2000

Legal Certainty in the MERCOSUR: The Uniform Interpretation of Community Law

Jan Kleinheisterkamp

Follow this and additional works at: https://scholar.smu.edu/lbra

Recommended Citation
Jan Kleinheisterkamp, Legal Certainty in the MERCOSUR: The Uniform Interpretation of Community Law, 6 LAW & BUS. REV. AM. 5 (2000)
https://scholar.smu.edu/lbra/vol6/iss1/2

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu
Legal Certainty in the MERCOSUR:

*The Uniform Interpretation of Community Law*

*Jan Kleinheisterkamp*

The MERCOSUR is a young and ambitious integration project that is the largest and most successful of its kind in Latin America. However, the financial turbulence at the beginning of this year has shown that the project's economic and overall success depends heavily upon the new Community's ability to offer a stable framework for investors. An important part of this framework is legal certainty. In the absence of a supranational court, the uniform application of Community regulations poses a serious problem. This article offers a solution by presenting a uniform method of interpretation adjusted to the special nature of the MERCOSUR. First, the article analyzes the character and structure of the Community law and shows the legal obligation of national judges to interpret and apply this law in a uniform way. A comparative study of the legal methodology in the Member States as well as the associated countries serves as the basis for developing a uniform method of interpretation. This method derives from the essence of the Community law of the MERCOSUR and the national legal traditions, fulfilling both the postulates of autonomy and acceptability. The key element of this work is the method of comparative law.

I. Introduction.

The young Common Market of the Southern Cone (MERCOSUR) and its legal framework present a new challenge for scholars dedicated to the economic law of Latin America. Recent turbulences linked to the "Samba-Effect" and the "Tango-Crisis," which may be considered childhood diseases of the dynamic integration process, show very clearly how important legal certainty is for the success of the economic integration.¹ For the participants of the economic and financial life of the MERCOSUR, on whose confidence and acceptance the ambitious project heavily depends, legal certainty is a funda-

---


* The author wishes to thank especially Dr. Katharina Pistor and Mr. Jens Scherpe, both colleagues at the Max-Planck-Institute, Hamburg, for their great help with the English version of the manuscript, and Dr. Jürgen Samtleben, head of the Department of Latin America, for his most valuable comments.
mental factor for investment decisions and, therefore, a major point in the discussion about the region's global competitiveness.\(^2\)

Legal research on the MERCOSUR should aim at presenting and analyzing its laws in view of the practical needs of making the law accessible to its users. Legal certainty is intimately linked with the predictability of the outcome of litigation, the final stage of any potential dispute. Assessing predictability requires solid knowledge of the criteria for decisions by the competent courts. How will the court decide? Or, to be more precise, how will the courts interpret the relevant statutory norms to find their decision?

These questions show that research on specific legal matters of the MERCOSUR can only be completed through interpretation of both the law on the books and the law in action. This research raises the question as to the choice of methods of construction. The norms of the MERCOSUR form part of the respective national legal orders after they are transformed. National judges apply these norms when resolving disputes between individuals. Although the norms have their roots in international treaties, the matters regulated by national judges often directly affect the legal relationship between private parties transacting within the MERCOSUR. This ambivalence leads to the general problem of how the law of the MERCOSUR is to be interpreted. This question has so far not been answered satisfactorily by legal scholars. With the objective, but also the limitations, of finding a workable framework for analyzing the law of the MERCOSUR, this article offers a tentative solution.

II. Interpretation of the Law of the MERCOSUR.

Explaining the method of construction depends decisively on the essential character of the norms to be interpreted.

A. CHARACTER AND STRUCTURE OF THE LEGAL ORDER OF THE MERCOSUR.

In article 1 of the constitutive instrument of the MERCOSUR, the Treaty of Asuncion of 1991,\(^3\) the Member States committed themselves to “harmoniz[ing] their legislation in the relevant areas to achieve the strengthening of the process of integra-

---


tion" through the establishment of a common market. The "real constitution" of the MERCOSUR, the Protocol of Ouro Preto (POP) of 1994, specifies how harmony should be achieved.

1. The Community Law of the MERCOSUR.

Article 41 of the POP identifies the Treaty of Asunción, its protocols (including the POP itself), and the additional or complementary instruments (I) as the primary sources of law of the MERCOSUR. Article 41 of the POP also names the agreements included within the scope of the Treaty of Asunción and their protocols (II), as well as the Decisions, Resolutions, and Directives of the respective organs of the MERCOSUR (III). The hierarchy of norms of this legal construction does not seem to be fully settled, thus showing an apparent need for further intensive scientific discussion. At the moment, one can in substance only evaluate the hierarchy of legal norms for individual cases on the basis of general principles, considering the objectives of the instruments of integration. The majority of agreements (acuerdos) based on article 41 II of the POP constitute specific international treaties that need to be ratified by the Member States to enter into force, even though they are entitled as Protocolos (with direct reference to the Treaty of Asunción) and are adopted formally by the Council of the Common Market (Consejo del Mercado Común, hereinafter CMC). In contrast, article 42 stipulates that the other acts of the Community organs are mandatory and, if necessary, have to be incorporated by

5. MIGUEL A. EKMEKDJIAN, INTRODUCCION AL DERECHO COMUNITARIO 270 (1994) (calling this the "Constitutional Law of the MERCOSUR").
6. See 1 B.O.M. 49 (1997) (entered into force July 16, 1993) (Article 19 of the Protocol of Brasilia (Decision CMC 1/91, Protocolo de Brasilia para la Solución de Controversias of Dec. 17, 1991) (naming these sources of the law in the same order, as to be applied by the arbitrators of the mechanism of conflict resolution between the member states regarding the interpretation of the provisions of the MERCOSUR); see also EKMEKDJIAN, supra note 5, at 270-71, 288.
7. Jürgen Samtleben, Der Südamerikanische Gemeinsame Markt (MERCOSUR) Und Seine Verfassung, 1996 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKENRECHT, WERTPAPIERMITTEILUNGEN [WM] 1997 (1997) (discussing the fundamental problems arising from the situation around the Treaty of Asunción as the founding instrument of the MERCOSUR, for which article 53 I POP determines its provisions might have been implicitly derogated by later Decisions of the CMC (upon which it is based) during the period of transition until the entry into force of the POP as the "regular constitution of the MERCOSUR").
8. Id. at 2003.
9. Id. at 2003-04 (calling them "conventional law of integration" as compared to the other formal acts as "law of integration set by the organs" whose transformation is left to the discretion of the individual states).
10. See infra notes 26 and 60 (giving a possible explanation of this procedure by the opinion of the Argentine Foreign Ministry and the reasons presented, respectively).
11. See Protocol of Ouro Preto, Dec. 31, 1994, art. 9, 34 I.L.M. 1244 (hereinafter POP) (repeating the already-established compulsory nature of the Decisions of the CMC; Id. art. 15 (establishing the Resolutions of the Common Market Group (Grupo Mercado Común) (GMC); Id. art. 20 (establishing the Directives of the Commission for Commerce of the MERCOSUR (Comisión del Comercio del MERCOSUR) (CCM).
the Member States into their legal systems in correspondence with their respective national requirements. These norms can be referred to as derived norms, which are somewhat similar to the secondary legislation of the European Community.

The fact that the Protocol of Ouro Preto did not provide the organs of the MERCOSUR with supranational competence, even after the period of transition, raises further problems. Thus, the entire legal system of the Community, from a narrow point of view, so far only represents a construction of public international law, raising doubts about the justification to speak of a Community law as a legal order (sui generis) independent from classical public international law. However, the primary sources of law and, even more so, the agreements and the formal acts of the Community organs, even in their framework of public international law, inter alia, grant rights and impose duties directly on the citizens of the Member States with the objective of economic integration and unification of their legislations. These agreements and formal acts create a law of integration that has the quality of internally applicable law for the citizens and the competent national judge. At the same time, the law of integration originates from international obligations of the Member States, as is evident in the primary sources of law and the agreements included within the scope regulated by article 41 I and II of the POP. Thus, the agreements and formal acts of the Community organs show the double nature of internationally uniform laws. Combined with the primary aim of regional integration, it is justifiably considered a form of Community law of the MERCOSUR, despite the absence of supranationality.

15. See Samtleben & Filho, supra note 12, at 270 (explaining the direct effect of individual provisions of the Treaty of Asunción in terms of “self-executing norms”).
18. Case 26/62, supra note 14 (discussing this case with respect to these criteria of qualifications of the young European legal order as Community law where the supranationality is only named as one of various indicators); see also Maurice Lagrange, La Unidad Juridica del Derecho de las Comunidades Europeas - Aspectos de la Acción Prejudicial, 3 DERECHO DE LA INTEGRACIÓN [INTAL] 56, 59 (1968); Dasso, supra note 2, at 1253; Cassagne, supra note 16, at 882; see also, e.g., Héctor Alegría, El Mercosur Hoy: La Realidad, Pragmatismo e Ideales, [1995-E] L.L. 838, 845; Samtleben, supra note 7, at 2003; Cf. Luiz Olavo Baptista, Aplicação das Normas do MERCOSUL no Brasil, [1998-2] REV. DER. MERCOSUR 28; Nuri Rodriguez Olivera, Mercosur como Instrumento para la Creación de un Derecho Comunitario, 1 REVISTA DE LA FACULTAD DE DERECHO 39-40 (1997) speaking only of the “law of integration” due to the lack of supranationality); Jorge H. Lavopa, Organización Institucional y Derecho Comunitario en el Mercosur, 148 E.D. 899, 909 (1992) (speaking of “a sort of embrional Community law,” offering maybe the most precise description).
2. The Special Case of the Parallel Agreements with the Associated Countries.

In addition to the legal harmonization in the four Member States of the MERCOSUR, parallel international agreements were concluded with Chile and Bolivia, which establish uniform regulations in specific areas for all six countries. The most significant parallel agreement to date is the Agreement on International Commercial Arbitration, approved by Decision CMC 4/98. This agreement is practically identical to the corresponding agreement of the MERCOSUR, approved by Decision CMC 3/98. This agreement will serve as an example to demonstrate the nature of parallel regulation.

To enter into force, CMC 4/98 needs to be ratified by at least two Member States of the MERCOSUR and by one associated country (article 26, paragraph 1). As contracting parties, the preamble identifies the MERCOSUR, Bolivia, and Chile (paragraph 2), revealing the MERCOSUR’s legal personality of public international law conceded by article 34 of the POP. Corresponding to article 35 of the POP, the Community should be able to act on its own with legally binding effect, but because of the missing supranationality of its organs, all Member States have to sign the agreement instead. Accordingly, all Member States are named as signatory parties in the preamble of CMC 4/98 (paragraph 1).

This procedure demonstrates that the parallel agreements have the form of an international treaty concluded by the MERCOSUR as a subject of international law with third states. This raises the question whether a parallel agreement is part of the internal legal order of the MERCOSUR in the same sense as the article 41 II POP agreements and should therefore be governed by the same rules as the Community law.

CMC 4/98 has been included in the framework of the Treaty of Asunci6on and the POP in paragraph 3 of the preamble, which fulfills the requisites of article 41 II of the POP. Yet, this can only be relevant for the Member States that are parties to these instruments, which excludes Bolivia and Chile. Accordingly, the signatory parties also made reference to the association agreements between the MERCOSUR and the other states, as well as to Decisions CMC 14/96 and 12/97 (paragraph 4 of the preamble), which form the basis of participation of the associated countries in any activities of the MERCOSUR. This means that the parallel agreements integrate the associated countries pre-

19. See infra note 119 (providing an example of a parallel agreement in Europe).
20. Decision CMC 3/98, 7 B.O.M. 19 (1999); Decision CMC 4/98, 7 B.O.M. 29 (1999) (providing that both concluded in Buenos Aires on July 23, 1998); see also 8 B.O.M. 30 (providing the other relevant existing parallel agreement on extradition, concluded in Rio de Janeiro on Dec. 10, 1998 and approved as Decision CMC 15/98, which follows the same pattern).
22. Agreements of Partial Range for Economic Complementation (Acuerdos de Alcance Parcial de Complementación Económica) [AAP.CE] Nr. 36 (with Bolivia) and Nr. 35 (with Chile), which were concluded in the framework of the Latin American integration process originated by the Latin American Integration Association (Asociación Latinoamericana de Integración) [ALADI] created by the Treaty of Montevideo (1980); see also Samtleben, supra note 13, at 4 n.7.
24. 5 B.O.M. 34-35 (1998) (commenting on the institutionalized participation of Chile at the activities of the MERCOSUR).
liminarily in the specific areas of the “daily life” of the Community. This can be regarded as an anticipation of the amplification of the MERCOSUR. In these specific areas, the associated countries regard themselves as being part of the Community and have thus been treated accordingly. Therefore, even though not representing Community law in a strict sense, the parallel agreements should still be treated as representational.


The national transformation of the norms requires special attention because it determines the application of these norms to private individuals in the MERCOSUR. In the case of international agreements, this transformation occurs via the internal legislative procedure that makes these laws mandatory; in the case of formal acts by the organs of

25. Decision CMC 4/98, supra note 20 (representing a milestone of the efforts of integration with respect to the associated countries because, for the first time after the fundamental AAP.CE Nr. 35 & 36, uniform rules are established for the “extended” MERCOSUR. This followed the procedure established for Chile in art. 5 of Decision CMC 12/97:
   Chile participará en las Reuniones de Ministros del MERCOSUL y en las correspondientes reuniones técnicas preparatorias. Los Acuerdos que se alcancen serán celebrados en primera instancia como instrumentos del MERCOSUL. Cuando ambas partes lo estimen de interés, esos mismos textos serán suscritos entre el MERCOSUL y Chile en ocasión de las Reuniones del Consejo del Mercado Común y serán incorporados en el marco del ACE Nº 35 cuando corresponda.

26. Decision CMC 3/98 (clearing up the fact that, being the first example for paralleled Community law, this decision does not contain a so-called clause of adhesion, through which the accession to the Treaty of Asunción leads ipso iure to the respective expansion of territorial jurisdiction of the other protocols containing it); see generally Samtleben, supra note 13, at 69. Such a clause was not necessary due to the anticipation of the expanded validity of the content of CMC 3/98 by the parallel agreement with the already associated countries (Decision CMC 4/98). Accordingly, the opinion of Argentina's Foreign Ministry is that such a clause is dispensable in any case because all agreements, by being simultaneously approved as Decisions of the CMC, become integrative parts of the Treaty of Asunción; cf. MERCOSUR/CT-RMJ/ACTA Nº4/98* (Annex II of the Minutes of the XXXVI Meeting of the Comisión Técnica de la Reunión de Ministros de Justicia del MERCOSUR June 9-11, 1998 in Buenos Aires) *(unpublished manuscript) (on file with Argentine Ministry of Justice, Office of the Law of Integration, and author).

27. See supra note 18 (providing understanding of vigorous prerequisites to qualify as Community law); Cafés La Virginia, C.S., Oct. 13, 1994, 1995-D L.L. 275, 288 (Arg.) (Boggiano, J.) (referencing the famous Van Gend & Loos E.C.J. decision (see supra note 14), Justice Boggiano postulates a treatment corresponding to that given to the European Community law also for the agreement concluded in the framework of the Treaty of Montevideo of 1980 with the justification of “the high level of integration reached” (emphasis added); see also Peña, supra note 2, at 456 (giving an initiative of Latin American integration that is commonly regarded as a complete failure); Cassagne, supra note 16, at 877; Art. 5 I Decision CMC 12/97 (“Chile participará en las Reuniones de Ministros del MERCOSUL y en las correspondientes reuniones técnicas preparatorias. Los Acuerdos que se alcancen serán celebrados en primera instancia como instrumentos del MERCOSUL. Cuando ambas partes lo estimen de interés, esos mismos textos serán suscritos entre el MERCOSUL y Chile en ocasión de las Reuniones del Consejo del Mercado Común y serán incorporados en el marco del ACE [short form for AAP.CE, supra note 22] Nº 35 cuando corresponda” (emphasis added)).
the Community, the transformation takes the form each state considers necessary for such norm to enter into force. The form of transformation thus determines the hierarchy of the Community norms in the domestic legal order, that is, for the significance that the domestic judge will attribute to them. Because the application of the transformed Community law lies primarily in the hands of the national judge and because his decision directly impacts the legal relationships between private individuals, if in doubt, the hierarchy should be determined on the basis of court rulings.

With respect to norms based on international agreements, significant differences can be observed between individual states, including the associated countries. In Argentina and Paraguay, after the last major constitutional reforms, the supremacy of the transformed international law, and thus of the Community law vis-à-vis the simple internal law, excluding the constitutional law, results directly from the countries' respective constitutions. In contrast, the constitutions of the other countries do not make reference to the hierarchy of international norms.

In Chile, for example, the formal prevalence of international obligations is not clear, but the factual prevalence of treaties, as leges speciales, has been recognized repeatedly.


31. Compare C.S., Nov. 14, 1988, 85 RDJ II-5 252, 253, 259 (Chile) (confirming the range of simple national law), with C.A. Santiago, Mar. 7, 1988, 85 RDJ II-2 11, 12 (Chile) (referring to article 27 of the Vienna Convention on the Law of Treaties and, implicitly, to the general principle of pacta sunt servanda, to justify the prevalence of the GATT Treaty over an opposing domestic norm; C.S. (Jan. 11, 1995) 177 GAC. JUR. 165, 167 (1995) (giving the constitutional basis of the transformation of international law); see also (art. 5 II and 50 Nr. 1 of the Constitution (Constitución Política de la República)); see generally Santiago Benadava, Las Relaciones Entre Derecho Internacional y Derecho Interno Ante Los Tribunales Chilenos, 59 RDJ 1, 25 (1962); Jürgen Samtleben, Schiedsgerichtsbarkeit in Chile, 1983 RECHT DER INTERNATIONALEN WIRTSCHAFT 167, 168, n.3 (providing further references).
Therefore, national laws enacted subsequently should also be interpreted in conformity with international treaties signed by Chile.\(^3\) In principle, the same holds true in Bolivia\(^3\) and Uruguay.\(^3\)

Originally, the situation in Brazil was somewhat more problematic. Here, the courts tended to always let the internal law prevail\(^3\) until they explicitly recognized the equal rank of domestic and international law (including the application of the basic rule of *lex specialis derogat leges genera*les).\(^3\) Therefore, today the situation in Brazil is similar to that of Chile, Bolivia, and Uruguay.\(^3\)

In summary, as of today, the observance of international obligations and, therefore, the prevalence of the transformed Community law, is at least *de facto* guaranteed.\(^3\)

---

\(^32\) Cf. C.S., Nov. 30, 1993, 90 RDJ II-6 159, 170, 172 (Chile); C.S., Jan. 11, 1995, 177 GAC. JUR. 165, 167 (Chile) (confirming the sentence of first instance); Benadava, *supra* note 31, at 25.

\(^33\) *Id.*

\(^34\) See Jaime Prudencio Cosío, *Curso de Derecho Internacional Privado* 27-28 (La Paz 1971) (describing the equal hierarchy); C.S. (July 18, 1978) 1624 GAC. JUD. 277, 291 (1978) (promoting the priority of international treaties *leges speciales*).

\(^35\) Cf. Midón, *supra* note 30, at 1048; see also Jimenez, *supra* note 30, at 60; Heber Arbuet Vignali, *Condiciones para la Aplicación de una Norma Internacional en el Ambito Interno*, 5 Revista de la Facultad de Derecho 131, 173 (1993) (defending an absolute priority of the international law); Adolfo Gelsi Bidart, *Tribunal de Justicia para el Mercosur*, 1 Revista de la Facultad de Derecho 57, 62 (1991) (defending somewhat more cautiously). *But see S.C.J.* (June 20, 1990) 102 LJU I 109, 111 (1991) (demonstrating where a national norm could not be interpreted in harmony with a prior treaty was given preference over the latter in full conscience of the international responsibility); Tribunal de Apelaciones en lo Civil de 2o. Turno (Sept. 19, 1988) 101 LJU I 5, 6 (1990) (interpreting the later treaty restrictively in the light of prior national legislation). *See also* Tribunal de Apelaciones en lo Civil de 1er Turno (20.12.1994) 112 LJU I 389, 391 (1995) (recognizing the primacy of the treaties in special procedural question due to article 524 Código General de Proceso (1988), which states "En defecto de tratado o convención, los tribunales de la República deberán dar cumplimiento a las normas en el presente Título.").

\(^36\) Jürgen Samtleben, *Handelsschiedsgerichtsbarkeit in Lateinamerika*, 21 Zeitschrift für Wirtschafts- und Bankenrecht, Wertpapiermitteilungen [WM] 769 (1989), relying on RSTF, 01.07.1977, 83 RTJ DD.MM.1978, p. 809, by which the doctrine was found that any later domestic regulation could overrule the effectiveness of a transformed treaty, irrespective of any international responsibility due to the breach of the treaty. This doctrine, in principle, has been affirmed by RSTF, 28.11.1996, D.J.U. 30.5.1997, p. 23176; *see also* Midón, *supra* note 30, at 1049.


\(^38\) Cf. Jimenez, *supra* note 30, at 57-58; Midón, *supra* note 30, at 1049 (As an exception, the international treaties prevail over the Brazilian tax legislation, due to the express provision of article 98 of the National Tax Code: "Código Tributário Nacional"). *See generally* STJ, 08.09.1998, D.J.U. 23.11.1998, p. 159; Baptista, *supra* note 18, at 34-35 (deriving from the *argumentum e contrario* the principal of equal hierarchy with the domestic law in all non-express cases); TJSP, 19.05.1998, 756 R.T. DD.MM.1998, p. 125, (deserving special attention interpreting Article 157 CPC strictly in the light of the Protocol of Las Leñas on Judicial Cooperation (1992), suppressing the procedural requisite of translation of a Spanish document, thus letting Community Law prevail over the restrictive national law).

\(^39\) Cf. Midón, *supra* note 30, at 1050 (making reference to the dependence on the "good faith of the domestic law").
trend towards granting complete priority is recognizable, but absolute legal certainty will probably only be reached by constitutional reforms following the example of Argentina and Paraguay.40

4. The Difficulty of Ensuring the Uniformity of Community Law.

The above discussion shows that national judges are obliged to apply the law of the MERCOSUR as internal law41 as long as its norms are sufficiently determined and are self-executing in that they do not depend on any additional internal acts of concretization.42 But despite their internal binding force as a result of transformation, these norms always retain their basic character as Community law because they were created for the purpose of establishing identical rules for the common market.43 Since they form a new uniform legal order of the Community, they have to be applied in a uniform way.

In practical terms, all integrational efforts depend upon the important and difficult task of finding a mechanism for implementing and guaranteeing uniformity.44 The difficulty of finding such a mechanism is multiplied by the inherent risk of fragmentation and lack of coherence because of the peculiarities of national legal traditions and concepts that are applied on a daily basis by national authorities.45 Without the cohesive powers of uniform application, there is always the imminent threat that the Community law will be degraded to a mere common historical source of diverging national regulation in the inevitable and even necessary process of further development.46 Legal scholars agree that, because of this threat, there is an unconditional need to guarantee uniform

40. Id. On the other hand, in Germany, for example, the transformed conventional international law also only assumes the rank of the transforming internal act, and the specific hierarchy of the European Community law as displacing national law is, as a matter of principle, only derived from the very nature of the act of transferring sovereign powers to a supranational institution. See, e.g., BVerfG (June 6, 1971) 31 BVerfGE 145, 173-174 (1972); see generally JOSEF ISENSEE & PAUL KIRCHHOF, 3 HANDBUCH DES STAATSRECHTS 311-12 (2d ed., Heidelberg 1996). This reasoning is still not possible in the MERCOSUR. This situation and the similar one in Italy have caused some doubts as to the legal certainty in the past. Cf. Gaudet, supra note 29, at 58.


43. See notes 3-4 and accompanying text.

44. Cassagne, supra note 16, at 877; Lagrange, supra note 18, at 59.


46. See infra note 152 (demonstrating the importance of a uniform evolution of the Community law).
application, especially the uniform interpretation of the Community law of the MERCOSUR by national courts.47

a. The Absence of a Supranational Court.

So far, there is no solution in sight as to how uniformity is to be achieved in reality. The vast majorities of legal scholars realize the problem but merely conclude that a solution for this demanding task is a supranational court with a centralized and binding competence of interpretation, following the model of the European Court of Justice.48

At the present stage of integration such an institution is not legally feasible because it would require supranationality.49 At the same time, the MERCOSUR as an economic


49. See supra note 13. Until now, the delegation of sovereign powers to a supranational organization is only safeguarded legally in Argentina by article 75 Nr. 24 of its Constitution, see supra note 30, as well as in Paraguay by article 1451 of the Constitution, which states "La República del Paraguay, en condiciones de igualdad con otros Estados, admite un orden jurídico supranacional que garantice la vigencia de los derechos humanos, de la paz, de la justicia, de la cooperación y del desarrollo, en lo político, económico, social y cultural." According to Rodriguez Olivera, supra note 18, at 46, this possibility allegedly is affirmed by the scholars in Uruguay by means of a generous interpretation of article 6 of the Constitution ("La república procurará la integración social y económica de los Estados Latinoamericanos, especialmente en los que se refiere a la defensa común de sus productos y materias primas. Asimismo, propenderá a la efectiva complementación de sus servicios públicos.") Olivera, supra note 18, at 46. See also Ruben Correa Freitas, La Primacía del Derecho Comunitario Sobre la Constitución de los Estados Miembros, 111 L.J.U. 111, 118 (1995); but see Labandera Ipata, supra note 2, at 69. In Brazil, this is not deemed possible due to a lack of corresponding legislative competence (articles 22, 23 & 24 of the Federal Constitution), calling for a constitutional reform; Midón, supra note 30, at 1049; but see Adriana Dreyzin de Klor & Teresita Saracho Cornet, La Eficacia de las Sentencias en un Espacio Integrado, [1996-A] L.L. 1570, 1573 & n.10 (misinterpreting the Federal Constitution of Brazil, art. 4 "párrafo único"). See infra note 66. But see TJSP, 19.05.1998, 256 R.T. DD.MM.1998, p. 123, supra note 38, at 126 (stating that the International Tribunal will be installed).
reality is already in full action. The urgent need for a stable legal framework to facilitate economic relations in the emerging Common Market cannot wait until the Member States eventually agree on the transfer of sovereign power to a supranational institution.\(^{50}\)

A court of the MERCOSUR could not and should not take over the entire load of application and interpretation of Community law. Even in the European Community with the Court of Justice in Luxembourg, it was clear from the very beginning that every national judge also has to be a Community judge.\(^{51}\) The judge is in charge of consolidating legal uniformity and coherence in its horizontal territorial dimension\(^{52}\) and needs to be provided with an effective tool capable of guaranteeing uniform application and construction of the Community law even without supranational guidance.\(^{53}\)

b. The Uniform Interpretation as a Legal Obligation.

A method of construction that could be applied by a judge of a future Community court would be a tool that would provide a method of uniform interpretation. The observance of such a unitarian method will largely depend first on the conviction of the respective national organs,\(^{54}\) and second, on a corresponding genuine legal obligation that could justify abandoning traditional domestic concepts.\(^{55}\) The treaties of the MERCOSUR do not include explicit, special clauses that impose such an obligation on nation-


\(^{52}\) See Casella, supra note 47, at 100; ADRIANA DREYZIN DE Klor, EL MERCOSUR - GENERADOR DE UNA NUEVA FUENTE DE DERECHO INTERNACIONAL PRIVADO 189 (Buenos Aires 1997); ROBERTO DROMI ET AL., DERECHO COMUNITARIO - RÉGIMEN DEL MERCOSUR 181 (Buenos Aires 1995) (supporting the MERCOSUR); JARVIS, supra note 51, at 2 (supporting the European Community); see generally 3 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 789 (Tübingen 1976); H. Mosler, L'application du Droit International Public par les Tribunaux Nationaux, 91 Recueil de Cours 619, 679 (1957 I). JAN KROPHOLLER, INTERNATIONALES EINHEITSRECHT 236 (Tübingen 1975) ("The less legal unity is secured by organizational means, the more this aim has to be considered when finding of justice is to be found by judges.") TJSP 19.05.1998, 756 R.T. DD.MM.1998, p.125, supra note 38, at 126 ("Until [the installation of the International Tribunal] happens, it is important that the judges feel the necessity to prudently bring together the instruments which aim at conflicts of the international market [referring to the MERCOSUR], thus creating a line of authority which guide the efficient and agile aims of the [legal] procedures.").

\(^{53}\) A parallel situation exists to the corresponding necessities when applying uniform law based on international treaties or model laws. Cf. Berger, supra note 45, at 33; FRANK DIEDRICH, DIE AUTONOME AUSLEGUNG VON INTERNATIONALEM EINHEITSRECHT 109-10 (Baden-Baden 1994); TILLMANN SCHMIDT-PARZEFALL, DIE AUSLEGUNG DES PARALLEL-ÜBEREINKOMMENS VON LUGANO 57 (Tübingen 1995).

\(^{54}\) Cf. JARVIS, supra note 51, at 3; see also TJSP 19.05.1998, supra note 52.

\(^{55}\) Cf. Bayer, supra note 17, at 624.
al judges. This only leaves the possibility of referring to the basic intent to create a uniform legal order for the Member States,57 as laid down in article 1 of the Treaty of Asunción. This provision not only manifests the intention of the parties, but constitutes the clear obligation of the Member States to “harmonize their legislation in the relevant areas” in order to strengthen the integration process.58

Even more to the point is article 38 of the POP, which requires the parties to “adopt all necessary means to assure in their respective territories the compliance with the norms originating from the organs of the MERCOSUR.”59 In light of the missing supranational powers of these organs, the term “norms” should not only be interpreted as including the acts referred to in article 41 III of the POP, but also the agreements regulated by article 41 II of the POP, considering these agreements are also regularly approved in the form of Decisions of the CMC.60 From this follows the genuine legal obligation of each Member State to guarantee the uniform interpretation of Community law. This is a compelling task that should be primarily assumed by the domestic courts to avoid the Member State’s responsibility for a breach of its international obligations.61

The same follows from the very essence of Community law. Private parties are granted certain rights in their communitarian dimension that are of special significance for their economic interests. Otherwise, there would be no justification for a regulation on the level of the Community.62 Because the private individual can invoke these rights only in front of the

56. See, e.g., the corresponding duty of article 18 of the European Convention of Rome on the Law Applicable to Contractual Obligations (1980) as manifested in article 36 of the German Law of Introduction to the Civil Code; see also DIEDRICH, supra note 53, at 112; Alejandro Garro, Armonización y Unificación del Derecho Privado en América Latina, 89 RDJ I 11, 23 (1992); Bayer, supra note 17, at 625.

57. Bayer, supra note 17, at 624.

58. See supra note 3, at 1045.

59. Art. 38 POP (“Los Estados Partes se comprometerán a adoptar las medidas necesarias para asegurar, en sus respectivos territorios, el cumplimiento de las normas emanadas de los órganos del MERCOSUL...”).

60. See supra note 10.


62. The economic freedom in a common market is an especially important reason for foreign investors to start businesses in the MERCOSUR and thus voluntarily subject themselves to its legal order. Cf. Peña, supra note 2, at 454 (advocating a “right to unrestricted access to the markets, protected by the law”).

63. The “Principle of Subsidiarity” is based on the fundamental assumption that a state party to an international treaty is never willing to concede more rights than is absolutely necessary, and there has to be a clear necessity to regulate a certain question on the Community level. See infra note 72; compare also Treaty on European Union (as consolidated according to the Treaty of Amsterdam) Feb. 7, 1992, arts. 3b and 5, O.J. C224/1 (1992) 31 I.L.M. 247 (1992).

“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
national courts, it is necessary to concede a further reaching right of a fundamental nature to have the granted Community rights applied and interpreted in a uniform way. This right has to correspond to the genuine obligation of the deciding national judge.64

Lastly, this obligation to apply and interpret the Community law uniformly also derives from a purely domestic point of view. By enacting the Community law as domestic law, the legislator manifested his will to give effect to the process of integration and legal harmonization, thus implicitly ordering its uniform application.65 This becomes even more evident in light of the so-called clauses of integration found in the constitutions of the Member States of the MERCOSUR.66

Corresponding with the nature of the Community law itself, the method to be applied will have to be autonomous and free of any respective national peculiarities and traditions.67 But, paradoxically, it will have to be synthesized from the national legal traditions to be truly a method all legal systems of the Community can have in common without which broad acceptance by all Member States could not be guaranteed.68 These postulates should be coherent with a possible fundamental pattern of any uniform law. The emergence of a legal order of new quality exceeds the mere sum of its components. This may have a synergetic effect by adding the new dimension of uniform community

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

Treaty on European Union, art. 3b.

64. Cf. Dasso, supra note 2, at 1253; see generally Adroaldo F. Fabricio, A Prejudicialidade de Direito Comunitário Nos Tribunais Supranacionais, 339 R.F. 3, 19 (1997). Considering the "implied powers" theory and the lack of a supranational presence with the competence of binding interpretatory powers, one could even speak of a fundamental Community right, since the homogeneous application is the conditio sine qua non for enjoying any Community rights; see also Bayer, supra note 17, at 633 (stipulating a private claim for legal certainty concerning the application of an international treaty).


66. See id. (referring to the programmatical article 4 "párrafo único" of the Brazilian Federal Constitution: "A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações."); see Midón, supra note 30, at 1039 (describing the clauses of integration in the other Member States. By contrast, such clauses cannot be found in the constitutions of the associated countries Chile and Bolivia.

67. See Casella, supra note 47, at 88; see also KROPHOLLER, supra note 52, at 235 et seq. (elaborating in detail the exigency of autonomy underlying the method of interpretation of international uniform law).

68. See Casella, supra note 47, at 103; cf. DIEGO P. FERNÁNDEZ ARROYO, LA CODIFICACIÓN DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA 51 (1994); see also DIEDRICH, supra note 53, at 110 (describing conventional international uniform law); Berger, supra note 45, at 33 et seq. (describing uniform law based on the model laws); see generally ZWEIGERT & KÖTZ, supra note 45, at 21.
and interdependence to the individual national experiences. In summary, the traditional individual concepts of legal construction will have to serve as the starting point by which coinciding foundations will have to be detached from their limited scope and adapted to that new quality.69

B. CLASSICAL CANONS OF INTERPRETATION AND THEIR LIMITATIONS.

In accordance with the “double nature” of unified legal norms, this analysis will focus on the rules for interpreting international treaties as well as individual national rules of interpretation.70

1. Interpretation in the Public International Law.

The principles of construction of international treaties are laid down in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which have acquired the status of customary law.71 Their main characteristic is to consider primarily the situation of negotiation between sovereign nations that want to regulate their legal relationships by way of compromise. This includes the basic assumption that the contracting parties will accept limitations on their rights only to the least possible extent.72 Therefore, the paramount rule is the supremacy of the parties' will, as suggested primarily by the wording of the treaty (article 31 I of the Vienna Convention).73 Every international treaty should, therefore, be interpreted autonomously in order to respect its contractual nature.74

However, these rules do not sufficiently acknowledge the fact that the unified Community law has less impact on the states as sovereign contracting parties than on the legal relations of private parties.75 In daily application, few differences exist between the Community law and domestic regulations, except for the former's larger territorial jurisdiction. Therefore, the national methods of legal construction should be, in principle,
more relevant than the methods of interpretation for rules applicable between states. Moreover, the latter lack the systematic context that is an essential part of any process of integration leading to a complex legal order. Nevertheless, it is worth noting that the international character of Community law, in formal and practical terms, emphasizes its cross-border dimension. It is therefore important to recognize the autonomy of the interpretation, considering that the ratio conventionis is part of the international treaties aspired, free of national peculiarities that would be inconsistent with uniformity.

2. Interpretation in the Context of the National Legal Orders.

To pay tribute to the “plus” that qualifies and promotes the Community law vis-à-vis the public international law, the national concepts of construction have to be analyzed and compared. The purpose of this analysis is to extract their common core in order to guarantee their desirable general acceptance. In light of the comparative law method, it is important to notice beforehand that all the countries of the MERCOSUR belong to the Romanistic legal family and, with the exception of Brazil, their origins can be traced to the genuine legal unity of the former Spanish Empire. Yet, for the question of methodology, it is of paramount importance to note that the methodological doctrines of the German scholar Savigny and those derived from his thoughts have strongly guided legal scholarship in all these countries. This leads to the comforting situation (of course only

76. See Lutter, supra note 69, at 598; Bayer, supra note 17, at 633; see also Cassagne, supra note 16, at 877 (especially for the Treaty of Asunción).

77. See DIEDRICH, supra note 53, at 110; KROPHOLLER, supra note 52, at 237. See also Casella, supra note 67, at 88.


79. See ZWEIGERT & KOTZ, supra note 45, at 113 et seq.; see also 1 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 581-82 (1975); Garro, supra note 56, at 24 et seq. (for the legal history of Latin American private law); José L. de los Mozos, Perspectivas y Método para la Comparación Jurídica en Relación Con el Derecho Privado Iberoamericano, 60 REVISTA DE DERECHO PRIVADO 773, 776 et seq. (1976).

80. See Garro, supra note 56, at 24, 28; Hugo Tagle Martínez, Derecho e Integración Internacional, 12 REVISTA CHILENA DE DERECHO 443, 444 (1985) (describing the modern process of integration in Latin America as the inversion of the original desintegration of the former Spanish colonies).

81. See, e.g., MARIA H. DINIZ, COMÉNDIO DE INTRODUÇÃO À CIÊNCIA DO DIREITO 383 et seq. (2d ed., São Paulo 1989); 1 MIGUEL M. DE SERPA LOPES, COMENTARIOS LEI DE INTRODUÇÃO AO CÓDIGO CIVIL 115 et seq. (2d ed., São Paulo 1959); CLOVIS BEVILAQUA, TEORIA GERAL DO DIREITO CIVIL 45 et seq. (reprint 1975) (1908); Rúbens Limongi Franca, HERMÉNÉUTICA E INTERPRETAÇÃO DO DIREITO POSITIVO, in 41 ENCICLOPÉDIA SARAIVA DO DIREITO 145, 152-53 (1980) (referencing GENY, whose methods of interpretation (données) were massively influenced by the German Pandekiststen, that is, Savigny in the long run); Cf. FIKENTSCHER, supra note 79, at 467-471. In Argentina, see ENRIQUE AFTALION ET AL., INTRODUCCIÓN AL DERECHO 423 et seq. (12th ed. 1984); F.A. TORRES LACROZE & GUILLERMO P. MARTIN, MANUAL DE INTRODUCCIÓN AL DERECHO 350 et seq. (4th ed. 1983). In Chile, see CARLOS Ducci CLARO, "Interpretación jurídica" 130 (3d ed. 1989) (describing the influence of Savigny on Bello, the “father” of the Chilean CC); FERNANDO FUEYO LANERI, INTERPRETACIÓN Y JUEZ 52 (Santiago de Chile 1974); LUIS CLARO SOLAR, EXPLICACIONES DE DERECHO CIVIL CHILENO Y COMPARADO 124 (reprint 1931) (1898). In Uruguay, see EDUARDO JIMÉNEZ DE ARÉCHAGA, INTRODUCCIÓN AL DERECHO, 113 et seq. (2d ed. 1987). In Paraguay, see JUAN JOSÉ SOLER, INTRODUCCIÓN AL DERECHO PARAGUAYO 527 (1954). In Bolivia, see JOSÉ A. OLGUIN ESTRADA, INTRODUCCIÓN AL ESTUDIO DE DERECHO 532-33 (2d ed. 1982).
for a continental lawyer) that the hermeneutical concepts in these countries are completely based on the traditional and well-settled continental methods, known today as the classical four canons of interpretation: the grammatical, the systematic, the historical, and the teleological interpretation. Court decisions, as well as works of the legal scholars, and partially even the legislations of the individual Member States of the MERCOSUR and of the associated countries, reflect these canons of interpretation.


In Brazil, Argentina, Chile, Uruguay, and Paraguay, judges charged with interpreting statutory law are guided by explicit rules in the introductory chapters of the civil codes or respectively in the law of introduction of the Civil Code. These statutory rules are partially accepted as generally valid for all laws. Still, except for Chile, whose pertinent chapter is quite detailed, and Brazil, these legal provisions do not receive much attention in the decisions of their respective courts. Instead, courts and scholars seem to follow a somewhat independent method of construction, largely referring to the classical canons of interpretation.

82. See Fikentscher, supra note 52, at 37 et seq., 101 et seq., 668 et seq. (detailing the development from Savigny to Ihering, who added the objective-teleological component to the present system in Europe).

83. See also Kropholler, supra note 52, at 263 et seq.; Lutter, supra note 69, at 598 et seq.; Diedrich, supra note 53, at 110 et seq.; Berger, supra note 45, at 34-35, which all take these canons as the basis for the elaboration of their rules of interpretation for their respective variations of the uniform law.

84. In South America, the dispute concerning the different schools of legal hermeneutics is still debated passionately between scholars. The courts pay no regard to these schools, therefore, corresponding to the purely practical aim of this study, they will not be considered here. For details, see, e.g., in Brazil, Jorge Lobo, Interpretatio do Direito Comercial, 337 R.F. 95, 96 et seq. (1997); in Argentina, see Aftalion & Garcia Olano & Vilanova, supra note 81, at 415 et seq.; in Chile, see Ducci Claro, supra note 81, at 20 et seq.; in Uruguay, see Jimenez de Arechaga, supra note 81, at 114 et seq.

85. See in Brazil, art. 5 of the Law Introduction to the Civil Code ("Lei de Introdução ao Código Civil," hereinafter LICC); in Argentina, art. 16 of the Civil Code ("Código Civil," hereinafter CC); in Chile, arts. 19-24 CC; in Uruguay, arts. 17-20 (corresponding literally to arts. 19-22 IC in Chile); in Paraguay, art. 62 CC (corresponding literally to art. 16 CC in Argentina).


87. See, e.g., in Chile C.S., Jan. 25, 1995, 92 RDJ II-1 7, 9 (Chile); C.S., Oct. 25, 1913, 12 RDJ 94, 105 (1915) (Chile) (applying the statutory provisions even on international treaties); see also C.A. Santiago, Oct. 5, 1990, 88 RDJ II-5 81, 85 (1991) (Chile). For the origins in the Civil Code of Louisiana of 1825, see also Claro Solar, supra note 81, at 124; Ducci Claro, supra note 81, at 95 & 249. For Brazil, see STF, 08.29.1967, 43 RTJ 47, 48 (1968); STJ, 04.16.1998, D.J.U. 1.6.1998, p. 141; see also supra note 86. In Uruguay, see C.J. (Feb. 29, 1980) 11 Anuario de Derecho Civil Uruguayo 56 (1980).

88. Limongi França, supra note 81, at 152 & 153 (distinguishing between the statutory rules of interpretation and the scientific rules of interpretation developed by courts and scholars).
b. The Grammatical Interpretation.

In Chile and Uruguay, interpretation on the basis of the literal wording of the norms is emphasized by the law. In Argentina and Paraguay, this rule ranks first. By contrast, this method is not mentioned in the Brazilian and Bolivian statutes. Nevertheless, all these countries recognize that the literal sense of the provisions must be the starting point and a clear point of reference of any hermeneutical analysis.

c. The Systematic Interpretation.

In the legislation in Chile and Uruguay, the contextual logic within the statute and the presumption in favor of correspondence and harmony between its provisions is stated as the basis of the systematic interpretation. In Chile, reference is also made to the con-

---

89. Based on the Roman principle in claris cessit interpretatio, article 19 CC in Chile and the almost identical article 17 CC in Uruguay state: "Cuando el sentido de la ley es claro, no se desatendrá su tenor literal, a pretexto de consultar su espíritu. Pero bien se puede, para interpretar una expresión obscura de la ley, recurrir a su intención o espíritu, claramente manifestada en ella misma..." But see C.S., Jan. 25, 1995, 92 RDJ II-1 7, 9 (1995) (Chile) (argumentum e contrario, that one can not adhere to the wording where the word's literal sense is not evident); accord DUCCI CLARO, supra note 81, at 101 et seq.; CLARO SOLAR, supra note 81, at 124; see also C.S., Oct. 25, 1913, 12 RDJ 94, 104 (1915) (Chile) (taking article 19 CC to confirm that the clear wording is a restriction to any interpretation even for an international treaty).

90. See art. 16 CC (Arg.) and the almost literally coinciding art. 62 CC (Para.) ("Si una cuestión no puede resolverse por las palabras ni el espíritu de la ley, se atenderá a las leyes análogas... ").


92. Article 22 I CC (Chile) and the practically identical article 20 CC (Uruguay) state that "El contexto de la ley servirá para ilustrar el sentido de cada una de sus partes, de manera que haya entre ellas la debida correspondencia y armonía." See also DUCCI CLARO, supra note 81, at 130 et seq. (speaking of the "logic element of interpretation").
textual dependence with other laws. In Argentina and Paraguay, this concept can only be presumed as part of the general reference to the "spirit of the law," which has to be understood as a generic term for all methods of interpretation beyond the literal wording. In the practical interpretation of the law, courts and scholars emphasize the need to harmonize individual provisions with the norms surrounding them systematically as well as with the entire legal order.

93. Article 22 II CC states that "Los pasajes obscuros de una ley pueden ser ilustrados por medio de otras leyes, particularmente si versan sobre el mismo asunto." See also Ducci Claro, supra note 81, at 141 et seq. (calling this the "systematic element of interpretation"). But see C.S., Jan. 16, 1997, 94 RDJ II-1 10, 11 (Chile) (calling this method of interpretation just one option of interpretation offered to the judge that he can accept or not).

94. See supra note 90.

d. The Historical Interpretation.

The “trustworthy history of the establishment” of a norm as a source for understanding its meaning is accepted in the Chilean and Uruguayan statutes and can again be derived in Argentina and Paraguay from the expression “spirit of the law.” The historical interpretation is fairly accepted despite the rather scarce mentioning of this rule and partial restrictions in the legal practice of some countries. Thus, the earlier solutions, which served as models, the preparatory works, and the original understanding of the legislator, may be considered when exploring the meaning of the provision.

e. The Teleological Interpretation.

The only explicit reference in the Brazilian legislation with regard to the teleological interpretation is to the social aims and the exigencies of the common welfare aimed at by a legal provision as criteria for unveiling its meaning. In contrast, in Chile and Uruguay, the inherent aims of the regulations are tied in a seemingly restrictive way to the wording of a provision and the history of its establishment. Finally, Argentina and Paraguay

96. See art. 19 CC (Chile) and the insofar identical art. 17 CC (Uru.) (“Pero bien se puede, para interpretar una expresión obscura de la ley, recurrir a su intención o espiritu, claramente manifestada [...] en la historia fidedigna de su establecimiento.”).

97. See supra note 89.


99. See LICC, supra note 5, art. 5 (“Na aplicação da lei, o juiz atenderá aos fins sociais a que ela se dirige e às exigências do bem comum.”).

100. See C.C. art. 192 (Chile) and C.C. art. 172 (Uru.) (“su intención”). See also supra note 89.
again only offer the generic term of the *ratio legis.* Even though sometimes slightly reduced to a counter-check by contrasting the legislator’s original intentions with the effects of the norm in practice—the inherent purpose of the norm—to be determined in an objective way and seen within its present socio-economical setting, is recognized and applied in all countries as a fundamental criterion of interpretation.


The domestic rules of interpretation do not seem too different from those of public international law, and courts have in fact applied them in some cases of international law in those countries. Nevertheless, they are not capable of guaranteeing a uniform interpretation of the Community law on their own. On one hand, national particularities have evolved despite large similarities of concepts. On the other hand, these do not address the distinct quality of the communitarian legal order. Its uniformity would presuppose a certain level of autonomy. Therefore, the adaptation and expansion of methodological instruments is necessary and can build on the common concepts discovered by comparative analysis. Favorable conditions exist for the autonomy of such a uniform method of interpretation. Most countries have a slight preference for a literal legal interpretation and

101. See supra note 90.

102. See, e.g., supra note 98 (mentioning different views in the details regarding the historical interpretation); supra note 102 (mentioning different views regarding teleological interpretation). See also Bayer, supra note 17, at 632-33.
show much sympathy for the discovery of the ratio legis. This corresponds to the internationally accepted ratio conventionis.

C. MODIFICATIONS BY THE EXIGENCIES OF THE COMMUNITY LAW: OUTLINE OF A UNIFORM INTERPRETATION IN THE MERCOSUR.

The following set of rules are designed as a uniform concept for interpreting the law of the MERCOSUR. They try to solve the above mentioned paradox by considering both the subjective requisite of a common basis firmly rooted in the respective legal orders as well as the objective requisite of independence of the legal orders. They also follow the methods developed for the interpretation of conventional international uniform law and the law of the European Community.

1. Autonomous Grammatical Interpretation.

The starting point should be the grammatical interpretation. In other words, the wording of the communitarian norm in question needs to be clarified. This implies searching for the natural notion of the relevant term, independent of its possible meanings within the national legal traditions. The comparison of the Spanish and Portuguese language versions is quite important because differences in these versions can be quite revealing. A coherent Community-wide usage of certain specific terms, which exceeds the natural meaning of the words, is likely to have evolved in only a very few cases because the legal order of the MERCOSUR is still quite young.


In case a uniform legal definition does exist and an interpretation of the wording is inconclusive, especially where ambiguities in the Spanish and the Portuguese texts

105. This has to be understood in contrast to the more subjective element of the ratio legislatoris. The presented objectivist tendency already follows from the comparison of the pertinent national provision regulating the interpretation. See supra notes 89, 90, 92, 93, 96, and 99. See KROPHOLLER, supra note 52, at 259 (distinguishing between the objectivist and the subjectivist view); KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 301-02 (5th ed. 1983); JIMÉNEZ DE ARÉCHAGA, supra note 81, at 114; Lobo, supra note 84, at 102.

106. See DIEDRICH, supra note 53, at 110; KROPHOLLER, supra note 52, at 237; Casella, supra note 47, at 88.

107. See supra notes 67 et seq.

108. See, e.g., KROPHOLLER, supra note 52, at 258 et seq.; DIEDRICH, supra note 53, at 110 et seq.; Lutter, supra note 69, at 598 et seq. (regarding the European law).


The meaning of the norm has to be explored by means of systematic interpretation. The regulative notions are to be elaborated in view of the overall structure of the embedding instrument, that is, the agreement or the formal act of the MERCOSUR forming the contextual logic. Despite the still fragmentary nature of this legal order, they also have to be seen in light of other regulatory works by the Community, which are somehow linked to the matter in question, as well as superior norms such as the constituting treaties. In contrast, the contextual consideration of national rules has to be largely disregarded because of the postulated autonomy of Community law.

When interpreting parallel agreements with associated countries, a problem may arise from the systematic consideration of other Community regulations. Because the associated countries are not bound by Community law (strictu sensu), it should, in principle, have only very limited significance for the interpretation of parallel agreements. However, different interpretations of the largely identical parallel agreements would obstruct their intention to create homogeneous conditions in preparation of a future accession by the associated

111. See KROPHOLLER, supra note 52, at 266 et seq. (for the treatment of literal divergences in multilingual texts of uniform laws). See also Samtleben, supra note 109, at 97.


114. DIEDRICH, supra note 53, at 111 (distinguishing the interpretation of Community law from the interpretation of other "simple" uniform law and seeing little applicability of the systematic method).


116. Cf. Case C-64/81, Cormann, 1982 E.C.R. 13, 24 ¶ 8. See also KROPHOLLER, supra note 52, at 271-72 (postulating, as a rule in case of doubt, the prevalence of international uniformity over the presumed coherence of the national legal order, which could not be as rigid).

117. See infra note 119 (for the general treatment of parallel agreements).

118. Cf. DIEDRICH, supra note 53, at 111 (discussing the similar situation of the later accession to uniform law based on international treaties).
countries to the MERCOSUR. Yet, the above mentioned parallel Agreement on International Commercial Arbitration (CMC 4/98) somewhat addresses this situation. It establishes a double standard in articles 19 Nr. 4 and 23 by remitting cases within the MERCOSUR to the relevant MERCOSUR agreements but those involving associated countries to other international instruments or national law. For practical reasons, such divergence may be inevitable. Fortunately, the specific differences are only minor and thus should not interfere with the uniform systematic interpretation. In principle, the interpretation of the parallel agreements should use the genuine Community law as the fundamental guideline. This would guarantee the uniformity even though minor differences may persist due to explicit remittal to other legal orders.

3. Autonomous Historical Interpretation.

The historical interpretation can only play a limited role because Community law is a compromise achieved by different states with their respective national interests and legal traditions. Frequently, one national concept dominates and is promoted and elevated to the Community level. Because an autonomous and uniform interpretation of Community law has priority, the history of establishment and the underlying national models can only serve as complementary sources of interpretation unless explicit reference is made to them in the legal instrument itself. For the purpose of comparative

119. Compare the similar difficulties encountered by the European Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Sept. 27, 1968, and the parallel Agreement of Lugano, Sept. 16, 1988. Still, this latter one prescribes corresponding mechanisms for the consolidation of uniformity as, for example, the recognition of the rulings of the E.C.J by the parties of Lugano, which are not Member States of the E.C. See, e.g., the Swiss Federal Court, Sept. 9, 1998, 124 BGE III 444, 447 (1998); SCHMIDT-PARZFALL, supra note 53, at 57 et seq.

120. See supra note 20 (for the parallel structure of this agreement and its implications).

121. Fortunately, this coincides with the restrictive tendency in the national conceptions of the historical interpretation. See supra note 98.


"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusions of the treaty; (b) any instrument which was made by one or more parties ... as an instrument related to the treaty." Id.

See SHABTAI ROSENNE, THE LAW OF TREATIES 214 (1970). For details, see ANWEILER, supra note 109, at 246 et seq; Lutter, supra note 69, at 601. Nevertheless, the relevance of historical materials
analysis\textsuperscript{123} and a better understanding of the law, the history of Community law may, however, be very helpful.\textsuperscript{124}

4. **Objective-teleological Interpretation.**

The objective-teleological method is of special importance because it provides the basis for the primacy of uniform interpretation of Community law. The basic intention of any Community law is integration and legal harmonization as stipulated by its primary sources.\textsuperscript{125} Every provision has to be interpreted in accordance with this premise, considering its uniform application throughout the Community.\textsuperscript{126} In essence, this is the teleological component of a systematic interpretation based on the \textit{ratio conventionis primae} or eventually the \textit{ratio communitatis}.\textsuperscript{127}

Furthermore, the specific purpose of a particular provision shall be explored when applying this method of interpretation. Preference is given to interpretation consistent with the purpose or intent of the provision\textsuperscript{128} and in harmony with the underlying principles and other fundamental objective decisions of the MERCOSUR.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{123} See infra note 142 (for a more differentiated view).
\item \textsuperscript{124} See, e.g., the valuable remarks of the Argentine Foreign Ministry set forth in supra note 26. But see DRUMI, EKMEKDJIAN \& RIVERA, supra note 52, at 185-86 (speaking of an “applicability of practically zero”).
\item \textsuperscript{125} Cf. supra note 3.
\item \textsuperscript{126} Dreyzin de Klor, supra note 115, at 1198 (speaking of the “principio armonizador”); EDUARDO HOOFT, \textit{El Mercosur y el derecho privado}, [1992-E] L.L. 870, 874. See also Court of the Andean Community (Dec. 3, 1987, proc. 1-IP-87), 28 GACETA OFICIAL DEL ACUERDO DE CARTAGENA 1.12, 3.12-4.12 (15.02.1988) (describing explicitly the fundamental teleological interpretation); Boggiano, supra note 122, at 43 and Kropholler, supra note 52, at 276-77 (both for the general international uniform law); DIEDRICH, supra note 53, at 114 (thus not deeming the teleological interpretation even worth mentioning as a matter of course); Samtleben, supra note 109, at 100 (for the “Código Bustamante”).
\item \textsuperscript{127} See supra note 115 (for the systematic interpretation in conformity with the primary sources of Community law). See supra note 55 et seq. (for the duty of legal harmonization deriving from the constitutive treaties).
\item \textsuperscript{128} Dreyzin de Klor, supra note 115, at 1198; DRUMI, EKMEKDJIAN \& RIVERA, supra note 52, at 184-85; cf. Samtleben, supra note 22, at 35. For the established practice of the E.C.J., see all decisions quoted in supra note 112 (interpreting provision by reference to the purpose); see also Case C-370/96, Covita, 1998 E.C.R. I-7711, 7744 § 36; Case C-36/69, Güneydin v. Freistaat Bayern, 1997 E.C.R. I-5143, 5170, [1998] 2 C.L.M.R. 871 [1997] § 38 (referring to the congruency of this interpretation with the \textit{effet util}); ANWEILER, supra note 109, at 198 et seq.; Lutter, supra note 69, at 602 et seq.; Court of the Andean Community (Dec. 3, 1987, proc. 1-IP-87), 28 GACETA OFICIAL DEL ACUERDO DE CARTAGENA.
\item \textsuperscript{129} Casella, supra note 47, at 99 (refering explicitly to the consideration of the fundamental economical objectives of the integration). Securing democracy can be named as another fundamental value laid down in the Protocol of Ushuaia of July 24, 1998 on the Democratic Compromise of the member states and the associated countries, (visited July 26, 1999) \url{<http://bull.bull.com.uy/secretariamercosur/PROTUSU.HTM>}. See also KROPHOLLER, supra note 52, at 277.
\end{itemize}
5. **Persuasive Authorities of the other Member States.**

The classical criteria of interpretation (even *mutatis mutandis*) find their limits in the personal appreciation of the respective legal practitioner.\(^{130}\) These methods provide for no other influence to ensure uniform application of Community law by the respective national judges beyond the common texts as sources of enlightenment. Yet, these are not enough to counter-balance the absence of guiding supranational judicial decisions. The potential of obstructive self-complacency calls for the view across the borders to secure the necessary Community-wide uniformity.\(^{131}\) The decisions of the courts as well as the legal opinions of scholars in other countries applying the uniform law are indispensable sources for the interpretation of Community law.\(^{132}\) Certainly, the interpretations by other courts cannot have any prejudicial authority due to the lack of a legal basis for any restrictions on the sovereign jurisdiction.\(^{133}\) These foreign courts can, however, assume the role of persuasive authorities from whose interpretation, for the sake of uniformity, the national authority should not deviate unless there are compelling reasons to do so in a particular case.\(^{134}\) Generally, this understanding can and should lead to a powerful additional potential for legal reasoning.\(^{135}\) It seems important to point out that this method is not comparative law *strictu sensu*.\(^{136}\) Rather, it means paying due consideration to the opinions of relevant authorities dealing with the very same law whether abroad or at home.\(^{137}\)

Awareness for the legal culture of the neighboring countries is traditionally quite underdeveloped in the Latin American countries.\(^{138}\) A constant flow and exchange of information between courts in different countries is now of paramount importance.\(^{139}\) Publishing laws and decisions on the Internet free of charge could substantially improve this process.\(^{140}\)

---

138. Garro, *supra* note 56, at 28 (exemplifying the much larger orientation by the European and North American jurisprudence, as well as other obstructing peculiarities); see also Boggiano, *supra* note 122, at 46.
139. Tosi, *supra* note 47, at 58 (demanding the coordination of the established respective national interpretations of Community law). Cf. KROPHOLLER, *supra* note 52, at 285-86 (presenting, as a model, the distribution of the "Nordisk Domssamling" containing the decisions of the superior courts regarding the nordic uniform laws, which is free of charge).

For discovering the foundations of the Community law, the method of comparative law is regularly among the most valuable tools of interpretation. In case the aforementioned methods cannot bring about the necessary clarity, a uniform interpretation can still be achieved by uncovering the basis of a Community provision, that is, the national legal orders and traditions. This is, beyond the restricted historical method, the consequent reaction to the procedure of the modern legislator. He takes his solutions from comparative law in the first place—a procedure that is inevitable, especially in the process of creating Community regulations. The comparative method is, therefore, regularly invoked or taken for granted when analyzing the law of the MERCOSUR.
a. The Interpretation based on the Comparative Method.

According to Kropholler, four categories of uniform regulations are to be distinguished, each implying a different treatment in light of the comparative method: (1) rules based on conceptions commonly accepted in all Member States; (2) rules without any precedents in national solutions, but rather, for example, in other international conventions; (3) rules clearly favoring one of several rivaling solutions in different national legal orders; and (4) rules forming a compromise between different national positions by adopting elements of various legal orders. The essential importance of comparative law for understanding the so-created Community provision is self-evident in types one and four. But even the scope of a new norm of type two can often be understood only in light of the respective national solutions. For norms of the third type, referring to a national concept that served as a model for the Community regulation is, however, rather problematic. If no express reference is made to the national law, its influence has to be restricted to a merely supplementary role. This is where the comparative approach can contribute very effectively. It analyzes the specific regulative conceptions of all participating states and puts them into a larger context, facilitating even the dynamic adaptation of the Community law in a uniform way.


At this point the question rises of how to bridge possible gaps in the legal provisions of the Community law. How are specific problems to be solved that have been ignored by a particular Community regulation although they clearly fall within the scope of the uniform law?


146. KROPHOLLER, supra note 52, at 279-80 (referring generally to international uniform law).

147. Id.

148. KROPHOLLER, supra note 52, at 279.

149. See Lutter, supra note 69, at 601-02 (referring to the vast differences in English legal literature regarding the meaning of section 54 of the English Companies Act 1948 ("true and fair view" rule), which nevertheless served as a model for Article 2 III of the 4th EC-Directive [78/660 EEC of 14.8.1978] and is consequently now incorporated in § 264 II of the German Code of Commerce). See also infra p. 24 (concerning the problems of the historical method).

150. See Case C-6418, Cormann, 1982 E.C.R. 13, 24 § 8; see also Lutter, supra note 69, at 602; see generally KROPHOLLER, supra note 52, at 280 (referring to international uniform law).

151. Cf. Bustamante Alsina, supra note 45, at 1159. See also supra note 104.

152. Cf. DIEDRICH, supra note 53, at 108 (on the necessity of a dynamic uniform law) and at 113 (arguing that this assures avoiding the fallback to a single domestic legal order); DROMI, EKMEKDJIAN & RIVERA, supra note 52, at 182 (referring to the MERCOSUR).
Analogy.

For this situation, the instrument of analogy has been developed at the national level. This method can be summarized as being the application of a similar solution (mutatis mutandis) to an unforeseen problem to bridge the legislative gap. In the civil law system, this procedure requires the statutes to show a lack of regulation incompatible with the original legislative intentions. On the other hand, a specific interest in regulation clearly comparable to that underlying another similar provision is necessary to justify the judge assuming quasi-legislative powers to fill the gap.\footnote{153} The applicability of analogy to uniform Community law is quite problematic. The analogous application of other Community norms should, in principle, be admissible. However, the chances of this being opportune are rather rare in the face of the restrictive conception of a legitimate analogy and the still quite fragmentary legal order of the Community.\footnote{154}

In contrast, the analogous application of domestic law by the national judge, that is, the referral to isolated legal concepts of an individual Member State, would clearly violate the primacy of the uniform Community law.\footnote{155} There is no comparable interest in regulation because of the communitarian dimension. Nevertheless, the analogous application of domestic law would be in accordance with the aforementioned concepts that legal provisions in international treaties are only leges specialis vis-à-vis the national provisions.\footnote{156} From this point of view, referring back to the general laws of the Member State (leges generales) would seem at first sight to be quite natural and coherent.\footnote{157} If this shall be avoided, the national judge has to be offered an alternative set of legal principles as a fallback option.\footnote{158}

\footnote{153} See LARENZ, supra note 105, at 265 et seq. (focusing on methodological details); FIKENTSCHER, supra note 52, at 726 (critiquing the previous point); infra note 159 (applying the analogy in the countries of the MERCOSUR).

\footnote{154} See supra note 110.

\footnote{155} See DIEDRICH, supra note 53, at 114-15 (addressing controversy with respect to the international uniform law); Bayer, supra note 17, at 634-35. For the delimitation between gaps comprehended by uniform law and those gaps beyond the scope of Community regulation, thus open for national analogy, see KROPHOLLER, supra note 52, at 302-03 (author is more open for the analogy at 293 et seq.).

\footnote{156} See supra note 31 et seq. (examining the quality of Community law as lex specialis in Brazil, Chile, Uruguay, and Bolivia).

\footnote{157} Cf. Bayer, supra note 17, at 634-35.

\footnote{158} Id. at 637.

\footnote{159} In Brazil, see art. 4 LICC ("Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito."). See also Lobo, supra note 84, at 103; SERPA LOPES, supra note 81, at 177 et seq. & 188 et seq. In Argentina, see art. 16 CC ("Si una cuestión no puede resolverse, ni por las palabras, ni por el espíritu de la ley, se atenderá a los principios de leyes análogas; y si aún la cuestión fuere dudosa, se resolverá por los principios generales del derecho, teniendo en consideración las circunstancias del caso."). See also TORRES LACROZE & MARTIN, supra note 81, at 363. In Chile, see art. 24 CC ("En los casos a que no pudieren aplicarse las reglas de interpretación precedentes, se interpretarán los pasajes obscuros o contradictorios del modo que más conforme prezca al espíritu general de la legislación y a la equidad natural."). PABLO RODRIGUEZ GREZ, TEORÍA DE LA INTERPRETACIÓN 124 et seq. (Santiago de Chile 1995) (explaining that the judge has to decide just as the legislator would have solved the problem). If there are no indications for such hypothetical, he has to refer to analogy. Id. at 124-25. If this is not possible, the general principles of law have to be
(ii) The General Principles of Law.

The legal systems of all participating countries contain statutory provisions that allow the judge to refer to analogous domestic law as well as to the "General Principles of Law" when faced with the difficult task of having to fill a statutory lacuna.\(^\text{159}\) For the aforementioned reasons, the judge should realize analogy is not suitable as applied to Community law because this would violate the clear intent of the legislator to create uniform law. A possible solution to this problem is for the judge to uncover such principles that have binding force for all authorities entrusted with the implementation of the provisions of Community law.\(^\text{160}\)

In light of the teleological postulates of uniformity and autonomy, the general principles have to be understood as the general principles of the legal order of the Community. This means they have to be evaluated on the basis of the law that contains the gap by analyzing which general concepts of regulation have shaped that law. The concepts of the individual national legal orders shall be contrasted in order to derive a hypothetical regulation on which the contracting countries would have been able to agree.\(^\text{161}\) In a similar fashion, the European Court of Justice puts special emphasis on "the General Principles of Law, as resulting from the totality of the domestic legal orders," which have to be deduced by applying the method of comparative law.\(^\text{162}\)

This shows that, in dealing with Community law, legal construction *latu sensu*, that is, both interpretation and bridging statutory *lacunae*, are based on the same methodological tools and heavily depend on the method of comparative law.\(^\text{163}\)

analyzed to find the presumption. *Id.* at 127. See also CARLOS DUCCI CLARO, INTERPRETACIÓN JURIDICA 152 *et seq.* (3rd ed., Santiago de Chile 1989). In Uruguay, see art. 16 CC ("Cuando ocurra un negocio civil, que no pueda resolverse [por la interpretación], se acudirá a los fundamentos de las leyes análogas; y si todavía subsistiera la duda, se ocurrirá a los principios generales de derecho y a las doctrinas más recibidas, consideradas las circunstancias del caso."). *Accord TAC Montevideo*, Mar. 9, 1994, 109 LJU I 799, 803 (1994) (where reference is made to the general principles of law in case of failure of the analogy). *In detail* JIMÉNEZ DE ARECHAGA, *supra* note 81, at 126 *et seq.* See also TAFam Montevideo, Nov. 9, 1993, 108 LJU I 392, 394 (1994) (because the Treaties of Montevideo (1889/1940) and a *lacuna* in the Uruguayan Private International Law did not apply, the provisions of the Treaties of Montevideo were respectively applied by invoking the analogy.). In Paraguay, see art. 62 CC ("Si una cuestión no puede resolverse por [la interpretación], se tendrán en consideración las disposiciones que regulan casos a materias análogas, y en su defecto, se acudirá a los principios generales de derecho."). See also SOLER, *supra* note 81, at 547 *et seq.* In Bolivia, see art. 1932 Code of Civil Procedure ("Código de Procedimiento Civil") ("[En caso de falta, oscuridad o insuficiencia de la ley, el juez] deberá fundar su sentencia en los principios generales de derecho, las leyes análogas o la equidad que nace del ordenamiento jurídico del Estado."). See also MOSCOSO DELGADO, *supra* note 91, at 419 *et seq.*


161. See Bayer, *supra* note 17, at 637; ZWEIGERT & KOTZ, *supra* note 45, at 18, 21; KROPHOLLER, *supra* note 52, at 299.


III. Final Remarks.

Even though the methodological questions arising from the practical challenge of applying Community law may seem rather abstract and theoretical, they are, nevertheless, of enormous practical relevance. If law is understood as social engineering, then the impact that its daily application has on individual lives is the essential guideline. Doubts about the fundamental tools of the social engineer, or rather, in the case of the judge, of the service technician, cannot be left for an uncertain future when the dynamic modifications of economy and society are already in full process. Establishing uniform Community law implies the claim to manipulate societies by involving a new dimension. Formerly self-centered societies are suddenly drawn much closer together, first, for the sake of better commerce and second, for better economic development. But this convergence, as every process of integration, will also always affect society as a whole.

The national lawyer, comfortably embedded in his traditional domestic concepts and methods and maybe already a little bit sleepy with so much coziness, will have to assume a new role urgently needed by the new Community. He is suddenly required to leave his little warm and snug shelter and jump into the much broader bed of the legal order of the Community, still cold and very Spartan, that he even has to share with others! This is no easy task, especially considering the vast dimension of work that follows from the indispensable requisite of the comparative method. To put the legal order of the Community to work and to handle the new and much more demanding tools, he will need a lot of support. This shows the fundamental importance of scientific research on the field of comparative law especially with respect to the MERCOSUR. The legal order of the MERCOSUR offers a new, exciting challenge for legal scholars who are thus called upon to participate in this young and dynamic process.

164. At this point, reference shall be made to the large research project by the Max-Planck-Institute for Foreign Private and Private International Law (Hamburg/Germany) on the "Economic Law of the MERCOSUR," involving the law of competition, the law of transportation, the law of international civil procedure and the law of arbitration of the MERCOSUR, led by Prof. Dr. Jürgen Basedow and Dr. Jürgen Samtleben.