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**Forum Selection Clauses within the
Mercosouthern Law : the Hard
Implementation of an Accepted Rule**

Diego P. FERNANDEZ ARROYO

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Diego P. Fernández Arroyo *

I. – INTRODUCTION

1. Sooner than anticipated, and somewhat unexpectedly, a court of a MERCOSUR member State initiated the “advisory opinion” procedure suggested by the 2002 *Olivos Protocol for the Settlement of Disputes in MERCOSUR* (hereinafter: PO).¹ While there may be some who feel that five years is not that short an interval for a first such move to be made, it is worth recalling that the PO makes only a single, laconic reference to the aforementioned procedure: “The Council of the Common Market may establish procedures related to the request of advisory opinions to the Permanent Court of Revision, defining their scope and proceedings” (Article 3).

The 2003 *Regulation of the Olivos Protocol* (hereinafter: RPO) does address the question, and authorizes not only the member States (acting jointly) and bodies with decision-making capacity, but also the Supreme Courts of the member States, to request interpretation of MERCOSUR norms.² But since the RPO has preferred to delay

* Professor, Complutense University of Madrid (Spain); “Pablo Neruda” Chair, *Institut des Hautes Études de l’Amérique Latine* of Paris (France) (2007/2008); President of the American Association of Private International Law (<www.asadip.org>). The author wishes to thank Carlos Ruffinelli and Romina Sarti for their many helpful comments.

¹ Advisory Opinion N° 1/2007 (3 April 2007), presented by María Angélica Calvo, Civil and Commercial Judge of First Instance, First Shift, jurisdiction of Asunción, Paraguay, in *Norte S.A. Imp. Exp. against/ Laboratorios Northia Sociedad Anónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante*, through the Supreme Court of Justice of the Republic of Paraguay, received at the Permanent Court of Revision on 21 December 2006. Upon receiving the Permanent Court of Revision’s answer, the Judge took her decision on 29 August 2007. This decision was appealed and is currently under examination by the Court of Appeals.

² Under the terms of Art. 3.1 RPO: “any judiciary issue comprised in the Treaty of Asunción, the Ouro Preto Protocol, the protocols and agreements celebrated under the framework of the Treaty of Asunción, the CMC Decisions, the GMC Resolutions, and the CCM Directives.” The 1991 Treaty of Asunción is the founding text of MERCOSUR; the 1994 *Protocolo de Ouro Preto* is the treaty which establishes the institutional frame of the Bloc; CMC means Common Market Council (the highest political body); GMC means Common Market Group; CCM means MERCOSUR Commercial Commission.

the drafting of specific procedural rules for requests for advisory opinions until after consultation with these Courts (Article 4.2 RPO), no-one really expected the latter procedure to be used (as in the case at hand) until after the new text was adopted, which was not until February 2007,³ that is to say, after the issue had been brought before the MERCOSUR Permanent Court of Revision (TPR).⁴

2. Still, with or without a detailed regulation, there appears to be little room for doubt as to the objective and purpose of the consultation that a State's judiciary body addresses, via the highest judiciary authority, to the TPR. That objective cannot be other than the interpretation of one or more provisions of MERCOSUR "common" law; and the purpose is, evidently, uniformity of interpretation of that law, which should directly serve legal certainty and, at least indirectly, improve the efficiency of the system. Bearing in mind the stated objective, the common Court must take account of the "legal interpretation of the MERCOSUR norms ... in as much as they relate to cases that are in process at the Judiciary Branch of the requesting member State." The logic of this detailed prescription is as elemental as it is overwhelming: the courts, at least in practice, and whatever the area in which they exercise their jurisdictional function, only consider those matters that are submitted for their consideration.

Within MERCOSUR, the term "advisory opinion" (*opinión consultiva / opinião consultiva*) appears less than fully satisfactory, although it is better than the "preliminary rulings" deriving from the European Community experience.⁵ In all cases, it is only in view of a consultation that certain bodies may or must (under the current MERCOSUR regulations, it is not obligatory) submit a question to the common Court in order to obtain a decision as to the correct interpretation of the law of the Bloc, which may be binding or not (in MERCOSUR, it is not binding). This is why expressions such as "interpretative opinion" or "opinion on the correct interpretation" might apply more correctly to the institution under study.

3. A reading of the TPR decision may astonish those who approach it "off guard," not so much because of its substance as because of its form.⁶ They will find four

³ Regulation of Proceedings for the request of consultative opinions to the Permanent Court of Revision by the Higher Courts of Justice of the MERCOSUR member States (hereinafter: ROC), MERCOSUR/CMC/DEC. N° 02/07. About the origin of the ROC, see M.A. OLIVEIRA, "Judicial Diplomacy: The Role of the Supreme Courts in MERCOSUR Integration", *Harvard I.L.J.*, vol. 48 (2008), 94, 98-100.

⁴ Nor did there exist any regulation in the member States about the national procedure for submitting consultations, including, among others, the concrete role of the highest courts of the member States. Only recently have the Supreme Courts of Uruguay and Argentina adopted rules to govern that procedure (Uruguay: *Acordada* 7.604/07; Argentina: *Acordada* 13/08).

⁵ Art. 234 EC Treaty.

⁶ Among the several commentaries which have been published on this opinion, see A. DREYZIN DE KLOR, "La primera opinión consultiva en MERCOSUR: ¿germen de cuestión prejudicial?", *Revista española de derecho europeo*, num. 23 (2007), 437; S. CZAR DE ZALDUENDO, "Primera Opinión Consultiva en el MERCOSUR", *La Ley* (2007-D), 179; J. SAMTLEBEN,

elements of reasoning (as two of the Arbitrators wrote in a joint opinion⁷) of radically different content, presented in very heterogeneous form, and with a “Declaration” (resolution) consisting of a series of independent “votes”, two referring to the substantial aspects of the case, three referring to the regulation and characteristics of the opinions, and a further five that are strictly procedural. Two aspects deserve particular attention: one is the lack of a logical sequence between the reasoning and the votes; the other is the evidence of dissent in a decision adopted in the course of proceedings whose purpose, paradoxically, as pointed out above, is to establish a uniform interpretation of MERCOSUR law. Article 9.1.c of the RPO certainly provides for the possibility to include dissidence, but it is one thing to know that it is allowed, and quite another to see the dissidence in practice. In truth, it is quite astonishing.

Beyond the grounds given by the Arbitrators, the reader had best not confuse the expression of legitimate wishes with the greater or lesser extent to which the reasoning given brings them about, on the one hand, with the actual decision adopted, on the other hand. Fortunately in this case, that decision is, at least in terms of the majority votes, clearer and more concrete than some of the reasoning. Also, and regardless of the impression which the reading itself may give, the reader will be well advised to bear in mind at all times that the discussion focused on the interpretation of a specific MERCOSUR regulation within the framework of the MERCOSUR law, and not on the entire body of MERCOSUR law in the context of European Community law.

II. – THE (SIMPLE) QUESTION

4. The issue confronting the Asunción Court referred to an international agreement in which the jurisdiction of Paraguayan Courts had been questioned. More specifically, the plaintiff’s attorneys convinced the Judge that the opinion of the TPR was necessary in order to establish whether she was entitled to judge the case. The background of the consultation was as follows: a Paraguayan company that acted as distributor in Paraguay for an Argentinean company sued the latter for contractual liability (damages and injuries, and loss of potential future earnings) before a Court of First Instance in Asunción. The Argentinean company responded by claiming lack of jurisdiction based on the clear terms of the agreement, according to which the parties not only had expressly submitted themselves to the Ordinary Courts of the city of Buenos Aires and the laws of Argentina, but – in the event that it should be necessary – had agreed on the applicability of the 1994 *Buenos Aires Protocol on International Jurisdiction in Contractual Matters* (hereinafter: PBA).⁸ In response to this defence, the plaintiff basically invoked two arguments: (a) the overriding application (with respect

“Gerichtsstandsklauseln im MERCOSUR – Erstes Vorlageverfahren vor dem MERCOSUR-Gericht”, *IPRax* (2008), 52.

⁷ Arbitrators BECERRA, FERNÁNDEZ DE BRIX, and OLIVERA GARCÍA gave their opinion individually. Arbitrators MORENO RUFFINELLI and GRANDINO RODAS did so jointly.

⁸ Approved by CMC Decision N° 01/94 and in force in the four original MERCOSUR States.

to the PBA) of Paraguayan Law N° 194/93, which establishes the legal regime of contractual relations between manufacturers and firms established abroad and natural or legal persons domiciled in Paraguay and which, among other things, stipulates the competence of the Paraguayan courts; (b) the application of the 1996 *Protocol of Santa Maria on International Jurisdiction on the Subject of Consumer Relations*,⁹ under which the PBA would be inapplicable on the grounds, always according to the plaintiff, that the contract was a consumer contract.

In other words, to resolve the case at hand, the Paraguayan Court needed to establish whether the specific submission by the parties to the Argentinean Courts was valid or not (and, as a consequence, whether the Paraguayan Court should have declared itself incompetent to take the case) under the terms of the MERCOSUR norms in force. A typical case of private international law (hereinafter: PIL) that called for a reply within this framework.

III. – THE (COMPLEX) RESPONSE

1. The preliminary steps

5. In order to respond to the question regarding PIL, the TPR, in reaching its decision, had to swim the unpleasant waters of determining the position that MERCOSUR regulations occupy within the Organization of the States that compose it. In actual fact, this legal query was not absolutely indispensable (since the same solution could be arrived at in other ways), but it was evidently felt necessary. The (majority) response of the TPR was, in principle, clear:

“The internalized MERCOSUR regulations prevail over the norms of internal law of the Member States. [Consequently] the Buenos Aires Protocol applies in the countries that have internalized it.”¹⁰

What may appear as exasperatingly obvious from the perspective of other regional integration Organizations (in and outside the Americas), becomes – in the context of the *Mercosouthern* sub-region – a step of great significance that should not be underestimated. Not for nothing, the submitting Judge – “supported”, do not forget, by the supreme judiciary instance of her country – had doubts regarding the precedence of the PBA over national law, in spite of its being a text adopted by consensus in the framework of the Treaty of Asunción and in force in the four MERCOSUR member States. This doubt, which formed a key element of the consultation, clearly indicates that the matter is not (or was not) resolved for everyone. This lack of resolution lends added importance to the TPR’s determination to strengthen the MERCOSUR legal system.

⁹ Approved by CMC Decision N° 10/96; not ratified by any of the MERCOSUR States.

¹⁰ Item 2 of the decision, majority vote of Arbitrators MORENO RUFFINELLI, GRANDINO RODAS and OLIVERA GARCÍA.

6. It is evident, however, as indicated in the reasoning of one of the Arbitrators,¹¹ that concerning PIL, all MERCOSUR States have established the principle that where an applicable norm of conventional origin exists, that norm prevails with respect to the internal norms regulating the same subject matter. Thus, the 1979 *Inter-American Convention on General Rules of Private International Law* adopted in the framework of CIDIP¹² II, held in Montevideo, which is in force both in the MERCOSUR States and in Venezuela,¹³ makes it unnecessary to consult the Vienna Convention on the law of treaties which, as is well known, codifies the customary rules in the matter. While the latter establishes the logical criterion that the internal law may not be invoked to default on compliance with obligations agreed in the framework of international treaties, the former establishes the principle (albeit strictly with reference to the determination of the applicable law) that the national rule is only applied in the absence of an applicable international rule.

7. Not satisfied with this significant step, which gives precedence to the “internalized” international text, other elements of reasoning vested in the TPR decision go very much beyond that important assertion. A consideration of MERCOSUR law is constructed as authentic community law, in an interpretation to the effect that, while there is doubt with respect to the MERCOSUR law in general, it is clearly unacceptable when referring to norms contained in international conventions, such as the MERCOSUR “Protocols” that regulate diverse aspects of the PIL. Nevertheless, some of the Arbitrators, tempted perhaps to hand down a historical decision, use typical community law arguments, some European, some Andean, to situate their reply within a scope that has little to do with community law.

Similarly, even when the question turned on which regulation took precedence, either the MERCOSUR or the national norm, and nothing was asked in relation to other international norms, a “concurring” vote of the TPR response (item 2), apart from some specific considerations about the public order to which I will refer in due course, affirms categorically that

“the norms of the MERCOSUR law must prevail over any internal law norm of the member States applicable to the case, including the internal law as such and the public and private international law of the member States.”

Although this was a minority opinion, and as such of only relative significance, the phrasing may cause confusion (and indeed, it would do so even if the reasoning were

¹¹ Opinion of Arbitrator OLIVERA GARCÍA.

¹² Inter-American Specialized Conference on Private International Law of the Organization of American States.

¹³ See <<http://www.oas.org/DIL/CIDIP-II-generalrules.htm>>. This Convention, together with the other PIL conventions in force in all the MERCOSUR member States, constitutes a sort of *Mercosouthern* “common” PIL even if it is not adopted by *Mercosouthern* bodies. See D.P. FERNÁNDEZ ARROYO, “La nueva configuración del derecho internacional privado del MERCOSUR: ocho respuestas contra la incertidumbre”, *Jurídica*, vol. 28 (1998), 267.

contained in the majority vote, and this notwithstanding the non-binding character of the response).

The intention – blatantly contrary to the will expressed by MERCOSUR – of investing the sub-regional Bloc’s norms with a “community” character which they lack, did not succeed. Thus, the Court’s response refers to the sub-regional order as a “MERCOSUR integration law”,¹⁴ confirming what I have stressed in the Introduction about the need to differentiate the wishes manifest in some votes from the material content of the response.

2. The response to the case itself

8. If the solution provided for the “preliminary” or basic question – the overriding applicability over the internalized norms and, specifically, of the PBA – at first sight appears to be clear and satisfactory, a more in-depth analysis of the decision tempers that first impression. This is because the response to the specific subject matter – the efficacy of the clause submitting to Argentinean Courts – opens a valve of unpredictable amplitude and uncertain control. There appears to be a consensus in the agreement regarding the aptitude and efficacy of party autonomy to determine jurisdiction in contract matters and indeed, how could this be otherwise given the empirical evidence that such is the basic rule of the PBA? However, after acknowledging the obvious, the national court may elect not to adhere to what was decided by the representatives of the MERCOSUR States.

The TPR, accordingly, completes the second phrase of the aforementioned Item 2 of the decision, which begins: “The Buenos Aires Protocol is applied in the countries that have internalized it,” specifying that it is up to the national court to “assess whether the agreements entered into by virtue of the Protocol were obtained abusively or in a way affecting international public policy, making it manifestly inapplicable to the particular case.” The reference to the agreement being obtained “abusively” follows the wording of Article 4 of the PBA. Formally speaking, it makes sense. The reference to the *ordre public*, however, is strictly the TPR’s own addition, an additional condition for the applicability of the agreement to elect a forum, in contradiction to the PBA’s provisions.

In this way, the response would be constructed as follows: the PBA is applicable, hence, if the parties have submitted the case to the courts of a particular member State, the chosen courts have jurisdiction, unless the courts of another State can deny such jurisdiction on the grounds of “abuse” or “international public policy”.

9. The TPR declined to invoke the *Santa Maria Protocol on International Jurisdiction Regarding Consumer Relations* (hereinafter: PSM) on two counts: (a) “it is not in force as it has not been internalized by any member State;” (b) “it refers to consumer relations, expressly excluded from the Buenos Aires Protocol.” The first ground speaks for itself, yet it serves to underscore the unanimity reached with respect

¹⁴ Item 1 of the decision, unanimous vote.

to the effective application of the text in question, which, even had it been agreed by consensus and laid down in a GMC decision, must first be ratified by the States and its conditions complied with before it can be put into effect.¹⁵

The second ground given by the TPR, although valid in substance, is not correctly formulated. The problem is not that the issue of consumer relations is excluded from the PBA: the Santa Maria Protocol cannot be taken into consideration because the case under examination is definitely not within the material scope of its application,¹⁶ which relates to agreements between consumers and suppliers.

3. Some incidental topics

10. The Arbitrators also had time to rule on the relevance and applicability of the norm regulating the functioning of the advisory opinions. Three particular problems are worth mentioning in this connection: the application of the ROC (see footnote 3), which came into force after the case had been submitted to the TPR, the lack of binding force of the opinion handed down by the TPR, as established in Article 11 of the RPO, and the question of who must bear the cost of the proceedings. As regards the first of these issues, a majority of the Court correctly held that the ROC was immediately applicable with respect to the body of rules that merely establish the procedure for the substantiation of the questions and their correlative responses.¹⁷

11. Regarding the non-binding effect of the opinion, the TPR was apparently unanimous in its desire for this situation to be amended when it redundantly voted that “the advisory opinions petitioned by the national judiciary bodies must be considered as prejudicial interpretations, *to this date not yet binding.*”¹⁸

12. Regarding the cost of the proceedings, the majority of the Court (dissenting: the two Paraguayan members¹⁹) decided to comply with the current norm that establishes that costs are to be paid by the State to which the requesting Court belongs.²⁰ Notwithstanding this divergent opinion, the Court produced the

¹⁵ Another thing is that the TPR (or the national Courts) may take into consideration some of its informing principles as elements for interpretation, in cases relative to the matter contained in said text.

¹⁶ According to Arbitrator OLIVERA GARCÍA, the contract in question “cannot, even remotely, qualify as ‘consumer related’.”

¹⁷ See the reasoned opinion of Arbitrator OLIVERA GARCÍA: “the universally accepted principle of immediate application of procedural norms must not be confused with the phenomenon of retroactivity, to which it is precisely opposed.” His reasoning is radically opposed to that of Arbitrator FERNÁNDEZ DE BRIX.

¹⁸ Author’s italics.

¹⁹ See dissidences of Arbitrators FERNÁNDEZ DE BRIX and MORENO RUFFINELLI regarding Items 4.1 and 4.2, respectively, of the decision. The former pronounces himself on the inapplicability of several ROC provisions “for their manifest non-conformity with the originating MERCOSUR law.”

²⁰ Art. 11 of the ROC: “The costs incurred on account of the rendering of consultative

unanimous statement that:

“Without prejudice to the vote of the members of this Court, the Court understands unanimously that it is necessary to recommend to the MERCOSUR Council the revision of Resolutions N° 02/07 of the CMC and N° 02/07 of the GMC,²¹ regarding the payment of fees, with the reasoning that the advisory opinion does not affect only one State, but is a procedure of judiciary cooperation that enriches the integration process. The advisory opinion builds the integration law, and thus all States are the beneficiaries, and consequently they must bear the corresponding expenses and fees.”²²

In other words, even though the majority accepted that *lege lata* the payment of the costs by Paraguay was unavoidable, they all agreed to prevail upon the CMC – that is to say, the highest authorities of the member States – to amend the current norm, so that all States bear their share of the cost.

4. The decision of the Asunción Judge

13. Upon receiving the TPR’s answer, the Asunción Judge took her decision on 29 August 2007. Surprisingly, she not only recalled the non-binding character of the opinion she had requested, but she also allowed herself some criticism of the TPR opinion. Concretely, she stated that she “shared the minority opinion of the TPR” and that she “did not share the mechanism (*sic*) applied by the TPR to determine the validity of a choice-of-forum clause under the regime established by the PBA.” While some may agree with the Judge’s assertions, it is clear that no-one can agree with the way in which she treats the TPR opinion. It may be acceptable from a strictly legal point of view, but it is totally unacceptable from any other perspective. At best, the Judge’s stance may serve to show that the non-binding character of the advisory opinion cannot coexist with the inclusion of minority opinions, especially bearing in mind the purposes of uniformity, certainty and efficiency of the MERCOSUR legal system.²³

That said, it must be accepted that the decision of the national Judge on the matter under examination is more accurate than the difficult TPR opinion, in particular where it deals with the alleged extension of the scope of the notions of “*ordre public*” and “abusively”.²⁴ Contrary to the TPR, the Judge correctly affirms that no provision in the PBA, nor any of the other rules at the same or higher level of hierarchy, allow

opinions requested by the Higher Courts of Justice, such as fees, travel expenses, per diem of the members of the Permanent Court of Revision and the other expenses that may arise in the course of the proceedings, shall be borne by the member States [the member State] to which the requesting Higher Court of Justice belongs.”

²¹ It should read: “Decision N° 02/07 of the CMC and Resolution N° 02/07 of the GMC.” Also, consequently, the recommendation should be addressed to the Council and the Group, and not exclusively to the former.

²² Item 5 of the decision.

²³ See *supra*, paragraph 2.

the requested court (which is not the court chosen by the parties) to examine the *ordre public* issue.

IV. – APPRECIATIONS

1. About the PIL issue (substance of the case)

14. Perhaps the most far-reaching aspect of the case is the very clear acceptance of contractual freedom, established regionally by the PBA and confirmed by the 1998 Arbitration Agreements, as a basic principle of contract law in the MERCOSUR.²⁵ It is well-known that the issue of contractual freedom has been controversial in the region, and that distrust with respect to the parties' freedom to designate a competent court and the applicable law has over time been variously expressed, both at the legislative and the academic level, as well as by the judiciary. Among the MERCOSUR States, in particular, Argentina is the only country where party autonomy in international contracts has clearly become the rule, although it is also an apparent trend in the other countries.²⁶ But, within MERCOSUR in general, the principle has been established as a fact. It is "fully embedded as a rule in the four MERCOSUR countries in respect of the prorogation of jurisdiction, rising as a pillar of great significance in the integrationist spirit."²⁷

Evidence of ingrained acceptance is the reason why, in the decision under study, none of the Arbitrators dared to doubt the will of the parties to determine the jurisdiction in contracts falling within the material scope of the PBA. In effect, the exceptions contained in Article 2 of the PBA contemplate those matters where, for different reasons, contractual freedom is doubtful or must be discarded. The list is not exhaustive and matters may be added that were not originally contemplated by the

²⁴ See *infra*, paragraph 16.

²⁵ See D.P. FERNÁNDEZ ARROYO, "International Contract Rules in MERCOSUR: End of an Era or Trojan Horse?", *International Conflicts of Laws for the Third Millennium. Essays in Honor of Friedrich K. Juenger*, Transnational Publishers, Ardsley (NY) (2001), 157; H. KRONKE, "The Scope of Party Autonomy in Recent UNIDROIT Instruments and the Conflict of Laws in the MERCOSUR and the European Union", *Liber Amicorum Operti Badán*, FCU, Montevideo (2005), 289, 301-302.

²⁶ See D.P. FERNÁNDEZ ARROYO, "What's New in Latin-American Private International Law?", *Yearbook of Private International Law*, vol. VII (2005), 85, 110-112. See also: L. GAMA JR., "Autonomy of Will in international contracts in the Brazilian Private International Law. A constitutional reading of Art. 9 of the Introductory Law to the Civil Code in favor of freedom of choice of applicable law", in: *Estudos em Homenagem ao Professor Jacob Dolinger*, Renovar, Rio de Janeiro (2006), 609; D.C. JACQUES, "Adoption of the principle of autonomy of will in international contracting by MERCOSUR countries", in: *Estudos em Homenagem a Erik Jayme*, Renovar, Rio de Janeiro (2005), 277; J. TALICE, "La autonomía de la voluntad como principio de rango superior en el derecho internacional privado uruguayo", in: *Liber Amicorum en homenaje al profesor Dr. Didier Operti Badán*, FCU, Montevideo (2005), 527.

²⁷ As is expressly remarked in the reasoning of Arbitrators MORENO RUFFINELLI and GRANDINO RODAS.

drafters of the Protocol without running the risk of deforming the text or emptying it of its substance. Even dealing with the – much longer – list of Article 2 of the 2005 Hague Convention on choice-of-court agreements,²⁸ nobody would think of adding contracts such as those considered here. In any case, there can be no doubt that we are not here faced with a consumer contract or relationship²⁹ which, even though it would not entail the application of the PSM (not applicable, as correctly ruled by the TPR), would serve to exclude application of the PBA.

15. The PBA does not require any particular connection between the chosen forum and the case, even though some of the Arbitrators' reasoning seems to fall into this error. Article 1.b of the PBA, in defining its scope of application, refers only to a "reasonable connection" for cases in which only one of the parties is located in a MERCOSUR State – which here, evidently, is not the case.³⁰ Anyhow, the question is an academic one, since the agreed jurisdiction is that of the place where one of the parties is located, hence the connection between that jurisdiction and the legal case is indisputable.

The requirement that any competent forum be justified by its reasonable character – a reasonableness arising from the proximity between the legal relationship

²⁸ Said list excludes from the scope of application no fewer than eighteen items. Such a lengthy explanation could derive from the fact that the material scope is not covered in the title – as is the case of the PBA which refers only to contractual questions – and from the possibility that any State in the world might incorporate the text – which is not the case of the PBA, which only the partner States may incorporate. Nevertheless, the Convention also includes a norm required by some countries – apparently concerned about intellectual property issues – according to which any member State may effect a declaration expressing that it will not apply the Convention to a matter in which it has "an important interest" (Art. 21). That stems rather from a desire to see the Convention approved. Of course, should such a declaration be produced, there would at least be the certainty that the choice agreements are not valid in respect of the subject matter of the declaration; that is to say, the exclusion would apply (and be visible to the parties) before, not after the controversy arose. Regarding the 2005 The Hague Convention, see T.C. HARTLEY, "The Hague Choice-of-Court Convention", *European Law Review*, vol. 31 (2006), 414; A. BUCHER, "La convention de La Haye sur les accords d'élection de for", *Revue suisse de droit international*, n° 1 (2006), 33; M.M. CELIS AGUILAR, "Convention on the agreements of choice of forum," *DeCITA*, n° 5/6 (2006), 613.

²⁹ The definition of consumer relationship given by the Annex to the PSM does not admit of any other consideration: "it is the link established between the supplier who, at a price, provides a product or renders a service, and [the person] who acquires or uses it as a final destination. The provision of products or rendering of services when rendered or produced gratuitously is equivalent, where performed in the framework of an eventual consumer relationship." In the opinion of Arbitrators MORENO RUFFINELLI and GRANDINO RODAS, the PSM "has been invoked by mistake."

³⁰ See M.B. NOODT TAQUELA, "The agreements of selection of forum in MERCOSUR", *Journal of Arbitration* (1996-II), 738. See, however, the reasoning by Arbitrator BECERRA, who agrees with the selection of the Argentinean courts made in the contract, because it "is valid in as much as (...) such jurisdiction has reasonable links with the current conflict (Article 1)."

and the jurisdiction designated to rule on it – is quite a different matter. This requirement falls upon, in the first place, the (national or international) lawmaker at the time of designating the competent fora. In the case of the PBA, it must be understood that for the “lawmaker” (read: the representatives of the member States), the parties’ selection of judges from one member State is reasonable *per se*; as reasonable as the three criteria for competence established in Article 7 for those instances where the parties did not exercise their power to select the forum.³¹ It is totally reasonable for the PBA that the parties submit their case to courts in any of the MERCOSUR countries, whether related to the case or not. Such a provision not only allows a neutral jurisdiction to be chosen (in the sense that it is not the jurisdiction “of” any of the parties), but also signals the highly integrating factor that MERCOSUR jurisdictions are – so to say – interchangeable.

16. By virtue of the established rule, the TPR used another method to permit the courts of a given State to disregard the effects of an express submission agreed by the parties: the determination that such submittal was obtained “abusively” or that it affected “international public policy.” As mentioned above,³² since the requirement that the agreement may not be obtained “abusively” appears in the text of Article 4 of the PBA, that mention by the Court makes perfect sense – formally at any rate. The same cannot be said, however, of the reference to the *ordre public*, which was introduced by the TPR.

The fact that I assert that the first reference makes sense does not mean that I agree with the way the Court has dealt with the issue. To begin with, it is worth stressing that, in spite of its unchallengeable appearance (there is no contractual freedom where one party to the agreement abuses the other), it is an ambiguous formula and as such potentially counterproductive. It is not by chance that in all international texts containing the formula, it was the delegation from Uruguay – a country traditionally opposed to party autonomy in international contracts³³ – that

³¹ It is to this and this alone that Feuillade correctly refers (M. FEUILLADE, *Competencia judicial internacional civil y comercial*, Ábaco, Buenos Aires (2004), 137), even though the quotation from this author by Arbitrator FERNÁNDEZ DE BRIS seems to have been made in support of his (the Arbitrator’s) argument of which “a typical example of how to evidence the abusive obtaining of a contractual choice of forum or applicable law (...) is the selection of an applicable forum (*sic*) without a reasonable connection with the contract and the parties involved.” This is obviously an erroneous affirmation, at least under the scope of the PBA, which clearly admits that in a case such as the one at hand, the parties can submit to the Brazilian or Uruguayan courts, with no link to the case.

³² See *supra* paragraph 8.

³³ For the scope of such an affirmation, see C. FRESNEDO DE AGUIRRE, “La autonomía de la voluntad en la contratación internacional”, in: *Curso de derecho internacional del Comité Jurídico Interamericano*, vol. XXXI (2004), 323, where she reproduces and amplifies the arguments of her well-known thesis of the same title (FCU, Montevideo (1991)). One cannot but acknowledge, however, that the presence of party autonomy in different international instruments ratified by this country, in the 2004 Uruguayan Draft PIL Act and in the “Basis for an Inter American Convention

proposed it. It therefore gives the impressing of being a conditional agreement, something like a “yes, but”, a safeguard against the perils that party autonomy would entail. For this reason, I believe that the TPR should have stated – in relation to the case at hand – exactly what constitutes an “abusive ” way of obtaining prorogation of jurisdiction, rather than stating that this is within the competence of the national court. The word “abusively” features in the text of the PBA, and it qualifies what may invalidate the basic rule of the Protocol. Hence it is a matter for the proper interpretation by the TPR, as was unanimously acknowledged by the Arbitrators in Item 1 of the decision, where they say:

“it is up to the TPR to interpret the MERCOSUR integration law, the application of such interpretation, as well as the interpretation and application of the national law, being the exclusive competence of such consulting judiciary bodies.”

It is true that the facts of each case that may determine whether there has been abuse are for the exclusive use of the national court, but with an explicit question about the subject before it, the TPR should not have shirked its responsibility and rather have given its views about what may be regarded as “abusive” in a distribution contract. In particular, it would have been most important if the TPR had indicated whether a difference in size or economic power of the businesses parties to the agreement, or the fact that one party was a manufacturing company and the other the distributor, constitute an abuse *per se* or if, on the contrary, for that to be the case proof must be adduced as to the presence of intent, mistake or violence in concluding the agreement. Armed with such definitions, the national court could then assess whether the facts of the case allow it to deny effect to the submission clause.

17. The reference to public policy must not be confused with the above. Unlike the word “abusively”, public policy does not feature anywhere in the text of the PBA.³⁴ Moreover, I believe it is no exaggeration to state that the only explanation for the reference to public policy in this context is the belief that the other condition will not be questioned. But beyond this, in the context of international jurisdiction in matters of private law, the public order can only fulfil one (very important) function,

on International Jurisdiction” presented by Uruguay before the OEA that same year, undoubtedly shows a change of attitude in this respect.

34 It is very surprising that the reasoning by Arbitrator BECERRA includes the following phrase: “I however agree with the public policy reserve that the PBA itself contains in its Article 5 and which constitutes a wall to the actions of foreign law, and also that the norms of national and international business law are as a general rule of relative public order since in general there does not exist a social interest in compromise.” Regarding the reference to Art. 5, it is possible that there exists a confusion with Art. 5 of the Inter American Convention on general rules of private international law mentioned in the reasoning of Arbitrator OLIVERA GARCÍA. I have no other explanation, since from what has been said there is nothing at all that has anything to do with Art. 5 of the PBA. Also, the vote by Arbitrator FERNÁNDEZ DE BRIX relates the said Article with public policy. But, how can a rule refer to questions of public policy when it ends by stating: “in any case, the law most favorable to the validity of the agreement will be applied”?

i.e. to safeguard access to the courts and the right of defence, that is to say, the fundamental rights of the plaintiff and of the defendant. No-one who has signed an agreement including a clause of submission to the courts of a foreign State, when such submission is allowed by the rules in force, may allege that this violates their fundamental rights, unless they can prove that there existed some irregularity in terms of the right to sign the contract or to include an express submission clause.

It is by no means the first time that this issue has raised a controversy in Paraguay, in particular where the “contest” between the designation of a foreign court and the alleged mandatory application of the aforementioned Law 194 of 1993 concerning agency, distribution and representation is concerned. The plaintiff in this case invoked decisions by the Supreme Court in other cases in support of the applicability of the relevant national rule despite the prorogation in favour of foreign courts.³⁵ However, the remitting Judge points out that, in annulling certain interim measures taken by a court of first instance against the Argentinean defendant, a Court of Appeals in Asunción (not in another but in this same case) had unequivocally opted in favour of the primacy of the PBA over Law 194, in a decision adopted after the two decisions by the Supreme Court.³⁶

Even though, between some decisions that do not refer to our case (those of the Supreme Court), and another, later decision that does refer to it (that of the Court of Appeals), the choice is quite clear, it would be better to refrain from any considerations of an internal character which must not affect the TPR’s decision as to the interpretation of MERCOSUR legal texts such as the PBA. I for one agree with the very clear statement contained in the TPR decision:³⁷

“In the normal instance of private international law, the internationality of the cases is presupposed. The hypothesis of having to litigate abroad forms part of this normalcy. The admission of party autonomy to determine the jurisdiction, which is a trend greatly generalized at the world level has, among others, the virtue of “advising” the parties to an agreement of the existence of a possibility of having to litigate overseas. To accept the clause, and then to attempt to ignore it is, in principle, a clear act of bad faith. In particular, between countries that participate in an integration process, there is no element authorizing to discard what the parties have freely agreed to substitute for the unilateral will of any one of them.”

As it happens, this is the hub of the question. While, in the general international framework, the fact of invoking a national rule in order to set aside a freely agreed

³⁵ See Supreme Court of Justice, Paraguay, Agreement and Sentence N° 285 (25 May 2006), in “Action of Unconstitutionality, in *Gunder ICSA against/ KIA Motors Corporation ref/ indemnización por daños y perjuicios*”; Agreement and Sentence N° 827 (Constitutional Room), and of 12 November 2001, in “*Electra Amabay SRL against/ Compañía Antártica Paulista Ind. Brasileira de Bebidas*”.

³⁶ See Civil and Commercial Court of Appeals, Fourth Room, Judiciary circumscription of Asunción, A.I. N° 408 (9 June 2006).

³⁷ Opinion of Arbitrators MORENO RUFFINELLI and GRANDINO RODAS.

contract with the counterparty is in itself an arguable act, in the concrete framework of integration and given the existence of “rules that are neither doubtful nor conditional,”³⁸ it is totally unacceptable.³⁹ Indeed, it is no more difficult for a company from Asunción than it is for a company from the Argentinean province of Formosa to litigate in Buenos Aires.

18. The fact that some or all of the rules of the national law that is invoked may be considered “of international public policy” within the meaning of “mandatory rules of PIL” is not sufficient in any case to impede submission to the foreign courts permitted by the MERCOSUR text. Where they exist, the rule of such norms would only impede the application of a foreign law or the production of effect of a foreign decision clearly incompatible with these norms. To assume that the existence of a mandatory norm of PIL in a national legal system requires the exclusive jurisdiction of the courts of that State⁴⁰ implies twisting the normal operation of the norms of jurisdiction, which cannot function if it must live with a hidden exclusive jurisdiction that any court may produce as by magic if persuaded by an astute attorney. It is perfectly understandable that a country will wish to protect its local companies, but in no case should we assume that only the judges and courts of a given country (in this case Paraguay, but there are lots of other examples everywhere) can solve the case.

19. We should not fall into the plaintiff’s trap, who also argued that the Argentinean company had tacitly submitted when responding with a counter-guarantee for the interim measures referred to above.⁴¹ This claim was dismissed not only by the remitting Judge, who pointed out that this procedural move by the Argentinean party had been made before the principal lawsuit was brought, but also by the fact that the procedures on interim measures are autonomous and even though evidently related to the issue at hand, the relationship was not such as to make one procedure depend on the other. What has or has not been agreed in respect of interim measures does not affect the real issue, still less the question of jurisdiction. Besides, Article 6 of the PBA clearly states that tacit submission must be “positive and not *de facto*.”

³⁸ *Ibidem*. The same idea, albeit expressed in different words, can be found in the Judge’s decision.

³⁹ The reference to “clear injustice” and to the agreement “clearly contrary to the public policy” in Art. 6 of the 2005 *Hague Convention on Choice of Court Agreements* only makes sense in that any State in the world may incorporate that Convention, as provided in its Art. 27. It gives the impression that the States that participated in the drafting of the Convention intended to open an umbrella in order not to get wet with eventual submissions to unpredictable jurisdictions, but always, in the sense that I outlined before (beginning of paragraph 17), to guarantee effective access to the courts and defence by trial.

⁴⁰ See L. RADICATI DE BROZOLO, “Mondialisation, jurisdiction, arbitrage: vers des règles d’application semi-immédiates?”, *Revue critique de droit international privé* (2003), 1.

⁴¹ See *supra* note 36 and accompanying text.

2. On the MERCOSUR legal system

20. After these brief comments on the core elements of the case, some reference must be made to the issue of the hierarchy of MERCOSUR law with regard to internal regulations that looms so large in the Court's decision. At the risk of seeming laconic, I will confine myself to making and explaining an affirmation, and to rescue a paragraph from the TPR response which I consider highly pertinent.

21. To my modest understanding, the lack of thoroughness evident in the decision is due mainly to what we might call the European obsession. From its very inception, MERCOSUR has been searching for its image in that fairground distorting mirror that European integration represents from the MERCOSUR perspective. It is not rare – and this present TPR decision is no exception – to come across statements that seek to convert the nitty-gritty of EC law into universally valid rules. There are hundreds of examples. However, there is no basis for notions such as “immediate application”, “direct effect”, “primacy”, etc., the definition of which the EC Court of Justice has spent years profiling painstakingly and not without difficulty or indeed criticism, in a very concrete institutional and normative context (among many other things) that bears little relation to that of our own region, can simply be adopted here wholesale, even though the MERCOSUR authorities have always rejected the European model.

In using the word “rejected”, I am not inventing anything. Whenever the highest authorities of the *Mercosouthern* States have debated the profile and functions of institutions, procedures and rules, they have had European examples before them, yet there has never been the necessary consensus to follow any of those models. From the very moment when the Treaty of Asunción was signed, up to the ROC, passing through the Ouro Preto Protocol, the several “re-launchings” of MERCOSUR, the Olivos Protocol, the RPO and the constitution of the Parliament, it has been glaringly obvious that other ways have always been preferred. Then why should the Arbitrators have to base their arguments on the primacy of MERCOSUR law in their awards, on the lines of the practice followed by the European Court of Justice? This is not a call for inaction; it is not even a positivist statement.⁴² It is, simply, a matter of democratic conviction, *i.e.* that persons who are not (as they should be, in my view) actually magistrates, cannot impose criteria that have repeatedly been discarded by the highest authorities of the States that comprise MERCOSUR.

Having said this, I confess that my personal opinion, as well as many of my colleagues', tends towards greater institutionalization of MERCOSUR and a higher level of commitment in ensuring compliance with the Bloc's norms, a horizon that will probably be achieved before many think it will. But these opinions, like them or not, cannot prevail over the unequivocal will of the authorities which, being in a position to reproduce the norms and institutions of the European model in our own

⁴² As demonstrated in my opinion that the TPR response has fallen short in respect of the characterization of what should be regarded as “abusive.”

region (as has been done in the Andean Community, for example), have preferred, for better or for worse, a *sui generis*, eclectic model based on a gradual and controlled development.

22. What has been said of the model is also valid for the rules. However strange it may seem to European and “*europeanised*” observers, the MERCOSUR norms continue to be adopted by consensus (that is, expressing the active or passive will of all the Member States) according to an inter-governmental procedure. In the case of certain specific rules (such as those that relate to the functioning of the institutions or the application of customs regulations), the MERCOSUR bodies establish that it is not necessary for them to be incorporated into the national legal systems. In all other cases, internalization is the watchword. In particular, with respect to those instruments that contain PIL rules, since the Bloc’s authorities have invariably decided to use the conventional route (“Protocols” to the Treaty of Asunción), so does every State when incorporating international treaties. In other words: the MERCOSUR PIL rules are not community law at all.

Another, very different, matter – and which as such should not be confused with the above in any event – is that in interpreting these norms it must be borne in mind that they were adopted in an integration context and are intended to help to achieve its objectives. In this sense, in the reasoning of Arbitrators MORENO RUFFINELLI and GRANDINO RODAS, it is accurately stated that:

“The private international law Protocols are international conventions, but very particular conventions, being contained in Decisions of MERCOSUR – which have binding character as per the Ouro Preto Protocol⁴³ – and having been adopted in the framework of an integration process. This information is fundamental at the time of establishing an interpretation of its rules. It is true that the incorporation process planned in each State must be followed – given that there is still no supranational legislative instance from which there might derive norms such as these, destined to their direct application in the member countries – but once these conventions are in effect they must be interpreted and applied in function of the finalities of MERCOSUR.”

How does this postulate apply to the case under study? Undoubtedly, by disregarding any manner of exception to Article 4 of the PBA which guarantees respect of the parties’ freedom to choose a jurisdiction. In any treaty, the principal function of rule like this is to guarantee respect of the parties’ commitments and the principle of good faith; besides, in a treaty elaborated as part of an integration process, it must be understood that the norm furthers the common objectives. The “ordinary”

⁴³ Perhaps this is the element that is causing some confusion. But no-one is unaware that the channeling of the protocols by means of the decisions of the CMC has not in effect changed their nature as international conventions as regards the process of their incorporation into the national legal systems, which may take years. Nonetheless, it must be acknowledged that there exists a deep contradiction between the deceptive use of the form of decision (binding) and the maintenance of the traditional procedure of treaty ratification, in which the role of the norms and the will of the national powers play a decisive role.

international treaties, even if they have an “international” purpose and even where they exhort the contracting States to preserve “uniformity” of interpretation, are interpreted and applied nationally. In the treaties adopted within an integration framework, the “common” interpretation must always prevail over the local one.

3. About interpretative opinions

23. Since so much account is taken of the actions of the judiciary bodies of other integration systems⁴⁴ in their interpretation of common legal rules in cases brought before national courts, it would be well to take note throughout that one common characteristic in both the EC and Andean Courts of Justice, repeatedly referred to in Advisory Opinion N° 1/2007, is that of sticking strictly to the question or questions that triggered the intervention of the regional court. The Central American Court of Justice took an identical attitude in the two “interpretative opinions” upon which it has so far been engaged.⁴⁵

24. Although, evidently, to challenge a Decision of the CMC – which in effect approves the ROC – and a Resolution of the GMC – which places the burden of the cost of these proceedings on Paraguay – cannot be the correct response to the interpretative consultation, the unanimous opinion of the Arbitrators as to the need to review the Decision is to be commended. In particular, it is very difficult not to agree that it is scarcely reasonable to transfer the full burden of the cost of the proceedings to the State where the request originated. The fact that cases first have to be examined by the relevant Supreme Court is sufficiently burdensome also to discourage the submission of questions that may not be very pertinent.

25. The Arbitrators also used a great deal of ink on the non-binding character of the advisory opinion. It is true that it appears not to make sense to introduce a mechanism to obtain the opinion of the regional instance about the interpretation of a controversial legal matter, and then not to accept it. But, on the same lines of thinking outlined in the foregoing, this is as far as the consensus between the member States goes.

If the authorities deem it convenient to proceed to reformulate the interpretative consultation procedure, one thing that ought to be eliminated, with or without a reform of the ROC, is the inclusion of dissidences as established in Article 9.1.c of the RPO. Any-one who has studied law knows that any rule is potentially susceptible of divergent interpretation. But the interpretative consultation procedure was introduced precisely

⁴⁴ Even where the distinction acknowledges problematic borders, it is symptomatic that in the bodies used as examples the words justice, judge, magistrate, etc., are used, while such terms have been expressly discarded in the MERCOSUR framework.

⁴⁵ CCJ, Resolution N° 73, Prejudicial Consultation of the First Civil Chamber, First Section, City of San Salvador, Republic of El Salvador; effect, that the existence of unfair competition be declared, and the interruption of the same, file N° 5-28-9-2005, de 19/06/2006, GO of the CCJ N° 20; CCJ, Resolution N° 76, Consultative Opinion of the PARLACEN on the procedure to be followed for the incorporation of the State of Dominican Republic as Full member of the Central American Court of Justice, file N° 3-12-9-2006, de 10/11/2006.

so as to provide a uniform interpretation, so, if the response comes up with a whole series of possible interpretations – even if we are told which of these received more support than others – the whole point of the procedure is lost. The Paraguayan Judge's bitter reception of the TPR's answer, causing her even to criticize that answer, is evidence that the mechanism is in need of some amendment to improve its functioning.

V. – COLOPHON AND EXPECTATION

26. The response of the TPR to this first interpretative consultation is partial in substance and confusing in form. While, on the one hand, it has not provided a clear solution to the problem at hand – the precedence of submission to the courts of a member State under the terms of the PBA –, on the other hand it broaches many topics that are not relevant (at least in the reasoning of some of the Arbitrators). Nevertheless, we should not forget that this is the first decision of its kind and that the TPR members – the current ones or their substitutes – have made their debut in a procedure of no mean complexity. Likewise, its imperfections do not mean that the TPR decision contributes nothing. On the contrary, despite its apparent simplicity, its affirmations that the PBA is applicable because it is in force and that the PSM is not applicable constitute, in the context in which they are made, a great step forward whose significance should not be underestimated. Moreover, the reasoning is generally legally accurate and full of common sense.

Perhaps because this was the first such consultation, some opinions seem to emulate that first movie picture where fledgling directors take the opportunity of their *opera prima* to relate their biography, whether or not relevant to the plot, to render homage to their teachers and to leave some symbolic mark, thinking that perhaps this may also be their last chance. Future such advisory opinions will, no doubt, be better elaborated.⁴⁶ In particular, it is very important that TPR Arbitrators refrain from developing issues which are not part of the question submitted and from playing the role of law-maker for which they have no mandate. All in all, and notwithstanding the difficulties encountered, advisory opinions carry within them the germ of better law in the Bloc, and their use must therefore be promoted. The reform of the RPO and the ROC and, above all, the debate about the characteristics of the TPR responses may be of great assistance in this sense. This debate, to which I hope to have humbly contributed with these lines, should be promoted in all the regional MERCOSUR and national fora, including the judiciary. After all, there are many beautiful things in life that, when done for the first time, are not always fully satisfactory, and this has so far not caused anyone of sound mind to stop seeking improvements.

⁴⁶ Fortunately, a second interpretative question has recently been submitted to the TPR (this time by Uruguay) and it seems that others are waiting to be sent to the high Mercosouthern tribunal (*Opinión consultiva 1/2008 "Juzgado Letrado de Primera Instancia en lo Civil de 1º Turno en autos: 'Sucesión Carlos Schnek y otros c/ Ministerio de Economía y Finanzas y otros. Cobro de pesos' IUE 2-32247/07"*).