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Derecho Internacional Privado de los Estados del MERCOSUR*

Edited by Diego P. Fernandez Arroyo,† with Forwards by Erik Jayme‡ & Didier Opertti Badan.§ Buenos Aires: Zavalía, 2003.
1438 pp.

*Reviewed by Mario J. A. Oyarzábal***

MERCOSUR: Southern Cone Common Market, formed by Argentina, Brazil, Paraguay and Uruguay, was created in 1991 by the Treaty of Asunción.¹ MERCOSUR essentially reflects the longest tradition of economic integration in history among the American States, although it follows the European example. During its short existence, and despite the absence of supra-national institutions, the MERCOSUR has generated an extended network of conventions and instruments on Private International Law issues, equally important for the originality of the solutions.² Texts elaborated up to the present deal primarily with jurisdiction, foreign judgments and so-called international judicial assistance, but this spectrum is already starting to widen to other topics. It is therefore very timely that a proper book is devoted to this process.

* Private International Law of the MERCOSUR States. The book is written in Spanish. It is this reviewer's understanding that the book's editor intends to translate this work into English, although the length (1438 pages) will make the project one of rather lengthy duration.

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1. See generally Rafael A. Porrata-Doria, Jr., *MERCOSUR, The Common Market of the Twenty-First Century?*, 32 GA. J. INT'L & COMP. L. 1 (2004); Marta Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration*, 25 CASE W. RES. J. INT'L L. 413 (2003); Enrique J. Aramburu, *Historical Perspective: The Evolution of MERCOSUR in a South American Integration*, 13 PACE INT'L L. REV. 183 (2001); Thomas A. O'Keefe, *An Analysis of the MERCOSUR Economic Integration Project from a Legal Perspective*, 28 INT'L LAW. 439 (1994).

2. See generally MERCOSUR's official website at <http://www.mercosur.org.uy/pagina1esp.htm> (last visited Apr. 19, 2005). The text in English of the most important MERCOSUR treaties, including the Treaty of Asunción, is available at <http://www.unionsudamericana.net/ingles/tratados/mercosur/mercosur.html> (last visited Apr. 19, 2005).

The book under review is the result of an initiative by Argentine-born Professor, Diego P. Fernandez Arroyo, and consists of thirty two chapters contributed by some authoritative writers and researchers in this field in Argentina, Brazil, Paraguay and Uruguay.

The essays cover all three objects of that part of law known as private international law: jurisdiction, recognition and enforcement of foreign judgments, and choice of law. Matters are studied from a dual perspective: that of the conventions and protocols adopted at the level of the MERCOSUR (MERCOSUR as a new source of private international law), and that of private international law systems of the four MERCOSUR Member States. Reference is also made to the international treaties concluded by individual MERCOSUR States with non-Member States, as well as to other international and regional conventions of singular relevance.

This book consists of two principal sections. The first part is devoted to the analysis of preliminary topics and general choice of law problems, jurisdiction, foreign judgments and awards. It contains twelve chapters. The second part, comprised of the remaining twenty chapters, addresses virtually every major area of choice of law.

Chapter 1 was contributed by the book editor, Professor Fernandez Arroyo, and explains some basic concepts and problems arising from the internationalization of private legal relationships, including the object, contents and ends of private international law, in the light of the relatively new phenomena of globalization, economic and political integration, international cooperation, influence of human rights and expansion of party autonomy beyond the sphere of contracts. Chapter 2, also written by the book editor, provides a panorama of the normative frame to solve private international law issues, both within and among MERCOSUR States, and discusses the role played by national constitutions and the Inter-American Conventions on Private International Law in this process. Special emphasis is given to MERCOSUR as a new source of private international law, its strength and weakness, and the issue of reception of MERCOSUR law by the municipal law of the Member States.

Chapters 3 through 5 refer to jurisdiction. After presenting the general relevant theoretical problems on this area and before analyzing the rules stating the competence of courts and other authorities in each MERCOSUR State according to their respec-

tive municipal private international law system, Chapter 4 deals extensively with the several and potentially conflicting treaties concluded by Argentina, Brazil, Paraguay and Uruguay in jurisdictional matters, starting with the Treaties of Montevideo of 1889 and 1940, the Bustamante Code, and the Inter-American Conventions, and continuing with the agreements concluded within and by MERCOSUR as such. These include the Protocol on International Jurisdiction in Contractual Matters signed in Buenos Aires on August 5, 1994, the Protocol on International Jurisdiction Regarding Consumer Relations, signed in Santa María on November 22, 1996, and the two Agreements on International Commercial Arbitration concluded in Buenos Aires on July 23, 1998 between MERCOSUR States, Bolivia, and Chile. These chapters were written jointly by professors Adriana Dreyzin de Klor and Amalia Uriondo de Martinoli (Universidad Nacional de Córdoba, Argentina), María Blanca Noodt Taquela (Universidad Nacional de Buenos Aires and Universidad de Moron, Argentina), Nádia de Araújo (Pontificia Universidade Católica de Rio de Janeiro, Brazil), Roberto Ruiz Díaz Labrano (Universidad Nacional de Asunción, Paraguay), Cecilia Fresnedo de Aguirre (Universidad de la República and Universidad Católica del Uruguay), and Fernandez Arroyo.

Chapters 6 and 7 address all general problems arising in the field of the applicable law, to wit: structure and operation of the conflict rule, characterization, preliminary question, *renvoi*, the *ordre public* reservation and the doctrine of *fraus legis*, as well as other result-oriented choice of law rules (*règles de conflit à coloration matérielle*) and mandatory rules (*lois de police*) usually passed by legislatures to protect certain interests which may have an impact in the outcome of a case. The Inter-American Convention on General Norms of Private International Law, adopted in Montevideo in 1984, is thoroughly analyzed together with the main provisions dealing with these problems in municipal law of all four MERCOSUR States. Both chapters were written by the Uruguayan Fresnedo de Aguirre.

The last four chapters of the first part of this book deal principally with matters of procedure and so-called international judicial assistance, and with recognition and enforcement of foreign judgments. Procedural and judicial cooperation issues are addressed by Professor Eduardo Vescovi (Universidad de la República, Uruguay) in collaboration with Fresnedo de Aguirre in Chapters 8 and 9. The issues are approached from a comprehen-

sive perspective and cover all problems of judicial notice and proof of foreign law and the "right of access to the courts," rogatory letters and judicial assistance and coordination among countries, from the standpoints of the four relevant Inter-American Conventions on the Taking of Evidence Abroad (Panama, 1975) as modified by its Additional Protocol (La Paz, 1984), on the Legal regime of Powers of Attorney to be Used Abroad (Panama, 1975), on Precautionary Measures (Montevideo, 1979) and on Proof of and Information on Foreign Law (Montevideo, 1979), and of the two MERCOSUR Protocols of Judicial Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters, signed in Las Leñas on June 27, 1992, and of Precautionary Measures, signed in Ouro Preto on December 16, 1994 as complemented by the Asuncion Agreement of 1997.

The chapters on recognition and enforcement of foreign judgments were authored by several scholars. Fernandez Arroyo, Vescovi and Noodt Taquela authored Chapter 10, dealing with the general principles regarding jurisdiction, procedural fairness and recognition of foreign public documents. Noodt Taquela and Professor Guillermo Argerich (Universidad Nacional de Buenos Aires) authored Chapter 11, dealing with international agreements in force between all or some MERCOSUR States. This includes the relevant Treaties of Montevideo and Inter-American and Hague Conventions, and most importantly, the bilateral treaties concluded between MERCOSUR States and a detailed analysis of Chapter V of the Protocol of Las Leñas which addresses this issue for cases arising in the MERCOSUR space. Some remarks on the proposed Hague Convention on Jurisdiction and Foreign Judgments are also included. Additionally, attention is given to the recognition and enforcement of foreign arbitral awards, again from the perspectives of the 1958 New York Convention, the Inter-American Conventions on International Commercial Arbitration (Panama, 1975) and on Extraterritorial Validity of Foreign Judgments and Arbitral Award (Montevideo, 1979), and the aforementioned Arbitration Agreements concluded among MERCOSUR States and between MERCOSUR, Bolivia and Chile in 1998. Finally, the rules on recognition and enforcement of foreign judgments and arbitral awards contained in municipal laws of the four MERCOSUR States are analyzed in some detail in Chapter 12, written by Professors Dreyzin de Klor and Uriondo de Martinoli (Argentina), Araújo (Brazil), Díaz Labrano (Paraguay) and Fresnedo de Aguirre (Uruguay).

The second part of this book contains the remaining chapters 13 to 32, and deals with virtually every major area of choice of law. Chapter 13 discusses the issue of domicile, capacity, name, and death or presumptive death of persons, and was authored by Fernandez Arroyo with the contribution of Carlos Bertosi. The following Chapter deals with associations other than corporations, when they perform acts and acquire goods or property abroad, and was authored by professors Cláudia Lima Marques (Universidade Federal do Rio Grande do Sul, Brazil) and Fresnedo de Aguirre (Uruguay). Both "physical" and "juridical" persons have traditionally been considered to be "the subjects of private international law" and are, therefore, discussed simultaneously.

Chapters 15 and 16 deal with the protection of minors and the endemic problem of transborder parental abduction. Efforts made by the United Nations Organization, the Hague Conference and the Organization of American States as well as the resulting Conventions adopted to palliate these problems, are accordingly addressed. These two chapters were authored by Fernandez Arroyo, Lima Marques, Dreyzin de Klor and Uriondo de Martinoli. Next Chapter, written also by Cláudia Lima Marques, addresses the problem of custody, legitimacy, legitimation and adoption when the child and the parent reside in different countries. Alimentary obligations are treated separately on Chapter 20 by Professor Fresnedo de Aguirre. Chapters 18 and 19 were written by Professor Beatriz Pallarés (Universidad Nacional del Litoral, Argentina) and are devoted to marriage and other forms of non-marital cohabitation, separation, divorce, marital property and contracts celebrated between spouses. Last, Chapter 21, authored by Professor Jorge Albornoz (Universidad Nacional del Litoral, Argentina), addresses issues of succession law when a person dies having a foreign domicile or property in more than one country. The estate of the deceased is treated as a single unit, according to the principle of unity arguably adopted by the four MERCOSUR States and most other civil law countries.

The chapters that follow until the end of the book discuss legal relationships having a uniquely or predominately patrimonial content. Chapter 22 deals with immovables and movables and was authored by Professor Pallarés. And Chapter 23, authored by Miguel Armando and Delia Lipszyc (Universidad Nacional de Buenos Aires) deals with immaterial property, including copyright, patents and trade marks.

Chapters 24 through 26 are devoted to contracts. The exten-

sive and detailed treatment of obligations in the book reflects the importance attributed to the subject by the editor and the contributing authors in the MERCOSUR integration process. Taking as the starting point the role of party autonomy to choose the court and the applicable law to the contract, the book analyzes international and municipal rules generally applicable in the absence of choice, as well as particular contracts that can produce special problems, such as consumer contracts, insurance, employment contracts, international sales of goods, distribution agreements, commercial licenses, banking contracts, secure transactions, and methods of financing (leasing, factoring and forfeiting). Fernandez Arroyo and Fresnedo de Aguirre were responsible for Chapter 24 (General Problems), Noodt Taquela for Chapter 25 (General Normative Frame of International Contracts in MERCOSUR States), and the three of them together with Jorge Albornoz for Chapter 26 (Special Contracts).

Transport, by land, sea and air and multimodal, is studied separately in Chapter 30, written by Fresnedo de Aguirre. Two agreements have been reached at the MERCOSUR level on this matter, the Agreement on International Multimodal Transport concluded in Ouro Preto on December 17, 1994, and the Agreement on Jurisdiction on the Matter of International Freight Transportation Contracts among MERCOSUR Member States concluded in Buenos Aires on July 5, 2002, which coexist with several other agreements in force between the MERCOSUR States; thus, justifying the special consideration given to this contract in the book.

Two further chapters, 27 and 29, written by Professors Noodt Taquela and Albornoz, with the collaboration of Adriana Villa and María Buezas, analyze the rules that regulate means of payment, in particular wire transfers, commercial papers, documented credit, credit cards, checks and letter of credit, when used to acquire goods or guarantee obligations abroad.

Chapter 28 is another important part of this book since it refers to the problem of torts, particularly the issues of product liability and litigation and automobile accidents. The MERCOSUR Protocol on Civil Liability resulting from Traffic Accidents, concluded in San Luis on June 25, 1996 is explained in some detail, as well as other relevant international conventions in which one or more MERCOSUR States are a party. This Chapter was also authored by Professor Fresnedo de Aguirre.

Finally, the two remaining chapters, 31 and 32, discuss cru-

cial and very sensitive issues for the integration process, respectively that of corporations authored by Fresnedo de Aguirre, and that of bankruptcy authored by Noodt Taquela. Those interested in corporations must, however, take into consideration the developments occurred in Argentine legislation after the publication of this book introduced by Resolución 7 of the Inspección Nacional de Justicia, regarding the registration of foreign corporations in Argentina.

This book argues that the MERCOSUR is becoming a dynamic force not only for the unification of private international law between the Member States, but also for the creation of uniform community law. However, the early stage of development of this unification justifies plainly the account of the traditional rules as incorporated in the book, particularly since conventions, internal laws and other relevant instruments are presented in an interrelated manner with a view to the ultimate solution of the cases. Additionally, the book has the merit of providing elements for a comparative study of the various legal systems involved.

Overall, *Derecho Internacional Privado de los Estados del MERCOSUR* is an important and stimulating book, which should be of great interest to those teaching or practicing private international law anywhere in the world, if they read Spanish. The essays included in the book provide a comprehensive overview of the structure, evolution, practice and case law of the private international law systems of the MERCOSUR States, with an extensive bibliography. But it also alerts to the need to create a MERCOSUR Private International Law system, and thus, as Professor Jayme indicates in his foreword, this book is a tool for such creation, a *création savante* that is likely to produce a deeper integration among the MERCOSUR States.