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CONTRACT LAW IMPLICATIONS IN MERCOSUR MEMBER STATES: A FUTURE AGREEMENT WITH THE EUROPEAN UNION?

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«Vinca dunque la perseveranza,
perché se la fatica è tanta,
il premio non sarà mediocre.
Tutte le cose preziose son poste nel difficile.»

Giordano Bruno

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ABBREVIATIONS

CMC = Common Market Council

CMG = Common Market Group

CCM = Mercosur Trade Commission

TPR = Permanent Review Tribunal

SAM = Mercosur Administrative Secretariat

FCES = Economic and Social Consultative Forum

UGAPIL = General Act on Private International Law

CISG = United Nations Convention on Contracts for the International Sale of Goods

UPICC = UNIDROIT Principles of International Commercial Contracts

LINDB = Law Introduction to the Norms of Brazilian Law

TFEU = Treaty on the Functioning of the European Union

ECHR = European Convention on Human Rights

PECL = Principles of European Contract Law

ABSTRACT

The intensifying development of international trade and cross-border economic transactions have transformed commercial contracts into a vital instrument for joining businesses that operate in different legal contexts. From this perspective, the existence of a predictable legal framework is particularly essential, since dissimilarities within domestic laws may affect the establishment, interpretation and enforcement of contractual relationships with foreign enterprises. Therefore, the determination of the applicable law configures as a central issue for international commercial parties, in particular when the transaction involves nations that belong to multiple regional integration systems.

This issue is extremely relevant in the relationship between MERCOSUR (the Southern Common Market) and the European Union. Established in 1991, MERCOSUR's creation had the aim of enhancing the regional economic integration process, in order to facilitate the flow of both goods and services by increasingly developing a common market in that area. As a matter of fact, the integration process strengthened the commercial and economic collaboration among the Member States, but on the other hand the same did not happen for what concerns the formation of a uniform legal framework. Contract law seems to remain highly dependent on Argentina, Brazil, Uruguay and Paraguay's domestic legal systems. Moreover, its intergovernmental nature increased the already present degree of legal fragmentation.

It is important not to underestimate this issue, especially regarding international commercial contracts. In fact, the four MSs use different approaches to establish the applicable law and to the recognition of party autonomy: in fact, some of them have adopted more flexible rules, but others are more restrictive about the freedom of choice. Furthermore, international conventions and non-binding instruments, like UNIDROIT and Hague Principles, or the CISG could contribute to generate greater stability, but apparently their usage is not so widespread within the bloc. As a result, legal predictability still configures as a concrete problem when engaging with businesses in MERCOSUR.

In particular, its relevance has increased in light of the ratification of the Agreement with the European Union: the key question here is whether structural differences between the two legal environments may possibly undermine the predictability and economic outcome of the trade between Latin and European firms.

Therefore, the objective of this thesis is analyzing the implications of the fragmented contractual scenario within MERCOSUR and to evaluate its relevance in the context of the new Agreement. More specifically, the research concentrates in depth on how the applicable law is chosen for those contracts concluded in MERCOSUR countries, the degree of acceptance of party autonomy, and last, the capacity of international and transnational legal instruments of reducing legal fragmentation. In addition, it is presented a comparison with the European

experience, in which the establishment of common rules on these matters appears to have created a more foreseeable and coherent environment.

A comparative and doctrinal approach has been adopted throughout the entire research, which led to the creation of three chapters.

In sum, the first chapter introduces the reader to an overview of MERCOSUR, by explaining its historical development and treaties, objectives and the institutional structure. Particular attention is given to its intergovernmental nature and how it affects the harmonization process. Then, the second one focuses more specifically on contract law implications in MERCOSUR Member States: differences and similarities are highlighted. Finally, the third chapter links the previous analysis with the EU-MERCOSUR Agreement. It explores its main takeaways and considers choice-of-law and choice-of-forum issues in commercial contracts between Latin and European parties. Also, it examines the European experience and its potential role as a model to achieve a greater convergence. Last, good faith principle and fair dealing are taken in consideration as instruments for developing common standards of conduct in light of the Agreement.

ABSTRACT (ITALIAN VERSION)

Lo sviluppo sempre più intenso degli scambi commerciali internazionali e delle transazioni economiche transfrontaliere ha rivoluzionato il concetto di contratto commerciale, rendendolo uno strumento essenziale che va ad unire imprese operanti in contesti giuridici diversi. In tal senso, la presenza di un quadro normativo affidabile acquista particolare importanza, poiché le dissimilitudini tra gli ordinamenti nazionali possono gravare sul processo di creazione, interpretazione ed esecuzione dei rapporti contrattuali tra imprese estere. Pertanto, l'individuazione della legge che governa il contratto si configura come una questione centrale per le parti coinvolte nelle operazioni commerciali internazionali, in particolar modo quando sono interessati Stati appartenenti a differenti sistemi di integrazione regionale.

Questa problematica assume ancor più rilevanza nell'interazione tra il MERCOSUR (Mercato Comune del Sud) e l'Unione Europea. Fondato nel 1991, il MERCOSUR nasce con l'intenzione di promuovere l'integrazione economica regionale per favorire la realizzazione di un mercato comune che agevolasse la libera circolazione di beni e servizi tra gli Stati membri. Sebbene, da un lato, tale processo abbia portato al rafforzamento della cooperazione economica e commerciale tra Argentina, Brasile, Uruguay e Paraguay, risultati analoghi non si sono registrati per quanto riguarda l'omogeneizzazione dei rispettivi ordinamenti giuridici nazionali. Difatti, il diritto dei contratti si mostra ancora ampiamente

dipendente da essi. Inoltre, la natura intergovernativa del MERCOSUR pare abbia contribuito a mantenere elevato il grado di frammentazione normativa, limitando dunque l'avanzamento dell'armonizzazione giuridica tra gli Stati membri. Infatti, essi adottano approcci differenti sia per determinare la legge applicabile al contratto, sia per quanto riguarda il riconoscimento dell'autonomia delle parti. In generale, alcuni ordinamenti riconoscono una libertà di scelta più ampia, mentre altri un metodo più restrittivo. A ciò si affianca la presenza di strumenti internazionali e transnazionali, quali i Principi UNIDROIT, i Principi dell'Aia sulla scelta della legge applicabile nei contratti commerciali internazionali e la Convenzione di Vienna sulla vendita internazionale di beni (CISG), i quali possono contribuire a ridurre l'incertezza derivante da questa frammentazione. Nonostante ciò, la loro applicazione all'interno del MERCOSUR non sembra ancora sufficiente a garantirne uniformità. Il risultato è che la imprevedibilità giuridica continua a rappresentare un problema concreto per le imprese che intrattengono rapporti commerciali con controparti situate in questo blocco.

Questa complessità entra ancor più in gioco alla luce del nuovo Accordo tra Unione Europea e MERCOSUR. In questo contesto, pare legittimo chiedersi se le differenze strutturali tra i due sistemi giuridici possano incidere sulla chiarezza dei rapporti contrattuali e, conseguentemente, sugli effetti economici delle relazioni commerciali tra imprese europee e latinoamericane.

Tenendo conto di ciò, il presente elaborato si propone di analizzare le implicazioni che derivano dalla frammentazione del diritto contrattuale all'interno del MERCOSUR e di valutarne l'effettiva rilevanza nel contesto del recente Accordo. Nello specifico, la ricerca analizza i metodi attraverso cui viene determinata la legge applicabile ai contratti commerciali nelle varie giurisdizioni nazionali dei rispettivi Stati membri, il livello di autonomia delle parti e la capacità degli strumenti internazionali e transnazionali di contribuire alla riduzione della frammentazione giuridica. A tale indagine si affianca un confronto con l'esperienza europea, nella quale l'introduzione di norme comuni in materia di diritto contrattuale ha portato alla creazione di un quadro più coerente per gli operatori economici.

La ricerca ha adottato un metodo prevalentemente comparatistico ed accademico, ed è articolata in tre capitoli. Il primo capitolo mostra un quadro generale del MERCOSUR: la sua evoluzione storica, i trattati, gli obiettivi e la struttura istituzionale. Particolare riguardo è dato alla sua natura intergovernativa e alle conseguenze che essa produce sul processo di armonizzazione giuridica tra gli Stati membri. Poi, il secondo si sofferma sulle implicazioni che il diritto contrattuale possiede nei diversi ordinamenti, andandone ad analizzare le principali differenze e similitudini. Infine, il terzo capitolo si propone di unire i risultati dell'analisi precedente al rapporto tra UE e MERCOSUR. Infatti, dopo aver esposto i principali elementi dell'Accordo e la sua rilevanza economica, si indagano gli aspetti relativi alla scelta della legge applicabile e del foro competente nei contratti commerciali

conclusi tra attori situati nelle relative zone. Viene inoltre presa in considerazione l'esperienza europea in materia di armonizzazione e coordinamento del diritto contrattuale, al fine di valutarne la possibile rilevanza come modello da intraprendere per ottenere una maggiore coerenza normativa all'interno del Mercado Común del Sur. Infine, vengono analizzati (in modo generale e all'interno dell'Accordo) i principi di *buona fede* e *fair dealing*, poiché ritenuti strumenti atti a definire degli standard di condotta comuni per rafforzare la prevedibilità dei rapporti tra attori commerciali nel contesto UE-MERCOSUR.

1. MERCOSUR: A COMPREHENSIVE LEGAL FRAMEWORK

In order to be more aware of the regional integration process in South America, it is vital to recall the political and economic context prior the creation of the Southern Common Market, better known as MERCOSUR. In fact, its emergence is the outcome of a long and complex historical journey marked by multiple integration attempts and repeated difficulties.

However, the study of its institutional structure is a prerequisite for the analysis of contracts' stipulation in its Member States. Essentially, it will determine whether a common *contract law* exists within the bloc or if the parties involved are constrained by different national legislations on this matter, mining the possibility of commercial success with the well-structured European Union and among the overall international trade.

1.1 HISTORICAL EVOLUTION

It is possible to trace back the first integration initiatives to the 1960s, with the first attempt being the creation of the Latin American Free Trade Area, or simpler ALALC. Most of the Latin countries decided to participate, such as Argentina, Brazil, Bolivia, Mexico, Paraguay, Peru, Chile, Uruguay, Ecuador, Venezuela and Colombia. Despite its ambitious goals, it is true to say that the project failed to deliver the expected results due to a rigid institutional framework, a lack of

coordination between the interested countries and their asymmetries in the economic development.

Only after 20 years, it was transformed into ALADI, the Latin American Integration Association. The main aim was providing an economic support to the interested region, and the establishment of a common market, long-term speaking. However, although the Association chose a more pragmatic and less rigid approach compared to the ALALC's one, the results were not astonishing: it led to the generation of just a few agreements.

A concrete Free Trade Area was far from its creation, due to intense political and economic issues. At the beginning of the 1980s, South America experienced a period characterized by debt crisis, which led to severe macroeconomic trade imbalances: many countries passed through both inflation and stagnation phenomena, which decreased their overall growth. The reduced capability of international competitiveness forced the adoption of protectionist regimes, further weakening the integration process.

One little step ahead was made when Brazil and Argentina, respectively in 1985 and 1983, started their transition to a democratic government. The Argentinian President Alfonsin was the first to capture the need of getting closer to an economic engagement and peaceful relations with other nations, especially with Brazil. These two main actors of the Southern Cone signed a bilateral rapprochement: the Declaration of Iguaçu. It represented an act of reconciliation between two countries

that lived too long a relationship marked by mistrust, geopolitical competition and economic rivalry. The idea behind was clear: building a common space where it was possible to strengthen the regional competitiveness in order to reduce the dependence on external economies.

Despite the favorable intentions, the economic crisis was too deep; Argentina's trade deficit was growing: the exports of food and raw materials, which formed the basis for a possible agreement, were losing value. In such scenario, Alfonsin and the Brazilian President Jose Sarney gave up to the integration process.

The uncertainty about the development of regional integration disappeared with the election of the new Presidents, Carlos Saúl Menem in Argentina and Fernando Collor de Mello in Brazil. In July 1990, they signed the "*Acta de Buenos Aires*", which marked a new phase of closed-to-open trade and reform programs. When reading the official Act, we can comprehend the main objective:

> «Establecer un Mercado Común entre la República Argentina y la República Federativa del Brasil, el que deberá encontrarse definitivamente conformado el 31 de diciembre de 1994. Ambos Gobiernos tomarán todas las medidas necesarias con el fin de cumplir con el objetivo, poniendo

especial énfasis en la coordinación de políticas macroeconómicas y en las rebajas arancelarias[1]»

After a while, Paraguay and Uruguay decided to join the Act, each for different reasons. Uruguay saw the liberalization between Argentina and Brazil as a threat for its preferential access to those markets. Instead, Paraguay's decision was politically driven: its participation meant the breaking with the military regime and the opportunity for a transition towards democracy. Therefore, the Foreign Ministers of these countries reunited on March 26, 1991 and signed the Asuncion Treaty, which led to the final creation of MERCOSUR. As said, it «is the culmination and institutionalization of the bilateral integration process that began many years ago[2]».

1.2 OBJECTIVES

The formation of MERCOSUR is driven by the chasing of defined goals across multiple sectors: the deep economic integration always stands at the core.

[1] *Acta de Buenos Aires (6 de julio de 1990)*. 2010. *Derecho Internacional Público – dipublico.org*. 24 giugno 2010. https://www.dipublico.org/4004/acta-de-buenos-aires-6-de-julio-de-1990/
[2] Kaltenthaler, Karl, and Frank O. Mora. "Explaining Latin American economic integration: the case of Mercosur." Review of International Political Economy 9, no. 1 (2002): p.74.

1.2.1 Economic objectives

In particular, the establishment of the common market provides the basis for the analysis of the economy-related objectives. At the economic level, as said above, Member States are pursuing an integration process capable of ensuring an efficient allocation of resources, which mostly guarantees the functioning of the national markets as and within a single economic space. Moreover, the free circulation of goods and services stimulates the trade-flow in the short-term, while the movement of factors of production (such as, capital and labour) encourages cross-border investments.

Another important goal is the prevention of market fragmentation: in order to avoid this matter, MERCOSUR experienced a gradual removal of tariffs, non-tariff barriers, technical barriers, quotas and other quantitative restrictions that can hinder the intra-trade. Then, the objective of a unified external trade policy is obtained through the adoption of a Common External Tariff (CET) by the Member States, reinforcing their strategic positioning in international negotiations. Essentially, MERCOSUR goes beyond a simple trade liberalization mechanism, aiming to a shared coordination of macroeconomic and sectoral policies in many areas (for instance agriculture, manufacturing industries, and transports).

1.2.2 Trade and development objectives

At the same time, MERCOSUR tries to achieve broader trades and development strategies in multiple ways. For instance, one key means is the expansion of the

intra-regional trade that enhances the nations' value chains and productive industries, reducing the dependence on foreign markets. It is possible to consider it as an instrument for promoting long-term economic growth: in fact, when individual economies start cooperating, they are more likely to prevent isolation and vulnerability to external shocks.

In this scenario, a further vital objective is the reduction of structural asymmetries among Brazil, Argentina, Uruguay and Paraguay. Since it is true that they suffer some disparities, MERCOSUR tries to foster an equal development through flexible mechanisms and targeted programs.

Globally oriented, the Southern Common Market adopts coordinated external actions to influence the global trading system and facilitate its expansion into the world economy.

1.2.3 Political and institutional objectives

To support and sustain over time the integration process, the economic sphere is not the only one that needs to function properly, but politics is too. In this sense, one of the main objectives is the cooperation in the dialogue among the Institutions of Member States, which leads to increased trust among them.

In addition, through the ratification of the Ushuaia Protocol, MERCOSUR ensures the consolidation of democracy within the bloc: democratic governance represents

a fundamental condition for the participation in the common market, promoting political stability.

At the institutional level, the main aim consists in harmonizing the different national legislation in those areas that are most relevant to integration: essential would be the reduction of legal fragmentation to provide a greater sense of legal certainty and regulatory coherence. However, as it is going to be highlighted further, this last objective represents one the greatest challenges for MERCOSUR, due to different reasons.

1.2.4 Social objectives

In the end, MERCOSUR has added into its agenda some objectives related to the societies of the Member States.

The overall integration process is meant to increase equally the welfare among nations by improving living standards, job creation and higher income levels per capita: social cohesion and inclusion are necessary. Moreover, the democratic values reflect another key aim that has emerged, which is the promotion of human rights.

More recently, the debate on sustainable development and the environment in the MERCOSUR legal systems has been added into the agenda. In general, environmental protection and sustainable development configure as pillars, which could allow Member States to align with the international commitment in

combating climate change. Nevertheless, Bressan and Garcia state that it is still an ongoing project:

> «An analysis of Mercosur documents shows that generic mentions of the Sustainable Development Goals prevail over those of specific SDGs, which demonstrates more rhetoric and low adherence to the creation of effective actions. In addition, mentions of the SDGs are scattered throughout Mercosur's decision-making bodies and technical instances, which makes it difficult to concentrate resources for the adoption of regional policies and mechanisms aimed at implementing the 2030 Agenda… There is still no regional climate change policy in Mercosur. The research highlights the need for a collaborative and technologically advanced approach to tackling environmental challenges in the region[3]»

To conclude, it is possible to state that from the evidences, MERCOSUR emerges as a multidimensional project, which multiple and sectorial objectives reflect the ambition of building a developed-integrated regional area.

[3] Bressan, R. N., e T. S. L. Garcia (2023*)*. Mercosur and Environment: progress in promoting the Sustainable Development Goals and the 2030 Agenda**.** Revista Brasileira de Política Internacional**,** 66(2), pp. 16-18.

1.3 TREATIES and PROTOCOLS

1.3.1 Treaty of Asunción

MERCOSUR's history lies on the ratification of multiple Treaties, Protocols and Agreements. As briefly highlighted in the analysis above, the Southern Common Market originates with the Treaty of Asunción in 1991. It is true to admit that it represents the founding instrument of the integration process in Latin America. When it was signed, it established the key objectives to be pursued over time: the first, as known, was to expand the dimension of the national markets through the creation of a common market and the elimination of restrictions to trade. Actually, the implementation of these measures boosted the intra-trade in the region: an annual growth in productivity rate higher than 26% was registered during 1991-1997. However, a decline started in 1998 and according to Bordazar "it occurred after several international events that negatively impacted the region, including the reduction in commodity prices and the financial, currency crises in Southeast Asia and Russia and the devaluation in Brazil" (Bordazar, 2021). Specifically, the devaluation of the Real uncovered the integration incompletion with a lack of coordination in the macroeconomic policy: in fact, no mechanism was immediately adopted to address the devaluation.

In addition, the Treaty established the free circulation of goods and services. Nevertheless, it is argued that many divergences have arisen in the functioning of

MERCOSUR as a free trade area and in the coordination of its trade policies. Indeed, according to Zelicovich[4], trade between the Member States has been affected by the application of instruments that instead acted as restrictions. In particular, Zelicovich takes as a starting point the financial crisis occurred in 2014 in South America, showing that they resorted to protectionist behaviors to defend their national markets. The application of non-automatic import licenses, safeguard measures and antidumping duties by Member States revealed a sort of breaking with the focal Treaty. It is worth noting that in Argentina in 2014, Brazil was the second most affected market by antidumping measures, following China. To summarize, it is possible to state that the general reaction to the crisis did not stick to the Asunción's commitments and, at the same time, it did not display the regional coordination expected in an "integrated" area.

1.3.2 Ouro Preto Protocol

The Treaty left the institutional development and enforcement mechanisms undefined. Only three years later, in 1994, the Ouro Preto Protocol contributed to shape MERCOSUR'S legal personality and define its structure: it chose an intergovernmental decision-making model, based on the *consensus* rule. However, it did not manage to create supranational bodies that could endow MERCOSUR law with supremacy: in fact, its law does not have a direct effect on the Member

[4] Zelicovich, J. (2015). El MERCOSUR a 20 años del Protocolo de Ouro Preto: un balance de la dimensión comercial. Revista Latinoamericana De Desarrollo Económico, 13(24), pp. 97-112.

States' national legal systems, but it requires to be incorporated to produce an internal effect.

It is fair to say that, in the academic literature, there are many criticisms towards this institutional design, as it has significant implications for the functioning of the bloc. In fact, Dreyzin de Klor wrote, «one of the major flaws in the process was precisely this lack of firmness in taking such an important decision in defining the institutional structure of MERCOSUR[5]». In her opinion, the obstacles to the advancement of the integration process deriving from this matter, could be solved through an institutional reform, which implements a supranational scheme that reduces the Member States' partial sovereignty.

If it is evident that, at the beginning of the entire process, the intergovernmental model was the one that provided most of the support, nowadays it reveals that MERCOSUR, as an entity, is still too dependent on its Member States. This leads to an overall fragmentation in different areas, and generates limited predictability in the dispute resolution.

1.3.3 Ushuaia Protocol

In 1992, the Member States signed the Declaration of Las Leñas, through which they began to affirm their commitment to a democratic regional integration. In this sense, the concept of functioning democratic institutions as a fundamental

[5] Dreyzin de Klor, A. (2010) Introduction to the Law of MERCOSUR, p.37

prerequisite, actualized with the ratification of the Ushuaia Protocol in 199 8 by the Member States and two Associated States, namely Chile and Bolivia. Article 1 officially reports «la plena vigencia de las instituciones democráticas es condición esencial para el desarrollo de los procesos de integración entre los Estados Partes del presente Protocolo[6]». In order to provide this protection, the Protocol implies sanctions in case of non-compliance: if a country commits a violation, measures are taken against it and if they reveal to be unsuccessful, that country's rights and obligations might be suspended within MERCOSUR.

On one hand, Gustavo Pereira Rubim evaluates positively the strength of the Ushuaia Protocol, especially referring to the case of Venezuela. With the death of Hugo Chávez and the succession of Nicolás Maduro, the country political and economic crisis increased notably. In 2017, the situation worsened and due to the failure to comply with the democratic norms, MERCOSUR decided to suspend Venezuela for an indefinite period. According to him, this case is more related to the individual interests of the dictator than with the Protocol's guidelines; thus, the Protocol represents a concrete step toward the democratic security of the region (Rubim, 2022).

However, at the same time, it is important to cite that this security seemed to vacillate with Bolsonaro's government in Brazil, which led to a period of political

[6] MERCOSUR. (24 de julio de 1998). Protocolo de Ushuaia sobre Compromiso Democrático en el MERCOSUR, la República de Bolivia y la República de Chile .

conflict and a reduction in coordination. In addition, his political decisions is one of the multiple reasons why the ratification of MERCOSUR-EU Agreement has stopped.

1.4 INSTITUTIONAL BODIES

Before proceeding to examine deeply the legal nature of MERCOSUR, it is necessary to highlight its institutional structure. It appears to relate strictly to the ratification by the Member States of the "Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR" or *Protocol of Ouro Preto* in 1994. From then on, MERCOSUR converted into a concrete international organization by expanding its functions and establishing six stable institutional organs[7].

1.4.1 Decision-making bodies

Decision-making bodies are those endowed legal and official power to take binding decisions. In MERCOSUR's institutional framework, there are three governing bodies worthy of analysis.

The highest one is the *Common Market Council*: it is responsible for governing the whole integration process and for setting the right political path to ensure the achievement of the previous-stated objectives. Essentially, it directs

[7] All information regarding Mercosur's Institutional Organs derives from the official Ouro Preto Protocol (https://www.mre.gov.py/tratados/public_web/ConsultaMercosur.aspx)

MERCOSUR's political agenda and it can negotiates agreements with third partners.

The Ministers of Foreign Affairs and Ministers of Economy of each Member State compose the CMC. Its Presidency is held by rotation among Member Nations, in alphabetic order, for a period no longer than six months. CMC reunites as often as necessary, but a meeting is compulsory at least once every six months with the participation of the Presidents. Meetings are coordinated by the Ministers of Foreign Affairs, and other authorities at the ministerial level can be invited to participate depending on the topic.

Decisions taken by the CMC configure as primary legal acts and they are binding on all Member States, meaning that they must be implemented once approved.

Then, the *Common Market Group* (GMC) configures itself as the executive body: in fact, it has the responsibility of implementing the decisions taken by the Common Market Council. In addition, it guarantees compliance with MERCOSUR legal instruments (such as the Treaty of Asunción, its Protocols and other agreements) and issues its final decisions through Resolutions that are binding on Member States. Another task is the creation of work programs that ensure a development towards the integration in the common market. It can create, change or cancel those organs or working groups, which present technical issues that can potentially harm the harmonization process. Moreover, it penetrates the financial area by approving

or adopting changes on the budget and the annual report submitted by MERCOSUR Administrative Secretariat.

For what concerns its composition, each Member State appoints four "full members" and four "alternates", which can be chosen from the Ministries of Foreign Affairs, Economy and the Central Bank. The GMC meets at least once every three months, rotating among the State Parties.

The third governing organ is the *MERCOSUR Trade Commission* (CCM), which is a specialized body that administers the implementation of the common trade policy instruments needed for the correct functioning of the common market. At the same time, it monitors issues related with the common trade policies, MERCOSUR intra-trade and businesses with third-countries. In fact, it is endowed to take decisions about the application (and relative changes) of the common external tariff, ensuring it is applied correctly. It issues Directives that are binding on Member States. Speaking about its composition, like the GMC, the CCM the CCM has four full members and four alternates per States Parties and it is coordinated by the Ministries of Foreign Affairs, who meet at least once a month.

1.4.2 Bodies with consultative nature

Bodies characterized by consultative nature, also known as advisory bodies, are responsible for providing recommendations, assessments and specialized advice. Despite the lack of formal, binding and decision-making authority, they provide a

fundamental contribution to the activities carried out by the bodies mentioned above.

It is true to say that, the *Joint Parliamentary Commission* (CPC) was the predominant advisory body in MERCOSUR structure. Established in 1994 through the Ouro Preto Protocol's ratification, the CPC acted as the first representative body of the Member States' national parliaments, fulfilling different and multiple functions. In general, it operated as a forum where an equal number of parliamentarians were selected to ensure a fair representation of their national legislatures. In this sense, the Commission started a long path of attempts in order to harmonize the national laws, trying to accelerate the domestic procedures for the incorporation of MERCOSUR norms into the national legal systems. However, the CPC also performed greatly its advisory role by issuing recommendations mainly on the integration process. Additionally, it executed a consultative function for the Council by examining high-priority issues related to legislative analysis to ensure an effective decision-making process. To summarize, the CPC configured as a link between the inter-governmental organs and the domestic legislative bodies for a decade.

Nevertheless, as the integration process was arising, it became evident that MERCOSUR needed a more autonomous regional legislative body, which could represent its citizens in a better way. In this regard, an Agreement and the drafting of the Constitutive Protocol led to the establishment of the MERCOSUR Parliament

(PARLASUR) in 2003 – 2004. Two years later, the National Parliaments of each Member States unanimously approved the related Protocol and in December, the MERCOSUR Parliament was officially created in Brasilia. With its headquarters set in Montevideo, it began a transition phase that led first to the appointment of parliamentarians by their respective national congresses, and then to their direct election. It is reasonable to assume that this institutional replacement was not intended just as an administrative reform, but as an embodiment of those principles that guided the foundation of the Parliament:

> «La instalación del Parlamento del MERCOSUR, con una adecuada representación de los intereses de los ciudadanos de los Estados Partes, significará un aporte a la calidad y equilibrio institucional del MERCOSUR, creando un espacio común en el que se refleje el pluralismo y las diversidades de la región, y que contribuya a la democracia, la participación, la representatividad, la transparencia y la legitimidad social en el desarrollo del proceso de integración y de sus normas[8]».

If PARLASUR is more oriented to the broad area of legislation, on the other side the Economic and Social Consultative Forum (FCES) represents the social-economic actors and sectors of each Member State, such as employers, workers' organizations and other civil groups. It is called to carry out many functions: one of

[8] Parlamento del Mercosur. *Protocolo Constitutivo del Parlamento del Mercosur*, p.1. (https://www.parlamentomercosur.org/innovaportal/file/175/1/protocolo_es-1.pdf)

them is the representation of non-governmental sectors, ensuring that the integration process takes in consideration social implications as well. Moreover, it analyzes how the policies designed to support the integration process influence the social and economic areas during the different phases of their implementation. In this context, it has the responsibility of conducting researches in order to find out which of these policies can be the most adequate to regulate integration.

However, Rodriguez Yong claims that the role of the Forum should be considered in light of some limitations: the FCES operates in advisory capacity, thus its recommendations and analysis are not binding on the Member States. Consequently, despite carrying out an important function in representing social actors, its ability to shape decision-making process in MERCOSUR remains constrained. According to him, this lack of enforceability reduces its effectiveness in establishing legal certainty (Rodriguez Yong, 2010).

The last one mentioned by Ouro Preto Protocol is the MERCOSUR Administrative Secretariat (SAM): it is its technical and operational support organ. Actually, it is the official archive of MERCOSUR documents and it has an active role: in fact, it translates the documentation in both Portuguese and Spanish and it is responsible for their publication in the *Boletín Oficial*. Essentially, the Secretariat keeps the institutional work organized and accessible, which is an obvious key-success requirement for an international organization.

1.4.3 Permanent Review Tribunal

For our analysis, it is worth underlining that in MERCOSUR institutional framework there is a judicial body: the Permanent Review Tribunal (TPR). It was established in 2002 through the ratification of the Protocol of Olivos, which also defines its main purposes. It provides the right interpretation and application of all MERCOSUR protocols, agreements and the related normative instruments. As it is a permanent judicial body, the TPR has the power to change the decisions taken by arbitrational tribunals and if the disputing parties agree, it can act as the only body for the dispute resolution. Its decisions have legal effects and they are binding for all the parties or States involved. Its structure consists in five arbitrators (four appointed by each Member State and one selected unanimously).

It is possible to state that understanding how the TPR deals with legal disputes is particularly relevant in determining contract law implications within MERCOSUR: in fact, its coherence and predictability might directly affect the legal certainty of the region. Nowadays, the effectiveness of the Tribunal is still subject of debate mainly because of the contrast between its dispute-resolution method and the organization's intergovernmental structure, as argued by Labrano. In his opinion, the TPR acts in a way that preserves the national sovereignty to a significant extent, and so its capacity to act autonomously is limited. In this sense, he defines it a "truncated" judicial body. Such limitations are evident also in another challenge that the TPR has to face: private actors have a restricted access to it, meaning that

individuals and firms are unable to bring cases directly to the Tribunal, but they have to rely on a state-controlled intermediation, called "political filter". This major issue is described not only by Labrano, but also by other scholars such as Almeida. She explains that for both private actors, individual citizens and corporations, the *locus standi*[9] does not exist, resulting in their inability to access the Tribunal straight. Instead, they are bound to the intervention of national authorities through the "National Section" of the CGM. In her opinion, this introduces a "non-judicial" filter, through which national governments might decline private complaints and legal claims for strategic reasons. In this way, the economic actors that are willing to operate in these markets could be discouraged by this vulnerability (Labrano, 2014; Almeida, 2018).

Following the same path, Rodriguez Yong argues that the legal certainty provided by the TPR depends largely on the possibility for foreign investors to have access to it:

> "For foreign investors, this system is not favorable for guaranteeing legal certainty for their investments because of two main reasons… for legal and administrative measures of a different character there is no cause of action

[9] The expression l*ocus standi* is used to express "the right or capacity to bring an action or to appear in a court".

for individuals. The second inconvenience for foreign investors is that there is no direct access to the Permanent or ad hoc Tribunals[10]".

To sum up, the impossibility for foreign investors to challenge MERCOSUR-non-compliant measures restricts their access to justice, creating weaknesses in the legal certainty.

An arbitration case[11] happened in 2005 between Uruguay and Argentina regarding the trade of remolded and retreaded tyres reflects the previous analysis. The dispute started when Argentina prohibited the import of used tyres into its national market: the Foreign Ministry stated that such decision was taken because those tyres mainly had a short lifespan and they would quickly become waste, consequently dama ging the environment. However, this measure affected a Uruguayan private firm called *Serisur*, since one of its main businesses was exporting these goods to other MERCOSUR associates. Thus, the country filed a lawsuit against Argentina's decision, saying that it constituted a restriction on free trade in the bloc. The dispute was ultimately brought to the Permanent Review Tribunal, which accepted Argentina's ban on imports. Nevertheless, the Tribunal's choice is perceived as ambiguous because only three years before, in 2002, the same litigation happened

[10] Camilo A. Rodriguez Yong, Providing Legal Certainty in South America: Can Mercosur Help?; Pace Int'l L. Rev. Online Companion, Oct. 2010, pp.28-29.

[11] EL PAÍS URUGUAY, *Uruguay pierde arbitraje con Argentina por neumáticos*, "El País Uruguay", https://www.elpais.com.uy/negocios/noticias/uruguay-pierde-arbitraje-con-argentina-por-neumaticos

with Brazil. In that specific case, the TPR ruled in favour of Uruguay, allowing the trade of such goods.

This case shows the vulnerability of MERCOSUR judicial system in different ways. First, it recalls the limitation of *locus standi* before the Tribunal: although Serisur resulted to be main victim of the ban on imports, it could not continue a legal action privately but it had to rely on the State to access the TPR. In addition, it seems to validate both Yong and Labrano's analysis: if the TPR confers such variable outcomes in litigations even between the MSs, it seems reasonable to fear the same uncertainty in international cases.

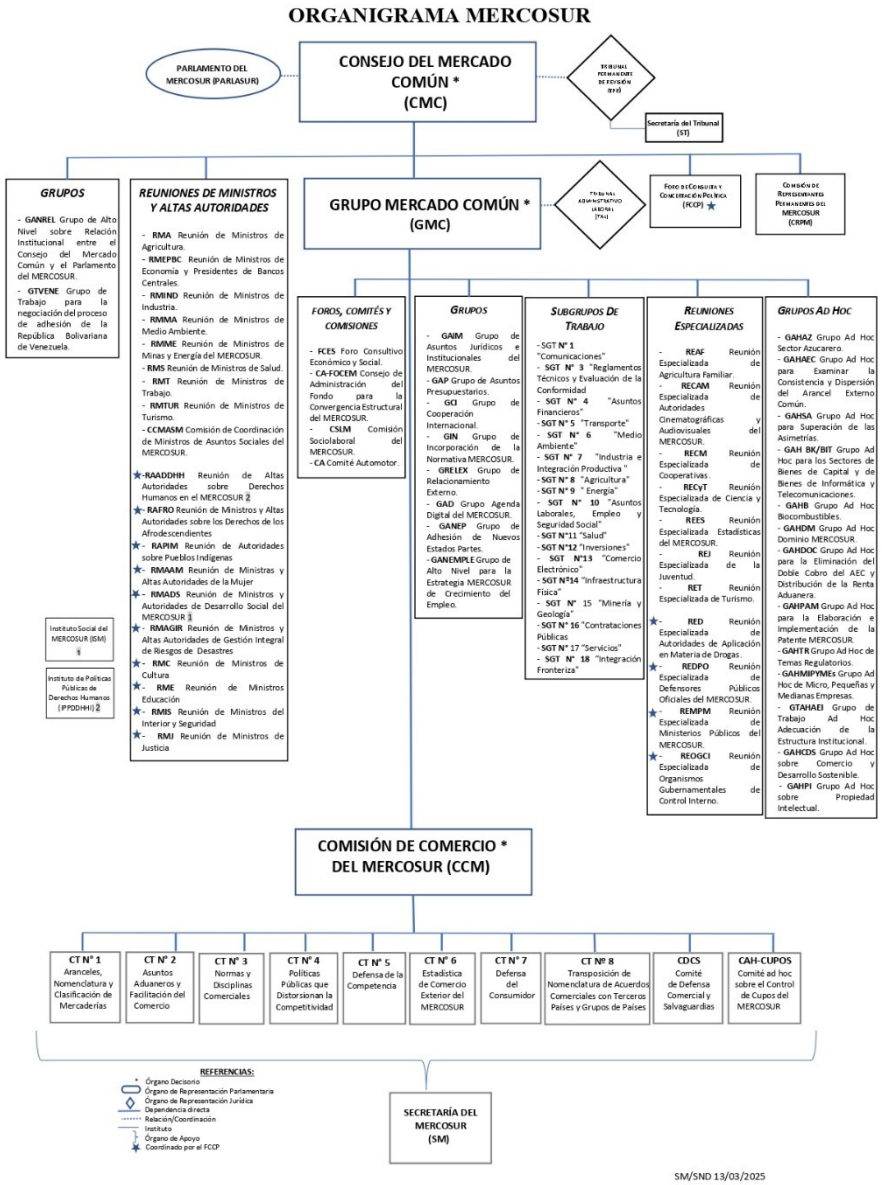


Figure I.1 sums up the institutional structure of MERCOSUR, highlighting its main decision-making, executive, and supporting bodies, as well as their functional relationships within the regional integration framework.

1.4.4 Intergovernmental Nature: a brief comparative analysis with the EU model

If the objective of an international organization such as MERCOSUR is to establish a framework where the legislations of the Member States are harmonized, it can be argued that this goal is far from being completely achieved; in fact, it continues to represent an ongoing process.

According to Moravcsik, the main element differentiating MERCOSUR law from that of the European Union lies in its intergovernmental character. In this sense, he has described it as an intergovernmental organization marked by strong presidential features. It is true to state that this characteristic clearly differentiates them, especially with regard to the employed institutional instruments. In the European context, the supranational institutions can exercise a more decisive influence on the integration process with respect to the single governments. In this way, they have the ability to propose comprehensive legislative reforms without being limited by national parties' pressures. Moravcsik adds that the fundamental components, which contributed to shape the process of European integration, can also be identified in MERCOSUR's experience: the interstate negotiation with the formation of national preferences. In the EU, States still function as primary actors in the integration process, strongly driven by economic interests. Quite the same happen in the Southern Cone, but some divergences emerge. If Member States of the European Union accepted progressively to transfer their sovereignty, the same did not happen in MERCOSUR's framework. Moravcsik criticizes the limited

effectiveness of its institutions, along with the restricted political, financial and legal autonomy when taking decisions regarding the conduct of the Member States. On this basis, the intergovernmental structure does not appear to mitigate institutional weaknesses, rather to reinforce them (Moravcsik, 1993).

In this context, it is true to say that, this mechanism in MERCOSUR creates a context of legal fragmentation. Legal certainty within a country's legal system plays a crucial role in influencing foreign investors' decisions about where to invest. Therefore, it is essential for countries to establish mechanisms that reduce or cancel this uncertainty to maximize commercial success. This importance is illustrated by a report written in 2008 in the newspaper *La Nación*, which noted that the British multinational Alexander Gold Group decided to abandon its copper and silver project in the region of Salta in Argentina. One of the reasons cited for this decision was the presence of legal uncertainty, which was mining the development of the project[12]. Yet, this is not the only case: in 2004, an iron and steel company called Acepar, referred to the Paraguayan government to resolve the legal uncertainty that was affecting the execution of its business activities.

However, according to Rodriguez Yong other elements influence the unwillingness of investors to choose these markets as primary ones. First, neither the Treaty of

[12] Carlos F. Pastrana, Una multinacional suspendió un proyecto minero en Salta, LA NACION (Arg.), June 26, 2008. https://www.lanacion.com.ar/economia/una-multinacional-suspendio-un-proyecto-minero-en-salta-nid1024744/

Asunción nor the Ouro Preto Protocol expressly recognize the principle of supremacy. Although recognized by the Permanent Review Tribunal, its position does not seem to concur with the one of the Member States: in fact, Brazil has not expressed recognition of MERCOSUR's supremacy over its national constitution. Article 102 of Brazil's Constitution is considered the one that underlines this fact:

> "The Supreme Federal Tribunal has primary responsibility for safeguarding the Constitution, with the power to decide on extraordinary appeal, cases decided in sole or last instance, when the appealed decision declares a treaty or a federal law unconstitutional[13]."

Rodriguez Yong argues that also in Uruguay, the Constitution seems to be at the top of the legal system. For what concerns Argentina, we register an ambivalence: the Constitution has the priority, but when it comes to ordinary laws, MERCOSUR laws can override the national ones; since the country respects the *pacta sunt servanda* principle, Argentina must follow the commitments made when it joined. Overall, this partial recognition of supremacy represents a despicable incentive for foreign investments.

A second motivation the author gives is the limited binding character of MERCOSUR, since its law is not directly incorporated into the national legal

[13] (Brazil. (1988). Constitution of the Federative Republic of Brazil. Article 102, Clause III, Item b. https://www.gov.br/defesa/pt-br/acesso-a-informacao/governanca/governanca-do-setor-de-defesa/legislacao-basica-1/arquivos/2022/constituicao-da-republica-fe, s.d.)

orders. He argues that this happens because the principle of direct application is not respected, unlike in other integration systems, such as the European Union (Rodriguez Yong, 2010).

2. CONTRACT LAW IN MERCOSUR MEMBER STATES: A COMPARATIVE ANALYSIS

2.1 MERCOSUR LEGAL NATURE

As cited in the previous chapter, the analysis of contract law within the MERCOSUR's Member States necessarily deals with the examination of its legal nature, since it represents a matter that deeply influences the regulation of private legal relationships within the bloc. As known, it embodies an intergovernmental model, where decision-making process is prone to remain in the hands of the Member States and normative acts require domestic incorporation to produce internal legal effects.

It is widely known that many scholars have conducted studies on this topic, but Jerabek offers a perspective worth of analysis: first, she tries to delineate the difference between the supranational and intergovernmental models, and then she interrogates herself whether it is possible for MERCOSUR to adopt the first one. The partial transfer of sovereignty and the existence of independent institutions that have normative authority capable of producing binding legal acts with direct effect and supremacy over national legal orders is what characterizes a supranational system, such as the one in the European Union. Jerabek sustains that these features have enabled the harmonization of private law, guaranteeing uniform application and legal certainty within the Union. In contrast, MERCOSUR operates with a

model that lacks both equivalent principles of direct effect, or supremacy, and centralized enforcement mechanisms.

Taking in consideration the Ouro Preto Protocol, it is true that the CMC obtained a representative function and it can exercise the legal personality of MERCOSUR international law. Nevertheless, she recalls Art. 37, which reveals that the Member States did not pretend to attribute to it any supranational characteristics. In fact, it makes clear that decisions made by the bloc's Institutions happen *by consensus* and in presence of all the Member States:

> «Las decisiones de los órganos del Mercosur serán tomadas por consenso y con la presencia de todos los Estados Partes[14]»

Jerabek argues that this configuration has enormous consequences for the functioning of contract law within the bloc. Thus, the regulations of contracts appears decentralized, having its roots in the individual domestic legal systems. In fact, as it will be discussed soon, there is no international convention that unifies the choice of law in commercial contracts in Latin America. In this sense, national civil codes continue to govern contractual relations: this undermines both their interpretation and resolution, generating a fragmented legal landscape. It is clearly noticeable that the absence of supranational institutions reinforces this divergence.

[14] MERCOSUR, *Protocolo de Ouro Preto adicional al Tratado de Asunción sobre la estructura institucional del MERCOSUR*, Art. 37, 1994. https://www.mercosur.int/documento/protocolo-ouro-preto-adicional-tratado-asuncion-estructura-institucional-mercosur

At this point, Jerabek asks herself whether it is feasible for MERCOSUR to switch and adopt the supranational scheme. To answer that question she conducts an analysis based on Best's key variables[15]: a) Number of member states, b) The relative sizes of the participating countries, c) Degree of real interdependence, d) The political framework, e) Perceptions, values and norms.

	Key variables	Possible challenges
1	**Number of member states**	
2	**Relative size of the participating countries**	
3	**Degree of real interdependence**	Degree of complementary Intra group trade Degree of transnational interaction Importance of political ties Importance of military alliances
4	**Political framework**	Existence of common threat Awareness of individual international impotence Existence of historical perceptions of the relationships between the participating countries
5	**Perceptions, values, norms**	(Dis)similarity of perceptions of the nature, objectives and importance of the integration process Differences in constitutional systems Differences in political systems Attitude towards institutionalization Perception of a common (regional) identity (Dis)similarities in national value systems (Dis)similarities in social structures

Figure II.1 represents Best's key variables of complexity in regional integration arrangements. They are an important indicator when choosing for the adoption of supranationalism and its adequacy in regional integration processes.

[15] Best, E. *Capacities for Regional Integration: a Conceptual Framework for Comparative Analysis*. In: HOSLI, Madeleine O.; SAETHER, Arild (Eds.). *Free trade agreements and customs unions. Experiences, challenges and constraints*. Brussels and Maastricht European Commission TACIS and EIPA, 1997, pp. 51-78.

In contrast to the European Union, the analysis of such variables for MERCOSUR showed an opposite outcome:

a) The reduced number of Member States (four in total) creates an integration scenario where each country is able to exert more power.
b) The relative size of participating countries highlights asymmetries in economic, demographic and territorial power: in particular, she recognizes Brazil's predominance since it is the largest Member States for territory and population. This fact could create many imbalances.
c) In this case, the interdependence does not classify as a requirement for integration. Rather, it is a consequence of that process, which limits the push toward supranational arrangements.
d) For what concerns the political framework, Jerabek argues that the success of the European integration depended on its geopolitical and historical context. For instance, it was facilitated by the presence of common external threat (such as the Cold War) and a strong political will to prevent other extended conflicts. These conditions fostered cooperation among governments, which led to a supranational scheme. In contrast, these factors seem to be absent in MERCOSUR context.
e) The same perceptions, values and norms seem to be more shared in the EU, achieving a regional identity. In MERCOSUR, the persistence of divergent

national priorities and strong attachments to sovereignty are obstacles to supranationalism.

In light of these considerations, it is possible to state the supranational model could be a great opportunity for MERCOSUR finally to create a uniform system, through which it can provide a stable legal environment. However, Jerabek considers the switch from an intergovernmental to a supranational scheme nowadays almost impossible in the Southern Cone (Jerabek, 2016).

2.2 DETERMINATION OF THE APPLICABLE LAW IN MERCOSUR COMMERCIAL CONTRACTS

When dealing with the determination of the law applicable to international contracts within MERCOSUR Member States, it is fundamental to situate such analysis within the wide framework of international law in Latin American. As observed by different scholars, such as Albornoz, this area distinguishes itself for the coexistence of multiple normative layers: international conventions, regional instruments and national rules operate here without a concrete and full harmonization (Albornoz, 2010).

The principle of party autonomy has been emerging as a pillar of the current contractual regulation worldwide, enabling the parties (companies or individuals) to designate the law applicable to their contract. In this sense, Bouwers states:

> «Party autonomy not only effectuates the fundamental policy underlying the law of contracts, that is the freedom to order one's relations with others on mutually acceptable terms, but it also promotes the traditional values of certainty, predictability and uniformity of result far better than any multilateral choice-of-law rule could.[16]»

[16] Bouwers, G. J. (2025*). Mercosur and Tacit Choice of Law in International Commercial Contracts: A Comparative Study of Private International Law of Contract in Argentina, Brazil, Paraguay and Uruguay.* Comparative and International Law Journal of Southern Africa, 58(2), p. 4.

However, in MERCOSUR context, the eligibility of such principle is still uncertain, due to many reasons: first, the absence of a comprehensive convention, ratified by all Member States, governing this matter in the region. In addition, the persistence of traditional national approaches does not seem to help. Consequently, the determination of the applicable law often depends on the interaction between different sources of law, generating uncertainty and limiting foreign business opportunities.

Even if some scholars claim that nowadays we are shifting towards a more autonomous mechanism, we must acknowledge that this kind of legal framework has its roots in a classical conflict-of-laws. In fact, the legal instrument *lex loci executionis* shaped by the Montevideo Treaties tried to change the regional legal approach. However, in some cases such instruments either remained silent or adopted a more restrictive position regarding party autonomy. This led to divergent interpretations: if on one hand, some legal traditions interpret this silence as an implicit rejection, on the other one there are some that interpret it as a freedom to choose the applicable law. In this sense, it could be true that the freedom to party autonomy is increasing, but its application within the bloc remains fragmented.

As explained by Bouwers, at the domestic level the determination of the law applicable to international commercial contracts strengthens its complexity due to the heterogeneity within the national legal systems (Bouwers, 2025).

2.2.1 Argentina

Argentina is the Member State where the eligibility of the applicable law in international commercial contracts is less restricted. This matter is mainly governed by the *Código Civil y Comercial de la Nación* (CCCN), which gives to this legal tradition a slightly modern perspective. Article 2651 states: «as regards their intrinsic validity, nature, effects, rights and obligations, contracts are governed by the law chosen by the parties». In this way, it seems that a significant autonomy is given to the parties, since it is specified that their choice of law can refer to the contract in its entirety or to only some specific parts.

However, the Code itself does not expressly state whether parties may choose a non-state law or a law that has no connection to them or the transaction. Moreover, other limitations emerge, since Art. 2599 gives priority to internationally mandatory rules over the Argentinian law regarding this topic: «the internationally mandatory norms prevail over party autonomy and exclude the application of the foreign law chosen under the conflict of law rules or by the parties». Article 2651 further requires that the choice of law be either express or demonstrated in a "certain and evident" manner. Therefore, where there is no express choice-of-law clause, courts must determine whether the parties have made a *tacit choice*.

Overall, this methodology enhances legal certainty in the country, but on the other side, it can limit the judicial flexibility in the commercial scenario.

2.2.2 Uruguay

Historically, Uruguay has been known for its rigid resistance to the principle of party autonomy. In fact, for many decades the determination of applicable law in contracts was governed by a restrictive domestic legislation. The old *Ley Vargas*[17] established that international agreements were subjected to the rule of the place of performance (the so-called *lex loci* solutionis[18]), thus precluding the parties from choosing a foreign governing law or opting for a foreign judicial forum if the contract's primary performance was localized in Uruguay. Consequently, this behavior often generated some frictions, limiting the country's openness to the global trade and modern arbitration methods (Ferreira Marino, 2023).

Then, something changed with the promulgation of the General Act on Private International Law (N° 19.920) in 2020: this represented the first step toward a modernization of the Uruguayan private international law. Thanks to this reform, now a contractual freedom does exist and finally the interested commercial actors have the right to the choice of law. Also, it completely removes the need for a physical or geographic connection. Now, parties can choose the law of a neutral

[17] Art. 2401, Law N. 10.084 of the Apéndice del Código Civil.

[18] LSD.Law Definitions, "Lex Loci Solutionis," https://definitions.lsd.law/lex-loci-solutionis: "A Latin legal principle that translates to 'the law of the place of solution.' It refers to the rule that determines which jurisdiction's laws should apply to a contract based on the geographical location where the contract's obligations are intended to be performed or fulfilled. It is particularly relevant in cases where parties from different regions or countries enter into an agreement, and a dispute arises concerning the performance aspects of that contract."

foreign country, even if it has no link to where they live or where the contract is carried out.

However, according to Marino, some passages regarding this *Ley* try to protect the country's national interests. First, he argues that the application of a foreign law through party autonomy still remains subordinate to the defense of national public policy. This means that Uruguayan courts can reject the choice of foreign law if it goes against the country's political and economic principles. Then, he cites Art. 6 of UGAPIL, underlining possible limitations to party autonomy: Uruguay can use overriding mandatory provisions, which are domestic laws that automatically apply to any contract litigated in the country, thus changing whatever foreign law the parties originally picked:

> « Las relaciones jurídicas privadas internacionales que son reguladas o están abarcadas por normas imperativas de aplicación necesaria que la República haya adoptado para el cumplimiento de políticas sociales y económicas, no serán sometidas a las normas de conflicto. Puede el tribunal, cuando lo considere pertinente, aplicar las disposiciones imperativas del derecho de otro Estado con el cual el caso tenga vínculos relevantes[19]»

[19] Uruguay. (2020). Ley Nº 19.920. Ley General de Derecho Internacional Privado , Diario Oficial [Official Gazette], November 27, 2020 (No. 30571).

Therefore, it is possible to state that Law Nº 19.920 tries to bring Uruguay towards the contemporary legal landscape, but with some reminiscences to national sovereignty (Marino, 2023).

2.2.3 Paraguay

According to the academic literature, Paraguay configures itself as a progressive nation in choice-of-law matters. In this context, the Paraguayan Law on the Law Applicable to International Contracts (N° 5393/2015) embraces party autonomy in commercial contracts. Art. 4 clearly states:

«Un contrato se rige por el derecho elegido por las partes. Las partes pueden elegir:

a) El derecho aplicable a la totalidad o a una parte del contrato;

b) Distintos derechos para diferentes partes del contrato, en la medida que estas sean claramente distinguibles[20]»

Nevertheless, Marshall and Pertegás argue that this autonomy is not absolute, because Art. 17 introduces the application of overriding mandatory rules and public policy exceptions:

> «1. La elección por las partes del derecho aplicable no impide que el juez aplique las normas imperativas del derecho paraguayo que, según este

[20] Law No. 5393/2015 on the Law Applicable to International Contracts, Art. 4 (Paraguay). https://www.csj.gov.py/cache/lederes/G-13-20012015-L-5393-1.pdf

derecho, deben prevalecer aún en presencia de la elección de un derecho extranjero.

2. El juez puede tomar en consideración las normas imperativas de otros Estados estrechamente vinculados con el caso teniendo en cuenta las consecuencias de su aplicación o inaplicación.

3. El juez puede excluir la aplicación de una disposición del derecho elegido por las partes si y solamente en la medida en que el resultado de su aplicación sea manifiestamente incompatible con el orden público[21]»

According to the authors, if on one side, these limitations can serve to safeguard the national public interests and legal system, they can harm both the freedom of choice and the dispute resolution system. Essentially, we can state that the Paraguayan framework tries to find an equilibrium between legal certainty and the national protection.

2.2.4 Brazil

Compared to the other Member States, Brazil stands out for adopting a greater restrictive approach to party autonomy's principle. In fact, its law system seems to remain rooted in the territorial connecting factors established by the Law of Introduction to the Civil Code (1942), then replaced with the LINDB or Law of

[21] Law No. 5393/2015 on the Law Applicable to International Contracts, Art. 17 (Paraguay). https://www.csj.gov.py/cache/lederes/G-13-20012015-L-5393-1.pdf

Introduction to the Rules of Brazilian Law in 2010. Art. 9 establishes that contractual obligations are governed by the law of the country where they are constituted, leaving little room for personal choices. Moreover, Beltrame de Moura argues that Brazilian courts generally interpret the place where the obligation was constituted as the place where the contract was proposed or concluded. In this sense, when a dispute has to be solved by a Brazilian court, it is likely that judges will tend to determine the applicable law through connecting factors rather than through the parties' contractual preferences. According to him, this approach reflects the traditional orientation of the nation's private international law and over years it has generated different debates regarding its sustainability in the global context. In fact, what appears is that Brazil has taken some steps backwards: with the Civil Code of 1916, the choice of the applicable law was recognized since it contained the expression "*in the absence of stipulation to the contrary*". Then, it was removed with 1942 reform, which gave life to a controversial doctrine: in this sense, a great part of academic literature interprets the current Art. 9 as the basis of this conflict. Because of the previous points, the effectiveness of contractual choice-of-law remains limited. According to De Moura, the only way for commercial parties to mitigate this uncertainty is relying on the Law No. 9,307/1996 of the Brazilian Arbitration Act. It seems to be the only to grant the parties a certain autonomy in selecting both arbitrators and procedural law applicable to the disputes. However, some scholars highlight the fact that such freedom is not extended to ordinary

judicial proceedings yet (Beltrame De Moura, 2023). On other hand, someone is positive about international arbitration, stating that it could function as a bridge between Brazil's historically restrictive private international law framework and the needs of modern international commerce, providing a solid sense of predictability and neutrality (Stringer, 2006).

2.3 CHOICE OF LAW AND PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL CONTRACTS

2.3.1 Inter-American Convention on the Law Applicable to International Contracts

Also called the Mexico City Convention, it was ratified in 1994 during the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V). Its adoption seems to be the result of a long codification process within the American system. In fact, some discussions about the applicable *governing law* began years earlier, but only with this final round the objective of delivering a more modern and flexible scenario for international commercial contracts in the American continent has been partially achieved.

First, it makes clear its scope of application by establishing the meaning of an "international" contract, stating that it occurs when the parties have their habitual residence or establishments in different states or when the contract itself has connections with more than one country. In this way, the Convention fully enters a global juridical scenario.

Moreover, the principle of party autonomy is central and recognized by Art. 7: "the contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or evident from the parties' behavior and from the clauses of the contract[22]". This reflects the modern view that allows the parties to organize the legal relationship based on their own preferences.

At the same time, the Mexico Convention proposed an innovative aspect, because as expressed in Art. 9, it opened to the recognition of the general principles of international commercial law. For instance, it acknowledged the usage of soft law instruments, such as the UNIDROIT Principles. In this sense, we can suggest that the Inter-American Convention tried to embrace the growing openness to global commercial practices.

Nevertheless, Albornoz and Moreno Rodriguez talk about the Mexico Convention as a categorical failure in the Latin American context, since none of MERCOSUR Member States has ratified it. According to them, a combination of factors explains this choice. First, they explain that this reluctance is given by the presence of other regional instruments (e.g. Montevideo Treaties), which reduced the adoption's sense of urgency. A possible idea is that the MS perceived this ratification as an institutional overlap, which would have further increased the already complex law

[22] Inter-American Convention on the Law Applicable to International Contracts, Art. 7. (1994, March 17). *Organization of American States*. https://www.oas.org/juridico/english/treaties/b-56.html

systems. Another point is the limited geographical extent: since it extended to just one continent, several states decided to bypass it.

Ultimately, what the authors highlight is a missed opportunity for the Member States to escape from territorialism and benefit from an expansion of international commercial arbitration in the bloc (Albornoz; Moreno Rodriguez, 2011).

2.3.2 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods and Hague Principles

It is possible to state that the evolution over time of the Hague Conventions reflect the development from a rigid toward a more flexible approach in private international law's matters. According to Lando's analysis, both 1955 and 1986 Conventions share as common objective the one of increasing legal certainty internationally, but they try to achieve this difficult outcome with two different methodologies, which represent their historical roots. In fact, the 1955 Convention that emerged from a post-war work shows the legal tradition of mainly European states. The author comments that the main goal was providing a greater sense of uniformity by settling clear choice-of-law rules. In this sense, the idea at the basis laid in the fact that commercial actors needed more certainty about the law governing their contracts in order to minimize both financial and legal risks. As a consequence, the Convention established a new, but rigid, system that favor the law of the seller's habitual residence in the absence of an express choice of law. This

solution aimed to reduce what Lando calls the "homeward trend", meaning the trend of national courts to apply their own domestic law.

As stated in the original text of the Convention:

> «A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract[23]»

By contrast, the Convention of 1986 was held under a diverse political and economic landscape: aiming to a global project, the process incorporated a highly diverse assembly of countries, including developing economies and socialist legal systems. For this reason, reaching the unanimity about a variety of legal topics revealed to be not so easy at first stance. However, the final decision is contained in Art. 7 and 8 of the foundational text:

> «A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties. The parties may at any time agree to subject the contract in a different law. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties. To the extent that the law applicable to a contract of sale has not been chosen by the

[23] Convention on the Law Applicable to International Sales of Goods, Art. 2. (1955, June 15). https://www.hcch.net/en/instruments/conventions/full-text/?cid=31

parties, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract[24]».

Despite the differences, both Conventions revealed instruments that opened the path for supporting the freedom of choice-of-law in commercial contracts (Lando, 1993). Nevertheless, only Argentina[25] has ratified the 1968 Convention, showing a meaningless interest of MERCOSUR Member States.

2.4 UNIFORM SUBSTANTIVE RULES AND SOFT LAW INSTRUMENTS: A SOLUTION TO LEGAL FRAGMENTATION?

2.4.1 United Nations Convention on Contracts for the International Sales of Goods (CISG)

For many scholars, the CISG Convention, adopted in Vienna in 1980 and entered in force in 1988, represents one of the greatest achievements in the law harmonization process regarding international sales and commercial contracts. In Viscasillas' opinion, it differs from the previous attempts of unification because they were mainly influenced by Western European legal traditions. Instead, the CISG seems to deliver a more universally acceptable framework, also attracting the participation of socialist countries, common-law jurisdictions and developing

[24] Convention on the Law Applicable to Contracts for the International Sale of Goods, Art. 7-8. (1986, December 22). https://www.hcch.net/en/instruments/conventions/full-text/?cid=61

[25] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH), *Status Table – Convention No. 61*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=61

economies. In such sense, the Convention is the output of a legislative effort that covered most of the previous century (Viscasillas, 2013).

As stated in UNCITRAL official website[26], its main goal is providing legal certainty and predictability in international trade, while reducing transaction costs in cross-border commercial exchanges at the same time. In this context, it wants to balance the interests of both buyers and sellers by using rules that are accepted by different legal systems. In addition, the CISG can apply in several context: for example, it may apply when private law rules select the law applicable to the contract, or the parties can deliberately choose the Convention's rules to govern their contract. In any case, the important point is that the CISG tends to reduce the need of relying on conflict-of-law rules, increasing uniformity in international businesses. This feature offers support to small and medium-sized firms in developing countries: since they often have constrained access to specialized legal advice, they can benefit from the CISG's framework application.

Nevertheless, the integration of such convention within the MERCOSUR framework presents a paradox: even though all Member States approved its application in different years, Boselli argues that there is still a poor development of the CISG principles in the national jurisdictions. According to him, despite the

[26] United Nations. *Convention on Contracts for the International Sale of Goods*. Vienna, April 11, 1980. United Nations Treaty Series, vol. 1489, p. 3. https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

important economic relevance of the bloc in the international trade, in particular with high CISG-utilizing economies like United States and China, the adoption of such rules in the MSs domestic law remains scarce and heterogeneous. In fact, the author conducted an analysis showing that national courts have produced few decisions applying the CISG. Argentina has the largest number of reported cases, 22 in total; Brazil follows with five cases; then, Paraguay and Uruguay are almost at zero.

Given this evidence, Boselli has asked himself what are the possible reasons regarding this lack of application, and he traced a main hypothesis. In his opinion, lawyers often tend to exclude the CISG principles during the negotiation of contracts because of the limited availability of local case law on which they can rely. This is partly due to a widespread absence of awareness about the Convention's scope and advantages by professionals.

In conclusion, the Vienna Convention could classify as a potential tool to improve legal uniformity and regional integration in MERCOSUR, but nowadays the benefits deriving from it are limited because of both its rare application and inadequate knowledge of the actors in the region. In this sense, according to Boselli the ratification of the CISG appears to be more symbolic rather than transformative (Boselli, 2017).

2.4.2 UNIDROIT Principles

The UNIDROIT Principles are a set of non-binding rules used in governing international commercial contracts. Established by the International Institute for the Unification of Private Law in Rome for the first time in 1994, they have been updated until 2016, which represents the latest edition.

Essentially, they provide a comprehensive scheme on the regulation of the main aspects of a contract. For instance, they control its formation and interpretation, the rights and obligations of the contracting parties and the remedies in case of a dispute. Thus, the key point is that the Principles do not try to emulate the rules of a specific national legal system; rather, they seek to find common solutions that are neutral and internationally accepted.

Another vital aspect to underline is that they are considered a *soft law* instrument, meaning that they do not have binding legal force by themselves but they are applicable only in certain cases. For example, when the parties directly choose them as the governing law for the contract, when tribunals use them to interpret the applicable law or when they are employed to manage the usage of lex mercatoria. From this point of view, they seem to adapt to a variety of situations, making this flexibility an absolute strength.

In addition, Chaves highlights the importance of the distinction between harmonization and unification of contract law, since they carry a different meaning in this context. A unification process wants to replace the domestic rules with a

uniform legal regime, while the harmonization tries to make the national legal system more compatible with international standards by providing shared principles. In this sense, he states the UNIDROIT Principles serve as a tool of harmonization rather than unification. In fact, they are not willing to cancel the national contract law, but they represent an excellent way to reduce legal uncertainty when stipulating international contracts (Chaves, 2024).

For this reason, UNIDROIT Principles acquire even more relevance in MERCOSUR area, since one of its main projects is the regional integration. Nevertheless, their application in the Southern Cone still appears to be facing legal obstacles. According to Da Gama, the main difficulty is the fragmented recognition of the party autonomy by the Member States: this heterogeneity creates a scenario for which it results more difficult to insert such Principles into national legal systems.

The UNILEX database[27], which is the official archive of the International Institute for the Unification of Private Law, shows us that there is a strong contrast in how the MSs integrate them in their legal systems and how often they rely on them. Among them, Paraguay is the leader in the bloc for the judicial application of the Principles, mainly due to the explicit authorization by Law N°5393/15: the data collected reveal 34 cases, meaning that Paraguayan courts are inclined in applying

[27] UNILEX, *UNIDROIT Principles case law by country*. Retrieved June 28, 2026, from https://www.unilex.info/principles/cases/country/all

the Principles for decisions about the lex contractus. Then, Argentina follows in the list but Da Gama points out that the country mainly relied on the UPICC to unify the new Civil and Commercial Code, in order to transforming it into a model for modern commercial rules. Thus, national judges mostly refer to the Principles to interpret domestic clauses in complex negotiations.

Unsurprisingly, with just six court cases, Brazil confirms to be slightly conservative. Under the LINDB, courts are attached to domestic contract law, making it tough for soft law instruments to reach the same level of the Brazilian Civil Code. In the end, Uruguay has maintained a rigid attitude towards the UPICC application over years, since we only have two cases on record. However, the author expects this situation to shift with the implementation of Law N°19.920, which seems to open to more freedom in the choice-of-law.

Country	**Recorded Cases**
Paraguay	34
Argentina	9
Brazil	6
Uruguay	2

Table II.2 sums up UNILEX data on recorded cases in MERCOSUR Member States regarding the application of UNIDROIT Principles.

In addition to simplifying the choice-of-law in contracts, Da Gama thinks that UNIDROIT Principles could also be used to fill the gap left by the irregular application of international conventions, especially the CISG. As we have seen, the Vienna Convention does not seem to confer particular legislative harmonization in the region despite its ratification: consequently, the use of such Principles by national courts could help in providing more consistency with the international commercial standards.

To sum up, UNIDROIT Principles could represent one of the greatest instruments to harmonize contract law in the Member States, but their effectiveness is limited due to the fragmentation of their domestic legal frameworks: the author describes this as one of the major paradoxes of MERCOSUR's integration process (Da Gama, 2020).

2.4.3 Hague Principles

The Hague Principles on Choice of Law in International Commercial Contracts were officially approved and adopted in 2015. As well as the UNIDROIT ones, they represent a non-binding instrument that helps the parties to a free choice-of-law governing their commercial contract. In this way, we can state they serve as a model for legislators, courts and tribunals in enhancing party autonomy in their legal systems. The official text reports the core of these Principles:

> «The overarching aim of the Principles is to reinforce party autonomy and to ensure that the law chosen by the parties has the widest scope of application[28]»

Moreover, it specifies that the governing law does not need to have a connection with the parties or to the transactions, and that commercial actors have the possibility to apply dépeçage.

Their application in MERCOSUR scenario appears more favorable with respect to the previous one, although it slightly varies across the MSs. First, the Argentinian legislation is considered the most aligned with the Hague Principles: in fact, many scholars assert that the new Civil and Commercial Code reflects them. Quite the same goes for Paraguay, since its jurisdiction is more receptive in embracing party autonomy. For what concerns both Brazil and Uruguay, the progression is a bit slower but they are currently viewed as a model to rely on for the future legal modernization process. Thus, they appear to have a more important role with respect to UNIDROIT Principles in MERCOSUR region for providing legal certainty and harmonizing the national systems to international law.

[28] Hague Conference On Private International Law (HCCH), *Principles on Choice of Law in International Commercial Contracts*, 2015, https://www.hcch.net/en/instruments/conventions/full-text/?cid=135

3. THE EU-MERCOSUR AGREEMENT: LEGAL CHALLENGES AND FUTURE PERSPECTIVES

The analysis conducted in the previous chapters revealed that contract law within MERCOSUR framework is characterized by a certain level of fragmentation. If the regional integration process improved the economic development and cooperation among the bloc, on the other hand it is true to say that the same did not happen for the regulation of international commercial contracts, which still relies on domestic legal systems. All the dissimilarities seen so far among the Member States, for instance in the recognition of party autonomy, the application of soft law instruments, the selection of the applicable law and the ratification of international conventions, show that a uniform pattern has not been achieved yet. Consequently, legal certainty in contractual matters remains a controversial issue in the area.

This is highly pertinent in light of the new Agreement between MERCOSUR and the European Union: since its main objective is the elimination of both tariff and non-tariff barriers to strengthen trade, it seems legit to ask ourselves whether differences regarding the two legal environments are going to undermine the effectiveness of the Agreement. In such sense, the final chapter of this thesis will first investigate the economic and legal context of the Agreement, highlighting its main features, such as the objectives and obstacles encountered during the negotiation process. Moreover, the chapter aims to assess whether the Agreement

has the capability of surmounting the legal divergences emerged within MERCOSUR Member States, or if this will put European commercial actors in an unfavorable position. In doing so, we want to demonstrate that the success of the Agreement does not depend just on economic factors, but also on legal ones.

3.1 THE EU-MERCOSUR AGREEMENT: LEGAL AND ECONOMIC CONTEXT

3.1.1 Negotiation process, objectives, political challenges and legal discrepancies

The European Union and MERCOSUR have tried to reach a closer economic integration for more than twenty years: this long negotiation process resulted in a FTA (Free Trade Agreement) between the parties and it currently represents one of the most ambitious interregional agreements concluded by the European Union. Negotiations formally started around 2000, but they experienced many interruptions due to different reasons, such as economic downturns, political disagreements and a discrepancy in values. In fact, because of concerns regarding MERCOSUR Member States' environmental protection policies, commitment to face climate change and sustainable development, a first attempt in 2019 to complete negotiations resulted in a failure, delaying its conclusion. Then, the addressing of sustainability matters led to a renewed text of the Agreement in December 2024, which finally marked the conclusion of the multiple negotiation rounds. Nevertheless, we must distinguish this milestone from the later signature (January, 2026 in Asunción, Paraguay) and the ratification happened in the

following two months[29]. Then, it finally entered into force in a provisional way on 1st May, 2026: this passage marks the current legal status of the Agreement.

As we can imagine, its main aim is to enhance economic cooperation by progressively eliminating tariffs and other barriers on a large section of traded goods and services in order to improve market flow. In fact, the economic relevance of the Agreement is consistent, since the blocs put together create a market of approximately 700 million consumers. In this context, the EU configures as the second-largest trading partner and foreign investor in the Southern Cone: as stated by the European Commission, nowadays European firms still face substantial obstacles when exporting overseas, particularly in sectors such as automotive, machinery, chemical, pharmaceuticals and professional services. Consequently, through the gradual elimination of these barriers, bilateral trade is expected to growth as well as the competitiveness of firms.

In general, academic researchers tend to classify it as a "new generation" agreement, because it does not focus only on economic aspects (e.g. trade liberalization), but it combines them with a broader regulatory cooperation that includes requisites regarding labour rights, competition rules, technological innovation and sustainability. Therefore, the extension of its scope highlights that

[29] MERCOSUR Member States have completed the ratification process as following: Argentina and Uruguay on 26th February, 2026; Brazil on 17th March, 2026; Paraguay on 30th March, 2026.

not only it aims to an easier trade, but it wants to strengthen a long-term strategic partnership between the parties.

However, as said before, the Agreement has remained politically controversial for a long period. One of the main reasons for its delay is due to the opposition of many EU Member States (like France, Ireland and the Netherlands) regarding environmental safety and the potential impact that larger agricultural imports from MERCOSUR can have on European farmers. Most of critiques claimed that expanding the agricultural activities in South America to satisfy the import demand could aggravate the ongoing Amazon rainforest's deforestation, undermining in such sense the reaching of the European Union's climate objectives regarding both the European Green Deal and the Paris Agreement. Moreover, additional uncertainties have risen related to the dissimilarities in food standards, pesticides regulation and labour obligations. All together, these issues transformed the Agreement from a merely commercial negotiation into a broader debate about "sustainable globalization".

From a legal perspective, the Agreement is a source of open debate. As known, the stipulation of international commercial contracts calls for a stable and coherent legal environment that allows the parties to predict their contractual rights and obligations, identify the applicable law and rely on effective dispute resolution mechanisms. In this scenario, the Agreement has introduced measures that simplify trade, but it is not the same for rules that govern contractual relationships.

Consequently, if the economic scenario will strengthen, the legal one within the European Union and MERCOSUR seems to remain pretty fragmented in-between of domestic and international law norms. It can be said that such limitation reflects the different levels of legal integration accomplished by the protagonists of the Agreement. In fact, the analysis, which will be presented below, is going to show that over decades the European Union has brought on a legislative harmonization process that led to a coherent legal system and has increased certainty in cross-border contracting. On the other hand, the previous chapter has demonstrated that a real contract law harmonization process has not happened yet in MERCOSUR area. As a result, the parties involved in this trade appear to be subject to legal uncertainty. Without any doubt, a bigger economic integration without a legislative correspondence configures as one of the main challenges deriving from the ratification of the Agreement. In this regard, it seems legit to ask ourselves whether its effectiveness depends not only on economic factors, but also on differences regarding the two legal environments (Mata Diz, 2022).

3.2 CHOICE-OF-LAW, CHOICE-OF-FORUM AND JUDGEMENTS RECOGNITION IN THE EU-MERCOSUR TRADE CONTRACTS

3.2.1 Applicable Law, Choice of Forum and Recognition of Foreign Judgments

The legal implications of the interaction between MERCOSUR and the European Union acquire relevance when a commercial contract is concluded between parties located in the two regions, since it requires a deep understanding of different legal

scenarios. In this sense, legal uncertainty may occur at different stages of the contractual relationship. Consequently, the parties should interrogate themselves about several topics: first, the mechanisms that govern the choice of the applicable law to the contract; then, which court holds jurisdiction to embrace a dispute arising from the contract; whether a judgment rendered by a foreign court can be recognized and enforced in another jurisdiction.

The first point is about the determination of the applicable law. Within the European Union, such issue is mainly regulated by Rome I, or Regulation No. 593/2008, that establishes a uniform path for conflict-of-law rules regarding contractual obligations. Its main contribution is given by Article 3, which states:

> «A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract[30]»

Moreover, Rome I Regulation can intervene also when the parties do not mention the governing law through Article 4, which establishes specific rules for different kinds of contracts without passing by a judicial choice. Yorke acknowledges that the Regulation has successfully replaced many national rules and created a common

[30] 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), Article 3, OJ L 177, 4 July 2008, https://eur-lex.europa.eu/eli/reg/2008/593/oj/eng

legal landscape, which ensures that courts in the European Union apply uniform rules when determining the governing law (Yorke, 2021).

In this sense, we can take in consideration an example about an Italian firm exporting goods to a Brazilian importer. If the parties did not clearly agree on the law governing their contract, a dispute may arise concerning which legal system should determine it. If such dispute is brought before an Italian court, the determination of the applicable law will be assessed by Rome I. On the opposite, the result might be different in front of Brazilian courts: although they are progressively trying to open to party autonomy, the final choice mainly depends upon their interpretation. The final outcome is that European business-makers cannot automatically assume the same level of predictability given by Rome I when a litigation takes place in Brazil.

Last, recital 11 states that the freedom of choice results to be a cornerstone of the European law, which reflects why the EU legal scenario configures as more harmonized. This view agrees with Kostova's analysis: according to her, Rome I Regulation increases contractual flexibility and facilitate international businesses for European Member States (Kostova, 2023).

Then, another issue regards the determination of the court that arbitrates the contractual dispute and the possible subsequent enforcement of foreign judgments. More specifically, the parties may designate the forum that will hold jurisdiction over a potential dispute resolution. Also, once a dispute has been decided by a court,

the resulting judgment may need to produce legal effects or be enforced in another country. Here, the question turns into whether the foreign judgment satisfies the conditions for recognition in the State where recognition is sought. Consequently, applicable law, jurisdiction and recognition of foreign judgments must be treated as distinct legal questions, even though they may interact within the same cross-border dispute.

3.2.2 Practical Case Analysis

A real-world case that shows this interaction concerns a dispute between an Italian firm and a Brazilian distributor for the cessation of a commercial agreement[31]. The contract they stipulated contained a clause that appointed the Court of Milan as the one in charge for the resolution of disputes. However, the Brazilian party commenced proceedings before the Court of São Paulo, which ruled in its favour and awarded the damages against the Italian one. When the distributor tried to enforce its ruling in Italy, the Italian Supreme Court stopped it and declared that since the parties, at the beginning, agreed on Italian jurisdiction being exclusive, the Brazilian court held no authority to examine the case. In the end, its judgment

[31] [1] Italian Supreme Court (Corte di Cassazione), Order No. 19571 of 10 July 2023, https://apps.dirittopratico.it/sentenza/cassazione/roma/2023/19571.html .
[2] Italian Ministry of Justice, *Recognition of Judgments in Italy under the 1989 Italy–Brazil Treaty*, Aldricus, https://aldricus.giustizia.it/2023/07/31/il-riconoscimento-delle-decisioni-in-italia-nel-quadro-del-trattato-italo-brasiliano-del-1989/
[3] International Bar Association, *Signed, Sealed, Enforced: The Treaty that Binds Italian and Brazilian Judgments*, https://www.ibanet.org/signed-sealed-enforced-the-treaty-that-binds-Italian-and-Brazilian-judgments

resulted invalid in Italy. Thus, here the problem that arose was whether the Brazilian judgment could be recognized and given effect in Italy. The final decision gave effect to the parties' choice of forum and prevented the foreign judgment from producing effects in Italy. The importance of this case for EU-MERCOSUR commercial relations lies in the interaction between these legal issues, since it highlights the difficulties that can arise when proceedings are brought before a different national court and the resulting judgment later has to be recognized in another country. Ultimately, this perspective illustrates that the legal challenges faced in the European-Latin trade extend beyond the simple negotiation of commercial terms and that such topics should not be treated as a single legal issue, because they require separate consideration at different stages.

3.3 TRANSNATIONAL LEGAL INSTRUMENTS AND THE EUROPEAN EXPERIENCE AS A MODEL FOR MERCOSUR

At this point, it is taken as read the fact that the Agreement does not create intentionally a shared framework that facilitates legal choices and interpretations. However, we could arise a question regarding international contract law instruments and ask ourselves if they can give to the two areas an efficient contribution.

A comparative analysis between the European and the Latin American experience shows that the success of such instruments does not generate just from their content but also on the institutional scenario they are operating in. As a matter of fact, the

European background proves that legal harmonization is obtained through the interaction of binding legislation, soft-law instruments and judicial practice. For instance, the Principles of European Contract Law were actually created with the aim of having common rules in order to develop a shared legal culture. Despite not having a biding character, they had a strong influence on the European harmonization projects since they configure as one of the main foundation pillars of the Draft Common Frame of Reference (DCFR). Therefore, the success of these Principles results in providing a common legal framework although not being directly applied by European courts. It is fundamental to mention that the creation of the PECL was greatly sustained by academics and scholars: it was not just an institutional attempt. They demonstrate that it is possible to reach gradually legal convergence through the development of common rules besides State law. This could represent a methodological example for MERCOSUR to enhance the academic effort that has been partly missing during last decades, in order to move closer to a legal convergence.

It is feasible to make an analogous observation concerning the application of international instruments such as the UNIDROIT Principles, since European tribunals often rely on them for the interpretation of commercial contracts and

dispute resolution. We can use as an example a case[32] decided in 1996 by the Court of Appeal of Grenoble, which mediated a dispute emerged between S.A.R.L. *Bri Production Bonaventure* (a French buyer) and *Pan African Export*, an American seller regarding a contract for the international sale of jeans. Essentially, it stated that the resell of the goods would be only in South America and Africa. However, the French company declared that it had the intention to reroute part of the shipment to Spain, and as a consequence the American exporter decided to close the international contract. This move triggered a legal issue concerning the absence of a governing law clause in the initial agreement between the parties. The French court solved the problem through the application of *lex mercatoria* and relied on Article 1.7 on good faith and fair dealing in trade of UNIDROIT Principles. The final verdict recognized *Bonaventure*'s bad-faith and delivered the termination of the contract.

In this regard, Marshall points out the value of the Hague Principles arguing that they actively contributed to develop private international law because they entitle parties to select transnational instruments, such as UNIDROIT Principles to govern their contracts. Nevertheless, he recognizes their partial purpose within the European Union context since they operate a complementary function near Rome I

[32] Cour d'Appel de Grenoble. (1996, October 23). *S.A.R.L. Bri Production "Bonaventure" v. Pan African Export* (No. 94/3889). UNILEX. http://www.unilex.info/case.cfm?pid=2&id=636&do=case

Regulation (Marshall, 2014). By contrast, in MERCOSUR their potential improvement is considerably greater: since there is not a comparable regional instrument like Rome I, the Hague Principles may become a common reference for contract law harmonization and encourage a convergence among the MSs legal systems.

In conclusion, it is fair to admit that until now these transnational legal instruments have been poorly adopted by MERCOSUR institutional framework and so, they cannot compensate for the actual lack of legal consistency present in the Agreement. However, we should not interpret them as irrelevant for the near future. As demonstrated, PECL, both UNIDROIT and Hague Principles, and the CISG have contributed to the European contract law harmonization but it required a long process along with binding legislation. Consequently, if MERCOSUR institutions are prone to it, such instruments may constitute a new starting point and valuable model for the future legal development of the region, also in light of the Agreement with the European Union. In fact, this marks the South American bloc's first agreement of this scale, encompassing a customs union and such a large number of individual nations.

3.4 GOOD FAITH PRINCIPLE AND FAIR DEALING: THEIR APPLICATION IN THE EU-MERCOSUR AGREEMENT

3.4.1 Good faith and fair dealing as convergence instruments

Both good faith and fair dealing represent fundamental principles of contract law and over time they increasingly acquired attention in the international trade. Although the interpretation of good faith can vary across different legal systems, its definition is based on an objective standard of conduct, meaning that it requires the parties to behave honestly and therefore to act with fairness, reasonableness and loyalty with regard to the terms and expectations established in their contractual relationship. Essentially, it aims to prevent the abusive and opportunistic exercise of contractual rights. In this sense, good faith acts as a support to other principles previously mentioned in this thesis, such as the freedom of contract and *pacta sunt servanda*. Research suggests that it executes three functions in contractual relationships:

1. Expansionary function, which adds further obligations not specifically mentioned in the contract (e.g. mutual cooperation and protection, transparency).
2. Restrictive function, which tries to limit abuses by stopping the parties from acting unfairly.

3. Corrective function, which may allow tribunals or courts to correct contractual obligations when their application would distort their equilibrium.

Therefore, the evidence is that when parties belong to different legal frameworks that does not share the same rules that govern the contract, *good faith* may provide to the development of shared expectations regarding a proper conduct, thus producing greater predictability even in the absence of a complete harmonization (Apaydin, 2019).

The role of good faith performing as a transnational standard of behaviour for commercial parties is shown also by the relevance that instruments, like UNIDROIT Principles, give to it. In fact, Article 1.7 states that «each party must act in accordance with good faith and fair dealing in international trade… the parties may not exclude or limit this duty[33]». Essentially, this provision acquires notable power because it associates good faith within a broader international trade scenario, rather than to the specific national systems.

In this regard, a comparative analysis conducted by Farnsworth is worth of being highlighted. He demonstrates that good faith and fair dealing are recognized in most domestic legal frameworks[34], although their content and effects are not necessarily

[33] UNIDROIT. (2016). *UNIDROIT principles of international commercial contracts 2016*, Article 1.7; International Institute for the Unification of Private Law (UNIDROIT), https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf

[34] The principle of good faith is explicitly codified in MERCOSUR Member States jurisdictions:

- Argentina: Art. 9, *Código Civil y Comercial de la Nación*

the same. Such comparison is fundamental because it shows that the total uniformity of the legal systems in which it operates, it does not represent an essential prerequisite for the existence and functioning of a shared principle. From this perspective, it can be argued that good faith may be an instrument to converge different legal contexts (Farnsworth, 1995).

Furthermore, it does not represent just an "ethical" principle because its break off could produce concrete legal consequences. This can be proven at both national and international levels. In the first case, for what concerns MERCOSUR countries, the disrespect of such principle constitutes an unlawful act: for instance, in Argentina (Art. 10 CCCN) and Paraguay (Art. 715) triggers the abuse of right, while exposing the violating party to contractual liability. In Brazil (Art. 421), it denotes a *violação positiva* that forces for a compensation to the damaged party. Last, the Uruguayan jurisdiction allows the innocent party to immediately withdrawn from the contract and claim for full financial compensation.

At the international level, UNIDROIT Principles address this issue by extending their application to multiple stages of the contractual relationship. Indeed, during the pre-contractual phase, Art. 2.1.15 states that if a party negotiates in bad faith, it might be liable for the losses caused to the other one. Similarly, Article 5.1.2 allows

- Brazil: Arts. 421–422, *Código Civil*
- Uruguay: Art. 1291, *Código Civil*
- Paraguay: core doctrine governing the interpretation and enforcement of obligations.

good faith and fair dealing to determine implied contractual obligations, even when they are not directly cited in the contract (UNIDROIT, 2016). Ultimately, on the basis of this broader application, it is reasonable to assume that good faith gains significance as a gap-filling and standard-setting instrument in international contract law.

3.4.2 Application in the EU-MERCOSUR Agreement

As acknowledged, this European-Latin partnership not only aims to strengthen economic aspects (such as larger trade-flows and investments), but also it seeks to create a regulatory framework, simultaneously combining other objectives regarding sustainable development and reliable business conduct. It is in this setting that certain sections of the Agreement refer to such principles as mean of fair conduct.

In the first place, it reaffirms the need to climate commitments. Both the European Union and MERCOSUR agreed to take part in *good faith* to the United Nations Framework Convention on Climate Change and the Paris Agreement[35] in order to pursuit the net-zero emissions by 2050 and reduce the deforestation issue. The European Commission has made clear that these commitments are a fundamental element to be respected in the partnership. Indeed, it has been included a suspension

[35] United Nations Framework Convention On Climate Change (UNFCCC), *The Paris Agreement,* 2015, *https://unfccc.int/process-and-meetings/the-paris-agreement*

clause that activates in the case one of party withdrawn from its responsibilities concerning the Paris Agreement or stops being part to it.

As claimed by the official text:

> «Gli elementi fondamentali dell'accordo sono … il proseguimento dell'adesione in buona fede alla convenzione quadro delle Nazioni Unite sui cambiamenti climatici (UNFCC) e all'accordo di Parigi. Il commercio deve sostenere la protezione dell'ambiente e lo sviluppo sociale, trattando questioni quali la gestione sostenibile e la conservazione delle foreste. Afferma esplicitamente l'impegno ad attuare effettivamente l'accordo di Parigi sui cambiamenti climatici, che costituisce un elemento essenziale dell'accordo di partenariato UE-Mercosur così come dell'accordo commerciale interinale, consentendo pertanto la sospensione di quest'ultimo qualora una parte receda dall'accordo di Parigi o cessi di esserne parte "in buona fede". Per la prima volta le parti di un accordo commerciale cui si applica un meccanismo di risoluzione delle controversie assumono il personale impegno giuridico di arrestare la deforestazione.
>
> Le parti cooperano sulle questioni relative ai cambiamenti climatici attinenti al commercio, secondo il caso, a livello bilaterale, regionale e nei consessi internazionali in materia. In tale contesto, riconoscendo il ruolo che il commercio svolge come contributo alla risposta alla minaccia pressante dei

cambiamenti climatici, ciascuna parte rimane parte in buona fede dell'UNFCCC e del relativo accordo di Parigi[36]»

Nevertheless, we must underline that this reference concerns the commitment taken by the Parties to the Agreement, but it is not sufficient to establish a general duty of good faith applicable to commercial contracts.

At the same time, the Agreement includes other provisions about trustworthy commercial practices and consumer protection that are pertinent to the discussion of responsible business conduct by companies. These conditions concerning corporate responsibilities apply both to the inter-firm relationships and to the interactions with customers, as reported in Article 10.53:

«Le parti riconoscono l'importanza di adottare e mantenere in vigore misure trasparenti ed efficaci intese a proteggere i consumatori … e che contribuiscono a consolidarne la fiducia, comprese misure che vietano le pratiche commerciali fraudolente e ingannevoli. Tali misure prevedono, tra l'altro, l'obbligo per i professionisti di agire in *buona fede* e di attenersi a pratiche di mercato oneste[37]»

[36] European Union and MERCOSUR, *EU–MERCOSUR Partnership Agreement*, Article 7.7, 2026, https://eur-lex.europa.eu/eli/agree_internation/2026/184/oj

[37] European Union and MERCOSUR, *EU–MERCOSUR Partnership Agreement*, Article 10.53, 2026, https://publications.europa.eu/resource/cellar/4c9693e4-1389-11f1-8870-01aa75ed71a1.0013.01/DOC_1

It can be argued that these points are particularly relevant for our analysis, because they constitute an indication that the European Union and MERCOSUR have attempted to establish common standards in different areas.

Overall, these passages show an important emphasis on responsible conduct, fairness and sustainable development within such regulatory framework. However, although they do not contribute to the actual harmonization of contract law, they may contribute indirectly to the development of shared expectations among commercial actors operating across the two blocs.

This analysis is highly pertinent in light of the legal fragmentation between the EU and MERCOSUR discussed at the beginning of the chapter. As said, the Agreement itself does not directly address the absence of a comprehensive and harmonized legal framework. Therefore, commercial actors will still face uncertainties in the area about the topics mentioned before (e.g., choice of law, contractual interpretation and remedies). Nevertheless, scholars claim that the establishment of shared norms about fair commercial conduct may contribute mitigating the consequences of this fragmentation.

Thus, the possible contribution of good faith and fair dealing should be interpreted as a convergence rather than a complete harmonization. It means that they provide a common point of reference through which Latin and European commercial parties can assess their behaviour, in order to facilitate business trade. We could state that they may serve as a connection between two legal frameworks, operating alongside

them. In this sense, they may reduce some of the unpredictability associated with divergent standards (Albertoni, 2026).

In conclusion, the EU-MERCOSUR Agreement does not deliver a full harmonization of contract law. But, references to good faith, fair dealing and responsible conduct may be perceived as indicators of convergence towards certain shared standards within specific areas covered by it.

CONCLUSIONS

This thesis has investigated the implications of the fragmented contractual scenario within MERCOSUR Member States and then, its pertinence and effects in the developing relationship with the European Union. Beginning with the main assumption that the increasing expansion of international trade needs a legal environment to be reliable and predictable, the research indeed has focused on these main topics: the determination of the applicable law in international commercial contracts, the recognition of party autonomy, the role of several legal instruments and the possible contribution of the European experience to form a greater legal convergence. Moreover, the work tried to assess whether the actual dissimilarities within MERCOSUR area could represent a concrete obstacle to the evolution of the relations with the European businesses, also concerning the provisional application of the Agreement in the current year.

The analysis has highlighted that, despite the progress made in the economic integration, MERCOSUR has not developed yet an efficient degree of harmonization in contract law. In fact, its intergovernmental characteristic and the relevance given to domestic legal systems contributed to the persistence of differences among the Member States. The approaches towards party autonomy and the choice of applicable law remain unequal, enhancing the fragmentation. As a consequence, legal predictability is still an issue to overcome in the region.

Also, the study of international conventions and transnational instruments has demonstrated that they may increase reliability in commercial relations, such as in the EU. However, it is legit to state that their current use within MERCOSUR cannot compensate entirely for the absence of a comprehensive regional framework.

In this sense, the European experience offers us an important comparison: the establishment of common rules led to a stable legal environment, which favorable to attract foreign business-makers. Nevertheless, it is not feasible to think that the European model can be easily copied by MERCOSUR, given the supranational nature of the EU. Rather, it may provide a useful reference for the gradual development of legal convergence.

As demonstrated in the third chapter, the Agreement does not have the capability of establishing a common contractual framework that solves possible arising legal issues. Thus, operators will continue to face uncertainty concerning the mentioned topics.

Therefore, the main answer of this research is that the absence of a unified contractual context in MERCOSUR, as a whole organization, results in a concrete challenge when dealing with foreign parties. In light of the Agreement, it has been shown that good faith and fair dealing may create shared expectations among commercial actors. As proven in this thesis, they operate as common standards of conduct, promoting cooperation, fairness and responsible commercial behaviour

even where the actors belong to different legal systems: however, they do constitute only a point of reference for the parties.

It is also necessary to acknowledge some limitations of this analysis. As the Agreement entered into provisional application only in May 2026, it is still too early to see how European and South American parties will address and navigate the legal issues arising from their commercial relations. Further research will therefore be needed to determine whether its implementation, together with the expected increase in trade between the two regions, will effectively contribute to greater legal convergence in the field of contract law.

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