Harmonising or unifying the law applicable to international sales contracts between the BRICS states

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Abstract
This article seeks to investigate the harmonisation of international sales law between the BRICS states in order to foster successful trade and investment relations within this trading bloc. It is postulated that the United Nations Convention on Contracts for the International Sale of Goods (CISG) offers a good starting point for the harmonisation of substantive sales laws among the BRICS states—especially in light of the fact that three of these states are already CISG contracting states. However, harmonisation of substantive sales laws does not supersede the need to refer to the rules of private international law. Therefore, rules relating to choice of law also need to be harmonised within the BRICS grouping.

INTRODUCTION

It is undisputed that the BRICS[1] countries play an important role in world economy.[2] Intra-BRICS trade and investment cooperation is arguably the most important focus area of cooperation among these states.[3] Though the BRICS states' economies have much in common—all being developing states—they have vastly differing legal systems and belong to different legal families.[4] Divergent regulatory frameworks for international trade and investment constitute a significant barrier to trade between these nations.[5] In fact, it has been argued that 'differences between legal systems impede

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1 The acronym refers to Brazil, Russia, India, China and South Africa.

2 For a general overview of BRICS and its cooperation plans, see BRICS, *The BRICS Report*: *A Study of Brazil, Russia, India, China and South Africa with Special Focus on its Synergies and Complementarities* (Oxford University Press 2012

3 ibid.

4 See 'The need for Harmonisation' below.

5 See, inter alia, Luiz Gustavo Meira Moser, 'Parties' Preferences in International Sales Contracts: An Empirical Analysis of the Choice of Law' (2015) 20 Uniform Law Review 19 21; and Ingeborg Schwenzer, 'Who Needs a Uniform Law, and Why?' (2013) 58 Villanova Law Review 723 723 who points out that, different domestic laws are always perceived as an obstacle to international trade.

international trade significantly more than any other factor.'[6] Different domestic legal systems even act as an impediment to cross-border trade at a regional level where there are many similarities between the relevant legal systems.[7] Therefore, the harmonisation of the legal principles relating to international trade—and specifically international sales—is sorely needed if there is to be meaningful trade cooperation between the BRICS states.

This contribution seeks to explore means of harmonising or, ideally, unifying the law applicable to international sales contracts between the BRICS countries. The discussion is limited to contracts governing the international sale of movable goods. There are two basic methods by which to harmonise or unify law: the unification of rules of substantive law; and the unification of the rules of private international law.[8] The United Nations Convention on Contracts for the International Sale of Goods (CISG)[9] is one of the most notable examples of the former, while The Hague Convention on the Law Applicable to International Sales of Goods of 1955[10] is an example of the latter. The Hague Principles on Choice of Law in International Commercial Contracts[11] may also be mentioned as an important contemporary initiative in the field of the unification of private international law. I agree that these methods of unification are not in conflict with each other and are indeed symbiotic.[12]

In this article, I consider accession to the CISG and its widespread application as the best approach to unifying international sales law on a substantive level among the BRICS states. The large number of CISG

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6 Giesela Rühl, 'The Problem of International Transactions: Conflict of Laws Revisited' (2010) 6 Journal of Private International Law 59 63.

7 Rühl (n 6) at 64.

8 René David, 'The Methods of Unification' (1968) 16 American Journal of Comparative Law 13 at 13.

9 UN, 'United Nations Convention on Contracts for the International Sale of Goods' (Vienna 11 April 1980) UN Document A/CONF.97/18: 1489 UNTS 3; (1980) 19 International Legal Materials 668; also available from *UNCITRAL* <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 16 November 2016.

10 HCCH, 'The Hague Convention on the Law Applicable to International Sales of Goods' (The Hague, 22 December 1986) <https://assets.hcch.net/docs/b4698bc5-9d42-4352-934f-5232a8dcb12c.pdf> accessed 18 January 2017, warrants mentioning, although it never entered into force.

11 HCCH, 'Hague Principles on Choice of Law in International Commercial Contracts' (The Hague, 19 March 2015) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 16 November 2016.

12 David (n 8) at 13. However, see Jan Hendrik Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* (Hart Publishers 2007) 156, who argues that the uniform substantive law and conflict of laws approaches are conceptually mutually exclusive. See Marlene Wethmar-Lemmer, *The Vienna Sales Convention and Private International Law* (Lambert Academic Publishers 2015) for an analysis of the relationship between the CISG and the principles of private international law.

contracting states[13] representative of all legal traditions, bear testimony to the fact that it is an effective means of bridging differences between legal systems.[14] Of the five BRICS states, Russia has been a CISG contracting state since 1990;[15] China since the Convention's entry into force in 1988;[16] while Brazil acceded to the CISG in 2013 and it entered into force in Brazil on 1 April 2014.[17] Brazil's recent accession is noteworthy and its reasons for doing so will be investigated. Brazil's joining the list of CISG contracting states makes the BRICS-CISG member state ratio three to two in favour of accession. The fact that CISG—a thirty-year-old Convention—membership has increased from 74 to 87 over the past six years, negates arguments that it is outdated or no longer relevant. It is argued that accession to the CISG's by the two remaining non-CISG members of the BRICS nations, will obviate harmonising or unifying initiatives in this field within BRICS and avoid reinventing the wheel. To this end, India and South Africa's reasons for not acceding to the CISG are investigated and evaluated.

It must be acknowledged that the CISG does not govern all aspects of contracts for the international sale of goods. In terms of Article 4, the CISG governs only the formation of the contract of sale and the rights and duties of the buyer and seller arising from the contract. The validity of the contract and the transfer of ownership in the goods sold are expressly excluded from the Convention's ambit.[18] Internal *lacunae*, or matters governed but not settled by the CISG, may also arise.[19] These *lacunae* and exclusions do not make the CISG an unacceptably incomplete set of rules. In fact they have promoted accession to the CISG as contentious matters which could have led to several states not acceding, have been left to the discretion of the parties to regulate. To this end, a choice of law of a domestic, or, possibly, non-national set of rules in any international sales contract should be encouraged. Harmonising choice of law rules internationally or regionally

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13 See 'CISG Status Document' (*UNCITRAL*) <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 16 November 2016 that lists all eighty-five contracting states.

14 Peter Schlechtriem and Ingeborg Schwenzer, 'Introduction' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3 edn, Oxford University Press 2010) 1.

15 See the CISG status document (n 13).

16 Id.

17 Id.

18 See the text of the CISG at (n 9).

19 Article 7(2) of the CISG provides in respect of internal gaps: 'questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.' Much has been written on what matters constitute internal gaps and how the method for gap-filling in Art 7(2) is to be applied. See, in general, Ingeborg Schwenzer and Pascal Hachem, 'Article 7' in Schlechtriem and Schwenzer (n 14) at 120 and Marlene Wethmar-Lemmer, 'The Vienna Sales Convention and Gap-filling' (2012) TSAR 274.

may be effected by the adoption of The Hague Principles on Choice of Law in Commercial Contracts.[20] However, it often happens that parties to an international sales contract do not include a choice of law clause. In such instances, the legal system applicable to the contract, or, if the CISG governs the contract, to matters not governed or settled by the Article 7(2)[21] gap-filling mechanism in the CISG, will have to be settled by using the rules of private international law of the forum. In this regard, harmonisation of the private international law rules of the BRICS states relating to the determination of the proper law of a contract, should be promoted. Though not the main focus of this article, the extent of confluence or divergence of the rules governing the determination of the proper law of a contract in the absence of a choice by the parties, needs to be established. Research initiatives geared towards unifying private international law regionally, and between the BRICS states specifically, should be encouraged.[22]

In conclusion, I argue for an integrated approach to the harmonisation of law in the field of international sales.

HARMONISING SUBSTANTIVE INTERNATIONAL SALES LAW AMONG THE BRICS STATES

The Need for Harmonisation based on the Divergent Legal Systems of the BRICS States

It is trite that the legal systems of the BRICS states differ markedly. Because it was a Portuguese colony, Brazil has a civil-law system.[23] China has a socialist legal system based on the civil-law tradition.[24] Historically, Russia also forms part of the civil-law family but of course its legal system was shaped for many years by the soviet doctrine and today bears influence of contemporary legal trends, specifically those of the European Union states.[25] India forms part of the common-law legal tradition as legacy of its previous colonisation by Britain.[26] South Africa has a mixed legal system, consisting of civil-law principles introduced by the Dutch occupation, common-law

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20 See (n 11) and the discussion under 'Harmonising the Rules of Private International Law'

21 See (n 19) .

22 See the research activities and initiatives of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg <https://www.uj.ac.za/faculties/law/Pages/Institute-for-Private-International-Law-in-Africa.aspx> accessed 16 November 2016.

23 Pau Garland, *American-Brazilian Private International Law* (Oceana Publications 1959) 15.

24 See Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis 1992) for a very detailed analysis of the Chinese legal system.

25 Olga Vorobieva, *Private International Law in Russia* (Wolters Kluwer Law and Business 2012) 18–19.

26 KB Agrawal and Vandana Singh, *Private International Law in India* (Wolters Kluwer Law and Business 2010) 46–47.

rules from the previous British colonisation, as well as African indigenous (customary) law.[27]

The vast historical, geographical, cultural, social, language, and legal differences in the BRICS states all constitute impediments to successful trade relations. The promotion of trade relations between the BRICS states to foster development in these economies with a consequent reduction in poverty, are arguably the main reasons for the establishment of their cooperation.

It is proposed that the largest intra-BRICS trade obstacle—its legal diversity—may be successfully addressed in the field of international trade law, and specifically in international sales law, by adopting (in the case of India and South Africa) and applying the CISG to international sales contracts between contracting parties from the different BRICS states. It is trite that a uniform or harmonised system of rules governing international commercial transactions substantially reduces transaction costs and promotes international trade.[28]

Promoting Accession to the CISG by the Non-contracting BRICS States—Following Brazil's Example

Suitability of the CISG as a Body of Rules governing International Sales Contracts between BRICS Contracting Parties/Merchants

As mentioned above,[29] China and Russia are long-standing contracting states to the CISG; Brazil has acceded recently; and India and South Africa are still non-contracting states.

With regard to its suitability, the CISG currently has eighty-seven contracting states representative of all legal traditions worldwide.[30] It is estimated that it is potentially applicable to more than two-thirds of all international trade transactions globally.[31] In respect of its uniform interpretation and application by fora, online CISG databases are expanding on a daily basis and make an ever-growing number of judgments available to judges at the click of a button. Mention may be made of the United Nations Commission on International Trade Law's (UNCITRAL's) case law information system, known by the acronym CLOUT (Case Law on UNCITRAL Texts). CLOUT functions on the basis of reporting offices in CISG contracting states transmitting decisions to the Commission's Secretariat. The original decisions are then made available at the Secretariat

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27 Philip Thomas, Cornelius van der Merwe and Ben Stoop, *Historical Foundations of South African Law* (LexisNexis 2000) 7.

28 See, inter alia, Salvatore Mancuso, 'China in Africa and the Law' (2012) 18 Annual Survey of International and Comparative Law 243 256.

29 See 'Introduction' above.

30 CISG status document (n 13).

31 Gralf-Peter Calliess and Insa Buchman, 'Global Commercial Law between Unity, Pluralism, and Competition: The Case of the CISG' (2016) 21 Uniform Law Review 1 19.

and an abstract of the decision is translated into all the CISG's working languages. The CLOUT information system is available online,[32] as are several other comprehensive CISG case law databases. The UNILEX database deserves special mention.[33] The advantage of UNILEX lies in the fact that most decisions are available in full text in their original languages. The Pace University CISG website[34] provides translations of a large and constantly growing number of CISG decisions through the CISG Case Translation Network.[35] Lastly, mention may be made of CISG-online,[36] the referencing system used by Schlechtriem and Schwenzer[37] in their respected CISG commentary.

The large number of contracting states attests to the fact that the CISG has been successful in bridging the differences between the common-law and civil-law peculiarities in respect of international sales law.[38] It would therefore serve as a good common denominator in the varying sets of sales law rules applied by the BRICS states. Even though it is not an exhaustive set of substantive international sales law rules, it may perhaps serve as a 'core'[39] for developing a more comprehensive and harmonised framework for international sales contracts between the BRICS nations. It has been pointed out that the universal nature of the CISG is fully compatible with further (regional) efforts at unification.[40] Article 90 of the CISG specifically states that the Convention 'does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to

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32 <http://www.uncitral.org/uncitral/en/case_law.html> accessed 16 November 2016.

33 <http://www.unilex.info> accessed 16 November 2016. The editor-in-chief is Prof MJ Bonell. UNILEX is based on a research project started in 1992 by the Centre for Comparative and Foreign Law Studies—a joint venture of the Italian National Research Council, the University of Rome I La Sapienza and the International Institute for the Unification of Private Law (UNIDROIT). The project has been financed by the Italian National Research Council. Printed versions of UNILEX are available from Transnational Publishers.

34 <http://iicl.law.pace.edu/cisg/cisg> accessed 16 November 2016.

35 <http://iicl.law.pace.edu/iicl/cisg-translation-network> accessed 16 November 2016.

36 <http://www.cisg-online.ch> accessed 16 November 2016. It is currently edited by Prof Ingeborg Schwenzer of the University of Basel, Switzerland.

37 See (n 14).

38 Ulrich Magnus, 'The Vienna Sales Convention (CISG) between Civil and Common Law—Best of all Worlds?' (2010) 3 Journal of Civil Law Studies 67 96.

39 Larry DiMatteo, 'CISG as Basis of a Comprehensive International Sales Law' (2013) 58 Villanova Law Review 69, advances the argument of the CISG being used as a core instrument to develop a more comprehensive international instrument on contract law.

40 Luca Castellani, 'Ensuring Harmonisation of Contract Law at Regional and Global Level: The United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL' (2008) 13 Uniform Law Review 115 121.

such agreement.'[41] It has also been noted that the CISG may act as a catalyst for further harmonisation and legal modernisation in the field of sales law.[42]

Given the vast differences between the legal systems of the CISG contracting states, the CISG represents the best set of rules that the parties could agree upon. The CISG has, therefore, been termed a 'relative optimum' which provides 'reasonable solutions of most sales problems'.[43] Indeed, the CISG governs the formation of an international sales contract[44] as well as the rights and obligations of both buyer[45] and seller.[46]

Language constitutes another obstacle to international trade in general,[47] and this could also pose a significant barrier to trade relations between the BRICS states. Given their shared common-law heritage, South African and Indian merchants would probably be able to converse in English with ease, but the same is not necessarily true of Brazilian, Chinese, and Russian merchants. The CISG largely solves this language barrier as it is available in six languages—Arabic, Chinese, English, French, Russian, and Spanish—all of which are equally authoritative in terms of the Convention.[48] The fact that much effort has gone into ensuring veracity and compatibility as regards terminology and interpretation of all the language versions of the CISG, makes the Convention a better solution to the language barrier than other translated versions of international sales contracts. Within the CISG regime merchants may rely on a tested and authoritative set of international sales-law rules to govern their contract in a language they understand. This would certainly encourage them to conclude contracts with merchants in states where language would otherwise have been a barrier.[49]

It has also often been pointed out that harmonisation of international sales law by means of a convention has distinct advantages over other (possibly non-binding) harmonisation tools.[50] A convention 'provides the highest level of predictability'[51] for contracting parties. The fact that a contracting state is under an obligation to give effect to an international convention, requires it to adapt its domestic law to ensure compliance with its obligations. This mandatory process requires a re-evaluation of relevant domestic law, and with this re-evaluation it may happen that an international

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41 See the text of the CISG (n 9) and Castellani (n 40) 121.

42 Karl Marxen, 'The Cycle of Harmonisation—from Domestic Laws to the CISG and Back?' (2015) 132 South African Law Journal 547 551.

43 Magnus (n 38) 95.

44 See Arts 14–24 of the CISG.

45 Articles 53–59 (obligations); arts 45–52 (remedies).

46 Articles 30–44 (obligations); arts 61–65 (remedies).

47 Schwenzer (n 5) 725.

48 See the text of the Convention (n 9), the declaration after Art 101 provides that all these languages are equally authentic.

49 See Moser (n 5) 34.

50 See Schwenzer (n 5) 728.

51 ibid.

convention influences the development of a domestic legal system. The large and very positive impact of the adoption of the CISG on the reform of Chinese (contract) law has been analysed,[52] and it has been noted in several other jurisdictions that the adoption of the Convention has also influenced and driven reform of domestic contract law.[53] Indeed, the CISG has served as a model for other international and regional developments.[54] From a regional perspective, mention may be made of the OHADA Uniform Act on General Commercial Law[55] which includes verbatim copies of many of the CISG's provisions.[56] The adoption of the CISG by all BRICS states would, therefore, most likely have the effect of bringing their domestic contract-law systems closer together and may also drive reform in domestic contract-law systems where this is necessary.

Non-binding instruments such as the UNIDROIT Principles[57] may be used to supplement the CISG and provide legal solutions to matters relating to the international sale of goods not regulated or not settled in the Convention. Such matters may have been intentionally omitted by the drafters for lack of consensus, or may relate to new developments that the CISG's drafters could not have foreseen.

It has been recognised that the CISG has brought us close to the global harmonisation of cross-border sales contracts.[58] Therefore, actively promoting accession to the CISG and its application to international sales contracts between BRICS states bring with it the incidental advantage of harmonising international sales law between BRICS states and most, if not all, of their other largest trading partners.

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52 See Shaohui Zhang, 'The Impact of the UNIDROIT Principles on the Reform of the Law of Obligations in China' (2008) 12 Uniform Law Review 178. It has been pointed out that when one analyses the New Code of Obligations of China, one finds many legal concepts and institutions taken from the CISG, which was clearly used as a source of inspiration.

53 See, in general, Angelo Chianale, 'The CISG as a Model Law: A Comparative Law Approach' (2016) Singapore Journal of Legal Studies 29, especially 33–36 and Marxen (n 42) 553 who refers to the CISG's role in the German *Schuldrechts*-reform.

54 Peter Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (2005) 10 Juridica International 27 28.

55 OHADA, 'Uniform Act' (Organisation for Harmonisation of Business Law in Africa) <http://www.ohada.org/> accessed 17 January 2017.

56 Franco Ferrari, 'CISG and OHADA Sales Law' in Ulrich Magnus, *CISG vs Regional Sales Law Unification* (selp 2012) 79; Salvatore Mancuso, 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 Annual Survey of International and Comparative Law 157 169.

57 The UNIDROIT Principles of International Commercial Contracts is published by the Institute for the Unification of Private law, known by its French acronym UNIDROIT. It is a non-binding set of rules that apply when the parties to a contract agree to its application. The current version is the '2010 UNIDROIT Principles' <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> accessed 17 January 2017.

58 Magnus (n 38) 96.

In a wide empirical survey, which included respondents from all the BRICS jurisdictions, as to parties' preferences with regard to the most desirable substantive law for international sales contracts, it was indicated that the most desirable features for a substantive law are: legal rules that are easy to ascertain; a body of case law that facilitates interpretation of the legal rules; limited restriction on party autonomy; and neutrality.[59] From the discussion above, it is clear that the CISG has all these features.

In conclusion, the CISG has proven itself a successful means of unification or harmonisation of international sales law over a period of thirty years. The constantly growing number of contracting states attests to the fact that it is still regarded as an effective set of rules to govern international sales contracts in today's world. It is therefore suggested that India and South Africa also accede to the CISG, and that the BRICS states use the CISG as a basis from which further to develop harmonised rules for international sales issues not regulated by the Convention—for example, rules on the validity of the contract. It would be unwise and an unjustifiable waste of time and resources for the BRICS states to duplicate harmonisation efforts[60] already achieved within CISG.

Brazil's Reasons for Recent Accession

It is interesting to note that Brazil only acceded to the CISG on 4 March 2013,[61] although it actively participated in the diplomatic conference in 1980 that led to the final drafting and adoption of the Convention.[62] Shortly before the adoption of the CISG, authoritative commentators pointed out that there had never been hostility towards its adoption; the obstacle to its adoption for so many years was simply lack of political will.[63]

Estrella-Faria points to two main reasons for Brazil's accession to the CISG. The first is that it will bring about regional unification of international sales law, as all MERCOSUR[64] states are now CISG contracting states.[65] Secondly, accession to the CISG establishes a proper set of governing rules for the international sale of goods in Brazilian law as the provisions of the

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59 Moser (n 5) 43.

60 See Spiros Bazinas, 'Harmonisation of International and Regional Trade Law: The UNCITRAL Experience' (2003) 8 Uniform Law Review 53 at 55, highlighting the undesirability of duplication of efforts in the harmonisation process.

61 CISG Status document (n 13).

62 See UN, United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March–11 April 1980) Official Records UN Doc A/CONF.97/19 at 15.

63 Iulia Dolganova and Marcelo Lorenzen, 'A Case for Brazil's Adhesion to the 1980 Convention on Contracts for the International Sale of Goods' (2009) 13 Vindobona Journal of International Commercial Law and Arbitration 351 360.

64 Full information on the South American trading bloc may be obtained from <http://www.mercosur.int/> accessed 17 January 2017.

65 Jose Estrella-Faria, 'Another BRIC in the Wall: Brazil Joins the CISG' (2015) 20 Uniform Law Review 211 212.

Brazilian Civil Code on the sale of goods are not tailored for international contracts.[66]

After conducting a detailed comparative analysis of the CISG's provisions and the relevant provisions in the Brazilian Civil Code, Estrella-Faria concludes that even though at first glance they appear to differ significantly, 'to a very large extent the differences are more of style than substance and that the practical result of applying the CISG will in most cases be similar to those achieved by Brazilian law.'[67] Lastly, Estrella-Faria makes the important point that the differences between the Brazilian Civil Code's provisions and those contained in the CISG, can, in the main, be attributed to the fact that the CISG focuses on the peculiar needs of international contracts, whereas the Civil Code is designed to govern domestic transactions.[68]

It is interesting to note that Portugal, the country whose legal system has greatly influenced that of Brazil due to its colonial ties, is one of the only states in the European Union that has not acceded to the CISG. In acceding to the CISG, Brazil has acknowledged that it is now part of new trade groupings of greater importance than its former colonial roots.

India and South Africa's Reasons for not yet Acceding

In light of the ever increasing number of contracting states, more recently including from some developing economies, questions remain as to why India and South Africa have not acceded to the CISG and whether these countries have valid reasons for not doing so.

Indian commentators advocating the adoption of the CISG by India, state that one of the main reasons for India's reluctance to accede to the Convention to date lies in the conviction that the CISG is not a 'comprehensive treaty'[69] mainly because it does not apply to the validity of the contract. Secondly, the commentators refer to the fact that the CISG's language appears vague to a common-law lawyer, and specifically refer to the concept of 'fundamental breach' under the CISG.[70] Thirdly, the notion of 'good faith'[71] in the CISG is regarded as vague and it is a matter of controversy whether it refers only to the Convention's interpretation, or whether it places a general duty of good faith upon the parties. Indian scholars acknowledge that Indian sales law—the Sale of Goods Act, 1930—is based on the English Sales of Goods

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66 Estrella-Faria (n 65) 214.

67 ibid.

68 ibid.

69 Yashasvi Nain and Shashank Manish, 'Why India should Opt for CISG' (2011) 3 India Law Journal <http://indialawjournal.com/volume4/issue_3/article_5.html> accessed 17 January 2017.

70 ibid.

71 According to art 7(1) of the CISG '[i]n the interpretation of this Convention, regard is to be had to its international character and the observance of good faith in international trade.' See 'Promoting Widespread Application of the CISG by the BRICS Countries'.

Act, 1893, and is very outdated.[72] Domestic Indian sales law is therefore not tailored to governing the complexities arising from modern international sales contracts effectively. Several Indian commentators are therefore in favour of acceding to the CISG to facilitate international trade between Indian merchants and their foreign counterparts.[73]

A detailed scholarly analysis of arguments for and against South Africa's adoption of the CISG has been undertaken elsewhere.[74] Convincing arguments in favour of accession to the CISG include the fact that most of South Africa's trading partners are CISG contracting states and, therefore, South African merchants are already faced with the application of the CISG on a frequent basis.[75] Furthermore, the CISG does not contain any legal principles entirely foreign to or in conflict with South African law.[76] The only South African commentator who argues against accession bases her argument on the fact that several important developing economies are not CISG contracting states;[77] accession to the CISG has not led to increased trade benefits for member states;[78] and it is often not used by traders or not applied by dispute settlement bodies.[79] However, this argument was made more than ten years ago and in the interim several developing countries, and indeed other African states, have acceded.[80] The data provided to substantiate the argument that accession to the CISG does not substantially increase trade, was based on import and export figures from selected jurisdictions for three years preceding and three years after their accession to the CISG.[81] At this very early stage after accession many contracting parties may still have been unfamiliar with the Convention or unsure of its effectiveness, and, therefore, have excluded its application. It has been pointed out that international traders who are unfamiliar with the CISG's contents exclude the application of the CISG even today.[82] The fact that it is

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72 Nain and Manish (n 69).

73 ibid.

74 Sieg Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1999) 116 South African Law Journal 323; and Sieg Eiselen, 'Adopting the Vienna Sales Convention: Reflections Eight Years Down the Line' 2007 (19) SA Merc LJ 14.

75 Eiselen (n 74) 342–343. The application in these instances is mostly based on art 1(1)(b) of the CISG. See Marlene Wethmar-Lemmer, 'When Could a South African Court be Expected to Apply the CISG?' (2008) 41 De Jure 419, for a detailed analysis in this regard.

76 Eiselen (n 74) 344.

77 Karin Lehmann, 'The United Nations Convention on Contracts for the International Sale of Goods: Should South Africa Accede?' (2006) 18 SA Merc LJ 317 320.

78 ibid 321–323.

79 ibid 323–325.

80 Benin, the DRC and Madagascar are African countries that have acceded to the CISG in the past ten years. Examples of other developing economies that have acceded in the past ten years include Albania, Azerbaijan, Brazil, the Dominican Republic, Guyana, Lebanon, Turkey and Vietnam. See the CISG status document at (n 13).

81 Lehmann (n 77) 328.

82 Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Wolters Kluwer 2014) 152–155.

not used in certain instances due to unfamiliarity with its contents, does not justify the conclusion that the CISG is an unsuitable set of governing rules for international sales contracts.

It is argued that India and South Africa may also have hesitated to accede to the CISG due to the strong influence of English law on the legal systems of both states. England is still not a CISG member state, and it has been said that England's failure to accede to the CISG to date is largely due to lack of political will.[83] The large number of contracting states representative of all legal traditions negates any possible argument that the CISG is not compatible with legal systems influenced by the common-law. The fact that India and South Africa are now part of a new economic community of emerging economies that is divided three to two in favour of CISG membership, should urge these non-contracting states to accede.

Promoting Widespread Application of the CISG by the BRICS Countries

The adoption of a uniform set of rules is only the first step in achieving a harmonised system of governing law for international sales contracts. If it is to succeed in its harmonisation goal, the CISG must be interpreted and applied uniformly and its application must not be too readily excluded on frivolous grounds.[84]

Article 7(1) of the CISG contains interpretation imperatives and requires that '[i]n 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.'[85] Much has been written on the interpretative requirements of the CISG, and I have analysed this provision elsewhere.[86] For purposes of the current discussion, it suffices to point out that Article 7(1) contains three requirements for its correct interpretation. Firstly, having 'regard to its international character' establishes the principle of autonomous interpretation of the CISG and requires the Convention to be interpreted without reference to the concepts and legal institutions of domestic legal systems.[87] Secondly, an interpretation of the CISG by taking into account the need for promotion of uniformity

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83 See Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005–2006) 25 Journal of Law and Commerce 483 in this regard.

84 Renaud Sorieul, Emma Hatcher and Cyril Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58 Villanova Law Review 491 498.

85 See the text of the CISG (n 9).

86 See Marlene Wethmar-Lemmer, 'Regional Harmonisation of International Sales Law *via* Accession to the CISG and the Importance of Uniform Interpretation of the CISG' (2014) 47 De Jure 298, and all the sources cited therein.

87 Sieg Eiselen, 'Literal Interpretation: The Meaning of Words' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier 2009) 61 and Wethmar-Lemmer (n 86) 300. Estrella-Faria (n 65) 241 also warns against adopting a 'homeward trend' in the CISG's interpretation and in doing so impeding the goals of creating a uniform legal order for international sales contracts.

in its application, urges the interpreter to take cognisance of foreign CISG decisions.[88] It is indeed possible to do so, as online CISG databases make a large and constantly increasing number of judgments instantly available to presiding officers.[89] From a BRICS perspective, participating states may strive towards a uniform interpretation of the CISG by noting the numerous available CISG cases decided by Chinese and Russian courts over the years.[90] Thirdly, it has been argued convincingly that in order to meet the requirement which demands observance of good faith in the CISG's interpretation, a reasonable interpretation of the CISG provisions is required.[91]

In addition to the CISG's uniform interpretation and application, in order to achieve a harmonised set of substantive law rules for international sales contracts between BRICS countries, parties should be encouraged to refrain from excluding the CISG's application unless they have valid reasons for doing so. Unfamiliarity with the contents of the CISG is not a valid reason for its exclusion, especially in light of the abundance of authoritative commentaries, scholarly articles, and decided cases available in numerous languages.[92] It is submitted that the only valid reason for the exclusion of the CISG by the contracting parties, is if it does not provide an adequate set of governing rules for a particular international sales contract, or, stated differently, if it is not an 'efficient'[93] governing system. A detailed analysis of the CISG's efficacy, has found that 'the CISG is, on the balance, an efficient governing system for many international sales transactions, and that it offers benefits related to neutrality, predictability, stability, and accessibility.'[94]

Consequently, the application of the CISG to international sales contracts between BRICS traders should be actively promoted to foster an efficient and predictable substantive legal framework for international sales transactions. Other than the CISG, there is no better set of legal principles governing international sales contracts, and any attempt to harmonise sales

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88 Wethmar-Lemmer (n 86) 301–304.

89 See the discussion on online CISG databases under, 'Suitability of the CISG as a Body of Rules Governing International Sales Contracts between BRICS Contracting Parties/ Merchants.'

90 Language will not constitute a barrier because of the cases being available through the CISG Translation Network (n 35).

91 See Wethmar-Lemmer (n 86) 300 and the sources cited.

92 See, for example, the Bibliography of scholarly writings relating to the work of UNCITRAL<://www.uncitral.org/uncitral/en/publications/bibliography.html> accessed 18 January 2017; and Pace CISG, CISG Bibliography <www.cisg.law.pace.edu/cisg/biblio/full-biblio.html> accessed 18 January 2017. According to Moser (n 5) 53, there are more than 3000 published CISG cases available online, and more than 10 000 online bibliography citations (including more than 1600 full text commentaries and books) to aid in the CISG's interpretation and uniformity of application.

93 See Spagnolo (n 82) in general.

94 Spagnolo (n 82) 317.

laws between divergent legal systems through a different instrument, would be a futile and unnecessary attempt to reinvent the wheel.

Current Application of the CISG in Intra-BRICS Trade

In terms of Article 1(1) of the CISG, the Convention applies to contracts for the sale of goods between parties whose places of business are in different states: (a) when the states are contracting states; or (b) when the rules of private international law lead to the application of the law of a contracting state.[95]

From a BRICS perspective, should buyers and sellers from Brazil, China, or Russia conclude international sales contracts with each other (in any combination), the CISG would apply in terms of Article 1(1)(a) unless the parties excluded its application under Article 6. Article 6 of the CISG allows parties to exclude the application of the Convention, derogate from, or vary its provisions.[96] Even if no mention is made of the CISG by the parties, courts in the CISG contracting states are under an international law obligation to apply the Convention.

Should the law of Brazil, China, or Russia be established as the law applicable to an international sales contract—either by means of a valid choice of law clause[97] to this effect, or, in the absence of a choice of law clause, if it is assigned as the proper law of the contract by the rules of private international law of the forum—the CISG would apply in terms of Article 1(1)(b).[98] Therefore, if a South African or Indian trader concludes an international sales contract with a Brazilian, Chinese, or Russian trader and the law of the CISG contracting state is found to be the governing law of the contract, the CISG would be applicable in terms of Article 1(1)(b)—unless the parties have validly excluded its application in terms of Article 6.

It is therefore clear that the CISG already applies to many intra-BRICS sales transactions and even merchants in non-contracting states are frequently faced with its application.

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95 Text of the CISG (n 9).

96 See CISG-AC Opinion 16, 'Exclusion of the CISG under Article 6' (Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia). Adopted by the CISG Advisory Council following its 19th meeting in Pretoria, South Africa (30 May 2014) <http://www.cisgac.com/cisgac-opinion-no16> accessed 17 January 2017. See also Marlene Wethmar-Lemmer, 'Party Autonomy and International Sales Contracts' (2011) TSAR 431 and 'The Vienna Sale Convention and Party Autonomy—Article 6 Revisited' (2016) TSAR 255 on Art 6.

97 The answer to the question of whether the CISG may be chosen as the governing law of the contract directly depends on the rules of private international law of the forum. This question is still debated and falls outside the scope of this contribution. See, in general, Symeon Symeonides, *Codifying Choice of Law around the World* (Oxford University Press 2014).

98 Wethmar-Lemmer (n 75) and Marlene Wethmar-Lemmer, 'The Important Role of Private International Law in Harmonising International Sales Law' (2014) 26 SA Merc LJ 93 95–104.

HARMONISING THE RULES OF PRIVATE INTERNATIONAL LAW RELEVANT TO INTERNATIONAL SALES CONTRACTS IN BRICS COUNTRIES

General

Even if the harmonisation or unification of substantive international sales-contract law is achieved amongst the BRICS nations, the rules of private international law still remain relevant.[99] Any substantive international law instrument that seeks to harmonise legal principles across diverse legal systems would inevitably have gaps and exclusions. The rules of private international law are indispensable to finding the correct governing system in such matters—be it in the appraisal of the validity of a choice of law clause, or in the determination of a governing law in the absence of a choice effected by the parties.

Harmonising the Rules relating to Choice of Law

Although '[t]he principle of party autonomy is generally regarded as an effective means to overcome the international transaction dilemma,'[100] national conflicts regimes differ in respect of the limits placed on party autonomy and prescribe divergent methods to determine and exercise choice of law.[101] These varying national choice of law regimes detract from the legal certainty relied upon when inserting a choice of law clause in an international contract—parties cannot be sure that their chosen law will indeed be found to govern their contract.[102] This is especially true of the choice of law regimes of the BRICS countries. Most problematic is the fact that party autonomy is not recognised in Brazil.[103] Brazilian conflict of laws rules do not allow parties to make a choice of law in an international contract,[104] unless the choice is contained in an arbitration clause.[105] Brazilian law does not prohibit choice of forum clauses, but Brazilian courts often override these forum selection clauses—giving rise to even more uncertainty.[106] Conversely, party autonomy is a recognised principle

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99 Rühl (n 6) 90 states that, 'when dealing with international transactions, conflict of laws cannot be ignored.'

100 ibid 91.

101 Andreas Schwartze, 'New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on Choice of Law in International Contracts in Comparative Perspective' (2015) 12 University of St Thomas Law Journal 87 88.

102 ibid 89.

103 María Albornoz, 'Choice of Law in International Contracts in Latin American Legal Systems' (2010) 6 Journal of Private International Law 23 44.

104 See art 9 of the Introductory Act to the Brazilian Civil Code—Decreto-Lei no 4.657 (4 September 1942), according to Estrella-Faria (n 65) at 212 more correctly renamed the Introductory Act to the Provisions of Brazilian Law or *Lei de Introdução às normas do Direito Brasileiro* by Lei no 12.376 (30 December 2010).

105 Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way' (2005/2006) 44 Columbia Journal of Transnational Law 959 960.

106 ibid 960.

under Russian private international law.[107] A tacit choice of law that 'follow[s] clearly from the contract or the circumstances of the case' is also allowed under Russian private international law.[108] Party autonomy is also recognised under Indian law[109] and a tacit choice of law that 'may be clearly inferred from the contract itself or its surrounding circumstances'[110] is also permitted. Contracting parties are also allowed to choose the law applicable to their contract in terms of the Law of the People's Republic of China[111] on the Law Applicable to Foreign-Related Civil Relations, 2010 (the Chinese Private International Law Act).[112] Chinese private international law does not, however, recognise a tacit choice of law.[113] Finally, the principle of party autonomy is recognised under South African private international law.[114] Tacit choice is also allowed in terms of the South African principles of private international law.[115]

'To largely remove the differences between conflict of laws regimes regarding choice of law and the connected legal uncertainties leading to high expenses for information and significant transaction costs, an international unification of choice of law rules similar to the CISG'[116] would be ideal. An international convention on choice of law would have the added advantage of being binding on state parties—but it is common knowledge that its adoption and ratification is an onerous task. In order to assist in creating convergence between national choice of law regimes, the Hague Conference recently adopted The Hague Principles on Choice of Law in

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107 Vorobieva (n 25) 87.

108 ibid 89.

109 Agrawal and Singh (n 26) 93.

110 *National Thermal Power Corporation v Singer Company* 1992 (3) SCC 551 para 13. A detailed analysis on tacit choice of law under Indian law in comparison with The Hague Principles is found in Jan Neels, 'Choice of Forum and Tacit Choice of Law: The Supreme Court of India and The Hague Principles on Choice of Law in International Commercial Contracts (An Appeal for an Inclusive Comparative Approach to Private International Law)' in *Eppur si Muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell to Celebrate His 70th Birthday* (UNIDROIT Vol I 2016) 358.

111 It is acknowledged that the position in terms of the rules of private international law of Hong Kong and Macau are still different, despite these regions becoming part of Mainland China. The references to Chinese private international law in this contribution are therefore limited to the current position in mainland China.

112 See art 41 of the Chinese PIL Act, English translation included in Jürgen Basedow and Knut Pissler, *Private International Law in Mainland China, Taiwan and Europe* (Mohr Siebeck 2014) 439–446. See, also, Qisheng He, 'Recent Developments of New Chinese Private International Law with regard to Contracts' in Basedow and Pissler 157 164.

113 According to art 3 of the Chinese PIL Act, the parties' choice of law must be explicit. See He (n 112) 165.

114 *Laconian, Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 525 F–G; Elsabe Schoeman, Christa Roodt and Marlene Wethmar-Lemmer, *Private International Law in South Africa* (Juta 2014) 50.

115 ibid.

116 Schwartze (n 101) 90.

International Commercial Contracts.[117] In terms of the Preamble to the Principles 'the instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.'[118] Most importantly for this discussion, is the fact that the Preamble specifically provides that the Principles may be used as a model for 'national, regional, supranational or international instruments.'[119] The Hague Principles contain a comprehensive and authoritative commentary that further aids in their uniform application.[120]

A detailed analysis of the substantive contents of The Hague Principles falls outside the scope of this contribution. Numerous scholarly contributions already exist in this regard.[121] It suffices, therefore, to mention a few salient points which illustrate the suitability of The Hague Principles as a set of rules governing choice of law in intra-BRICS sales contracts. The application of the Principles is limited to commercial contracts. Consumer and employment contracts are expressly excluded.[122] The internationality requirement is satisfied if parties to the contract have their places of business in different states.[123] The Principles give full recognition to the principle of party autonomy.[124] They do, however, recognise *depecage.*[125] It is important to note that the Principles do not require any link between the contract and the law chosen—therefore allowing parties to choose a neutral law.[126] Article 3 of The Hague Principles also allows parties to designate a non-national law as the governing law of their contract, unless not permitted in terms of the law of the forum.[127] The Commentary to the Principles expressly states that this provision allows parties to choose the CISG as the governing law of their contract.[128] Article 4 of The Hague Principles sets a high standard[129] for tacit choice of law, requiring it to appear clearly from the provisions of the contract or the circumstances. This high standard

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117 See (n 11).

118 Preamble para 1 of The Hague Principles (n 11).

119 Preamble para 2 (n 11).

120 See the text of The Hague Principles.

121 For detailed analysis of The Hague Principles on International Commercial Contracts, see, inter alia Symeon Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 American Journal of Comparative Law 873.

122 Article 1 of the Principles (n 11).

123 Article 1(2) of the Principles. The internationality requirement of the Principles is exactly the same than the CISG—Art1.

124 Principles Art 2(1) (n 11).

125 According to Art 2(2)(b) different laws may be applied to different parts of the contract.

126 Article 2(4) of the Principles.

127 This limitation or qualification was necessitated by the fact that several jurisdictions still do not allow the choice of a non-national legal system.

128 Commentary to The Hague Principles para 3(5) (n 11).

129 See Jan Neels and Eesa Fredericks, 'Tacit Choice of Law in The Hague Principles on Choice of Law in International Contracts' (2011) De Jure 101, for a detailed analysis of this provision.

of certainty required for a tacit choice of law may be acceptable under Chinese law which currently only allows for an express choice of law.[130] The Principles provide a novel solution to the much debated and often insoluble problem of different choice of law clauses in conflicting standard forms—or the so-called 'battle of the forms' problem.[131] Article 9(1) of the Principles provides that the chosen law shall govern all aspects of the contract between the parties. This approach enhances legal certainty in respect of the applicable law. Furthermore, The Hague Principles contain rules to determine the law applicable to important matters in assignment transactions where two or more contracts that contain different choice of law agreements are involved.[132] Finally, the Principles provide for the application of overriding mandatory rules of the forum irrespective of the law chosen by the parties.[133]

All the BRICS countries are members of the Hague Conference on Private International Law.[134] It is suggested that it would therefore not be difficult to harmonise rules relating to choice of law amongst the BRICS nations. It is proposed that the BRICS states endorse The Hague Principles on Choice of Law. Even though Brazil does not currently recognise party autonomy, it has acceded to the CISG which gives full recognition to the principle of party autonomy.[135]

Lastly, in respect to choice of law, it has long been recognised that one of the important factors taken into account when making a choice in favour of a governing law is a high level of legal certainty of the system chosen.[136] Research has shown that ratification of the CISG is a feature that greatly promotes a choice of such a legal system as governing law.[137]

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130 Article 3 of the Chinese PIL Act (n 112).

131 According to Art 6(2) 'if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.'

132 Article 10 of the Principles provides: 'In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor—*a)* if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract; *b)* if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs: i) whether the assignment can be invoked against the debtor; ii) the rights of the assignee against the debtor; and iii) whether the obligations of the debtor have been discharged.'

133 Article 11(1) of the Principles. However, Art 11(3) provides that the choice of the parties should only be overridden if 'the result of the application would be manifestly incompatible with the fundamental notions of public policy of the forum.'

134 List of member states to the Hague Conference on Private International Law <https://www.hcch.net/en/states/hcch-members> accessed 19 January 2017.

135 Albornoz (n 103) 30.

136 Moser (n 5) 27.

137 ibid 31.

Harmonising the Rules relating to the Determination of the Proper Law in the Absence of a Choice[138]

A brief overview of the principles of private international law in the BRICS states in respect of the determination of the proper law of the contract in the absence of a choice made by the parties, reveals the divergent nature of these regimes.

In terms of article 9 of the Introductory Act to the Brazilian Code,[139] the law applicable to a contract is the law of the place where the contract is formed (*lex loci contractus*), and this is presumed to be the domicile of the offeror.[140] Estrella-Faria points out that Brazilian courts do not take other connecting factors relied upon in most other jurisdictions, such as the place of performance (*locus solutionis*), into account, and also do not follow the approach of determining the law of closest connection to the contract.[141]

The new Civil Code of the Russian Federation[142] contains private international law provisions in its Third Part. Article 1211(1) of the Code provides that, in the absence of an agreement between the parties concerning the applicable law, the law of the country with which the contract is most closely connected shall apply.[143] Article 1211(2) of the Code creates a rebuttable presumption in favour of the law of the country of residence or principal place of business of the party obliged to perform the 'characteristic performance' of the contract, as the law of closest connection. Article 1211(3) provides that, for a contract of purchase and sale, the seller is the party effecting the characteristic performance. The provisions of the Russian Civil Code on applicable law in the absence of a choice by the parties were clearly influenced by the Convention on the Law Applicable to Contractual Obligations (the Rome Convention) of 1980[144] that contains

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138 For a thorough discussion in this regard, see Garth Bouwers, 'The Law Applicable to an International Contract of Sale in the Absence of a Choice of Law—A Comparative Study of Brazilian, Russian, Indian, Chinese and South African Private International Law' (LLM Dissertation, University of Johannesburg 2013).

139 See (n 104).

140 Estrella-Faria (n 65) 212.

141 ibid 213.

142 The third part of the new Russian Civil Code contains private international law provisions and came into effect on 1 March 2002. See Vorobieva (n 25) 19 in this regard.

143 Vorobieva (n 25) 92. See the (2002) Yearbook of Private International Law 349 for a translation of the Civil Code of Russia of 2001.

144 80/943/EEC Official Journal L 266; 1605 UNTS 59 <http://eur-lex.europa.eu/> accessed 9 November 2016. See, in this regard, Mikhail Badykov, 'The Russian Civil Code and the Rome Convention: Applicable Law in the Absence of Choice by the Parties' (2005) 1 Journal of Private International Law 269.

an almost identical provision.[145] In essence, therefore, under Russian law, in the absence of a choice of law, an international sales contract is governed by the law of the place of the seller, unless the contract is found to be substantially more closely linked to another legal system.

Indian law follows the common-law approach in determining the proper law of a contract.[146] The current position in this regard has been set out by the Indian Supreme Court in the *Thermal Power Corporation* case.[147] In the absence of a choice of law, the law which has the most real and substantial connection to the contract must be applied.[148]

The new Chinese Private International Law Act provides that '[i]n the absence of such choice of law, the contract is governed by the law of the habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected.'[149] The position under Chinese law is therefore in keeping with the position globally. It is also similar to the position under Russian law.

The position under South African law is still somewhat uncertain.[150] The subjective approach to assigning the proper law of the contract in the absence of choice, in terms of which a court determines 'what ought, reading the contract by the light of the subject matter and of the surrounding circumstances, to be presumed to have been the intention of the parties'[151] has not been officially rejected by the Supreme Court of Appeal. However,

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145 Article 4 of the Rome Convention (n 144) provides: '(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country; (2) Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated; (3)…; (4)…; (5) Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.'

146 Argrawal and Singh (n 26) 93.

147 See (n 110).

148 *Thermal Power Corporation* case (n 110) para 13; Agrawal and Singh (n 26) 94.

149 Article 41 of the Chinese PIL Act (n 112). See in this regard Guangjian Tu and Muchi Xu, 'Contractual Conflicts in the People's Republic of China: The Applicable Law in the Absence of Choice' (2011) 7 Journal of Private International Law 179.

150 Consult Christopher Forsyth, *Private International Law* (5 edn, Juta 2012) 329–336 and Schoeman, Roodt and Wethmar-Lemmer (n 114) 53–56 for a detailed analysis.

151 *Standard Bank v Efroiken and Newman* 1924 AD 171 185.

several decisions have been delivered in which judges have expressed their support in *obiter dicta* for the objective approach for determining the law of closest connection to the contract.[152]

In light of the fact that there is currently no Hague Conference instrument containing rules on determining the applicable law in the absence of choice, it is submitted that harmonisation of these rules among the BRICS states would be rather challenging. The broad judicial discretion inherent in determining the 'law of closest connection' as per the predominantly common-law approach, differs greatly from the far more pedantic approach in the civil-law codes. I support a solution similar to the Rome I Regulation.[153] There should be fixed rules for commercial contracts, and in the case of an international sales contract, it should be in line with the Rome I Regulation's approach that has clearly also found favour outside of the EU.[154] In terms of article 4(1)(a) of the Rome I Regulation, a contract for the sale of goods shall be governed by the law of the country where the seller has his or her habitual residence.[155] This fixed rule is coupled with an escape clause in article 4(3) allowing for the contract to be governed by the law of the country with which it is most closely connected if it is determined that the contract is manifestly more closely connected with a legal system other than the legal system provided for in subsection 4(1)(a).[156]

The Rome Regulation's approach has much to commend it in that it provides the necessary legal certainty combined with flexibility and judicial discretion.

CONCLUSION—PLEA FOR AN INTEGRATED APPROACH TO HARMONISATION

In this contribution, I have sought to highlight the importance of a harmonised regulatory framework for international sales contracts between merchants from different BRICS states.

From a substantive law perspective, accession to and utilisation of the CISG as a set of governing rules have been proposed. It is unfortunate that the CISG excludes certain important matters such as validity of the contract from its scope of application. This is an area of international contract law for which the BRICS parties may wish to adopt an additional uniform law instrument *intra se*, or, alternatively, ensure, by means of harmonisation of

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[152] See, for example, *Improvair (Cape) Ltd v Establissements Neu* 1983 (2) SA 138 (C) at 146H–147A; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 526D–H.

[153] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Official Journal of the European Union 2008 L 177/6. See, also, Brooke Marshall, 'Reconsidering the Proper Law of the Contract' (2012) 13 Melbourne Journal of International Law 505.

[154] For example in the Chinese PIL Act, Art 41 (n 112).

[155] See the text of the Regulation (n 153) above.

[156] See (n 153).

their principles of private international law, that the legal system governing contractual validity is determined in a predictable manner. Calls have been made for UNCITRAL to investigate the possibility of drafting an instrument on general contract law[157] which may supplement the CISG effectively.[158] It is emphasised that the new Convention will not aim to modify the CISG or to detract from its application—but will only address areas outside the CISG's scope and possibly fill internal gaps in the CISG.[159]

However, the CISG as it currently stands, would still be an effective starting point[160] in establishing a uniform set of rules to govern international sales contracts between traders from the BRICS states. A harmonised set of substantive law rules are indeed necessary to provide a predictable governing system in order to increase trade between the countries with diverse legal systems, and the CISG has stood the test of time in this regard. It would be far more expedient to encourage accession to the CISG by India and South Africa than to attempt to draft a new instrument to unify substantive sales law principles among the BRICS states.

It is also apparent that the principles of private international law relating to choice of law and the determination of the proper law of an international sales contract in the absence of a choice, need to be harmonised among the BRICS states. In lieu of an instrument drafted by the Hague Conference on the determination of the applicable law in the absence of a choice, further research is necessary. In this regard, I offer a preliminary suggestion in this contribution in line with the Rome I Regulation approach.

It is erroneous to argue that the international or regional unification of substantive law in the field of the international sale of goods eliminates or greatly reduces the need for resorting to the rules of private international law. The gaps and exclusions in the CISG have proved that national legal systems differ too greatly for an exhaustive set of internationally acceptable substantive law rules to govern international sales contracts to offer a realistic solution. There will inevitably be gaps in the harmonised substantive law regime. Being able to refer to the rules of private international law to fill such gaps enhances the proper functioning of a harmonised substantive law

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157 See Sorieul, Hatcher and Emery (n 84) 491 and Pilar Perales Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' (2013) 58 Villanova Law Review 733 in this regard. The Swiss delegation made an official proposal at UNCITRAL's forty-fifth session held in New York from 25 June–6 July 2012. See UN, 'Possible Future Work in the Area of International Contract Law: Proposal by Switzerland' (UN Document A/CN.9/758) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement> accessed 18 January 2017.

158 Schwenzer (n 5) 731.

159 Viscasillas (n 157) 736.

160 Bruno Zeller, 'Regional Harmonisation of Contract Law—is it Feasible?' (2016) 3 Journal of Law, Society and Development 85 at 96 also suggests that, for regional harmonisation, the CISG may be used as 'base convention' and additional protocols may then be attached to it to cover gaps.

document such as the CISG. However, rules of private international law also differ from one jurisdiction to the next. Therefore, an attempt should be made to establish a harmonised set of substantive law rules as well as a harmonised set of private international law rules in order to achieve a well-functioning legal framework in any field, but especially for international sales contracts.