

LAW AND ECONOMICS: ARBITRATION, CISG AND REORGANIZATION

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Law and Economics

Economics provides jurists a theory about **human behavior** and the response of this economic agent to **incentives** provided by the legal system.

As economic and social activities gain sophistication, the legal system reaches areas not typically covered by law or traditional legal thinking, such as the stock market, regulation, etc.

As such, the **legal system provides formal rules and concrete institutions for economists to analyze.**

Law and Economics

The focus of the analysis is on the consequence (“consequentialism”)

It reveals the true interests of the parties

Aim: development, efficiency, cost saving, justice (?)

Law and Economics → Using the lenses of economic science to analyze legal problems (human behavior focusing on consequences).

Law and Economics

- **Various schools** and tendencies, among which the most currently discussed are **new institutional economics** and behavioral economics;
- There is no need for great mathematical models (economics is facing discredit);
- It does not explain or deplete the **legal dogmatic**, but it does explain the behavior of parties in a contract or litigation;

L&E: ARBITRATION

Benefits:

- Speediness;
- Confidentiality
- Qualification of the arbitrator
- Less formal (?);
- Less costly (?);
- Creates incentives for cooperation

L&E: ARBITRATION

- Minimizes transaction costs;
- Better predictability and legal certainty (“pacta sunt servanta”); **less paternalist?**
- Internalize the costs of litigation, and thus save tax payers' money
- Create incentives to assess the odds of the case
- Minimizes opportunity costs

L&E: CISG

On a **global scale**, **transaction costs are greater**, considering an environment with more uncertainties and insecurities, caused by cultural and language barriers, different customs and legal systems, amongst other.

While **national legal systems help to minimize transaction costs locally**, by allowing the parties to enter into transactions with full knowledge of the set of rules applicable to incomplete contracts, **the same does not apply internationally**.

Considering the sovereignty of nations, **different legal systems may have conflicting rules** regarding the same matter.

L&E: CISG

CISG serves to minimize transaction costs by harmonizing legislation regarding the international sale of goods in nations that have ratified the Convention.

According to UNCITRAL*, there are currently 83 signatories of the Convention, including Germany, France, Italy, United States of America, China, Brazil and main Latin-American Countries.

* http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status.html

L&E: CISG

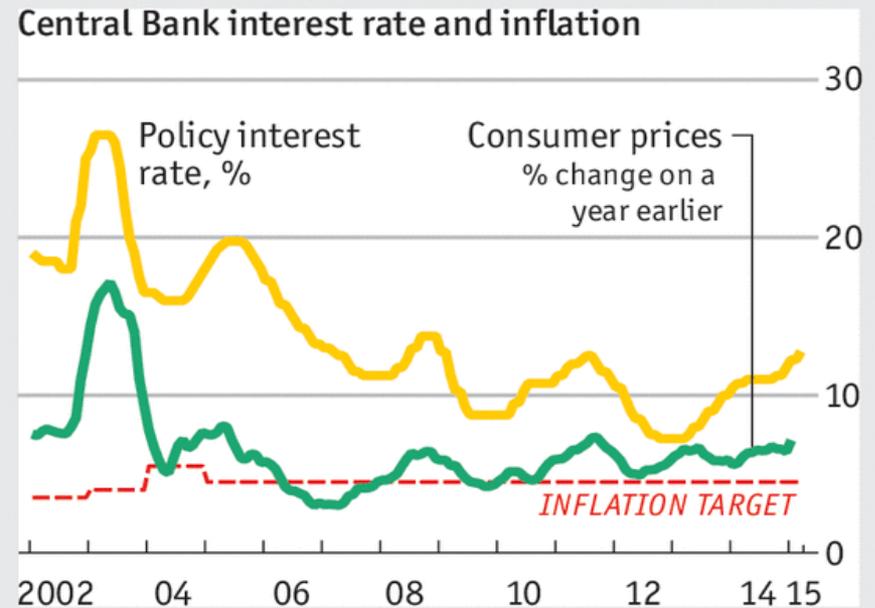
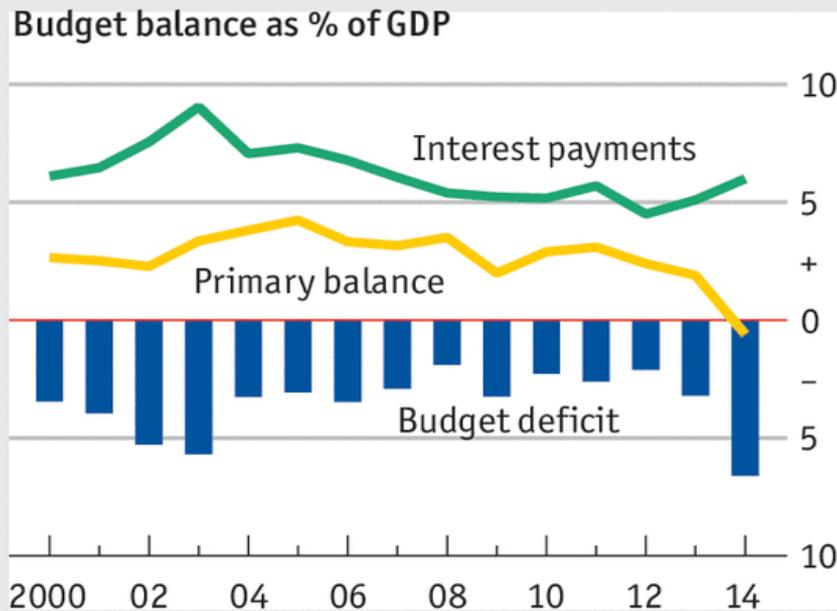
As such, CISG provides legal and economic incentives to parties entering into international transactions for the sale of goods, considering its two main principles are **free will** (granting liberties to parties) and **good faith** (limiting opportunistic behavior

CISG also provides incentives for parties to establish it as rule of law for arbitration involving international contracts, considering it establishes a “**neutral legal system**”.

ARBITRATION AND REORGANIZATION

Economy in Brazil

Budget, interest and inflation



Sources: Central Bank of Brazil; Haver Analytics; Thomson Reuters

Economist.com

ARBITRATION AND REORGANIZATION

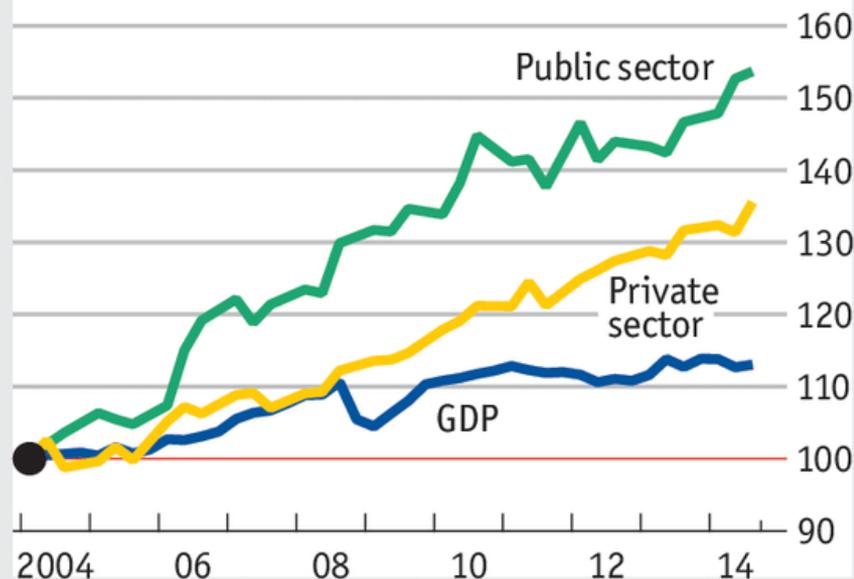
Economy in Brazil

Wages and jobs



Median real wages and GDP

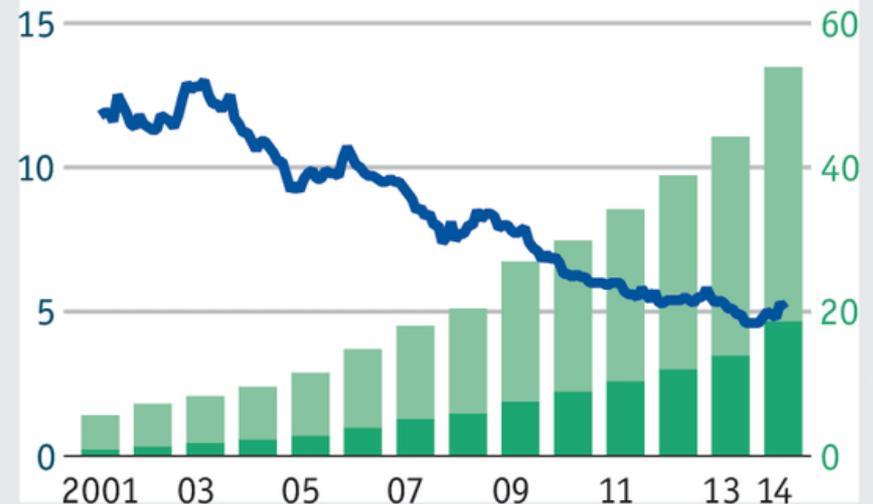
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Sources: National Accounts; IBGE; Central Bank of Brazil; *The Economist*

Government spending, reais bn:

Unemployment rate, %



Economist.com

ARBITRATION AND REORGANIZATION

Current Brazilian macroeconomic panorama dictates that, in a microeconomic scenario, the **likelihood of businesses facing judicial or extrajudicial reorganization or bankruptcy will increase** in the upcoming months/years.

→ Do the pros to use arbitration (such as speediness) outweigh the cons (such as high costs)?

→ Is arbitration a viable option in the event of judicial or extrajudicial reorganization or bankruptcy?

L&E: INSOLVENCY

UNCITRAL Model Law on Cross-Border Insolvency adopts certain L&E principles, seeking to promote the objectives of:

- Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- Greater legal certainty for trade and investment;
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

L&E: INSOLVENCY

The model law, as such, seeks to increase economic efficiency by minimizing transaction costs and information asymmetry.

- It does not seek to establish a unified substantive insolvency law, as opposed to CISG, but establishes a regimen of cooperation that respects the differences among national procedural laws.
- Currently, Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in 20 States.
- Only Chile and Colombia have ratified the model law in South America (sadly?)

UNCITRAL Model Law – Brazil?

- Brazil has not adopted UNCITRAL Model Law on Cross-Border Insolvency: Law No. 11,101/2005 did not bring rules on cross-border insolvency;
- Important gap to be fulfilled, causing uncertainty among economic agents, and hindering international cooperation;
- Concern: some Brazilian scholars understand that although Model Law was created in order to be applied globally, it provides courts with some level of flexibility and discretionary which better suits common law countries; and
- Nevertheless, Brazil should somehow foster the adoption of Model Law into Brazilian legal framework (even if with some adjustments/amendments), thus providing more legal certainty to companies, investors and creditors, following a worldwide trend on standardizing cross-border insolvency procedures.

ARBITRATION AND REORGANIZATION

Brazilian jurisprudence upholds that if an arbitration agreement is in place at the time one of the parties is adjudicated bankrupt, an arbitral proceeding in course may not be suspended (or new arb proceeding may be commenced), and the administrator of the bankruptcy may not refute the validity of the arbitration clause.

As per international arbitration, ICC International Court of Arbitration's prevailing position on the matter is favorable to the continuity of the arbitration regardless of the existence of bankruptcy proceedings (CCI 6.075/1991).

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Thank you!

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