinforced by the Specific Relief Act, whose Section 27 states that the court may *refuse* rescission “*(b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made*”.

In order to seek harmonisation, the research attempted to understand this relevance attributed to the ability to restore in the case of voidable contracts, opposed to the lack of such requirement in case of void contracts. Clearly, the common law approach is much more centred on the aggrieved party (“*the plaintiff who wants back, must give back*”⁹⁹⁸) while the civilian approach is focused on the other party (or both parties) who enriched from the performance and, therefore, restitution or equivalent must be permitted.

However, the assessed literature says little about the cause of the attributed divergence. In an effort to understand the approach, the South African author Jacques DU PLESSIS considers the grounds unclear, and suggests that it could be related to the “*contractual nexus of reciprocity*”, which could survive in cases of voidable contract (which was effective until being avoided), but not for the void contracts, where reciprocity has never existed⁹⁹⁹.

For the referred author, nonetheless, the reciprocity that characterises the strict requirement of the return of the *same* performances, would not exist (or should not be required) in the case of voidable contracts¹⁰⁰⁰. This flexible approach was also adopted in South African by not imposing the ability to restitution as a condition to invalidate a contract.

Moreover, the requirement of providing for substantial restitution (precisely what was received), would seek to safeguard that the proprietary and factual consequences of the contract are equally unwound for both parties¹⁰⁰¹. Another suggestion is that, in case of voidable contract, it is the aggrieved party who brings the claim and, therefore, should have an additional burden to extinguish the contract (provide equal restitution). The reason for this approach would be also to secure the benefits received, which would be important

⁹⁹⁸ CHEN-WISHART, Mindy, *In defence*, cit., 174.

⁹⁹⁹ DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, cit., pp. 139-140.

¹⁰⁰⁰ *Idem*, *ibidem*, p. 139.

¹⁰⁰¹ HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., 261.

“in the development of the law of restitution, especially in the commercial field where parties generally need to be certain that benefits which have been transferred have been validly transferred and will not be upset too readily”¹⁰⁰².

Therefore, the divergence would rely upon the nature and seriousness of the vice of the contracts. Since voidable contracts comprise less serious defects and it is in the hands of the aggrieved party in terms of having the choice to keep the enforceability or not, the liability for the consequences of such a “choice” must be also put in this party’s hand. The avoidance of a contract is detrimental to the legal practice (especially under common law tradition) and, therefore, an additional burden is put on the shoulders of the aggrieved party for extinguishing a contract due to a less serious problem.

The same threshold or additional requirement is not applicable to void contracts, since, considering the seriousness of the defect, they must be annulled in any case and inability to restitution *in natura* may be substituted by equivalent compensation¹⁰⁰³.

The above efforts help to understand the reasons behind the Indian approach - even though not compelling enough to justify such a divergence -, but do not assist in the quest for harmonisation. Another possibility to approximate the Indian system to the other four would be through possible exceptions in the posed rules and practical experiences.

In this path, the wording of Section 27 of the Specific Relief Act, transcribed above, leads to the idea that the refusal in case of inability to restore is not mandatory (“*may be refused*”). Additionally, as mentioned in Part I, Section 30 of the same Act opens the possibility to the judge to award compensation based on equity. Moreover, the English Misrepresentation Act (Section 2(2) also provides that the courts shall have the power to award damages *in lieu* of rescission (and restitution), when equitable to do so¹⁰⁰⁴.

Although these provisions lead to the possible relaxing of the rule applicable to voidable contracts, literature states that Indian courts generally insist on assessing the restitution ability *before* declaring rescission of voidable contracts (the order for restore is previous to the order of rescind¹⁰⁰⁵), as in English common law¹⁰⁰⁶, which is different, for

¹⁰⁰² VIRGO, Graham, *Failure of consideration: myth and meaning in the English law of restitution*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, pp. 126-127.

¹⁰⁰³ HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., p. 267.

¹⁰⁰⁴ See Part I, Chapter 2, item 3.

¹⁰⁰⁵ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 966.

¹⁰⁰⁶ HELLWEGE, Phillip, *Unwinding mutual contracts*, cit., p. 255; TREITEL, Guenter, *The Law*, cit., p. 469.

example, from the Brazilian experience which focuses on the defect and not in the restitution for avoidance purposes¹⁰⁰⁷. In fact, both provisions (Section 30 of the Specific Relief Act and Section 2(2) of the Misrepresentation Act) assume that the party is already entitled to avoidance - *i.e.*, is able to restore – and, in particular circumstances, an equitable alternative of compensation may be granted.

With respect to the limitation of the remedy to pay “damages *in lieu*”, this was not particularly clear until a recent judgement of the English precedent *Salt vs. Stratstone Specialist Ltd*, according to which damages *in lieu* of rescission is a remedy applicable only if the rescission is still available¹⁰⁰⁸. However, literature criticises the general rule, since there would be no reason why the factors barring the right to rescind should limit the discretion to award damages. In fact, such a remedy would be appropriate to cases where the right to rescind is lost due to the inability to make counter-restitution. The mere denial to rescission or to apply for damages *in lieu* may lead to an unjust outcome to the aggrieved party¹⁰⁰⁹.

The general rule on barring avoidance in case of inability to restore has not prevented courts from deciding differently in concrete cases though. In the European experience, as already mentioned in Chapter 2, the replacement restitution of performance by compensation was possible based on equity in particular cases of invalidity when the costs involved were not substantial¹⁰¹⁰. Furthermore, exceptions judged by English courts are used in India to justify the granting of rescission right in cases where the party is not able to restore. The excerpt below, from the case *Lagunas Nitrate Co vs. Lagunas Syndicate* highlights the importance to deviate from the general rule on preclusion of avoidance:

“The general rule is that as a condition of rescission there must be a restitution in integrum, but at the same time the court has the full power to make all just allowances. It was said by Lord Blackburn in Erlanger v New Sombrero Phosphate Co (1878 AC 1218), that the practice had always been for a court of equity to give relief by way of rescission whenever by the exercise of its power it can do what is practically just, though it cannot

¹⁰⁰⁷ PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado* (at.), cit., p. 361.

¹⁰⁰⁸ *Salt vs. Stratstone Specialist Ltd*, 2015 EWCA Civ 745, 2015 2 C.L.C 206, *apud* TREITEL, Guenter, *The Law*, cit., p. 447.

¹⁰⁰⁹ TREITEL, Guenter, *The Law*, cit., p. 447.

¹⁰¹⁰ ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., pp. 285-286.

restore the parties precisely in the state that they were in before the contract.”¹⁰¹¹

This reasoning to do what is practically just, introduced by the leading case *Erlanger vs. New Sombrero Phosphate Co.* (1878 AC 1218) mentioned in the excerpt above, is also present in other common law precedents¹⁰¹², and English literature used as a source of the Indian legal system. On this issue, Indian literature refers to Guenter H. TREITEL and quotes: “As in cases of misrepresentation, the party seeking rescission must restore benefits that he has obtained under the contract, but he is not required to make precise restitution: the principle of allowing rescission for misrepresentation so long as equity can achieve a result that is ‘practically’ just applies also where rescission is sought on the ground of undue influence”¹⁰¹³.

According to this English author, commonly referred by Indian literature, the essential point in cases of rescission is that the parties are not unjustly enriched (it is more important than evaluating whether they are harmed), and, therefore, the party who is able to make substantial, though not precise, restitution is able to rescind if he/she returns the object of the contract in its altered state, accounts for any profits deriving from it and makes allowance for any deterioration caused by the dealing with the subject matter¹⁰¹⁴.

Therefore, it is possible to state that Indian law would be ready to accept the possibility to permit avoidance and equivalent compensation when precise *restitutio in integrum* is not possible or feasible. Although the cases relate to the vice of misrepresentation (either innocent or fraudulent), the same rules on bars and exceptions generally apply to other defects, such as undue influence and duress¹⁰¹⁵. This possibility must not, however, be understood as a general right of the party entitled to rescind a voidable contract. The instances where this was permissible are conceived as exceptional and only applicable as a “best practical course” in accordance with the specific facts of the case¹⁰¹⁶. Such a

¹⁰¹¹ *Lagunas Nitrate Co vs. Lagunas Syndicate*, (1899) 2 Ch 392 (CA), *apud* SINGH, Avtar, *Law of contract*, cit., pp. 223-224. In the sense of allowing restitution, also *Spence vs. Crawford* (1939) 3 All ER 271, *apud*, CHEN-WISHART, Mindy, *In defence*, cit., p. 176. Also in TREITEL, Guenter, *The Law*, cit., p. 473.

¹⁰¹² *Molton vs. Camrous*, 154 ER 1107: (1848) 2 Exch 487, *apud* SINGH, Avtar, *Law of contract*, cit., pp. 223-224.

¹⁰¹³ SINGH, Avtar, *Law of contract*, cit., p. 224.

¹⁰¹⁴ TREITEL, Guenter, *The Law*, cit., p. 472.

¹⁰¹⁵ *Idem, ibidem*, cit., pp. 511 and 523.

¹⁰¹⁶ PATHAK, Akhileshwar, *Contract Law*, cit., p. 207.

reservation was indeed made by the same precedent reproduced above, according to which the “practically just” measure is not applicable to all cases:

*“On the other hand, where both parties had spent money on the property in terms of the contract in such manner that restitution was not possible, rescission was not allowed even though there was innocent misrepresentation on the part of the seller of the property.”*¹⁰¹⁷

In any case, when the party is prevented from avoiding a contract in India, such party is allowed to claim incurred damages in general due to the vitiated contract that could not be extinguished¹⁰¹⁸. This is a different remedy from the damages *in lieu* of rescission discussed above (a discretion of the courts more applicable to cases of misrepresentation and only when the party is already entitled to rescind).

Considering that, is it possible that the damage indemnification covers the amount related to the exchanged performance? In other words, could the damages work as an alternative to *restitutio in integrum*? The research did not return a clear answer on this possibility, but in English common law the possibility seems to be acceptable. In a case of a railway construction, the rescission was denied due to the impossibility to restitution to the *status quo ante*, and the remedy in damages was the most convenient available measure¹⁰¹⁹.

In fact, there seems to be no compelling reasons for totally denying the damages remedy to cover the equivalent restitution amount. After all, the idea that damages in cases of nullity have a supplementary function in putting the party “*in the same position in which it would have been if it had not concluded the contract*” is generally accepted¹⁰²⁰. Why could this remedy not rather have a *primary* function when precise *restitutio in integrum* is forbidden? Moreover, the wider doctrine of unjustified enrichment, which is applied in India¹⁰²¹, adds other important ingredients to the discussion. If a party cannot enrich on

¹⁰¹⁷ *Lagunas Nitrate Co vs. Lagunas Syndicate*, (1899) 2 Ch 392 (CA), quoting case *Erlanger vs. New Sombrero Phosphate Co* (1878 AC 1218), *apud* SINGH, Avtar, *Law of contract*, cit., p. 223.

¹⁰¹⁸ PATHAK, Akhileshwar, *Contract Law*, cit., p. 206.

¹⁰¹⁹ *Boyd & Forrest vs. Glasgow & SW Ry* 1915 S.C HL 20, *apud* TREITEL, Guenter, *The Law*, cit., pp. 473-474., according to which the rescission would not make practical sense and, therefore, it was applied the remedy in damages to the party and the contract was kept.

¹⁰²⁰ For instance, it was incorporated in the uniform initiatives analysed in Chapter 2 above.

¹⁰²¹ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 970.

other's expenses due to an invalid ground, the enriched amount must be returned to the other party.

Both alternatives (damage compensation or return of the unjust enrichment) would not solve the problem of preventing avoidance in India, as opposed to the other four BRICS systems. The voidable contract will be kept enforceable and restitution to the precise *status quo ante* will not occur. Furthermore, the remedy in damages generally refers to the restoration to the status as if the contract has been duly performed by the parties and not to the *status quo ante* (without a contract)¹⁰²², though this concept of damages is usually applied in cases of breaches.

Despite these opposing arguments, it seems that to resort to those alternatives may put the parties in a similar situation in practice in the five countries. Again, this would not lead to the conclusion that substantial restitution, equivalent compensation, damage indemnification and unjustified enrichment are the same or even comparable concepts. They are theoretically different. In practice, however, they could produce comparable results to the affected parties, and, as stated in the introduction of Part II, the guidance for searching harmonisation in this present study focuses on practical results.

In the view of the foregoing, even in this tricky exception to the general rule on the consequences of contract avoidance, it is possible to identify room for harmonisation among the BRICS countries, especially in practice. Brazil, Russia and China are more direct in allowing compensation of the equivalent, South African practice is in the middle ground to allow this alternative and not prevent rescission, and India, in exceptional cases, may follow the same path as the other four countries and allow avoidance with non-precise restitution.

Compatibility is also observed in practical aspects. The outcomes to be achieved in the general remedies applicable to voidable or void contracts are that: all financially deleterious effects of the vice are reversed; the aggrieved party is not left in a better position after the contract has failed; and the guilty party bear the loss resulting from accidental damage to or destruction of the subject matter¹⁰²³. Such outcomes are possible to be achieved in the five BRICS countries, either by means of precise *restitutio in integrum*, equivalent

¹⁰²² POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 998-999.

¹⁰²³ MILLER, Saul, *Unjustified Enrichment*, cit., p. 463.

compensation, damage indemnification, reversal of unjustified enrichment or even the combination of more than one approach.

Even if one considers the practical approximation of the countries by means of theoretically different approaches too forced (and this will probably cause discomfort to traditional civilians), at least mutual contributions can be inferred by the comparison among the systems. The statement that “*English law has much to learn*” from civil law in terms of restitution¹⁰²⁴, can be applied to India in the BRICS context. The compensatory model in alternative to precise *restitutio in integrum*, adopted by the four other countries, is an approach that can contribute to solve unfair situations that might be encountered in India. South Africa is the best example of this contribution. Being influenced by both mindsets of common and civil law, the country moved in the direction of the civilian approach which grants avoidance and requires a substitute compensation.

While in the case of the mechanism of avoidance the common law approach contributes to the civil law framework, in this first case related to the consequences of avoidance the situation is inversed. The compensatory model prevents the parties from being bound to a voidable contract and allows the most suitable solution for restoring them to the *status quo ante*.¹⁰²⁵ It is also the most adequate method to prevent abuses by parties wishing to escape from their duties by alleging invalidity, such as a judgement in Russia, where the owner of a construction had to pay a fair price for the work performed by the other party under an invalid contract, even though precise restitution was not possible¹⁰²⁶.

The opposite approach (rigid common law rule) subverts the policies that protect parties whose consent was affected by a vice, with the imposition of an additional burden on this party to demonstrate the ability to make substantial restitution. This position may leave an unjust situation unremedied and the aggrieved party liable for possible non-performance of a contract which does not reflect its true will (since the contract will be upheld)¹⁰²⁷. Not for any other reason, the compensatory model was adopted by the uniformizing enterprises discussed in Chapter 2 above as a “best solution” for international commercial contracts.

¹⁰²⁴ CHEN-WISHART, Mindy, *In defence*, cit., 175.

¹⁰²⁵ HELLWEGE, Phillip, *Unwinding*, cit., p. 1753; HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1407; DU PLESSIS, Jacques, *Fraud*, cit., p. 204.

¹⁰²⁶ Ruling of Supreme Commercial Court of 27 December 2010 No VAS-17039/10, *apud* YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law*, cit., p. 135.

¹⁰²⁷ CHEN-WISHART, Mindy, *In defence*, cit., pp. 176-177.

Since the relationships within BRICS are naturally international and generally commercial, the Indian common law system can take account of the experience of the other civilian countries with respect to this issue (such as the Russian example above), as happened in exceptional cases and recognised by the mixed system of South Africa.

2.2.Shared guilt and/or parties *in pari delicto*

The second exception to the rule of restitution in case of avoidance refers to the instances where a contract is void for illegality or when both parties intentionally contribute to the nullity of the contract (the parties are aware of the nullity and, even though conclude the contract). This exception is summed up by the maxim *in pari delicto potior est conditio possidentis*, pursuant to which the parties are prevented from claiming restitution of the performances exchanged.

Differently from what happens with the inability to restore, an exception that affects voidable contracts, the *in pari delicto* rule refers to void contracts either due to illegality or to shared contribution for nullity. Here, it is important to clarify that not all illegal contracts are deemed null and void, since illegality can, in some circumstances, be cured to avoid nullity¹⁰²⁸. In the BRICS context, this differentiation is observed, since illegal contracts are usually void in India (a rule of common law countries¹⁰²⁹), South Africa and Brazil (where the illegal object renders the contract void¹⁰³⁰), but not always in China and Russia, where nullity will take place in accordance with the seriousness of the rules and principles affected¹⁰³¹.

Considering this, the mentioned countries do not possess specific rules applicable to restitution in case the nullity derives from illegality or common intentional behaviour, but instead refer to the general framework applicable to void contracts, which allows *restitutio in integrum* or alternative compensation in all five countries, even in India pursuant to Section 65 discussed above. In this sense, the *in pari delicto* rule, which derogates this approach applied to void contracts, is a maxim applied more in practice and

¹⁰²⁸ STORME, Matthias E., *Harmonization*, cit., p. 198.

¹⁰²⁹ Pursuant to the precedent *Mogul Steamship Co vs. McGregor Gow & Co* 1892 AC 25, *apud* SWADLING, W. J., *The role of illegality*, cit., p. 303.

¹⁰³⁰ Pursuant to Article 166, II of the Brazilian Civil Code.

¹⁰³¹ Pursuant to Article 153 of the Chinese Civil Code and Articles 168 and 169 of the Russian Civil Code.

reveals a general common ground, prevalent in all countries in the sense that no one acting illegally must be aided by the courts¹⁰³².

The reasons for preserving this maxim are generally accepted in any system, such as: the discouragement of parties engaging in illegal and void transactions, the punishment of the parties who contract illegally, as the law will not assist those who acted illegally, a party can never base its claim on his own turpitude, and also the dignity of the court must be safe guarded¹⁰³³. Those reasons make sense in cases of serious infringements and approximate countries. However, problems arise when countries apply such rule with different degrees of strength and with different consequences for the contract¹⁰³⁴, as happens in the BRICS countries.

In Brazilian and Russian cases, the strength and precise consequences will depend on the concrete case, but generally the rule on restitution will prevail (and damage indemnification will generally take care of the illegality and the fault). China has the more detailed rule in Article 157 of the new Civil Code, stating that restitution (or equivalent compensation) must be made in all cases of void contracts (including illegality) and, when there is fault by both parties, they will be proportionally indemnified of the incurred loss. Contrastingly, India and South Africa apply the *in pari delicto* more vigorously and deny restitution¹⁰³⁵. Nonetheless, these latter systems contain exceptions which may favour the quest for harmonisation in this issue.

In India, the general exceptions of the English common law doctrine apply, meaning that restitution may be operated when: the parties repent before the illegal purpose is executed (also referred to as “the contract is still executory”), the illegality was necessary to protect one party, the party is able to make the restitution claim without relying on the illegal purpose (for instance, relying on property rights), or when the illegality is only by one party, which will automatically result in them not being *in pari delicto* and the less

¹⁰³² BONELL, Michael Joachim, *The New Provisions*, cit., p. 532.

¹⁰³³ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1923; KÖTZ, Hein, *Illegality*, cit., p. 848; DANNEMANN, Gerhard, *Illegality*, cit., pp. 314-315.

¹⁰³⁴ HONDIUS, Ewoud, *Corruption in Contract Law and Disgorgement of Damages*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016, p. 1045.

¹⁰³⁵ Pursuant to Frederick POLLOCK and Dinshaw F. MULLA, Section 65 of the Indian Contract Act (which provides for restitution or compensation in case of nullity) is not in derogation of the *in pari delicto* rule and only cases not covered by this maxim would fall within the scope of the provision (POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 977).

guilty/innocent party is entitled to restitution¹⁰³⁶. Indian literature also adds the cases of ancillary obligations of void contracts not tainted by illegality and of partial invalidity¹⁰³⁷.

These exceptions do not prevent, however, that unfair situations can arise out the application of the *in pari delicto* rule, which can be as detrimental as the illegality itself (or common intention to nullity). For instance, if the illegal purpose was already executed, would it be correct that the parties keep such wrongful purpose or its result? The same reflection is made when the parties cannot rely the restitution claim upon any basis other than the illegality. Would it be correct that they maintain such vitiated basis? And if one of the parties, which also acted intentionally and illegally, maintains possession of the illegal subject matter, would it be the most adequate solution just to “*leave as it is*”? Even if one considers the application of the rule only in instances of serious infringements¹⁰³⁸, would this be enough to justify the upholding of the parties in such a serious situation of infringement?

These reflections seem to be taken into account by the South African practice in order to deviate from the classic and strict application of the *in pari delicto* rule. As discussed in Chapter 2 of Part I, the court practice in this country, inspired by the case *Jajbhay vs. Cassim*¹⁰³⁹, developed other exceptions that better address the discomfort caused by common law rigidity: restitution will occur when one party will be enriched at the expense of the other part if the *in pari delicto* rule is applied, when applying the *in pari delicto* rule would indirectly enforce the illegal contract and, most importantly for harmonisation purposes, under any other consideration of public order.

These further exceptions, in addition to approximate the South African system to the other civilian countries, can pave the way for reaching compatibility with the Indian system or, at least, contribute towards its development. In order to demonstrate that, as introduced in this Chapter, it is important to assess the purposes and inspirations of the legal systems. In the Indian case, the most out of sync within BRICS context, recent common law

¹⁰³⁶ BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 330; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., p. 650; BONELL, Michael Joachim, *The New Provisions*, cit., p. 532; MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1924; SWADLING, W. J., *The role of illegality*, cit., pp. 301 and 305; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 577-578.

¹⁰³⁷ SINGH, Avtar, *Law of contract*, cit., pp. 344-346 and 422-423.

¹⁰³⁸ BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 327.

¹⁰³⁹ *Jajbhay vs. Cassim* 939 AD 537 *apud* MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 165.

precedents dealing with the application of the *in pari delicto* rule may reveal interesting purposes and inspirations.

The English case *Tinsley vs. Milligan* clearly demonstrates the concern of balancing the effects of applying the *in pari delicto* rule in a strict manner. In the case, two parties illegally concealed the ownership of an asset that one of them owned, and, when this latter party claimed the ownership, the defendant alleged that no aid should be granted since the parties acted *in pari delicto* to conceal the ownership in order to obtain undue advantages. The judgement of Nicholls LJ addresses the conflict:

“The courts have to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that a court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of the conduct. (...) The court must weight, or balance, the adverse consequences of granting relief against the diverse consequences of refusing relief. The ultimate decision calls for a value judgement... (...) There has been illegal conduct of which the court should take notice. (...) Nothing should be done which will encourage people to make fictitious transfers of property for fraudulent purposes. (...) The other side is that (...) To refuse to grant relief to the defendant would be, in very real sense, to deprive the defendant to her own property, and to give it to the plaintiff, her co-venturer in this fraudulent activity. (...) Balancing these considerations, I have no doubt that, far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so. (...) That would be to visit on the defendant a disproportionate penalty, in the circumstances as they are.”¹⁰⁴⁰

¹⁰⁴⁰ *Tinsley vs. Milligan* (1992) Ch. 310 (CA), (1994) 1 AC 340 (HL), *apud*, BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 332-333. Also *apud* BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., pp. 652-655 and TREITEL, Guenter, *The Law*, cit., pp. 594-596.

The above reasoning is important because it does not mention any of the generally accepted exceptions to the *in pari delicto*, but rather is based on applying the most adequate measure in order to preserve the involved interests (value judgement). Such an intention to not promote more detrimental effects than the illegality itself is also inferred from a previous case, also quoted by Indian literature, in which Bingham LJ so stated: “*on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which is bound to condemn*”¹⁰⁴¹.

Despite the contributory reflections undertaken in the cases, which could lead to a direction towards the relaxing of the *in pari delicto* rule in common law tradition, with important effects to the Indian experience, the grounds for granting restitution in the *Tinsley vs. Milligan* case was the general exception that the party could exercise the right of restitution without relying on the illegality, but rather on the property rights. Since the claimant has paid the price for the asset and the property was a common understanding between the parties and against third parties too, the court accepted the claim for restitution in a sense to give certainty to the general exceptions applied in the country¹⁰⁴².

More recently, the *Tinsley vs. Milligan* case was rediscussed, and English common law seems to be ready to disrupt the traditional paradigm applicable to the *in pari delicto* rule. In the case *Patel vs. Mirza*, judged in 2016, the Supreme Court went a step further to state that the rigid approach applicable to illegality shall not lead to incoherent or abusive results, and allowed for restitution if the requirements of a claim for unjust enrichment are met. The excerpts below demonstrate such reasoning:

“121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim

¹⁰⁴¹ *Saunders vs. Edwards* 1987(2) All ER 651, *apud* PATHAK, Akhileshwar, *Contract Law*, cit., p. 238.

¹⁰⁴² BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 333; SWADLING, W. J., *The role of illegality*, cit., pp. 295-296; TREITEL, Guenter, *The Law*, cit., p. 596.

might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case.

(...)

*268. However, restitution still being possible, none of this is a bar to Mr Patel's recovery of the £620,000 which he paid to Mr Mirza. The reason is simply that although Mr Patel would have to rely on the illegal character of the transaction in order to demonstrate that there was no legal basis for the payment, an order for restitution would not give effect to the illegal act or to any right derived from it. It would simply return the parties to the status quo ante where they should always have been. The only ground on which that could be objectionable is that the court should not sully itself by attending to illegal acts at all, and that has not for many years been regarded as a reputable foundation for the law of illegality. This was Gloster LJ's main reason for upholding Mr Patel's right to recover the money. Although my analysis differs in a number of respects from hers, I think that the distinction which she drew between a claim to give effect to a right derived from an illegal act, and a claim to unpick the transaction by an award of restitution, was sound."*¹⁰⁴³

The reasoning of the award was that the forfeiture of the restitution would not be a just and proportionate response to the illegality and the underlying policy would not be protected if the parties remain "as they are"¹⁰⁴⁴. Indeed, the case shows that English common law has virtually abolished the strict operation of the illegality defence¹⁰⁴⁵ and comes closer to the civilian systems (compensatory model) by separating the illegality from the consequences of the ineffectiveness of the contract (restitution), similar to understanding discussed in Part I in the Brazilian, Russian and Chinese experiences. The excerpt below demonstrates that:

¹⁰⁴³ *Patel vs. Mirza* 2016 UKSC 42, available at: <https://www.supremecourt.uk/cases/uksc-2014-0218.html>. Accessed on 15 August 2021.

¹⁰⁴⁴ TREITEL, Guenter, *The Law*, cit., p. 589.

¹⁰⁴⁵ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1923.

“... the courts will not give effect to an illegal transaction or to a right derived from it. But restitution does not do that. It merely recognizes the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs. The effect is to put the parties in the position in which they would have been if they had never entered into the illegal transaction.”¹⁰⁴⁶

In fact, the impact of *Patel vs. Mirza* was so strong in English case law, that the restitution became the general prevailing rule in cases of *in pari delicto* and the non-restitution became the exception in instances of grossly immoral acts and where the order of restitution “would be functionally indistinguishable from an order for performance” of the illegal contract¹⁰⁴⁷.

If the new general rule is applicable in cases of illegality, the same would apply regarding simple nullity with the knowledge of both parties. Since the English precedents also shape the Indian system, it is possible to identify important common ground in BRICS also with respect to this issue related to the consequences of invalidity. In other words, the possible acceptance by India of restitution even in cases of *in pari delicto*, though exceptionally, demonstrates that the BRICS systems are not as far apart with respect to this point as it appeared earlier.

The recent switch of direction in England (with effects in India) is reminiscent of the reflection exercise made previously by the South African courts in shaping the rule on restitution in cases of illegality and common contribution to the nullity. Being influenced by both common and civil law traditions, the courts faced the dilemma of having the interests of certainty in favour of the use of hard-and-fast rules (common law), and, at the same time, the fact that these strict rules may in certain instances produce results which violate underlying policy, since they can be over-inclusive or under-inclusive when applied in particular circumstances¹⁰⁴⁸. Therefore, such a dilemma led the courts to adopt a flexible approach (compensatory model) in order to protect the country’s public policy.

The recognition of the compensatory model even in cases of illegality and shared guilt demonstrates that the BRICS countries are aligned (even though in different stages of

¹⁰⁴⁶ *Patel vs. Mirza* 2016 UKSC 42, at 250.

¹⁰⁴⁷ TREITEL, Guenter, *The Law*, cit., pp. 589-590.

¹⁰⁴⁸ MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, cit., p. 166.

development) with the modern and flexible trend adopted internationally, as discussed in Chapter 2 above. This derives from the notion that the unrestricted bar to restitution may bring about similar or worse effects than the illegality itself, such as the perpetuation of the wrongfulness, a disproportionate sanction to one of the parties, the unjust (and undue) enrichment of the other, and, finally, the undermining of the policy and purposes which the *in pari delicto* rule was designed to prevent¹⁰⁴⁹. After all, the upholding of the parties to a null or illegal contract “where they are” is the same as turning such an illegal or void contract into something valid¹⁰⁵⁰.

And, again, such a reflection on the pros and cons was the reason for the uniformising initiatives analysed in Chapter 2 to adopt the flexible approach of restitution in the provisions related to illegality, according to reasonable circumstances. The granting of restitutionary remedies in these cases was considered relevant for the international experience, especially to avoid abusive behaviour from parties invoking the traditional “bar” to escape from payments due in return of received work or goods¹⁰⁵¹. Otherwise, the objective of discouraging illegality would be frustrated and lead to an opposite effect: encouraging illegality and corruption by the parties and, at a later stage, these parties allege that such corruption/illegality prevents any remedy or restitution from their side.

Obviously, the issue of shared guilt and illegality is very complex and there may be cases where a fully satisfactory result is not feasible. Nevertheless, the flexible approach, although causing some degree of uncertainty, is a valuable tool for the attempt to reach an outcome as best as possible when pondered to the specific cases¹⁰⁵². The courts should be allowed to make a careful investigation of the concrete facts instead of denying restitution directly and providing a better answer to advance the interests of the violated norm, principle or policy, which may be reached by allowing restitution claims¹⁰⁵³.

Considering the foregoing, it is possible to conclude that, although the BRICS countries follow different main rules with respect to restitution in cases of illegality and common contribution to invalidity, the recognised exceptions demonstrate compatibility and

¹⁰⁴⁹ KÖTZ, Hein, *Illegality*, cit., p. 848; MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1923; JOHNSTON, David – ZIMMERMANN, Reinhard, *Unjustified enrichment*, cit., p. 25; DANNEMANN, Gerhard, *Illegality*, cit., 319.

¹⁰⁵⁰ DANNEMANN, Gerhard, *Illegality*, cit., p. 321.

¹⁰⁵¹ MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., pp. 1925-1926; BONELL, Michael Joachim, *The New Provisions*, cit., pp. 534-536.

¹⁰⁵² DANNEMANN, Gerhard, *Illegality*, cit., pp. 320 and 322.

¹⁰⁵³ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 576 and 580-582.

harmonisation – in this case, the exceptions of South Africa and India compatibilise the treatment conferred to this issue with the civilian experiences of Brazil, Russia and China. Not only the exceptions, but also the doctrine on unjustified enrichment (applied in all systems) contributes to such harmonisation, as indicates the recent English common law precedent. Such an outcome of harmonisation is achieved even at a theoretical level, with the potential of important convergence in practice.

Furthermore, it is undeniable that the different grounds and forms to allow restitution applied by some countries may express contributions to the others. The Chinese recent codified provisions as well as the policy protection discussed in South Africa can contribute to the development of more certain and direct approaches in Brazil, Russia and especially in India. As discussed in Part I, even in Brazil and Russia which provide for the compensatory model, the practical criteria for such compensation are still obscure.

With respect to these practical issues, a final remark comprises the apparent lack of uniformity existing in the quantification of the restitution in cases of illegality or shared guilt, in particular when the precise restitution in kind is not possible. Would the party be entitled to the pure costs of the performance? Or would the price agreed in the invalid contract be the correct standard? Or, contrastingly, must the contract price be set aside and should rather an objective standard appraised by a third expert be applied? Should such quantification be made considering the time of performance or of the avoidance?

The answers to all those questions are hardly inferred from the analysed national legal frameworks and will generally vary in accordance with the concrete case. Such a difficulty is, as discussed in Chapter 2 above, one of the reasons alleged by common law practitioners against the compensatory model when it is not possible in kind (putting a price tag on the illegal performances)¹⁰⁵⁴.

Indeed, not even the uniformising initiatives reached a solution on this issue of quantification and used vague concepts such as “*allowance in money*”, “*reasonable sum*” or “*monetary value*” without further details on how and when it is to be appraised. Advocacy is strong towards the consideration of the time of the performance (and not the avoidance)¹⁰⁵⁵, but the consideration of possible benefits, costs and deterioration does not allow for the definitive fixation of this pattern.

¹⁰⁵⁴ DANNEMANN, Gerhard, *Illegality*, cit., p. 321.

¹⁰⁵⁵ CLIVE, Eric, *Unjustified*, cit., p. 599; CLIVE, Eric, *Restitution*, cit., p. 389-390.

Similarly, there is also the consideration that the objective approach (market standard) would be preferable to the subjective approach (contract price), since the contract is invalid and the consideration to the parties' agreement would not make sense¹⁰⁵⁶. However, this is not the reality in all BRICS systems¹⁰⁵⁷ and none of these approaches would deal with the issue of received profits, since in either case the amount to be restored would comprise a portion of the profits. The issue was discussed in detail by Ewoud HONDIUS in a defence to the disgorgement of profits in favour of the aggrieved party in cases of illegality, since the profits are generally higher than the damages paid and, therefore, without the disgorgement, the illegality would be worth pursuing instead of being discouraged¹⁰⁵⁸.

The discussion is complex since the disgorgement of profits is a gain-based remedy, which has an autonomous nature dissociated from the traditional concept of damage indemnification, as well as from the sanction/penalty mechanism. In other words, damages are based on the victim's loss and not on the wrongdoer's gain¹⁰⁵⁹. Therefore, its adoption by the legal systems is hard and, when this is the case, it operates by approximation to other legal institutes.

Such a difficulty is observed when analysing the treatment conferred by some of the BRICS countries. Chinese, Brazilian and South African systems do not contain rules on disgorgement of profits as a general remedy of contract law¹⁰⁶⁰. In China, there are some scarce rules in the field of company law, securities law, intellectual contract and tort, but not for general contract law¹⁰⁶¹. In Brazil, the concept of disgorgement damages would be

¹⁰⁵⁶ See, for instance, HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1409.

¹⁰⁵⁷ As seen in Part I, China and India, for instance, also consider the subjective approach for restitution (Minutes of the National Court's Civil and Commercial Trial Work Conference, issued by the Supreme People's Court on 08/11/2019, No. 254, §32, 33 and 34, *apud* ZOU, Mimi, *Chinese Contract.*, cit., p. 111; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 1002).

¹⁰⁵⁸ HONDIUS, Ewoud, *Corruption*, cit., pp. 1047-1049.

¹⁰⁵⁹ *Idem*, *ibidem*, p. 1048.

¹⁰⁶⁰ GAO, Xiang – LIU, Chengwei, *The Disgorgement Damage System in Chinese Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015, pp. 408 and 415; TERRA, Aline de Miranda Valverde, *Disgorgement of Profits in Brazilian Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015, p. 446; DU PLESSIS, Jacques – VISSER, Daniel, *Disgorgement of Profits in South African Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015, pp. 346 and 364.

¹⁰⁶¹ For instance, Article 54 of the recently amended Chinese Copyright Law, which provides for the disgorgement of unlawful gains: "Where the copyright or copyright-related rights are infringed, the infringer shall give compensation according to the actual damages suffered by the rightsholder as a result or the infringer's unlawful gains; where it is difficult to calculate the rightsholder's actual damages or the infringer's unlawful gains, compensation may be given by reference to the applicable royalties. Where the copyright or copyright-related rights are infringed and the circumstances are serious, damages may be given between one and five times the amount determined according to the aforementioned methods."

approximated to the unjustified enrichment, but not yet developed as such by literature and case law¹⁰⁶². In South Africa, not even the rules on unjustified enrichment could help to address the issue sufficiently, since the doctrine requires not only the undue enrichment, but also the impoverishment of the other party (“*double cap*” rule), which not always happens in cases of illegal profits¹⁰⁶³.

Although under development, the concept faces other difficulties. For instance, when both parties are at fault, would the possibility of disgorgement of profits achieve the intended purpose? A discussed way out would be the return to the State or affected third parties – similar to what exists in Russia for some specific cases of restitution related to nullity of contracts¹⁰⁶⁴. Nevertheless, such confiscation remedy stumbles upon the fact the restitution (or disgorgement of profits) to the State would have the adverse effect to make the interested parties refrain from claiming nullity and illegality, since they will not receive the “product” of such a claim (it will go to the State)¹⁰⁶⁵.

The issue is therefore still controversial and the national systems, as well as the international comparative enterprises, seem not ready to adopt or defend a fixed and uniform standard for the quantification of the restitution and the recovery or not of the attributed profits. It is a recent concern and further development is yet to be seen.

Until then, the former and up-to-date guidance by the Supreme People’s Court of China may bring insights to the discussion on standards of quantifying restitution, according to which: liability cannot exceed the benefit that should be derived from the contractual performance; the reimbursement shall be based on the price agreed upon the parties at the time of the transaction; where the enrichment exceeds the contract price, the surplus shall be reasonably allocated between the parties; there must be consideration to the appreciation or depreciation of the goods/property when determining restitution, and correlation of the market factors applicable to the contract and transferee’s activities; and, finally, the use of the subject matter must be off-set¹⁰⁶⁶.

¹⁰⁶² TERRA, Aline de Miranda Valverde, *Disgorgement*, cit., pp. 448-449.

¹⁰⁶³ DU PLESSIS, Jacques – VISSER, Daniel, *Disgorgement*, cit., p. 348 and 365.

¹⁰⁶⁴ Pursuant to Article 169 of the Russian Civil Code.

¹⁰⁶⁵ HONDIUS, Ewoud, *Corruption*, cit., p. 1062; GAO, Xiang – LIU, Chengwei, *The Disgorgement*, cit., p. 427. Also, with respect to restitution, see MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 1923.

¹⁰⁶⁶ Minutes of the National Court’s Civil and Commercial Trial Work Conference, issued by the Supreme People’s Court on 08/11/2019, No. 254, §32, 33 and 34, *apud* ZOU, Mimi, *Chinese Contract*, cit., p. 111. Even previously to this guidance, the Supreme People’s Court had already issued important restitution parameters

It is not the aim of this study to discuss whether the above parameters are right or wrong, but rather to highlight the existence of more detailed rules that can inspire the other BRICS countries in shaping their own method for such an obscure issue (either by adoption or deviating from the parameters above).

By way of conclusion, the present item demonstrated how complex and apparently antagonist rules can be harmonised within countries with contrasting legal experiences and influences. Either in the case of inability to restitution when the contract is voidable, or in the case of restitution in the face of illegality/common intention to nullity, the compatibility result was reached upon consideration to certainty, coupled with sensitivity to change in order to obtain the less detrimental situation to the involved parties and to society as a whole.

3. Hardship

The last issue to entail discussions on divergences among the BRICS countries, as well as in any group of countries composed by the influences of common law and civil law traditions, is the application of the doctrine of hardship.

Even though the word “hardship” refers to extreme difficulty in general, for the purposes of this study, it has been herein used to name the doctrine applied by national legal systems and international instruments to address the cases where the performance of a contract has become extremely difficult due to the occurrence of supervening events which could not have been foreseen at the time of the conclusion of the contract. The performance is still possible though much more onerous and/or burdensome. Upon such occurrence, the doctrine of hardship generally comprises two very different notions of contract life and functions to be exercised by the court or arbitral tribunal: the decision on the termination or the modification of the contract¹⁰⁶⁷.

for construction contracts: if the money has been invested in the building that is undergoing construction, the party could claim refund of the money plus an appropriate amount of compensation to be determined by reference to the prevailing rate of profit in the local real property industry; if construction of the housing is completed, the party could claim an amount of compensation to be determined in accordance with the value of the share of the housing due to claimant (Supreme People’s Court Provisions on Certain Questions concerning the Adjudication of Cases on Scientific and Technological Disputes (repealed 2000), SPC Gazette, 1995, s. 46, *apud* LING, Bing, *Contract Law*, cit., p. 206).

¹⁰⁶⁷ TALLON, Denis, *Hardship*, 2nd ed., cit., pp. 328-329.

Given the existence of other legal doctrines and circumstances that lead to the termination and discharge of contracts, the concept of “hardship” is usually applied to identify instances where the modification of the contract, in order to preserve it, is also permissible¹⁰⁶⁸. As mentioned in Chapter 2 above, although rooted in the medieval *clausula rebus sic stantibus*, the doctrine of hardship began to develop in the twentieth century due to the drastic economic and political changes that marked this period, leading to cases where, even if the performance was not deemed impossible, the balance of duties has changed profoundly and has become questionable whether performance of the contract under the original terms could be reasonably expected and forced¹⁰⁶⁹.

The doctrine gained shape and integrated many civil law codifications and court practice from the 1940s/1950s decades, which, however, was not a reality for the countries following the common law tradition, such as India and South Africa. These countries provide for a stricter approach that does not allow the discharge of the parties unless the performance becomes impossible. The root of this strict common law approach recalls theory of absolute contract, originated in the English precedent *Paradine vs. Jane*, of 1647, according to which a tenant was not made exempt from the obligation to pay the rent, even if he was not able to occupy the rented territory, since it was an obligation to “pay money”, which did not become impossible, but merely more burdensome¹⁰⁷⁰.

Such a narrow approach was dominant until the famous *Taylor vs. Caldwell* case, of 1863, pursuant to which it was recognised the discharge of the parties when one of the performances became impossible due to the destruction of a music hall with fault of neither contracting parties¹⁰⁷¹. The ruling was still extremely restrictive since it dealt merely with cases of physical impossibility, and the theory of presumption of risks’ allocation between the parties was dominant for deciding other cases.

The doctrine of impossibility was further developed in English common law in order to comprise not only cases of physical impossibility, but also those where the

¹⁰⁶⁸ As suggested by TALLON, Denis, *Hardship*, 2nd ed., cit., p. 329.

¹⁰⁶⁹ HARMATHY, Attila, *Hardship*, cit., p. 1039.

¹⁰⁷⁰ *Paradine vs. Jane* 1646 Aley 26 (82 ER 897), *apud* PERILLO, Joseph M., *Hardship*, cit. p. 2; RÜFNER, Thomas *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 905; BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 608-609; PUELINCKX, Alfons H., *Frustration*, cit., p. 48; TREITEL, Guenter, *The Law*, cit., p. 1034.

¹⁰⁷¹ *Taylor vs. Caldwell* 1863) 3B &S 826 (122 ER 309), *apud* MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 667; RÜFNER, Thomas *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 905; BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 609; PUELINCKX, Alfons H., *Frustration*, cit., p. 48; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 528.

contract's objective was frustrated, even though the performance was still objectively possible. It was the birth of the common law doctrine of frustration. The leading cases of frustration were the so-called "coronation cases", where the postponement of the King's coronation event frustrated the object of contracts for the rent of floors with direct balcony view to the crowned King's passage. In these cases, even though the rental of the floor was possible, as well as the payment in money, the courts decided in favour to the discharge, since the foundation of the contracts had disappeared¹⁰⁷².

The coronation cases inaugurated the application of the doctrine of frustration in common law countries and was latter conceptualised as "*when the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*", in a case of a dispute involving the increase of price and delay in delivery¹⁰⁷³. Hence, although more flexible than the impossibility rule, the frustration doctrine is narrower than that of general hardship, since the supervening circumstances must lead to a "radical change" of the contractual obligations, and not only to an increase of onerousness¹⁰⁷⁴.

These two concepts, hardship and frustration, divide the legal systems in the civil law and common law traditions and, as a consequence, divide the BRICS countries with respect to the effects of the supervenient change of circumstances to ongoing contracts. While Brazil, Russia and China contain more detailed rules on hardship situations, India follows the frustration doctrine, and South Africa privileges impossibility but is still building the recognition of hardship. As seen in Part I, in these two countries, hardship is conceived to be comprised within the commercial risks of the parties.

Such a divergence also flourishes in practice. In Brazil, for instance, the number of court-supervised claims related to revision or termination of contracts based on financial hardship situations has exploded since 2002, with the introduction of specific rules by the

¹⁰⁷² *Krell vs. Henry* (1902) 2 KB 740, *apud* BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 613-613; RÖSLER, Hannes, *Change*, cit., p. 165; RÜFNER, Thomas *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 906; PUELINCKX, Alfons H., *Frustration*, cit., p. 49; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 667; ZIMMERMANN, Reinhard, *Roman Law*, cit., p. 48; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 528.

¹⁰⁷³ Lord Radcliffe in case *Davis Contractors LTD vs. Farenham UDC* 1956 UKHL 3 AC 696, *apud* TALLON, Denis, *Hardship*, cit., p. 501; PUELINCKX, Alfons H., *Frustration*, cit., p. 50; HUTCHISON, Andrew, *The Doctrine*, cit., pp. 92-93.

¹⁰⁷⁴ HARMATHY, Attila, *Hardship*, cit., p. 1041; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 667. For instance, in a coronation case the discharge was not granted since the affected party who has rent a boat could still be used for one of the purposes to see the English fleet, even though the coronation was postponed (*Herne Bay Steamboat vs. Hutton* 1903 2 KB 683, *apud* ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 528-529 and also in TREITEL, Guenter, *The Law*, cit., p. 1058).

reformed Civil Code¹⁰⁷⁵, while in India and South Africa those claims are generally dismissed.

For the quest of harmonisation, an effort to find possible common grounds between the two doctrines is deemed necessary. For such an enterprise, regard should be firstly given to the underlying purposes of each doctrine and their divergences in order to, in a second step, assess possible compatibilities or even contributions between them.

The doctrine of hardship was detailed in Chapter 2 above and individually in Chapter 3 of Part I, which avoids additional repetition, especially because the civil law countries (Brazil, Russia and China) adopt a similar approach, with comparable requirements established by the international and European instruments. A closer look towards the frustration doctrine is worthwhile and, given the influence of the English experience on the Indian system, especially in cases of frustration¹⁰⁷⁶, the resort to this country will be necessary.

As per the Lord Radcliffe's statement highlighted above, frustration entails a radical change not only in the supervenient circumstances affecting the performance, but also in the consequences to the contract's object. In the same judgement, his Lordship emphasises the distinction from mere difficulty in performance, which does not result in radical change and, therefore, must not be considered for the purposes of frustration: "*But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for*"¹⁰⁷⁷. According to another emblematic English case, the economic difficulty was also disregarded as triggering frustration:

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency,

¹⁰⁷⁵ According to a research, only in the Brazilian Supreme Court of Justice, there have been more than five thousand court judgements and almost true hundred thousand single-judge decisions (monocratic decisions) on contract revision or termination over the past twenty years (FERREIRA, Antonio Carlos - RODRIGUES JR, Otavio Luiz – LEONARDO, Rodrigo Xavier, *Revisão judicial*, cit.).

¹⁰⁷⁶ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 852.

¹⁰⁷⁷ *Davis Contractors LTD vs. Farenham UDC* 1956 UKHL 3 AC 696, *apud* BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 617-619.

an unexpected obstacle to the execution, or the like. Yet this does not in itself affect the bargain which they have made.”¹⁰⁷⁸

Such a threshold of proved radical change and the disregard of increased onerousness was also reinforced in the case *Ocean Tramp Tankers Corp. vs. VO Sovracht, The Eugenia*, related to the obstruction of the Suez Canal, pursuant to which the decision was to deny frustration since there was no fundamental change to the party’s position and, even if it was the case, the situation was deemed to be self-induced¹⁰⁷⁹. Also, the case discussed the question of “justice”, as can be inferred from the excerpt below:

*“The fact that it has become more onerous or more expensive is not sufficient to bring about frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. (...) Applying these principles to this case, I have come to the conclusion that the blockage of the canal did not bring about a ‘fundamentally different situation’ such as to frustrate the venture.”*¹⁰⁸⁰

Therefore, the test for applying frustration is focused on the contract’s object itself, but not on its costs. This test leads courts to deny claims of supervenient economic imbalance between the parties, especially when there are any available degree of choice or alternatives to the affected party to perform the contract, even though more burdensome¹⁰⁸¹. In the above Suez Canal case, the court’s interpretation was in the sense that, by assisting the parties, the court would be introducing to the contract a provision that both parties could, by themselves, have included from the very beginning (for instance, that it was essential for

¹⁰⁷⁸ *British Movietonews Ltd vs. London and District Cinemas*, 1951 A C 166, *apud* TREITEL, Guenter, *The Law*, cit., p. 1036.

¹⁰⁷⁹ According to the files, a clause in the contract stated that the ship was not to be ordered into a war zone without first obtaining the permission of her owners. The ship was nevertheless ordered to proceed via the Suez Canal during the 1956 crisis in the Middle East, and the ship was detained by the Egyptian authorities. Therefore, in addition to not being frustrated, any frustration would be induced by the parties (pursuant to the explanation brought by HUTCHISON, Andrew, *The Doctrine*, cit., p. 93).

¹⁰⁸⁰ *Ocean Tramp Tankers Corp. vs. VO Sovracht, The Eugenia* 1964 2 QB 22 – The Suez Canal, *apud* BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 620-621; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 531; TREITEL, Guenter, *The Law*, cit., p. 1037. A similar case quoted by Indian literature in which the closure of the Suez Canal did not lead to frustration was *Tsakiroglou & Co Ltd vs. Noble & Thorl GmbH*, 1962 AC 93, *apud* POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 862.

¹⁰⁸¹ BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., pp. 1120 and 1135; TREITEL, Guenter, *The Law*, cit., p. 1066; BANGIA, R. K., *The Indian Contract*, cit., p. 250.

the contract that the route was through that Canal, and that resort to alternative routes would increase the agreed costs or frustrate the deal)¹⁰⁸².

Intrinsically related to radical change, English courts (as well as Indian) tend to recognise frustration when the essential feature of the contract ceases to exist due to supervenient circumstances, despite its performance being still possible¹⁰⁸³.

Upon these considerations, certain circumstances are conferred differently with regards to treatment among the systems. What triggers frustration and discharge in a common law country may be qualified as a requirement either for *force majeure* leading to discharge, or for hardship, which, in turn, may lead to discharge or adaptation of the contract in civilian countries¹⁰⁸⁴. However, the other way round seems not to be the same, *i.e.*, not every situation leading to hardship may trigger frustration in common law countries.

This divergence recalls the basis of each involved legal tradition. The countries which put emphasis on contractual certainty (common law) provide for narrow escape routes from the contract (impossibility or frustration), while, in contrast, the civilian tradition search for contractual fairness as prevailing over certainty, and claims for a more flexible approach which may lead to both judicial termination or adaptation of the contract (hardship)¹⁰⁸⁵. Whereas the test for frustration is more focused on the creditor's position, the hardship test usually considers all interests involved in the relationship¹⁰⁸⁶.

Despite these distinctions, when one analyses the basis of the modern hardship doctrine, points of contacts with the frustration doctrine are identified. For instance, the ruling of the commonly quoted hyper-inflation cases in Germany were based on the disappearance of the contractual basis ("*Wegfall der Geschäftsgrundlage*"). In other words, even if focused on the onerousness of performance due to the increase/decrease of price, the threshold analysed by the courts was precisely whether the contract was no longer the same which the parties have entered into, with the disruption of the basis stipulated at the time of the formation of the contract¹⁰⁸⁷. Therefore, a very similar test to the one made in common

¹⁰⁸² PUELINCKX, Alfons H., *Frustration*, cit., p. 52.

¹⁰⁸³ *Herne Bay Steam Boat Co. vs. Hutton* 1903 2 KB 683, *apud* BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 615.

¹⁰⁸⁴ PUELINCKX, Alfons H., *Frustration*, cit., pp. 50-51.

¹⁰⁸⁵ BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1094.

¹⁰⁸⁶ RÖSLER, Hannes, *Change*, cit., p. 165.

¹⁰⁸⁷ BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 619 and 633-634; BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1140, quoting case RGZ 103, 328, 3 Feb 1922, The 1919 Inflation. Also quoted by ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 520.

law courts, with the difference that, in Germany, the possibility of adaptation of the contract is acceptable, and not only the discharge.

On the common law experience, it is also possible to find proximity with the hardship. Joseph M. PERILLO quotes the American case *Pollard vs. Shaffer*, whose facts were similar to the predecessor *Paradine vs. Jane*, i.e., a lessee was not able to pay the agreed lease and to deliver the leased land in good repair due to enemy occupation and destruction of the property, but nonetheless was ordered to pay the rent and repair. In this case, of 1787, the court deviated from the leading precedent and exempted the lessee from the payment of rent and reparation. Without discussing hardship, the case refers to its application since the discussed obligation was to pay money, which was not impossible, though far more burdensome considering the circumstances (paying for and repairing a destroyed property). According to the author, common law unconsciously applied the hardship theory in this case¹⁰⁸⁸.

More recently, other cases judged in English common law recognised the discharge of the parties due to excessive economic imbalance between them due to severe change of circumstances affecting long-term contracts. This was the judgment of the case *Staffordshire Area Health Authority vs. South Staffordshire Waterworks Co.*, of 1978, where the court discharged the parties due to the substantial imbalance caused by the decrease in currency on water supply over the years, and the contract was of indetermined deadline¹⁰⁸⁹. In another case, the court refused a claim for specific performance on the ground of hardship, since the performance would be excessively burdensome to the party¹⁰⁹⁰ – an example of indirect application of hardship.

The economic imbalance and extreme onerousness resulting in unduly harsh or unfair consequences were considered to be comprised within the scope of frustration in order to discharge the parties also in other cases¹⁰⁹¹. Even instances of extreme inflation (as

¹⁰⁸⁸ PERILLO, Joseph M., *Hardship*, cit., p. 4, quoting case *Pollard vs. Shaffer* 1 U.S. 210 (1787).

¹⁰⁸⁹ *Staffordshire Area Health Authority vs. South Staffordshire Waterworks Co.* 1978 1 WLR, apud BAR, Christian von – CLIVE, Eric (eds.), *Principles*, cit., p. 718; BEALE, Hugh *et al.* (eds.), *Cases*, cit., pp. 621 and 630; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 534. The exceptionality of this judgement strongly relies on the fact that the contract was of indefinite duration, pursuant to TREITEL, Guenter, *The Law*, cit., p. 1055.

¹⁰⁹⁰ *Patel vs. Ali* 1984 Ch 283 : (1984) 2 WLR 960 : (1984) 1 All ER 978, apud SRINIVASAN, Badrinath, *Harship*, cit., p. 69.

¹⁰⁹¹ As per the assessment made under the Common Core project in ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 567.

opposed to merely severe inflation) may be capable of frustrating a contract in common law experience¹⁰⁹².

Therefore, even though more reluctant, there is some space in common law experience for consideration of circumstances that usually leads to the application of hardship in civil law countries. Moreover, both frustration and hardship doctrines require the unpredictability of the changes, absence of fault/contribution by any of the parties, and the regard to the allocation of the parties' risk in order to be applied¹⁰⁹³.

The proximity between the doctrines is also assessable in the BRICS experience, especially when analysing Indian practice. As demonstrated in Chapter 3 of Part I, the case *Satyabrata Ghose vs. Mugneeram Bargur* put focus on the change of circumstances and the substantial striking of the contract's root as essential for applying the frustration doctrine¹⁰⁹⁴. The requirements of fundamental disruption and exceptionality of circumstances are also present in the legal provisions provided by Brazilian, Russian and Chinese codifications.

Furthermore, despite the traditional understanding that commercial difficulties such as an increase of prices and unreturned profits fall outside the scope of frustration, Indian courts have recognised the discharge of the parties in cases of substantial economic imbalance based in the increase of price, when such an increase totally upsets the very foundation upon which the parties rested their bargain. This was the reasoning to judge the cases *Alopi Parshad and Sons, Limited M/s vs. Union of India*¹⁰⁹⁵ and *Easun Engineering Co Limited vs. Fertilisers and Chemicals Travancore Limited*, where the latter involved an increase of 400% of the price and led the parties to a fundamentally different situation compared to the conclusion of the contract¹⁰⁹⁶. Similar decision was rendered in case *Uttar Haryana Bijli Vitran Nigam Ltd. vs. Central Electricity Regulatory Commission*, according

¹⁰⁹² TREITEL, Guenter, *The Law*, cit., pp. 1056-1057 quoting case *National Carriers Ltd vs. Panalpina Northern Ltd* 1981 AC 675.

¹⁰⁹³ PERILLO, Joseph M., *Hardship*, cit., pp. 7-8; RÖSLER, Hannes, *Change*, cit., p. 165; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 673.

¹⁰⁹⁴ SINGH, Avtar, *Law of contract*, cit., pp. 392-39.

¹⁰⁹⁵ Although in this particular case the discharge was denied, the reasoning considered that, for the discharge under Section 56 of the Indian Contract Act, the change in price must be fundamental and shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerges (*Alopi Parshad and Sons, Limited M/s vs. Union of India* 1960 SC 588, *apud* POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 863 and KHANDERIA, Saloni, *Transnational*, cit., p. 65).

¹⁰⁹⁶ *Easun Engineering Co Limited vs. Fertilisers and Chemicals Travancore Limited* AIR, 1991, Mad 158, *apud* PATHAK, Akhileshwar, *Contract Law*, cit., p. 281. Also in POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 863.

to which the parties were discharged based on frustration by virtue of a 150% increase in the coal price after a change of legislation¹⁰⁹⁷.

In South Africa, although cases recognising the discharge of the parties due to commercial hardship are almost absent, there is a strong advocacy in favour to the adoption of new rules inspired in the international uniform instruments (such as the PICC) for addressing the problem of substantial change of circumstances, especially in long-term contractual relationships, which would also encompass the modification of contracts¹⁰⁹⁸.

Considering the above, the approximation of the doctrines of hardship and frustration has the effect to approximate and harmonise the assessed legal systems. For such harmonisation purposes, however, the focus must be redirected from the effects of these doctrines and turned towards its requirements, purposes and roots. Since the hardship doctrine leads to possible adaptation of the contract in addition to termination, which is not provided in cases of frustration¹⁰⁹⁹, resort to the effects as a parameter for comparison would frustrate the quest of the present study. This redirection of focus must not, however, be of much concern in practice, since even when the court grants discharge based on frustration, the parties are free to engage new negotiations and conclude an “adapted contract” without the need of court supervision.

Conceptually though, in accordance with both doctrines, the contract is understood as a place where the parties’ risks are attributed, and they can only be exempted from this attribution in very exceptional circumstances. Both are conceived to be a “last resort” remedy, when alternatives and negotiation attempts fail and, therefore, they were also conceived in a manner to prevent abuse from the parties¹¹⁰⁰. Both have a common normative basis that might be described as a desire to do what is fair¹¹⁰¹. Both grant courts with power within narrow boundaries to release parties from their contractual obligations, not only where the equilibrium of the transaction has been distorted but also where its purpose had been frustrated¹¹⁰². Furthermore, both doctrines functionally recall the application of the

¹⁰⁹⁷ *Uttar Haryana Bijli Vitran Nigam Ltd. vs. Central Electricity Regulatory Commission*, the Appellate Tribunal for Electricity, New Delhi (Appellate Tribunal for Electricity, decided on 7 April 2016), *apud* KHANDERIA, Saloni, *Transnational*, cit., p. 66.

¹⁰⁹⁸ See HUTCHISON, Andrew, *Relational Theory*, cit., p. 325; HUTCHISON, Andrew, *Gap Filling*, cit., pp. 424 and 426.

¹⁰⁹⁹ BEALE, Hugh *et al.* (eds.), *Cases*, cit., p. 630; TALLON, Denis, *Hardship*, cit., p. 329.

¹¹⁰⁰ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., pp. 676-678; On frustration being a measure of *ultima ratio*, see FAZILATFAR, Hossein, *The Impact*, cit., p. 163.

¹¹⁰¹ HUTCHISON, Andrew, *Gap Filling*, cit., p. 416.

¹¹⁰² ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 533.

ancient *clausula rebus sic stantibus*, since the reason behind both is ultimately that “a contract need not to be performed if there has been a fundamental change of those circumstances which were decisive for its conclusion”¹¹⁰³.

In other words, the doctrines deal with a basic innocent “error” which is not attributed to any of the parties at the moment of the conclusion of a contract, and, given the change of circumstances, causes the contract to be extremely hard to be performed by one of the parties. Despite such “error”, the risk assumed should not be such that comprises also totally unforeseeable and drastic changes in the contractual environment. The response to such a situation is given exceptionally by both doctrines, which, in turn, will be applied differently by each country considering the concrete facts¹¹⁰⁴.

Furthermore, similar to the hardship doctrine, whose application demands the verification of several requirements and criteria (*see* Part I, Chapter 3 and Part II, Chapter 2, item 3), the doctrine of frustration is also regarded as “multi-factorial” and relies on several factors, such as “*the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances*”¹¹⁰⁵.

The same multiple requirements are also provided for in Indian literature based on court practice and reveals similarities with the treatment hardship in civilian countries, according to which a contract *cannot* be discharged by frustration if:

“The contract is absolute in terms and can be able to cover the frustrated events; the contract makes full and complete provision for a given contingency; it can be reasonably supposed to be within the contemplation of the parties to the contract at the time they made the contract; where the event is such that any of the parties could foresee or could have foreseen with reasonable diligence; if only a portion of the contract becomes impossible or difficult to perform; if despite the supervening events, the object and purpose of the contract is not rendered useless, and the contract

¹¹⁰³ ZIMMERMANN, Reinhard, *Roman Law*, cit., pp. 48-49.

¹¹⁰⁴ PUELINCKX, Alfons H., *Frustration*, cit., p. 66.

¹¹⁰⁵ Pursuant to case *The Sea Angel*, 2007 EWCA Civ 547, *apud* TREITEL, Guenter, *The Law*, cit., p. 1038.

*can be performed substantially in accordance with the original intention of the parties, though not literally in accordance with the language of the agreement*¹¹⁰⁶.

When one also refers to the impracticability aspect of the frustration doctrine, more similarities arise, since it is related with a higher degree of burden affecting one party (as in the case of the hardship's aspect of excessive onerousness) and not only the "radical change" of the obligation¹¹⁰⁷. Even though it is an American common law concept, the impracticability is effectively applicable in India, as observed in Chapter 3 of Part I¹¹⁰⁸, and is defended to be applied in South Africa, since it would be not totally "foreign" to this law¹¹⁰⁹.

Therefore, the purposes and grounds of both doctrines are very similar, in particular when combined with the principles of consent, party autonomy/freedom of contract and the *pacta sunt servanda*, which are adopted by the five BRICS legal systems.

In all systems, the parties conclude contracts in order to obtain gains, and, at the same time, expect that their counterparts also search for gains, even though imbalance may occur during the course of the performance. None of them, however, enters into a contract expecting to gain from the other's substantial loss due to unexpected changes in circumstances that were not comprised within the parties' risk assumption¹¹¹⁰. In such an exceptional scenario, the law must be applied to secure the preservation of their consent or, at least, the avoidance of a situation that is contrary to their real contracting consent.

Indeed, the protection of the consent of the parties is regarded as a focal point that approximates hardship and frustration. After all, contractual liability stems from consent and, when a supervenient event totally outside the contemplation of the parties drastically shifts the nature of foreseen contractual risks, such consent is impacted. In this context, the

¹¹⁰⁶ POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 860.

¹¹⁰⁷ FARNSWORTH, E. Allan, *Comparative*, cit., p. 31; PERILLO, Joseph M., *Hardship*, cit., p. 14; ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., p. 531-532 and TREITEL, Guenter, *The Law*, cit., p. 1052; FAZILATFAR, Hossein, *The Impact*, cit., p. 165; HUTCHISON, Andrew, *The Doctrine*, cit., p. 91; KHANDERIA, Saloni, *Transnational*, cit., p. 60.

¹¹⁰⁸ Regarding the Indian experience and application of impracticability theory, see NAIR, M. Krishnan, *The Law*, cit., p. 211; POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., p. 853 and 857. See also case *Satyabrata Ghose vs. Mugneeram Bargur & Co* AIR 1954 SC 44: 1954 SCR 310, *apud* SINGH, Avtar, *Law of contract*, cit., p. 392.

¹¹⁰⁹ Pursuant to HUTCHISON, Andrew, *Gap Filling*, cit., p. 420.

¹¹¹⁰ PERILLO, Joseph M., *Hardship*, cit., p. 14.

pressure for the performance of a contract under circumstances not contemplated by the parties and whose results do not address their true intent would mean a disruption to the party autonomy and not its protection. Respecting the parties' intent, the equilibrium initially contracted, is also a way to protect party autonomy and the binding nature of the contracts¹¹¹¹ and is contemplated by both doctrines.

The fear that the hardship doctrine or the possible enlargement of the frustration doctrine would violate the party autonomy and the binding force of the contracts is, consequently, regarded as not being accurate when focusing on the parties' consent. Conversely, the application of these doctrines (especially the hardship with the possible adaptation of the contract) is rather seen as a valuable tool to benefit the binding force of the contracts and party autonomy principles. The binding force and party autonomy are not immutable or static concepts, but rather dynamic, which must operate from the date of the conclusion of the contract and also follow its performance for the future¹¹¹².

For those reasons, it is possible to assess that both doctrines are not only compatible, but also play a contributory role between each other. As regards to compatibility, as observed from the above, both are focused on protecting the parties' consent, either in cases of total frustration and radical change of the contracts, or in cases of extreme difficulty which substantially affects (or changes the position of) one party. Hardship, as well as frustration, is a remedy in equity¹¹¹³ and this sense of equity guides the judges in both traditions in order to decide the consequences of the specific case.

Additionally, hardship contributes to frustration by fixing more concrete requirements for its occurrence, and by opening the possibility of adaptation of the contract. The detailed and exceptional requirements are better than having no precise rules to address those situations and are also important to avoid uncertainty¹¹¹⁴ - the great concern of common law in recognising hardship as a doctrine along with frustration. On the other hand, civilians may also benefit from the common law experience of frustration, especially with the advice to the parties to be more cautious in drafting contracts¹¹¹⁵, the consideration of a

¹¹¹¹ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., p. 660; PERILLO, Joseph M., *Hardship*, cit., p. 13.

¹¹¹² DOUDKO, Alexei G., *Hardship*, cit., p. 493; MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., pp. 653-654 and 661.

¹¹¹³ TALLON, Denis, *Hardship*, cit., p. 503.

¹¹¹⁴ BEALE, Hugh *et al.* (eds.), *Cases*, 2nd ed., cit., p. 1146; RÜFNER, Thomas *in* JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries*, cit., p. 910.

¹¹¹⁵ As pointed out by TREITEL, Guenter, *The Law*, cit., p. 1037.

wider range of situations (not only economic imbalance), as well as the rigidity of the cases' assessment, in order to prevent frivolous litigation on contract termination or adaptation and to preserve certainty in commercial practice.

Balancing these two sides, it is undeniable the importance of discussing and harmonising the doctrines of hardship and frustration. Not for any other reason, the uniformizing international initiatives discussed in Chapter 2 provide for detailed requirements, coupled with some degree of vagueness, in order to keep contractual stability and, at the same time, be accepted by as many systems as possible¹¹¹⁶, including common law countries that participated in these enterprises.

This is also true for the BRICS context, where compatibility and contributions from one country to the other is very welcome. Understanding the Indian and South African stricter experience may be valuable for better drafting contracts and avoiding the explosion of litigations claiming for contract revision faced in Brazil. Likewise, the more detailed rules and possibilities addressed in the Chinese recent Civil Code, as well as in Russia (described in Part I), may contribute to Indian¹¹¹⁷ and South African practitioners understanding that hardship is as exceptional as frustration, and cases of economic imbalance, when striking the roots of the contract and changing the parties' position, may also be considered for the discharge or even adaptation of contracts (another valuable contribution).

These insights and contributions are particularly relevant in the current pandemic scenario, with the outbreak of several unpredictable situations directly affecting commercial relationships among the five countries, which entails a claim for more adequate rules to deal with those consequences (hardship rules), especially in the common law countries, as recently recognised by Indian literature¹¹¹⁸.

Again, based on these doctrines, their concepts, requirements and practical application, each legal system and involved courts must be able to find the proper balance between party autonomy, *pacta sunt servanda*, certainty, on one side, and the considerations of equity and fairness on the other side¹¹¹⁹.

¹¹¹⁶ MEKKI, Mustapha – KLOEPFER- PELÈSE, Martine, *Hardship*, cit., pp. 657-658.

¹¹¹⁷ Reference is made to the consideration of hardship rules set forth in the PICC (analysed in Chapter 2 above) by Indian literature without the reservation of inapplicability, which could suggest at least an openness to contribution (see POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian*, cit., pp. 902-903).

¹¹¹⁸ KHANDERIA, Saloni, *Transnation*, cit., pp. 59 and 79-80.

¹¹¹⁹ As revealed by the comparative experience in Europe (see ZIMMERMAN, Reinhard – WHITTAKER, Simon, *Good Faith*, cit., p. 700).

This Chapter closes the comparative exercise initiated in Chapter 1. After “filling the boxes” of commonalities and divergences among the BRICS systems, it was possible to select the three issues whose divergence had the potential to raise more concerns in practice: mechanism of avoidance, consequences of avoidance and hardship.

The identified divergences are intrinsically linked with the common law vs. civil law dichotomy and, as such, the analysis of previous international initiatives for drafting uniform instruments was important to demonstrate how this clash was dealt with in order to achieve a “best solution” for harmonisation. Despite the importance of the insights deriving from these initiatives, the present study was not focused only on the achievement of a best solution for the BRICS, but rather on the assessment of possible compatibility and contribution among the systems and, ultimately, among the different traditions.

In the three issues it was possible to answer positively the questions posed in the introduction of this Chapter 3. By focusing on the dissonant system (or systems), rooms for harmonisation were demonstrated either by way of resorting to exceptions, approximation of concepts, recent development of case law, or even approximation of practical consequences to the parties. Therefore, the obstacles previously identified were proved not to be insuperable. Moreover, it was possible to detect mutual contributions among the systems in all of the three issues.

Such an assessment of compatibility and contribution was possible with the attempt to avoid the usual pre-conceptions of common law and civil law influences. However, at the end of a comparative study, it is normal to identify better, worse, or equally valid solutions, and this is important to allow the contributory achievement¹¹²⁰.

In this study, even though some inclinations are unavoidable, the results demonstrated that the “common points” could be identified by approximation either to a common law solution (mechanism of avoidance), or to a civilian solution (consequences of avoidance), or even by considering both approaches with equal weight (hardship).

¹¹²⁰ ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction*, cit., pp. 46-47.

As already mentioned, the five legal systems are still evolving and are open to being developed and, consequently, it is possible that other common grounds and contributions (in theory and/or in practice) exist with respect to contract law among them, those which could not be encompassed by this thesis.

Therefore, the present study also proposes an invitation for further comparative works among the BRICS systems either in the issues of invalidity and hardship, or in other fields of contract law. As pointed out by Vivian Grosswald CURRAN, the comparative work “*reveals the images of the world*” and “*its beauty and utility never end*”¹¹²¹.

¹¹²¹ CURRAN, Vivian Grosswald, *On the shoulders*, cit., p. 16.

CLOSING REMARKS

An international comparative study of contract law, such as the present one, is generally multifaceted. It mixes comparative law techniques, concepts of international trade law and, mainly, institutions of civil law.

In this path, the objective herein was to enable the comparison with as many elements as possible and, most importantly, the construction of a harmony bridge among the five legal systems of the BRICS. Targeting such an objective, the study then focused on the aspects that facilitated such demonstration, without ignoring the existence of other possible aspects related to the issues of invalidity of contracts and hardship.

For an international comparativist, each possible room for approximation of different systems, with the focus on international integration, is a treasure, a valuable finding, and brings the sensation of mission accomplishment. The search of this sensation guided the preparation of this study.

After a neutral description of each national system in Part I, it was possible to undertake a comparative reflection and achieve harmonisation among them in Part II. The “national reports” rendered an overview of the BRICS countries legal background, general principles of contract law and the main rules applicable to the validity/invalidity of contracts and hardship.

Based on this introductory and descriptive part, it was possible to identify commonalities and divergences among the systems in the two issues. In the group of divergences, the issues of the mechanism of avoidance of the contracts, the consequences of avoidance and hardship in general were selected as the most concerning and apparently more difficult to harmonise. Given such difficulty, preliminary resort to previous initiatives of comparison and uniformisation of contract law was pertinent to obtain insights.

The discussions and solutions adopted by the PICC, PECL and the DCFR, as well as the comparative findings of the Common Core were valuable for understanding the mentality of the different systems, especially with respect to the common law *vs.* civil law dichotomy. The uniformisation effort of these initiatives, however, in addition to be very European centred, was not primarily focused on achieving common grounds among the involved participants, but rather a “best solution” to be uniformly applied or, at least, supplement national treatment in face of problems of contract law.

The scope of the present thesis was slightly different since it aimed at reaching common grounds, when possible, and discussing the divergences in order to obtain contributory experiences from country to country. As well as this, all the analyses made in the previous chapters furnished the tools for such a quest.

In the majority of cases, the research demonstrated an alignment among Brazil, Russia and China, as opposed to India and South Africa. With respect to the mechanism of avoidance, the countries were divided between those providing for a court-supervised measure (Brazil, China and Russia) and those where the avoidance of a contract is a self-help remedy (rescission of India and South Africa). Nevertheless, it was possible to identify exceptions in India, which also provided for the rescission as a judicial measure subject to specific rules and limitation periods.

Furthermore, the research of the civil law countries did not return compelling reasons (other than the “black letter” rules) to prevent the avoidance outside court supervision, particularly in international practice. On the contrary, they authorise the escape from the court in cases of termination of ongoing contracts and, since the continuation of an invalid contract is more serious to the practice than the mere termination, the act of avoidance should be facilitated to the aggrieved parties. The grounds for historical reasons and the need to assess “facts” do not alter this conclusion, since the same necessity exists in the case of termination and, despite that, the systems accept a more flexible approach, especially to international contracts.

In any case, the practical results may also approximate the countries and will depend on the behaviour of the parties. If they are in agreement with regards to the invalidity, court proceedings will be avoided in the five countries; if they disagree, litigation will be inevitable in the five countries as well. This convergence in practice also demonstrates how Brazil, Russia and China could take account of the more flexible common law approach provided for in the South African and Indian systems, to facilitate the avoidance of contract by direct communication, unburdening the courts’ work.

As for the consequences of invalidity, India appears as the sole dissonant system, since South Africa, despite the common law influence, is closer to Brazil, Russia and China in recognising the possibility of avoidance and restitution of performances even when it is not possible to restore *in natura*, as well as by adopting a more flexible approach with respect to contracts tainted by illegality. However, recent court practice in India and English common law (which is also a source of Indian law) reveals that the dissonant BRICS country

is ready to accept the possibility of restitution in both cases of inability to restore in kind and when the parties are *in pari delicto*.

In addition to this clear harmonisation of the systems, it is undeniable that the civil law approach of permitting restitution contributed to this change of posture in India and England, as it did previously in South Africa, with a quest to enforce the protected policy (violated by the parties) and avoid unfair situations (for instance, the parties stay with the product of an invalid and/or illegal contract). Inside the BRICS context, the more detailed rules and guidance of restitution set forth in the Chinese system may contribute to the development of quantification measures by the other systems in order to provide certainty coupled with the avoidance of abusive and unfair situations.

Finally, the research demonstrated that the systems are not that far apart with respect to the treatment conferred to hardship situations. The extreme difficulty threshold that results in a resort towards the hardship doctrine in Brazil, China and Russia is compatible to the threshold that triggers the doctrine of frustration in India and South Africa. If one disregards the final effects of these doctrines in termination or adaptation (which vary even inside the countries recognising hardship¹¹²²), and turn the focus to its purpose of protecting the parties' intent and to the requirements of substantial change to the parties' position and unpredictability, the two doctrines become compatible and harmonised.

Additionally, the different approaches adopted by the divergent countries play an undeniable contributory role inside the BRICS. India and South Africa could benefit from the experience to allow exceptional adaptation of the contracts when it appears the best solution in practice, whilst Brazil, Russia and China may learn from the strictness of the common law experience and reduce frivolous judicial demands.

Such an exchange of compatibilities and contributions is of particular interest for the BRICS systems in the face of the recent distressed environment caused by the COVID-19 pandemic. The pandemic drastically affected the five countries in health, political and also commercial aspects. The way each countries' case law and literature will develop upon such a crisis and the amount of contractual problems arising therefrom, may uncover new insights for the treatment of the issues of invalidity and, especially, hardship.

¹¹²² In Brazil, the termination of contracts is the rule, as well as in Russia, while Chinese practice favours adaptation of contracts.

Therefore, the attention to the experiences of other “colleagues” of the same group of countries may assist in better addressing current and future problems of each individual system. This is the quest and the benefit of comparative law, which was sought in the present study. After all, as once said by the founder and most notorious name of comparative law, Ernst RABEL: “*das gesunde nationale Recht entwickelt sich wie der normale Mensch nur im sozialen Beisammenleben mit seinen Genossen*”¹¹²³ or, as translated by Reinhard ZIMMERMANN, “*a healthy national law, just as a normal human being, can only develop on the basis of social exchange with its companions*”¹¹²⁴.

¹¹²³ RABEL, Ernst, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, Max Hueber, Munich, 1925, p. 23.

¹¹²⁴ ZIMMERMANN, Reinhard, ‘*Double Cross*’, cit., p. 33.

REFERENCES

I. Laws and Statutes

- Brazil

- Brazilian Civil Code of 1916, Law No 3,071/1916.
- Introductory Law to the Brazilian Legal System, Decree Law No 4,657/1942.
- Brazilian Federal Constitution of 1988.
- Brazilian Consumer Code, Law No 8,078/1990.
- Brazilian Arbitration Law, Law No 9,307/1996.
- Brazilian Civil Code, Law No 10,406/2002.
- Decree No 7,962 of March 15th, 2013.
- Decree No 8,237/2014 that promulgates the United Nations Convention on Contracts for the International Sales of Goods in Brazil.
- Law No 13,874/2019, which derived from Provisory Act No 881/2019.
- Law No 14,010/2020.
- Statement 21 of the I Journey of Civil Law.
- Statement 22 of the I Journey of Civil Law.
- Statement 23 of the I Journey of Civil Law.
- Statement 25 of the I Journey of Civil Law.
- Statement 148 of the III Journey of Civil Law.
- Statement 170 of the III Journey of Civil Law.
- Statement 175 of the III Journey of Civil Law.
- Statement 176 of the III Journey of Civil Law.
- Statement 364 of the IV Journey of Civil Law.
- Statement 466 of the IV Journey of Civil Law.
- Statement 431 of the V Journey of Civil Law.

- Statement 439 of the V Journey of Civil Law.
- **China**
- General Principles of Civil Law of 1986.
 - Contract Law of the People's Republic of China of 1999.
 - Law of the Application of Law for Foreign-Related Civil Relations of 2010.
 - General Rules of Civil Law of 2017.
 - Chinese Civil Code of 2020.
- **India**
- Contract Act of 1872.
 - Evidence Act of 1872.
 - Sale of Goods Act of 1930.
 - Constitution of India of 1950.
 - Limitation Act of 1963.
 - Specific Relief Act of 1963.
 - Consumer Protection Act 1986.
 - Information Technology Act of 2000.
- **Russia**
- Federal Law on Protection of Consumer Rights of 1993.
 - The Civil Code of Russian Federation.
- **South Africa**
- Arbitration Act 42 of 1965, South Africa.
 - Companies Act of 1973.
 - Electronic Communications and Transactions Act 25 of 2002, South Africa.

- International Trade Administration Act 71 of 2002.
- Consumer Protection Act 68 of 2008, South Africa.

- **International Instruments**

- Principles of European Contract Law - PECL.
- UNIDROIT Principles of International Commercial Contracts - PICC.
- United Nations Convention on Contracts for the International Sales of Goods, Vienna, 1980 - CISG.
- Draft of Common Frame of Reference - DCFR
- UNIDROIT Convention on International Financial Leasing.
- UNIDROIT Convention on International Factoring.

II. Cases and Judicial Authoritative Acts

- **Brazil**

- Superior Court of Justice, REsp 579107-MT, Rel. Min. Nancy Andrighi, j. 07/12/2004.
- Superior Court of Justice, REsp 1087783-RJ, Rel. Min. Nancy Andrighi, j. 01/09/2009.
- Superior Court of Justice, REsp 849228/GO, Rel. Min. Luis Felipe Salomão, j. 03/08/2010.
- Superior Court of Justice, REsp 964060-GO, Rel. Min. Sidnei Beneti, j. 28/09/2010.
- Superior Court of Justice, REsp 936741/GO, 4.^a T., j. 03.11.2011, v.u., rel. Min. Antonio Carlos Ferreira, j. 08/03/2012.
- State Court of São Paulo, AC 0222100-44.2009.8.26.0100, Rel. Des. Achile Alesina, j. 20/10/2015.
- Superior Court of Justice, AgRg no AREsp 711391/MT, Rel. Min. João Otávio Noronha, j. 01/12/2015.

- Superior Court of Justice, REsp 1280218-MG, Rel. Ministro Paulo de Tarso Sanseverino, Rel. p/ Acórdão Ministro Marco Aurélio Bellizze, j. 21/06/2016.
- Superior Court of Justice, REsp 1115596-GO, Rel. Min. Raul Araújo, j. 09/08/2017.
- Superior Court of Justice, AREsp 1394945-SC, Rel. Min. Marco Buzzi, j. 26/11/2018.
- Superior Court of Justice, REsp 1343290-SP, Rel. Min. Luis Felipe Salomão, j. 16/04/2019.
- Superior Court of Justice, AgInt no REsp 1343290-SP, Rel. Min. Luis Felipe Salomão, j. 20/08/2019.
- State Court of São Paulo, Appeal No 2068208-07.2020.8.26.0000, Rel. Des. Gomes Varjão, j. 22/04/2020.
- State Court of São Paulo, Appeal nº 1121451-73.2017.8.26.0100, Rel. Des. Maurício Pessoa, j. 21/07/2020.
- Superior Court of Justice, SLS 002783, Rel. Min. Humberto Martins, j. 23/09/2020.
- Superior Court of Justice, AREsp 500425-RJ, Rel. Min. Raul Araújo, j. 19/10/2020.
- State Court of São Paulo, Appeal No 2179933-98.2020.8.26.0000, Rel. Min. Tércio Pires, j. 12/11/2020.
- Superior Court of Justice, REsp 1903878-MG, Rel. Min. Moura Ribeiro, j. 17/11/2020.
- Superior Court of Justice, AgInt no AREsp 1724503-SP, Rel. Min. Marco Buzzi, j. 18/12/2020.
- State Court of São Paulo, Appeal No 2010052-89.2021.8.26.0000, Rel. Des. Cesar Luiz de Almeida, j. 02/03/2021.

- **Canada**

- *Saxon vs. Saxon* (1976) 4 WWR 300, 305, 306 (BC SC).

- **China**

- Supreme People’s Court on Questions Concerning implementation of the General Principles of Civil Law, 26/01/1988.
- Interpretation on Certain Questions Concerning the Application of Contract Law of 1999 and 2009.
- Guiding Opinion of the Supreme People’s Court on Several Issues concerning Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation, 07/07/2009.
- Minutes of the National Court’s Civil and Commercial Trial Work Conference, issued by the Supreme People’s Court, 08/11/2019, No. 254.
- *Shanghai Tongzai Industrial Co Ltd vs. Faz East Cabe Company Ltd.*
- Guiding Opinions (Part I) on Several Issues concerning the Proper Trial if Civil Cases involving the Novel Coronavirus Pneumonia Epidemic, 16/04/2020.

- **Germany**

- RGZ 103.328, 03/02/1922 (The 1919 inflation).

- **India**

- *Waghela Rajsanji vs. Shekh Masludin* 1887 LR 14 I.
- *Hurnandrai Fulchand vs. Pragdas Budhsen* 1922-23 50 IA 9: AIR 1923 PC 54 (2).
- *Satyabrata Ghose vs. Mugneeram Bargur & Co* AIR 1954 SC 44: 1954 SCR 310.
- *Gurunath vs. Kamalabai* AIR 1955 SC, 206.
- *Gherulal Parakh vs. Mahadeodas*, AIR 1959 SC 781: (1959) 2 SCR 406.
- *Alopi Parshad and Sons, Limited M/s vs. Union of India* 1960 SC 588.
- *Harinagar Sugar Mills Ltd vs. Shyam Sundar Jhunjunwala* AIR 1961 SC 1669.
- *Sushila vs. Hari Singh*, AIR, 1971 SC 1756.

- *State of Rajasthan vs. Associated Stone Industries* 1985 1 SCC 575, 580: AIR 1985 SC 466.
- *Easun Engineering Co Limited vs. Fertilisers and Chemicals Travancore Limited* AIR 1991 Mad 158.
- *Oriental Insurance Co Ltd vs. Mantora Oil Products (P) Ltd*, 2000 10 SCC 23.
- *Bellachi vs. Pakeeran* 2009 12 SCC 95: (2009) 4 SCC (Civ) 640.
- *Uttar Haryana Bijli Vitran Nigam Ltd. vs. Central Electricity Regulatory Commission*, the Appellate Tribunal for Electricity, New Delhi, 07/04/2016.

- **Russia**

- Decision of the Supreme Commercial Court No 6/8 on 01/07/1996.
- Resolution of Plenum of the Supreme Court No 13 and Plenum of the Supreme Commercial Court No 14 on 08/10/1998.
- Decision of the Federal Arbitration Court of the East-Siberian region on 27/06/2003 N A33-10697/02.
- Resolution of Federal Commercial Court of Volgo-Viatskii District on 24/08/2007 No A79-9483/2006.
- Ruling of Supreme Commercial Court of 25/12/2008 No VAS-16667/08.
- Resolution of Federal Commercial Court of Moscow District on 10/11/2009 No KG-A41/11592-09, No A41-13282/09.
- Resolution of Federal Commercial Court of Volgo-Viatskii District of 16/11/2009 No A11-847/2009.
- Decision of the Federal Arbitration Court of the Volga-Vyatka district on 10/12/2010 N A82-1979/2010.
- Ruling of Supreme Commercial Court on 27/12/2010 No VAS-17039/10.
- Resolution of Federal Commercial Court of North-Western District of 17/01/2011 No A13-2968/2010.
- Ruling of Supreme Commercial Court on 22/02/2011 No VAS-1312/11.

- Ruling of Supreme Commercial Court on 11/10/2011 No VAS-12624/11.
- Ruling of Supreme Commercial Court on 20/12/2011 No BAC-15941/11.
- Ruling of Moscow City Court on 29/02/2012 No 33-6512.
- Resolution of the Supreme Arbitration Court of the Russian Federation on 03/05/2012 N BAC-33521
- Informational Circular of Supreme Commercial Court, ab. n 11, Part 1.
- Ruling of the Supreme Arbitration Court No. 22.

- **South Africa**

- *Jajbhay vs. Cassim*, 1939 AD 537.
- *National & Overseas Distributors Corporation (Pty.) Ltd. vs. Potato Board* 1958 (2) S.A. 473 (A.D.).
- *Preller vs. Jordaan* 1956 (1) SA 483 (A).
- *Extel Industrial (Pty) Ltd. vs. Crown Mills (Pty) Ltd*, 1999 SA 719 SCA.
- *Van Reenen Steel (Pty) Ltd vs. Smith NO* (97/2001) 2002 ZASCA 12.
- *Barkhuizen vs. Napier* 2007 (5) SA 323 (CC).
- *Transnet Ltd t/a National Ports Authority vs. Owner ofMVSnow Crystal* 2008 (4) SA 111 (SCA).
- *Everfresh Market Virginia (Pty) Ltd vs. Shoprite Checkers (Pty) Ltd* 2012 (1) SA256 (CC).
- *Botha vs. Rich*, 2014 (4) SA 124 (CC).

- **United Kingdom**

- *Paradine vs. Jane* 1646 Aleyn 26 (82 ER 897).
- *Holman vs. Johnson* 1775 1 Cowp. 341, 98 ER 1120.
- *Molton vs. Camrous*, 154 ER 1107: 1848 2 Exch 487.

- *Taylor vs. Caldwell* 1863 3B &S 826 (122 ER 309).
- *Raffles vs. Wichelhaus* 1864 2 H&C 906: 159 ER 375.
- *Erlanger vs. New Sombrero Phosphate Co* 1878 AC 1218.
- *Mogul Steamship Co vs. McGregor Gow & Co* 1892 AC 25.
- *Lagunas Nitrate Co vs. Lagunas Syndicate* 1899 2 Ch 392 (CA).
- *Krell vs. Henry* 1902 2 KB 740.
- *Herne Bay Steamboat vs. Hutton* 1903 2 KB 683.
- *Christineville Rubber Estates Ltd, re,* 1911 81 LJ Ch 63.
- *Dunlop Tyre Co vs. Selfridge & Co* 1915 AC 847.
- *Boyd & Forrest vs. Glasgow & SW Ry* 1915 S.C HL 20.
- *Spence vs. Crawford* 1939 3 All ER 271.
- *Cricklwood Property & Investment Trust Ltd vs. Leighton's Investment Trust Ltd* 1945 AC 221 (HL).
- *British Movietonews Ltd vs. London and District Cinemas* 1951 A C 166.
- *Davis Contractors LTD vs. Farenham UDC* 1956 UKHL 3 AC 696.
- *Kiriri Cotton Co v. Dewani* 1960 AC 192.
- *Tsakiroglou & Co Ltd vs. Noblee & Thorl GmbH* 1962 AC 93.
- *Ocean Tramp Tankers Corp. vs. VO Sovracht, The Eugenia* 1964 2 QB 22.
- *Staffordshire Area Health Authority vs. South Staffordshire Waterworks Co.* 1978 1 WLR.
- *National Carriers Ltd vs. Panalpina Northern Ltd* 1981 AC 675.
- *Patel vs. Ali* 1984 Ch 283 : (1984) 2 WLR 960 : (1984) 1 All ER 978.
- *Saunders vs. Edwards* 1987(2) All ER 651.

- *Tinsley vs. Milligan* 1992 Ch. 310 (CA), (1994) 1 AC 340 (HL).
- *Tribe vs. Tribe* 1996 Ch 107 (CA).
- *The Sea Angel* 2007 EWCA Civ 547.
- *Salt vs. Stratstone Specialist Ltd* 2015 EWCA Civ 745, 2015 2 C.L.C 206.
- *Patel vs. Mirza* 2016 UKSC 42.

- **United States of America**

- *Pollard vs. Shaffer* 1 U.S. 210 1787.

III. Consulted Bibliography:

- AMARAL NETO, Francisco de Santos, *A Autonomia Privada como Princípio Fundamental da Ordem Jurídica - Perspectivas Estrutural e Funcional*, in *Doutrinas Essenciais de Direito Civil*. Vol. 2, 2010;
- AZEVEDO, Antônio Junqueira de, *Negócio Jurídico. Existência. Validade e Eficácia*, 4th ed., São Paulo, Saraiva, 2002;
- _____, *Contrato de opção de venda de participações societárias. Variação imprevisível do valor da coisa prometida em relação ao preço de mercado. Possibilidade de revisão por onerosidade excessiva com base nos arts. 478 a 480 do Código Civil em contrato unilateral*, in *Novos Estudos e Pareceres de Direito Privado*, São Paulo, Saraiva, 2009;
- _____, *Insuficiências, deficiências e desatualização do projeto de Código Civil na questão da boa-fé objetiva nos contratos*, in *Revista Trimestral de Direito Civil*, Rio de Janeiro, v. 1, 2000 (3-12);
- _____, *O direito como sistema complexo e de 2ª ordem; sua autonomia. Ato nulo e ato ilícito. Diferença de espírito entre responsabilidade civil e penal. Necessidade de prejuízo para haver direito de indenização na responsabilidade civil*, in *Estudos e Pareceres de Direito Privado*, São Paulo, Saraiva, 2004;

- _____, *Princípios do atual direito contratual e a desregulamentação do mercado. Direito de exclusividade nas relações contratuais de fornecimento. Função social do contrato e responsabilidade aquiliana do terceiro que contribui para inadimplemento contratual*, in Estudos e Pareceres de Direito Privado, São Paulo, Saraiva, 2004;
- _____, *Relatório brasileiro sobre revisão contratual apresentado para as Jornadas Brasileiras da Associação Henri Capitant*, in Novos Estudos e Pareceres de Direito Privado, São Paulo, Saraiva, 2009;
- BANGIA, R. K., *The Indian Contract Act*, rev. KUMAR, Narender, Haryana, Allahabad, 2009;
- BAR, Christian von – CLIVE, Eric (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, full edition, vol. I, Munich, Sellier, 2009;
- BARALDO, Fabio Pimentel Franceschi, *A lei da liberdade econômica como um instrumento para a renovação do direito internacional privado no brasil*, in Revista de Direito Constitucional e Internacional, vol. 118, 2020 (93 – 103);
- BASEDOW, Jurgen *et al*, *Encyclopedia of Private International Law*, vol. 4, Cheltenham, Edward Elgar, 2017;
- BEALE, Hugh *et al.* (eds.), *Cases, Materials and Text on Contract Law*, Oxford and Portland, Hart Publishing, 2002;
- _____, *Cases, Materials and Text on Contract Law*, 2nd ed., Oxford, Hart Publishing, 2010;
- BEVILÁQUA, Clóvis, *Código Civil dos Estados unidos do Brasil*, Rio de Janeiro, Ed. Rio, 1979;
- BHADBHADE, Nilima, *Contract Law in India*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2016;
- BONELL, Michael Joachim, *The New Provisions on Illegality in the UNIDROIT Principles 2010*, in Uniform Law Review, vol. 16, No. 3, 2011 (517-536);
- _____, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016;

- BOULOS, Daniel Martins, *A autonomia privada, a função social do contrato e o novo Código Civil*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003;
- BRAGINSKII, Mikhail I., *Civil Law According to Russian Legislation: Developments and Trends*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;
- BRÖDERMAN, Eckart J., *UNIDROIT Principles of International Commercial Contracts. An Article-by-Article Commentary*, Alphen aan den Rijn, Kluwer Law International BV, 2018;
- BU, Yuanshi, *Chinese Civil Code, The General Part*, München, Beck, 2019;
- BUSSADA, Wilson, *Código Civil Brasileiro. Interpretado pelos tribunais*, vol. 1, t. 2, Rio de Janeiro, Liber Juris, 1980;
- BUSSANI, Mauro – MATTEI, Ugo, *The Common Core Approach to European Private Law*, available at: [The Common Core Project \(unitn.it\)](http://unitn.it);
- _____, *Opening up European Law*, Bern, Stämpfli, 2007;
- BUTLER, William E., *The Civil Code of the Russian Federation*, London, Wildy, Simmonds & Hill, 2016;
- CARTWRIGHT, John, *Defects of Consent in Contract law*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011;
- CHEN, Lei – RHEE, C.H. Remco, *Introduction*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012 (1-17);
- CHEN-WISHART, Mindy, *In defence of unjust factors: a study of rescission for duress, fraud and exploitation*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (159-193);

- CLIVE, Eric, *Restitution and Unjustified Enrichment*, in HARTKAMP, Arthur S. *et. al*, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998 (383-394);
- _____, *Unjustified Enrichment*, in HARTKAMP, Arthur S. *et. al*, *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004 (585-603);
- COHEN, Nili, *Israeli Law as a Mixed System – Between Common Law and Continental Law*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002 (15-27);
- COMEAU-GALLIMORE, Shawn, *Towards a trans-systemic approach to observing Chinese civil law development*, in *China-EU Law Journal*, 2013 (161-184);
- CRISTOFARO, Giovanni de, “Invalidity” of Contracts and Contract Terms in the Feasibility Study on a Future Instrument for European Contract Law, in SCHULZE, Reiner – STUYCK, Jules, *Towards a European Contract Law*, Munich, Sellier, 2011 (97-120);
- CURRAN, Vivian Grosswald, *On the shoulders of Schlesinger: The Common Core of the European Private Law Project*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007 (1-16);
- DANNEMANN, Gerhard, *Illegality as a defence against unjust enrichment claims*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (310-324);
- DIMATTEO, Larry A. – CHEN, Lei, *History of Chinese Contract Law*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- DING, Chunyan, *Perspectives on Chinese Contract Law: Performance and Breach*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- DOUDKO, Alexei G., *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, in *Uniform Law Review*, vol. 5, No 3, 2000;

- DOZHDEV, Dmitry, *Russian Private Law and European Legal Transplants*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007;
- DU PLESSIS, Jacques, *Fraud, duress and unjustified enrichment*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (194-224);
- DU PLESSIS, Jacques – MCBRYDE, William W., *Defects of Consent*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004;
- DU PLESSIS, Jacques – VISSER, Daniel, *Disgorgement of Profits in South African Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015 (345-367);
- DUGGAN, Niall, *BRICS and the Evolution of a New Agenda within Global Governance*, in REWIZORSKI, M. (ed.), *The European Union and the BRICS. Complex Relations in the Era of Global Governance*, Springer, 2015, (11-25);
- EBERLE, Edward J., *Comparative Law*, in Annual Survey of International & Comparative Law, vol. 13, Issue 1, Article 5, 2007 (93-102);
- ERP, J.H.M. van, *The Pre-Contractual Stage*, in HARTKAMP, Arthur S. *et. al*, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011 (493-513);
- FABRE-MAGNAN, Muriel, *Defects of Consent in Contract Law*, in HARTKAMP, Arthur S. *et. al*, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998;
- FARNSWORTH, E. Allan, *Comparative Contract Law*, in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017 (3-39);
- FAZILATFAR, Hossein, *The Impact of Supervening Illegality on International Contracts in a Comparative Context*, in Comparative and International Law Journal of Southern Africa, vol. 45, no. 2, 2012 (158-188);

- FERNANDES, Micaela Barros Barcelos, *Impactos da lei 13.874/2019 no princípio da função social do contrato: a liberdade econômica em foco*, Revista dos Tribunais, vol. 1010, 2019 (149-179);
- FERREIRA, Antonio Carlos - RODRIGUES JR, Otavio Luiz – LEONARDO, Rodrigo Xavier, *Revisão judicial dos contratos no regime jurídico emergencial e transitório das relações jurídicas de direito privado na pandemia de 2020 (Lei 14.010, de 10 de junho de 2020)*, in Revista de Direito Civil Contemporâneo, vol. 25, 2020 (311-337);
- FIKENYSCHER, Wolfgang, *Closing Remarks: Harmonizing National and Federal European Private Laws, and a plea for a Conflicts-of-Law Approach*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002 (43-48);
- FONSECA, Rodrigo Garcia, *A função social do contrato e o alcance do artigo 421 do Código Civil*, Rio de Janeiro, Renovar, 2007;
- FONTAINE, Marcel, *Cause, Good Faith and Hardship. Three Issues in the Process of Harmonizing Contract Law*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016 (1131-1145);
- FORSYTH, Christopher F., *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*, 5th ed., Juta, 2012;
- FRANKENBERG, Günter, *How to do projects with Comparative Law. Notes of an expedition to the Common Core*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007 (17-47);
- FU, Junwei, *Modern European and Chinese Contract Law. A Comparative Study of Party Autonomy*, Alphen aan den Rijn, Kluwer Law International, 2011;
- GAO, Xiang – LIU, Chengwei, *The Disgorgement Damage System in Chinese Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015 (407-428);
- GEBHARDT, Immanuel – SCHULZ, Thomas, *Comments on the Chinese Regulations Regarding Modification and Transfer of Contracts*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis*

on the Chinese Contract Law, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003 (173-178);

- GIRVIN, Stephen D., *The Architects of the Mixed Legal System*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996;
- GODOY, Claudio Luiz Bueno de, *Função social do contrato. Os novos princípios contratuais*. 2ª ed., São Paulo, Saraiva, 2007;
- GOMES, Orlando, *A função Social do Contrato*, in *Novos temas de direito civil*, Rio de Janeiro, Forense, 1983;
- _____, *Contratos*, 26th ed., atualizada por AZEVEDO, Antônio Junqueira de – MARINO, Francisco P. de Crescenzo, Rio de Janeiro, Forense, 2008;
- HAN, Shiyuan, *A snapshot of Chinese Contract Law from an historical and comparative perspective*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012 (235-255).
- _____, *General Principles under the CCL*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- HARMATHY, Attila, *Hardship*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016 (1035-1043);
- HELDRICH, Andreas – REHM, Gebhard, *Modernisation of the German Law of Obligations: Harmonisation of Civil Law and Common Law in the Recent Reform of the German Civil Code*, in *Comparative remedies for breach of contract*, Oxford, Hart, 2005 (123-133);
- HELLWEGE, Phillip in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;
- _____, *Invalidity*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012, (990-993);

- _____, *Unwinding Contracts*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012 (1751-1755);
- _____, *Unwinding mutual contracts: restitutio in integrum v. the defence of change of position*, JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (243-286);
- HONDIUS, Ewoud, *Corruption in Contract Law and Disgorgement of Damages*, BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016;
- _____, *Towards a European Civil Code*, in HARTKAMP, Arthur S. *et. al.*, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998;
- _____, *Towards a European Civil Code*, in HARTKAMP, Arthur S. *et. al.*, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011 (3-25);
- HUTCHISON, Andrew, *Gap Filling to Address Changed Circumstances in Contract Law - When It Comes to Losses and Gains, Sharing is the Fair Solution*, in *Stellenbosch Law Review*, vol. 21, no. 3, 2010 (414-428);
- _____, *Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication*, in *South African Law Journal*, vol. 134, no. 2, 2017 (296-326);
- _____, *The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Contract Law*, in *South African Law Journal*, vol. 127, no. 1, 2010 (84-106);
- HUTCHISON, Dale, *Contract Formation*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996;
- HUTCHISON, Dale – PRETORIUS, Chris (eds.), *The Law of Contract in South Africa, Private Law*, 3rd ed., Cape Town, Oxford University Press, 2018;

- IAKOVLEV, Veniamin, *The arbitrazh courts and the new Russian Civil Code*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;
- JAIN, Abhimanyu George, *Indian Practice relating to International Law*, in *Indian Journal of International Law*, 2016 (239-253);
- JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;
- JANSSEN, André – CHAU, Samuel C.K., *The Impact of the UNIDROIT Principles of International Commercial Contracts on Chinese Contract Law: Past, Present and Future*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- JIN, Zhendoo, *From a supplementary legislator to a legitimate judicial lawmaker – on the role of the Supreme People’s Court in developing law in mainland China*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012 (29-60);
- JINGCHUN, Shao, *Performance of Contracts under the Contract Law of P.R. China*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003 (115-122);
- JOHNSTON, David – ZIMMERMANN, Reinhard, *Unjustified enrichment: surveying the landscape*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (3-33);
- JONES, William, *Sources of Chinese Obligation Law*, in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017 (295-325);
- JUNIOR, Humberto Theodoro, *Livro III-Dos fatos jurídicos: Do Negócio Jurídico*, in TEIXEIRA, Sálvio de Figueiredo (coord.), *Comentários ao Novo Código Civil*, vol. III, tomo I, Rio de Janeiro, Forense, 2008;

- KENNEDY, David, *The Politics and Methods of Comparative Law*, in BUSSANI, Mauro – MATTEI, Ugo (eds.), *The Common Core of European Private Law*, Hague, Kluwer Law International, 2002;
- KHANDERIA, Saloni, *Transnational Contracts and Their Performance during the COVID-19 Crisis: Reflections from India*, in BRICS Law Journal, vol. 7, no. 3, 2020;
- KOMAROV, Alexander, *Legal Framework for Business Contracts in the Russian Federation*, in LEIN, Eva – SKALA, Josef – URSCHER, Lukas Heckendorn (eds.), *Business Law in Transition. A Comparative Perspective on Eastern Europe*, Reports of the ISDC Colloquium, Basel, Schulthess, 2010;
- _____, *The UNIDROIT Principles of International Commercial Contracts and the Developments of Contract Law in Modern Russia*, in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016;
- KÖPCKE, Maris, *A Short History of Legal Validity and Invalidity. Foundations of Private and Public Law*, Cambridge, Intersentia, 2019;
- KÖTZ, Hein, *Illegality of Contracts*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (847-849);
- KOZLOV, Victor, *The new Russian Civil Code of 1994*, in Saggi, Conferenze e Seminari, vol. 21, Roma, Centro di Studi e ricerche di diritto comparato e straniero, 1996;
- KURAKIN, Alexey – SURKHARENKO, Alexander, *Anti-Corruption in the BRICS Countries*, in BRICS Law Journal, vol. V, 2018 (56-77);
- KURZYNSKY-SINGER, Eugenia, *Russian Civil Code*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford, Oxford University Press, 2012;
- LACERDA, Paulo de, *Código Civil Brasileiro*, 15 ed., Rio de Janeiro, Livr. Jacintho, 1933;

- LEGRAND, Pierre, *A Diabolical Idea*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004 (245-272);
- LEIBKÜCHLER, Peter, *Comments on the Supreme People's Court's Interpretation No. 1 on the Private International Law Act of the PRC*, in *China-EU Law Journal*, 2013 (201-216);
- LENG, Jing – SHEN, Wei, *The evolution of Contract Law in China: Convergence in Law but Divergence in Enforcement?* in HALEY, John O. (ed.), *Comparative Contract Law*, Cheltenham, Edward Elgar, 2017, (326-362);
- LIMA, Clarissa Costa de, *Reflexões sobre a resolução do contrato na nova teoria contratual*, in, MARQUES, Cláudia Lima, *A Nova Crise do Contrato, Estudos sobre a Nova Teoria Contratual*, São Paulo, Revista dos Tribunais, 2007;
- LING, Bing, *Contract Law in China*, Hong Kong, Sweet & Maxwell Asia, 2002;
- LING, Li, *China's New Contract Law: Guarantee for Healthy Development of its Market Economy*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV-Berliner Wissenschafts-Verlag, 2003 (1-5);
- LIU, Qiao – REN, Xiang, *Balancing Public Interest with Transactional Security: The Validity of Contracts tainted with Corruption under Chinese Law*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015;
- LÔBO, Paulo, *Direito Civil, Contratos*, São Paulo, Saraiva, 2011;
- _____, *Direito Civil, Parte Geral*, 3rd ed., São Paulo, Saraiva, 2012;
- LOEBER, Dietrich André, *Comments on the 1994 Russian Civil Code and its Meaning for Comparative Legal Studies*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;
- LOHSSE, Sebastian, in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;

- LOOKOFSKY, Joseph – BERNSTEIN, Herbert L., *Understanding the CISG in Europe, A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, The Hague, Kluwer Law International, 1997;
- LUBBE, Gerhard, *Voidable Contracts*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Claredon, 1996;
- MACQUEEN, Hector L., *Illegality and Immorality in Contracts: Towards European Principles*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011 (555-570);
- MACQUEEN, Hector – COCKRELL, Alfred, *Illegal Contracts*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004;
- MAKOVSKII, Alexander L., *The Russian Civil Code and its Impact upon Commercial Transactions*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;
- MANCUSO, Salvatore, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, in *Annual Survey of International & Comparative Law*, vol. 14, Issue 1, Art. 4, 2008 (39-60);
- MARINO, Francisco Paulo de Crescenzo, *Revisão Contratual: Onerosidade Excessiva e Modificação Contratual Equitativa*, São Paulo, Almedina, 2020;
- MARQUES, Cláudia Lima, *Contratos no Código de Defesa do Consumidor*, 4^a ed., São Paulo, Revista dos Tribunais, 2002;
- MARTINS, Guilherme Magalhães, *A Revisão dos Contratos Cíveis e de Consumo em tempos de Covid-19*, in *Revista de Direito do Consumidor*, vol. 132/2020, (31-56);
- MARTINS, Ives Gandra as Silva, *A função social do contrato*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003;

- MARTINS-COSTA, Judith, *A boa-fé no Direito Privado, critérios para a sua aplicação*, São Paulo, Marcial Pons, 2015;
- MCKENDRICK, Ewan – LIU, Qaio, *Good Faith in Contract Performance in the Chinese and Common Law*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- MEIER, Sonja in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;
- MEKKI, Mustapha – KLOEPFER-PELÈSE, Martine, *Hardship and Modification (or 'Revision') of the Contract*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011;
- MELLO, Marcos Bernardes de, *Teoria do Fato Jurídico. Plano da Validade*, 6th ed., São Paulo, Saraiva, 2004;
- MENKE, Fabiano, in NANNI, Giovanni Ettore (coord.), *Comentários ao Código Civil. Direito privado contemporâneo*, São Paulo, Saraiva, 2019;
- MICHAELS, Ralf, *Comparative Law*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (297-301);
- MILLER, Saul, *Unjustified Enrichment and Failed Contracts*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004;
- MIRAGEM, Bruno, *Nota relativa à pandemia de coronavírus e suas repercussões sobre os contratos e a responsabilidade civil*, in Revista dos Tribunais, vol. 1015, 2020, (353-363);
- MOCCIA, Luigi, *The idea of "law" in China: an overview*, in GOLOTA, Lukasz et. Al., *Perspectives on Chinese Business and Law*, Cambridge, Intersentia, 2018 (59-94);

- MOZOLIN, V.P. – MASLIAEV, A. I. (eds.), *Russian Civil and Commercial Law*, vol. 1, ed. and transl. BUTLER, William E., London, Wildy, Simmonds & Hill Publishing Ltd., 2009;
- NAIR, M. Krishnan, *The Law of Contracts*, 4th ed., Madras, Orient Longman, 1978;
- NAUDÉ, Tjachie, *The Civil Law Consequences of Corruption under South African Law*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015;
- NICHOLAS, Barry, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* in Saggi, Conferenze e Seminari, vol. 9, Roma, Centro di Studi e ricerche di diritto comparator e straniero, 1993;
- NOVOSELOVA, Maria, *BRICS: Dialectics of Unity and Diversity as a Key to Successful Global Cooperation*, in BRICS Law Journal, vol. IV, 2017 (145-151);
- O'NEILL, Jim, *Building Better Global Economic BRICs*, in Global Economics Paper No: 66, Goldman Sachs, 2011, disponível em: <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf>;
- PALLEY, Claire B.A., *Comparative Study of Mistake*, in Zimbabwe Law Journal, vol. 1, 1961 (140-206);
- PATHAK, Akhileshwar, *Contract Law*, New Dehli, Oxford University Press, 2011;
- PENTEADO, Luciano de Camargo, *Figuras parcelares da boa-fé objetiva e venire contra factum proprium*, in Revista de Direito Privado, vol. 27, 2006 (252-278);
- PEREIRA, Caio Mário da Silva, *Instituições de Direito Civil. Contratos. Declaração Unilateral de Vontade. Responsabilidade Civil*, vol. III, 11th ed., atualizada por FICHTNER, Regis, Rio de Janeiro, Forense, 2004;
- PERILLO, Joseph M., *Hardship and its impact on Contractual Obligations: a comparative analysis*, in Saggi, Conferenze e Seminari, vol. 20, Roma, Centro di Studi e ricerche di diritto comparator e straniero, 1996;
- PISSLER, Knut B., *Chinese Law, Influence of European Private Law*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012 (182-185);

- POLLOCK, Frederick – MULLA, Dinshaw F., *The Indian Contract & Specific Relief Acts*, vol. I, 15th ed., Haryana, Lexis Nexis, 2017;
- _____, *The Indian Contract & Specific Relief Acts*, vol. II, 15th ed., Haryana, Lexis Nexis, 2017;
- PONTES DE MIRANDA, Francisco Cavalcante, *Tratado de Direito Privado. Parte Geral. Validade. Nulidade. Anulabilidade*, tomo IV, 4th ed., São Paulo, Revista dos Tribunais, 1983;
- _____, *Tratado de Direito Privado. Parte Geral. Validade. Nulidade. Anulabilidade*, tomo IV, at. MELLO, Marcos Bernardes de – EHRHARDT JR, Marcos, São Paulo, RT, 2012;
- PUELINCKX, Alfons H., *Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances :A Comparative study in English, French, German and Japanese Law*, in *Journal of International Arbitration*, Kluwer Law International, vol. 3, Issue 2, 1986 (47 – 66);
- QIU, Xuemei, *Contract Law*, in GOLOTA, Lukasz et. Al., *Perspectives on Chinese Business and Law*, Cambridge, Intersentia, 2018;
- RABEL, Ernst, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, Max Hueber, Munich, 1925;
- RANIERI, Filippo, *Good Faith*, in BASEDOW, Jürgen et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (790-794);
- RASSKAZOVA, Natalya, *Russian Law of Obligations: Structure, Positioning and Connection with Supranational Law*, in SCHULZE, Reiner – ZOLL, Fryderyk, *The Law of Obligations in Europe. A New Wave of Codifications*, Munich, Sellier, 2013;
- RECHSTEINER, Beat Walter, *Direito Internacional Privado. Teoria e Prática*. 15th ed., São Paulo, Saraiva, 2012;
- REIMANN, Mathias, *Of Products and Process. The first six Trento Volumes and their making*, in BUSSANI, Mauro – MATTEI, Ugo, *Opening up European Law*, Bern, Stämpfli, 2007 (83-100);

- REMIEN, Oliver, *Public Law and Public Policy in International Commercial Contracts and the UNIDROIT Principles of International Commercial Contracts 2010: A Brief Outline*, in *Uniform Law Review*, vol. 18, No. 2, 2013, (262-280);
- RODRIGUES, Silvio, *Direito Civil. Parte Geral*, vol. I, 34th ed., São Paulo, Saraiva, 2003;
- RÖSLER, Hannes, *Change of Circumstances*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (163-167);
- RUDOKVAS, Anton D., *Contract Formation and Non-Performance in Russian Civil Law*, in SCHULZE, Reiner – ZOLL, Fryderyk, *The Law of Obligations in Europe. A New Wave of Codifications*, Munich, Sellier, 2013;
- RÜFNER, Thomas in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;
- SALOMÃO FILHO, Calixto, *Função social do contrato: primeiras anotações*, in *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, vol. 132, a. XLII, 2003;
- SANTOS, J. M. de Carvalho, *Código Civil Brasileiro Interpretado*, vol. III, Rio de Janeiro, Calvino, 1934;
- SCHMIDT, Jan Peter in JANSEN, Nils – ZIMMERMANN, Reinhard, *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018;
- SCHLECHTRIEM, Peter, – SCHWENZER, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods*, 3^a ed., München, Beck, 2010;
- SCHROETER, Ulrich G., *Anticipatory Breach, Change of Circumstances and Third Party Rights: A Civil Law Perspective*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- SEFTON-GREEN, Ruth (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge, Cambridge University Press, 2005;
- SHIRVINDT, Andrey, *Russian Contract Law for Foreigners*, in *Russian Law Journal*, vol. III, Issue 1, 2015 (169-180);

- SINGH, Avtar, *Law of contract (a study of the Contract Act, 1872) and specific relief*, 12th ed. (reprinted), Lucknow, EBC, 2019;
- SMITS, Jan M., *Codification in Europe and China: What Makes Contract Law Special?* in, CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012 (257-271);
- SNIJDERS, W, *The Civil Codes of the Russian Federation and the Netherlands: Similarities and Contrasts*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;
- SNYDER, Francis – LU, Yi, *The future of transnational law, EU, USA, China and the BRICS*, Bruxelles, Bruylant, 2015;
- SRINIVASAN, Badrinath, *Harship & Substituted Performance as Defences against Specific Performance: Critique of the Recent Developments*, in National Law School of India Review, vol. 31, no. 1, 2019, (53-71);
- STORME, Matthias E., *Harmonization of the law on (substantive) validity*, in BASEDOW, Jürgen – HOPT, Klaus J. – KÖTZ, Hein, *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Tübingen, Mohr Siebeck, 1998 (195-207);
- SWADLING, W. J., *The role of illegality in the English law on unjust enrichment*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (289-309);
- _____, *Restitution and Unjust Enrichment*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 1st ed., Nijmegen, Ars Aequi Libri, 1994 (267-283);
- TADEU, Silney Alves, *Responsabilidade civil: nexo causal, causas de exoneração, culpa da vítima, força maior e concorrência de culpas*, in Doutrinas Essenciais de Responsabilidade Civil, Revista dos Tribunais, vol. 1, 201 (567–606);
- TALLON, Denis, *Hardship*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 2nd ed., The Hague, Kluwer Law International, 1998 (327-332);
- _____, *Hardship*, in HARTKAMP, Arthur S. et. al, *Towards a European Civil Code*, 3rd ed., Nijmegen, Kluwer Law International, 2004 (499-504);

- TERRA, Aline de Miranda Valverde, *Disgorgement of Profits in Brazilian Law*, in HONDIUS, Ewoud – JANSSEN, André (ed.), *Disgorgement of Profits. Gain-Based Remedies throughout the World*, Heidelberg, Springer, 2015 (445-458);
- THORSTENSEN, Vera Helena - OLIVEIRA, Ivan Thiago Machado (Eds.), *BRICS in the world trade organization: Comparative trade policies Brazil, Russia, India, China and South Africa*, Institute for Applied Economic Research (IPEA), Brasilia, 2014, available at https://saiia.org.za/wp-content/uploads/2014/07/BRICS-in-the-WTO-Comparative-Trade_20140621_web-version.pdf.
- TREITEL, Guenter, *The Law of Contract*, 15th ed., at. PEEL, Edwin, London, Sweet&Maxwell, 2020;
- TWIGG-FLESNER, Christian, *General Principles of Chinese Contract Law and English Common Law Perspective*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- TYAGAY, Ekaterina, *Russian Business Law*, in BRICS Law Journal, vol. III, 2016 (176-179);
- UJJANNAVAR, S. S., *Law of Contract*, 2nd ed., New Delhi, Eastern Law House, 2009;
- USOKIN, Sergey, *Russian Experience and Practice on Civil Law. Consequences of Corruption*, in BONELL, Michael Joachim – MEYER, Olaf (ed.), *The Impact of Corruption on International Commercial Contracts*, Heidelberg, Springer, 2015;
- VAN HUYSSTEEN, Louis F. – MAXWELL, Catherine J., *Contract Law in South Africa*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2014;
- VAN HUYSSTEEN, Louis F. – LUBBE, Gerhard F. – REINECKE, MFB, *Contract. General Principles*, 5th ed., Cape Town, Juta, 2016;
- VELOSO, Zeno, *Invalidade do Negócio Jurídico. Nulidade e anulabilidade*, 2nd ed., Belo Horizonte, Delrey, 2005;
- VELOSO, Zeno, *Nulidade do negócio Jurídico*, in ALVIM, Arruda – CÉSAR, Joaquim Portes de Cerqueira – ROSAS, Roberto, *Aspectos controvertidos do novo*

- Código Civil. Escritos em homenagem aos Ministro José Carlos Moreira Alves*, São Paulo, Revista dos Tribunais, 2003;
- VENOSA, Sílvio de Salvo, *Direito Civil, Parte Geral*, vol. I, 5th ed., São Paulo, Atlas, 2005;
 - _____, *Direito Civil. Teoria Geral das Obrigações e Teoria Geral dos Contratos*, vol II, 5th ed., São Paulo, Atlas, 2005;
 - VERONESE, Lígia Espolaor, *A Convenção de Viena e seus Reflexos no Direito Contratual Brasileiro*, São Paulo, Almedina, 2019;
 - VIEIRA, Iacyr Aguilar, *Plaidoyer por uma aplicação da Convenção de Viena de 1980 relativa à compra e venda internacional de mercadorias no Brasil*. In: VIEIRA, Iacyr Aguilar (org.) *Estudos de Direito Comparado e de Direito Internacional Privado*, Curitiba, Juruá, 2011;
 - VILLELA, João Baptista, *Equilíbrio do Contrato: os números e a vontade*, RT, 2010 (85-122);
 - VIRGO, Graham, *Failure of consideration: myth and meaning in the English law of restitution*, in JOHNSTON, David – ZIMMERMANN, Reinhard (ed.), *Unjustified enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002 (103-127);
 - VISSER, Daniel, *Unjustified Enrichment*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996;
 - VOGENAUER, Stefan, *Commentary on the Unidroit principles on international commercial contracts (PICC)*, 2nd ed., Oxford, Oxford University Press, 2015;
 - _____, *Common Law*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (265-267);
 - _____, *The UNIDROIT Principles of International Commercial Contracts at Twenty: Experiences to Date, the 2010 Edition, and Future Prospects*, in *Uniform Law Review*, vol. 19, No. 4, 2014 (480-518);

- WANG, Liming, *The systematization of the Chinese Civil Code*, in CHEN, Lei – RHEE, C.H. Remco (eds.), *Towards a Chinese Civil Code. Comparative and Historical Perspectives*, Leiden, Nijhoff, 2012 (21-28);
- WANG, Yi, *Prospect of Validity in Chinese Contract Law*, in DIMATTEO, Larry A. – CHEN, Lei (eds.), *Chinese Contract Law. Civil and Common Law Perspectives*, Cambridge, Cambridge University Press, 2018;
- XIAOYAN, Zhou, *Provisions on Validity of Contracts in the Contract Law of China*, in GEBHARDT, Immanuel – YUQING, ZHANG – Schroeder. Rainer (eds.), *Comparative Analysis on the Chinese Contract Law*, Berlin, BWV- Berliner Wissenschafts-Verlag, 2003 (93-105);
- YEFREMOVA, Maria – YAKOVLEVA, Svetlana – HENDERSON, Jane, *Contract Law in Russia*, Oxford and Portland, Hart, 2014;
- ZHANG, Mo, *Chinese Contract Law. Theory and Practice*, Leiden, Martinus Nijhoff, 2006;
- ZANETTI, Cristiano de Sousa, *A conservação dos contratos nulos por defeito de forma*, 1st ed., São Paulo, Quartier Latin, 2013;
- _____, in NANNI, Giovanni Ettore (coord.), *Comentários ao Código Civil. Direito Privado Contemporâneo*, São Paulo, Saraiva, 2019;
- _____, *O Risco Contratual*, in LOPEZ, Teresa Ancona - LEMOS, Patrícia Faga Iglecias - RODRIGUES JUNIOR, Otavio Luiz (coord.), *Sociedade de Risco e Direito Privado. Desafios normativos, consumeristas e ambientais*, São Paulo, Atlas, São Paulo, 2013;
- ZELLER, Bruno, *The Development of a Global Contract Law. Still a Dream?* in BONELL, Michael Joachim, *Eppur si muove: the age of uniform law*, vol. 2, 1st ed., Rome, UNIDROIT, 2016 (1179-1193);
- ZHUIKOV, Viktor M., *The Supreme Court of the Russian Federation and the New Russian Civil Code*, in SIMONS, William, *Private and Civil Law in the Russian Federation. Essays in Honor of F.J.M. Feldbrugge*, Leiden, Nijhoff, 2009;

- ZIMMERMANN, Reinhard, *Common Frame of Reference (CFR)*, in BASEDOW, Jürgen *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford, Oxford University Press, 2012, (261-265);
- _____, *'Double Cross': Comparing Scots and South African Law*, in ZIMMERMANN, Reinhard - VISSER, Daniel – REID, Kenneth, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004;
- _____, *Good Faith and Equity*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996;
- _____, *Roman Law and the Harmonization of Private Law in Europe*, in HARTKAMP, Arthur S. *et. al*, *Towards a European Civil Code*, 4th ed., The Hague, Kluwer Law International, 2011 (27-53);
- _____, *The Unwinding of Failed Contracts in the UNIDROIT Principles 2010*, in *Uniform Law Review*, vol. 16, No. 3, 2011, (563-588);
- ZIMMERMANN, Reinhard – WHITTAKER, Simon, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000;
- ZIMMERMANN, Reinhard – VISSER, Daniel, *South African Law as a Mixed System*, in ZIMMERMANN, Reinhard – VISSER, Daniel, *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon, 1996;
- ZOU, Mimi, *An Introduction to Chinese Contract Law*, Beijing, LexisNexis, 2018;
- _____, *Chinese Contract Law and the 2020 Civil Code*, Hong Kong, LexisNexis, 2020;
- ZWEIGERT, Konrad – KÖTZ, Hein, *Introduction to Comparative Law*, 3rd ed., transl. WEIR, Tony, Oxford, Oxford University Press, 1998.