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Derecho Internacional Privado de los Estados del MERCOSUR

Mario J.A. Osarzabal
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 conventions 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-
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 Noordt Taquela authored Chapter 10, dealing with the general principles regarding jurisdiction; procedural fairness and recognition of foreign public documents. Noordt 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), Araujo (Brazil), Diaz Labranco (Paraguay) and Fresnede de Aguirre (Uruguay).

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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 Claudia Lima Marques (Universidade Federal do Rio Grande do Sul, Brazil) and Fresnede 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 Claudia 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 Fresnede 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 moveables 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 Fresneda de Aguirre were responsible for Chapter 24 (General Problems), Noodt Taques 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 Fresneda 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 Taques and Albornoz, with the collaboration of Adriana Villa and 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 tort, 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 Fresneda de Aguirre.

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