INTRODUZIONE
AI CONTRATTI COMMERCIALI
INTERNAZIONALI *B2B*
E ALLE *JOINT VENTURES*

SCENARIO

LAW AND GLOBALISATION

by Giovanni Iudica ‡

I. TECHNOLOGICAL REVOLUTION AND GLOBALIZATION

In the following pages it will be attempted to clarify what the law of globalization is, what the relationship between law and the worldwide establishment of market economy and, ultimately, how the complex phenomenon of globalization, or 'mondialization', has affected, modified or influenced (or is likely to eventually influence) the law. Symmetrically, the paper will also explore how law can govern, order, or at least orient the course of globalization, providing it with shape and certainty.

It must be clarified from the beginning that this paper does not seek to deal with all forms of internationalism, or with just any phenomena of internationalization, or with globalization in a broad and generic sense[1]. In fact, if globalization is understood in a broad sense, i.e. as a process of expansion or conquest of new territories or of economic or social integration

‡ Dean of Bocconi University Law School (Milan, Italy), Full Professor in "Civil Law".

[1] In recent years, many studies and essays, published both in Italy and abroad, and which cannot be cited in full here, have analyzed the theme of globalization (*Globalizzazione, Mondialisation, Globalisierung*), and its different facets (especially the economic, financial, political, sociological, philosophical and historical ones). For the purpose of this study, and with particular regard to the historical aspects, see, eg, J Osterhammel and NP Petersson, *Globalization: A Short History* (Princeton University Press, Princeton 2000); S Latouche, *The Westernisation of the World* (Polity Press, Cambridge 1996); MR Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale* (Il Mulino, Bologna 2000) 16 ff; MR Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale* (Laterza, Rome–Bari 2006); MR Ferrarese, 'Globalizzazione – Aspetti istituzionali' in *Enciclopedia delle Scienze Sociali*, vol. IX (Istituto della Enciclopedia Italiana Treccani, Rome 2001) 163; D Zolo, 'Globalizzazione' in *Digesto IV (Discipline pubblicistiche),* update vol II (UTET, Turin 2005) 378; D Zolo, *Globalizzazione. Una mappa dei problemi* (Laterza, Rome-Bari 2006); L Scuccimarra, *I confini del mondo. Storia del cosmopolitismo dall'antichità al settecento* (Il Mulino, Bologna 2006).

among people, it must then be admitted that it is not typical of our times, but rather dates back to the beginnings of civilization.

All populations were nomadic before settling. The defining features of this period were continuous and exhausting migrations of tribes and armies from one place to another, as well as relentless, turbulent waves of invading 'barbarian' populations. Of course, these events undoubtedly caused great devastation and sufferings of all kinds. However, they also brought about profitable trade, circulation of goods and the diffusion of knowledge.

The desire to cross boundaries, however, did not disappear as mankind began to settle in territories upon the discovery of agriculture. The Homeric Ulysses, on the one hand, and the Dantescan Ulysses, on the other, are two remarkable literary embodiments of this human desire. It would be sufficient to reflect upon the beginnings of Western civilization, on the Cretan and Phoenician experiences, to appreciate how dynamically they led to the establishment of trade and businesses throughout the Mediterranean basin. It would equally suffice to think of the commercial relationships the Romans initiated with Eastern populations. Finally, another example could be that of the courageous medieval merchants who, through their trade, unified Europe, which at the time was fragmented into thousands of small principalities.

All this would surely be enough to demonstrate the existence of a constant and courageous human desire of crossing boundaries, may they be marked by a mountain range, a river, an island or by city walls[2]. And it is worth mentioning that these migrations, these displacements of populations and these exchanges between merchants belonging to different ethnic groups and civilizations did not happen without rules, independently from any form of law. It is therefore true, as it has been cleverly

[2] See IM Wallerstein, *The Modern World-System*, vols I-III (Academic Press, San Diego 1974, 1980 and 1989), according to whom the birth of the 'world-economy' produced the divorce of politics from economy, and the detachment of national homogeneity (rooted in the territory) and international heterogeneity. See also AG Hopkins, *Globalization in World History* (WW Norton, London 2002). FA Von Hayek, *Law, Legislation and Liberty* (Routledge, London 1982) already spoke, referring to the relationship between citizens of distant continents, of the 'Great Society'. Finally, arguing that law has had a marginal role in the process of globalization, see G Teubner, *La cultura del diritto nell'epoca della globalizzazione* (Armando Editore, Rome 2005) 57 ff.

demonstrated,[3] that modern history is, in many ways, a tale of continual crossing of boundaries imposed by geography and local interests.

This long and uneven human adventure, however, should not be confused with the notion of globalization this paper focuses on, i.e. with that definition of globalization embodied by the worldwide establishment of market economy. The latter only is a consequence of some unique and specific factors without past precedents[4].

In particular, it is possible to discern three main causes behind the worldwide triumph of the market.

The first is the intrinsic efficiency of market economy: the capitalist system of production in a free economy has proven to be the most efficient mechanism for generating and spreading wealth. Moreover, such efficiency has shown to increase as the size of the market expands, or as economic transactions are liberalized, or yet as the flow of information becomes faster[5].

The second factor is the simultaneous failure, through implosion in a swamp of bureaucratic lack of efficiency, of the socialist economic model (the so-called 'real socialism') in which the means of production are owned by the central government and economic decisions are centralized[6].

Finally, the third factor which has boosted the worldwide success of market economy is the *technology* of the late twentieth century or, more precisely, the formidable technological revolution of the last thirty or forty

---

[3] See A Giddens, *The Consequences of Modernity* (Stanford University Press, Stanford 1991); M Lupoi, *Alle radici del diritto comune europeo* (Istituto Poligrafico e Zecca dello Stato, Rome 1994) and P Grossi, *L'ordine giuridico medievale* (Laterza, Rome-Bari 1995) 41 ff.

[4] See K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, Boston 1944) and E Cafagna and C Sandrelli (trs), U Beck, *Che cos'è la globalizzazione. Rischi e prospettive della società planetaria* (orig *Was ist Globalisierung? Irrtumer des Globalismus—Antworten auf Globalisierung;* Italian trans edn Laterza Rome–Bari 1999) 56 ff. Beck criticizes the 'metaphysics of the global market', emphasizing the risk that multinationals may avoid taxation and solidarity obligations at a national level.

[5] Zolo, 'Globalizzazione' (nt 1) 386.

[6] See B. Lotti (tr), E Hobsbawn, *Il secolo breve* (orig *The Age of Extremes: The Short Twentieth Century*; 6th Italian trans edn Rizzoli, Milan 1995) 537 ff. Hobsbawm describes, using tools from Marxist analysis, the 'end of socialism', concluding, without hiding his bitterness, that: 'The *tragedy* of the *October Revolution* was precisely that it could only produce its kind of ruthless, brutal, command socialism'. Zolo, 'Globalizzazione' (nt 1) 386 talks about 'collapse'.

year[7]. It is a grand phenomenon. Let us just consider the revolution of transportation (from the car to the plane), which drastically reduced the size of the world making each part of it relatively close, if not quite within reach. Let us further consider the revolution in the means of communication, of the *media* in general. In particular, the development of radio, telephone and television allows mankind to witness the same events as in one community and in real time, as well as to acquire the same economic, scientific or financial information. This is especially true of the information technology revolution (encompassing a range of innovations, from the introduction of computers to that of wireless network connections), which not only modified the way we write and communicate, but also the way we sell and buy and, above all, the way in which we learn and think. Because of its peculiar features, its causes and especially its originality, this type of globalization - a direct effect of the *fin de siècle* technological revolution - cannot be regarded simply as the last chapter of the long and tormented history of modernity[8].

Obviously, this extraordinary and multifaceted technological revolution has heavily impacted the real economy, i.e. the way material wealth is produced. However, it has also given a powerful boost to the development of finance and financial capital, with far-reaching consequences for politics, geopolitics and also for society and individuals at large. Sociologists and economists, although divided between supporters and critics of glob-

[7] See E Severino, *Il destino della tecnica* (Rizzoli, Milan 1998); E Severino, *Il muro di pietra. Sul tramonto della tradizione filosofica* (Osservatorio Italiano Series, Rizzoli Milan 2006) and E Severino and N Irti, *Dialogo su diritto e tecnica* (Laterza, Rome–Bari 2001) 80.

[8] M McLuhan and B Powers, *The Global Village: Transformations in World Life and Media in the 21st Century* (OUP, New York 1992); G Simons, *Eco-computers, The Impact of Global Intelligence* (Wiley, New York 1987); M Castells, *La sociétè en réseau. L'ère de l'information* (Fayard, Paris 1998); P Virilio, *La Bombe Informatique* (Galilée, Paris 1998); A Freschi, *La società dei saperi. Reti virtuali e partecipazione sociale* (Laterza, Rome–Bari 2002); *I signori della rete. I mondi di Internet, le frontiere delle telecomunicazioni, la guerra dei bottoni* (Quaderni speciali di Limes, Gruppo Editoriale L'Espresso, Rome 2001) 25 ff; C Sini, *La libertà, la finanza la comunicazione* (Spirali, Milan 2001) 191 ff. According to N Irti, 'Le categorie giuridiche della globalizzazione' (2002) 48 Rivista di Diritto Civile 625, 629: 'as the speed of transportation and the rapidity of communication eliminate distance and create an undistinguishable *anywhere*, they suppress duration and convert it into pure *simultaneity*'. Therefore this is the question that naturally arises: 'which market governs world markets? Which modes and which shapes of juridicity turn out to be compatible with telematic space?'.

alization, have nevertheless attempted to provided remarkable clarification and interpretation of this multifaceted and complex phenomenon[9].

II. THE PROTAGONISTS OF THE GLOBAL MARKET ECONOMY

Businesspeople are the principal players in this modern form of globalization taking place on the world market. For our purposes, however, this category should not be taken to include the small merchants, tradesmen and firms operating on local national markets. The principal players of globalization are, instead, the big corporations. The *mercatores* acting as protagonists of the globalized economy are the *ipermercatores,* the *Übermenschen* of the economy, which one could call the *Überunternehmer*, consisting very often of public companies, great transnational corporations and multinational companies[10].

Companies falling in this category cannot be labelled 'multinationals' simply because they import and export on the international scale or because they have branches, distributors or licensees spread throughout the globe. Instead, far more incisively and in a qualitatively different way, the multinational character of such companies stems from the fact that various stages of their production process (from gathering financial resources to the purchase of raw materials, from the actual processing of components of semi-finished products to their assembly, from the packaging of the finished product to its distribution on the market) are spread out in a multitude of different countries.

This is a straightforward consequence of the natural quest, on the part of entrepreneurs, for profitable options in order to maximize profit margins and minimize losses. Namely, as part of this search, entrepreneurs

---

[9] J Beynon and D Dunkerley (eds), *Globalization: The Reader* (Routledge, New York 2000); J Stiglitz, *Globalization and Its Discontents* (WW Norton, New York 2002) 219 ff; U Beck, *World Risk Society* (Polity Press, Cambridge 1996); G Bettini (tr), Z Bauman, *La solitudine del cittadino globale* (orig *In Search of Politics*; 8th Italian trans edn, Feltrinelli, Milan 2006).

[10] Ferrarese, *Le istituzioni* (nt 1) 101 ff; F Galgano, *La globalizzazione nello specchio del diritto* (Il Mulino, Bologna 2005) 28 ff and 157 ff. This latter work is commented by MR Ferrarese, A Zoppini, F Marrella and MJ Bonell, 'Un dialogo sulla globalizzazione' (2007) Contratto e Impresa 1345. According to F Galgano, 'Globalizzazione e conglomerazione' (2006) 22 Contratto e Impresa 73, 79, the globalized company should not be considered as a real multinational company, having as many nationalities as the countries in which it operates; rather, it should be considered a 'national' company which also operates abroad, matching the holding's nationality and being subject to the law of the related country.

will try to establish headquarters in a country with an efficient bureaucracy and low taxation or else in a (relative) tax haven. Secondly, entrepreneurs will try to benefit from the low cost of third world labour, buy raw materials at the best price available on the international market and allocate profits to either remunerate the invested capital, make new investments or direct them towards international capital markets. In so doing, entrepreneurs will consider the trend of the London, Frankfurt or Milan stock exchanges, as well as that of New York, Tokyo or Singapore. Additionally, entrepreneurs will pay attention to changes in consumer taste and be swift in restructuring industrial production, and so on.

Communications from one end of the world to the other will take place in the language of business (English) through e-mail. Fast, punctual and efficient means of transport will solve the problems related to distance and, especially, will make it profitable to localize the various economic operations in distant areas[11].

In other words, it is not a purely quantitative change, simply connected to the increasing dimensions of multinationals. These new opportunities have brought about a completely *new way* of producing and exchanging wealth. Even the professions, offering services to multinational firms as their clientele, have come to operate in a global perspective. Let us consider the top law firms[12] which offer their expertise, through powerful organizations and in a single common language, in branches located in many countries throughout the world. Art, music and painting, which are the most eloquent mirrors of the society we live in, offer another concrete and visible example of globalization. Let us take architecture, for instance: the architecture of our age has de-localized as well, abandoning the taste, the techniques and the traditions of the land in which the building will be erected, to embrace the more rational concept of efficient space allocation. This has produced and still produces similar aesthetic solutions around the globe, with results which contrast with the style cultivated for centuries in a given place.

---

[11] D. Cavallini (tr), J Stiglitz, *La globalizzazione che funziona* (orig *Making Globalization Work*; ET Saggi, Italian trans edn Einaudi, Turin 2007) 213 ff; S Sassen, *A Sociology of Globalization* (WW Norton, New York 2007).

[12] Y Dezelay, *Marchands de droit: la restructuration de l'ordre juridique international par les multinationales du droit* (Fayard, Paris 1992); Cavallini (tr), Stiglitz (nt 11) 212 ff; SM Carbone, 'Il ruolo dell'avvocato nella *new economy*' (2000) 16 Contratto e Impresa 1203; MR Ferrarese, 'Potere e competenza nelle professioni giuridiche' (1992) 19 Sociologia del diritto 43.

III. STATE, LAW AND TERRITORY

The legal context in which globalization - strictly defined[13]- has developed, and continues to develop very rapidly through the involvement of medium-large and mid-sized companies as well, is that of a crisis. A crisis that has touched upon several fundamental aspects of the framework (consisting of forms, tools, concepts, preconditions and reference points) that until recently held up the legal universe and provided certainty for both society and the economy[14]. More specifically, globalization is the result (and, at the same time, at least in part, the cause) of the crisis of the two main actors on the modern legal stage, namely the State and the law[15]. Considering the fundamental connection between the declining role of these legal institutions and the phenomenon of globalization[16], this section specifically explores the characters of, and reasons for, this crisis.

As for the State, it must be admitted that it has been the masterpiece or at least one of the most incredible creations of Western culture. The State is an institution with a remarkably linear ideology, a model which has rapidly conquered the globe, spreading throughout the entire 'civilized' world. The moment of its triumphal establishment is usually dated to the Peace of Westphalia[17]. With the Treaty of 1648, which marked the end of the Thirty

---

[13] See above sect I.

[14] N Irti, *Nichilismo giuridico* (Laterza, Rome–Bari 2004)

[15] P Grossi, 'Globalizzazione, diritto, scienza giuridica' (2002) 125 Il Foro Italiano 151; U La Porta, *Globalizzazione e diritto. Regole giuridiche e norme di legge nell'economia globale. Un saggio sulla libertà di scambio e i suoi limiti* (Liguori, Naples 2005) 23 ff; C Amato and G Ponzanelli (eds), *Global law vs Local law. Problemi della globalizzazione giuridica* (Giappichelli, Turin 2006); M Franzoni, 'Vecchi e nuovi diritti nella società che cambia' (2003) 19 Contratto e Impresa 565.

[16] 'The problem cast by globalization ... is a problem in the creation of norms and that is what ought to induce deeply to rethink the relationship between norms and law' (La Porta (nt 15) 68).

[17] The motto *Cuius regio, cuius religio* has led to the triumph of the sovereignty of the modern State. See C Schmitt, *L'unità del mondo e altri soggetti* (Antonio Pellicani, Rome 1994) 51 ff; C Schmitt, *Land und Meer* (Reclam, Leipzig 1942). With the conquest of both North and South America: 'For the first time in history, man could take the whole, physical globe like a ball into his hand.' (*ibid* 45, translated in CL Connery, 'Ideologies of Land and Sea: Alfred Thayer Mahan, Carl Schmitt, and the Shaping of Global Myth Elements' (2002) 28 Boundary2 173, 191). R Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order' in C Blach and R Falk (eds), *The Future of International Legal Order*, vol. I (Princeton University Press, Princeton 1969) 32 ff; Zolo, 'Globalizzazione' (nt 1) 391; GL Ulmen (tr), C Schmitt, *The Nomos of the Earth in the International*

(segue)

Years' War, a pluralistic system of sovereign States was officially launched. From that moment on, the modern State—national, sovereign and territorial in nature—asserted itself over the remnants, rich in history, honour and glory, of the political universalism of the Empire and the Papacy. The exclusive power of command over citizens was the maximum expression of State sovereignty within domestic territory. Outside of its territorial and legislative sphere, instead, State sovereignty could be summarized by the Latin phrase *superiorem non recognoscens*:[18] in the sense that no political or legal authority could overtake its authority. This model, which stabilized in Europe in the eighteenth and nineteenth centuries, became universal with the expansion of the international community.

During the Age of Enlightenment, the creation of the State allowed the bourgeoisie (that was to take control of it) consisting of merchants, philosophers and lawyers to undertake a radical departure in comparison to the system typical of the *ancien regime*. Namely, the law, including private law, became law *of* the State, derived *from* the State only and administered by the State alone[19]. This gave the State total control over the production of law, particularly of the rules which govern the market, production and trade. The State holds political power and addresses its citizens through authoritative acts, with 'general and abstract' commands which are binding. The State only is entitled to the power to create law. The State is legislator or, even better, is *the* legislator. The will of the State is the source of law. Its word is binding and the other sources are hierarchically subordinated. Custom (consisting of tradition, usage, habit and practice), a principal constituent of the law of the pre-bourgeois era and - for thousands of years - a main source of law everywhere, was relegated to the bottom of the hierarchical order: simply mentioned, and barely tolerated, as a purely ancillary source[20].

State, law and territory are the triad behind the legal universe of bourgeois Enlightenment. The territoriality of the State produces and reflects itself in the territoriality of the law. With the seizing of political power and the exclusion of the noble class from the *grand jeu*, the bourgeoisie took

---

Law of Jus Publicum Europaeum (Telos Press, New York 2006); N Irti, *Norma e luoghi. Problemi del geo-diritto* (Laterza, Rome–Bari) 51 ff.

[18] Zolo, 'Globalizzazione' (nt 1) 391.

[19] P Grossi, 'Globalizzazione e pluralismo giuridico' (2000) 29 Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno 551.

[20] Grossi (nt 15) 155.

control of the State. Additionally, by establishing the latter's monopoly over the production of law, including private law, it held the key to the main means of controlling society, in other words, to the most incisive instrument in establishing order and stability[21].

In order to guarantee the maximum degree of certainty, it is self-evident that the command needs to be written down. The law is made up of statutes, which, in turn, are written laws. The role of the legal scholar is properly to interpret legal provisions, while the judge's is faithfully to apply it. In this rigid Enlightened Eden the jurist (perhaps even educated, learned and knowledgeable) is an interpreter of the law and the judge, as Montesquieu wrote, may only be the *bouche de la loi*[22].

The most extreme and ingenious expression of this 'textualization' process concerning the law is Napoleon's immortal masterpiece: the *Code civil*. The *Code civil,* in other words, represents the supreme fruit of the Enlightenment's passion for law. It is the ultimate embodiment of the great utopia of believing it possible to place all of the legal universe, especially all of private law, into a single text. A single text whose main task was to present a statement of the law that would be clear, logical, certain, complete, coherent, binding, conclusive and of uniform application for all citizens, all at the same time[23].

With the affirmation of modern States, a series of important institutional modifications have therefore taken place: the reduction of law to *written* law, the substitution of custom with statutory law, the codification, the enforcement apparatus established by the State, the systematic construction of laws and of the legal order more generally, as well as the technical simplification of the law of modern sovereign States. All these changes have clearly enhanced the certainty of the legal framework, guaranteed

---

[21] The Hobbesian idea of the State as a *machina machinarum*, collected by Schmitt and mentioned by Irti (nt 14) 45. See also Irti (nt 17) and N Irti, *Il salvagente della forma* (Laterza, Rome–Bari 2007).

[22] C Montesquieu, *Ésprit des Lois* (Librairie de Firmin Didot Frères, Paris 1864) 134-35, expresses himself as follows: 'it sometimes happens that the law, which is at the same time enlightened and blind, is too rigorous in some cases. But the judges of the nation are, as I have already said, nothing more than the mouth which pronounces the words of the law. As such they are inert and can moderate neither the force nor the rigor of the law' (translated in M Richter (tr, ed), C Montesquieu, *The Political Theory of Montesquieu* (CUP, Cambridge 1977) 251).

[23] A Schiavone, *Alle origini del dritto Borghese, Hegel contro Savigny* (Laterza, Rome-Bari 1984); P Grossi (nt 15) 158; P Grossi (nt 3) 18 ff.

safer conditions for economic operations and, in short, have been advantageous elements for both social and economic agents. To sum up, there is no doubt that these factors strongly contributed to the success of the market economy and to the development of capitalism[24].

IV. STATE AND CODE IN CRISIS

The destiny of such an Eden created by the bourgeoisie, the masterpiece of the *petite bourgeoisie*, was, however, already doomed the same moment it came into being.

In three centuries the ideal asserted at Westphalia lost its vigour. Nowadays, this ideal appears to be outdated in several ways. On the one hand, States lost out, at the end of a winding path, to *internal* forces, which led to the regionalization of power and consequently to its refraction among society's pluralist and democratic components. On the other hand, *external* pressures pushed towards broad international institutions and led to the dislodging of important components of the State's power to hierarchically superior structures[25]. Let us consider, on the one hand, how niches of power have been carved out by the so-called 'intermediate societies' or about the continually increasing powers of the various territorial entities, starting with Italian regions (*regioni*) or German *Länder* or 'substate' territories (such as Scotland). On the other hand, it is possible to remember the federations of States (such as the U.S.A. or Canada) or forms of inter-State economic or political concentration or cohesion, like the European Union or Mercosur, which have greatly reduced the State's sovereignty both in the economic and legal fields. If one looks at the European Union, for example, it is immediately clear that the fundamental economic decisions that involve all the member countries are made in Brussels. As a consequence, the EU Member States have undergone a substantial reduction of their autonomy. In the interaction of these forces, both internal and exter-

[24] T Biagiotti, F Casabianca and P Rossi (trs), M Weber, *Economia e società*, vol. II (orig *Wirtschaft und Gesellschaft*; Italian trans edn Edizioni di Comunità, Milan 1974) 131 ff.

[25] A lot has been written on the modern State's crisis. See, eg, to the point, S Cassese, *La crisi dello Stato* (Laterza, Rome-Bari 2002); P Barcellona, *Il declino dello Stato* (Dedalo, Bari 1998); the dated work of S Romano, 'Lo Stato moderno e la sua crisi' (1910) 2 Rivista di Diritto Pubblico e della Pubblica Amministrazione in Italia 95, reprinted in S Romano, *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale* (Giuffrè Milan 1969), and also O Pesce (tr), Z Bauman, *Dentro la globalizzazione. Le conseguenze sulle persone* (orig *Globalization: The Human Consequences*; 10th Italian trans edn Laterza, Rome-Bari 2005).

nal, centripetal and centrifugal, one can discern a crisis which involves all aspects of the State's sovereignty, starting from its territoriality. 'The local and global dimensions'—as it has been said—'prevail over the national dimension'[26]. This process, which brought about the progressive crumbling of the Enlightenment's ideal, did not only affect the national, legislating, sovereign and territorial State, but also influenced the central expression of its power: statutory law. The code's crisis, in other words, is in several ways an expression of the crisis of the State as a legislator.

The institutional history of these last two centuries is the history of the slow, gradual, melancholy decline of the perfect model discussed above[27]. A decline that occurred with different timing and in different territories, sometimes quickly and other times slowly, among contradictions and inconsistencies. On the whole, however, the decline has been unrelenting, as constantly happens in the natural world, where, year after year, spring follows winter, although in some places it is precocious and full-bloomed and other times it is tardy and timid. Still today, in the countries which just ceased to be planned economies, codification is seen as something which has to be done, as it were compensation for what should have been done in the past and a pledge for the new ruling class that starts to work in a free economy. On the other hand, in those countries in which codification is an ancient tradition, the legislator keeps on working on the code, either modifying existing parts thereof or introducing new ones[28].

It is a fact, however, that the crisis of the code (and of the ideology which underlies it) started the day after its promulgation. The most predictable and comprehensible weakness of a code was the acknowledge-

---

[26] Zolo, 'Globalizzazione' (nt 1) 393. See also A Amendola, *I confini del diritto. La crisi della sovranità e l'autonomia del diritto* (Edizioni Scientifiche Italiane, Naples 2003) 86 ff.

[27] See above sect III.

[28] Among the recent codes we can remember, in chronological order, the following ones: the Dutch (1992), the Russian, the Albanian, the Kazak and that of Quebec (all enacted in 1994), those of Kirghizstan and of Vietnam (both of 1996), those of Uzbekistan, Byelorussia, Georgia and Lettonia (enacted in 1997), the Armenian one (1998), those of Azerbaijan and Turkmenistan (both of 1999), the Lithuanian and the Estonian codifications (both of 2001), those of Moldova, the Czech Republic and Mongolia (all of 2002), those of Brazil and Slovakia (both of 2003) and the Ukrainian one (2004).

One may also consider the changes enacted in the respective codes in France, Germany, the Netherlands and Italy. An ample debate as to why ought law to be codified has already been going on for long. Cf P Cappellini and B Sordi (eds), *Codici: una riflessione di fine millennio* (Giuffrè, Milan 2002).

ment, immediately after its promulgation, that more laws would be necessary. Namely, more provisions would be needed to regulate either aspects that had been neglected by the *Code* or new subjects which emerged either from the market or from economic needs, entrepreneurial creativity and societal dynamics more generally. The utopia of the code's completeness, therefore, quickly collapsed[29]. More precisely, it occurred that both the special and the complementary legislation enacted to fix, to complete the Code or to fill its gaps slowly expanded to the point of creating constellations of provisions totally independent of it. A notable consequence of this was that the Code, created to be the only supreme law, ended up playing, in several ways and in vital sectors of the economy and society, a marginal role and performing only a secondary function: a process known as 'decodification'[30].

The most troubling aspect of this crisis is probably that jurists in charge of interpreting the *Code*'s provisions, of understanding their meaning and scope of application, did, instead, much more than simply interpret the text. The very members of the *école de l'exégèse* did not even share matching and unambiguous opinions[31]. Rather quickly, upon the rubbles of this zealous *école*, different streams of thought developed, which, according to their technical and cultural references, sponsored different interpretations of the same provisions, drawing different conclusions from identical sentences. Therefore, the utopia of the code's clarity and coherence also collapsed. Judges took this process even further. In civil law countries each judge, not being bound by the *stare decisis* rule, has felt authorized to freely interpret the provisions of the Code to be applied to the case before him. Consequently, next to a variety of doctrinal opinions on the meaning of the same provision, one can nowadays also find a variety

[29] See, eg, D de Bechillon, 'L'imaginaire d'un code' (1998) Droits. Revue Française de Théorie, de Philosophie et de Culture Juridiques 173 and B Oppetit, 'L'avenir de la codification' (1996) Droits. Revue Française de Théorie, de Philosophie et de Culture Juridiques 73.

[30] N Irti, *L'età della decodificazione* (Giuffrè, Milan 1999)

[31] On the *école de l'exégèse,* see E Gaudemet, *L'interprètation du code civil en France depuis 1804* (Bâle, Paris 1935); L Husson, 'Analyse critique de la méthode de l'éxègese' (1972) 17 Archives de Philosophie du Droit 115; and also F Geny, *Méthode d'interprétation et sources en droit privé positif* (Librairie Générale de Droit et de Jurisprudence, Paris 1899); J Bonnecase, *L'Ecole de l'éxègese en droit civil* (De Boccard, Paris 1924); N Bobbio, *Il positivismo giuridico* (Giappichelli, Turin 1961); Tarello, 'Scuola dell'Esegesi' in *Novissimo digesto italiano*, vol. XVI (UTET, Turin 1957) 819; P Ricouer, *Le Conflit des interpretations. Essais d'herménetique* (Seuil, Paris 1969).

of interpretations put forth by judges. This desecration of the Code, thrown into history's tormented flow of interests and passions by judges and interpreters, caused the loss of its primal ideological identity. Such a fate, however, has unexpectedly also been the source of its success, allowing it both to resist the misfortunes and the mutations of institutions and to survive through time[32]. The *ius quo utimur*, i.e. the law in action has continued, in civil law countries as well, to be a body of knowledge firmly accessible to technicians only, meaning to doctors of law and judges: all this, however, notwithstanding the presence of statutory law and the code[33].

V. BEYOND THE STATE, BEYOND THE LAW

It is nevertheless necessary to mention another, and probably fundamental, element which significantly contributed to determining the crisis of the two pillars (the sovereign and territorial State and written statutory law) of the traditional legal order. This element consists of the *élan vital* of the merchant bourgeoisie, the very class that created and took control of the State in the first place. In opposition to the calm and detached spirit of the agricultural and pastoral nobility, the demon of the bourgeoisie - particularly of its most productive, most capable and strongest industrial and commercial wing - is the search for economic adventure. A search fuelled by a passion for risk in the continuous pursuit of technological innovation, in the ambition always to conquer new markets, in the obsessive search for profit and novelty, and at the same time in the perpetual escape from the spectre of a crisis (which is often perceived as the first step towards bankruptcy): it is, in short, the untameable spirit of wanting to cross set limits and boundaries.

The entrepreneurial bourgeoisie which played a central role in the creation of the modern State founded upon the rule of law, and which was able to profit from its efficiency, soon realized that the traditional legal structures were no longer fit to satisfy the needs which arose from the *fin de siècle* technological revolution. The substantial economic development

---

[32] On the interpretative role of the judiciary, also in civil law systems, see G Zaccaria, *La giurisprudenza come fonte di diritto* (Edizioni Scientifiche Italiane, Naples 2007); G Alpa, *La certezza del diritto nell'età dell'incertezza* (Edizioni Scientifiche Italiane, Naples 2006); A Pizzorno, *Il potere dei giudici* (Laterza, Rome-Bari 1998); F Viola and G Zaccaria, *Le ragioni del diritto* (Il Mulino, Bologna 2003); A Catania, *Metamorfosi del diritto. Decisione e norme nell'età globale* (Laterza, Rome-Bari 2008).

[33] Costantini, *La legge e il tempio. Storia comparata della giustizia inglese* (Rome 2007)

and increased welfare - notwithstanding the World Wars and the political and social tensions of the 'short century'[34] - and above all the technological revolution nurtured the natural aspiration of entrepreneurs to expand the market to new territories, going far beyond the boundaries, the structures and the logic of traditional States. It was the search for new and more substantial profit margins, or barely the attempt to stay afloat, to shore up competition and to avoid being pushed out of the market that led entrepreneurs to shift and move beyond the State. In this sense globalization, meaning technological revolution, was more a necessity of economic development rather than a generic or neutral entrepreneurial frenzy.[35].

The institutions of the traditional State - the legislating, sovereign, national and territorial State - were certainly functional for an economy tied to its territory, and are still functional for the simple economic environment which thrives in suburban scenarios. Moreover, it must be noted that the small bourgeoisie, the lower social classes and the working classes still aim nowadays to gain, through democratic means, influential positions *within* the State's structures. A goal which certainly appears outdated considering that this happens while the more dynamic and innovative merchant bourgeoisie looks far *beyond* the State, or, even better, already *is* beyond the State[36]. In fact, after the technical revolution of the latter half of last century, State structures appear now too narrow, insufficiently functional and often incompatible with the interests of those entrepreneurs who, when deciding *where* and *how* to produce, look not only to the national territory, but to the whole world. Entrepreneurs, and above all the *ipermercatores*, tolerate the typical dysfunctions of the State apparatus less and less. A slow and heavy, or even corrupt, bureaucracy creates intolerable inefficiencies and is ultimately at odds with the nature of economic decision making which, in order to be effective, requires decisions to be taken quickly. In the same way, a trial which goes on for ten or fifteen or twenty

---

[34] This is the original title of EJ Hobsbawm's well-received volume. See Lotti (tr), Hobsbawm (nt 6).

[35] S Moore (tr), K Marx and F Engels, *The Communist Manifesto* (Penguin Books, London 2002). Marx and Engels had predicted a 'global market', a 'universal trade' with exchanges throughout the 'whole world'. They imagined, with extraordinary vision, 'a universal interdependence between the nations', but didn't reach the point of imagining this form of 'globalization' which has gone beyond the States and the nations, being this a consequence of the revolution in the *Téchne* that the two philosophers couldn't even imagine.

[36] Pesce (tr), Bauman, (nt 25) 73 ff; S Cassese, *Oltre lo Stato* (Laterza, Rome-Bari 2006); S Cassese, *Lo Spazio giuridico globale* (Laterza, Rome-Bari 2003).

years is perceived not simply as a shortcoming, but as a true and total *gap* in the enforcement of law. It is an obstacle which makes it more profitable to take on the entire (statistically quantifiable) risk of non-performance rather than bear the cost of trial at a snail's pace.

It is impossible to deny that the State or other territorial entities (such as regions or municipalities) still play a useful, and often irreplaceable, role in several areas of law (for example in criminal, tax or administrative law)[37]. In fact, in counter-trend to the entrepreneurial attitude, there has been an increasing need for people to foster and consolidate their relationship with the community, the territory, the *Heimat* from which they draw nourishment, certainty and purpose in life. It is a fact, however, that with globalization there has been an increase in the complexity of the system because of the establishment of an economic and legal level of interaction above the State or, at least, because of the coexistence of multiple legal sources. The State's legal framework coexists with the supranational one (the EU, UN, WTO, international treaties and so on) and with sources enacted by territorial levels of government (for instance, Italian regions have been vested with the power to create laws in the private law sector as well). Each of these normative dimensions coexists with and is subject to the global one[38]. In the advent of the global market, the economy has dissociated itself from politics[39]. The Fichtian and Weberian representations of modern law as a coercive legal order, in which compliance with the rules is guaranteed by the use of force in the territory on which the State holds sovereignty, and which 'owes its legitimacy to the rational "calculability" and predictability of its actions'[40], appears to be a faded painting which does not portray the real image of the market. In this fresh, more

[37] And also in the regulation of transactions which are an expression of the local economic texture.

[38] See D Zolo, *Complessità e democrazia* (Giappichelli, Turin 1987); C Galli, *Spazi politici. L'età moderna e l'età globale* (Il Mulino, Bologna 2001).

[39] See Irti (nt 8) 628; F Galgano, 'La globalizzazione e le fonti del diritto' (2006) 56 Rivista Trimestrale di Diritto Pubblico 313, 315; MR Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (Il Mulino, Bologna 2002) 167; Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 46 ff, also discusses the dissociation between law and economy with the onset of industrial economy, in the sense that while trading expands progressively on an international scale, law retracts and fragments inside the individual nations.

[40] Ferrarese, *Le istituzioni della globalizzazione* (nt 1) 51.

mobile, more fluid, more liquid[41] dimension the 'law no longer fulfils its function of reinforcing the expectations of legal actors: it works as a composite and pragmatic tool used to manage risks connected to interactions dominated by uncertainty'[42]. The State, because of its history, its instruments and its nature is not able to face the dimension of 'global problems'[43]. A dimension in which the *citoyens* have become, in the words of Adam Smith, 'citizens of no particular country'[44].

VI. THE NEW LAW OF THE GLOBALIZED ECONOMY

In view of this, it would not be conclusive to argue that the law of the globalized economy is only that laid down in international treaties[45]. First, these treaties regard specific matters (bills of exchange, the international sale of goods, aspects of the conflict of laws and so on) and are not intended to regulate each and every field of human activity[46]. Secondly, they are an expression of an activity which can be traced back to the State's func-

---

[41] Zolo, 'Globalizzazione' (nt 1) 395

[42] Bettini (tr), Bauman (nt 9) 78.

[43] Zolo, 'Globalizzazione' (nt 1) 395. Francesco Algarotti, in his essay (originally of 1763), 'Saggio sopra il commercio' in *Opere scelte di Francesco Algarotti*, vol I (Società tipografica de' classici italiani, Milan 1862), after having mentioned that 'that nation ... which will be left last with a florin in the trough, will finally remain in the world the leader' (*ibid* 452), states nonetheless that the 'same people' could not be 'at once emperor and sailor of the world' (*ibid*).

[44] This is mentioned by Galgano, *Globalizzazione e conglomerazione* (nt 10) 77.

[45] According to Irti (nt 8) 634, the answer to the problem as to the law of globalization is '*in the political use of legal sophistication*, that is in inter-state agreements, valid beyond the borders of individual States. Only inter-state agreements are able to *take economic affairs back in the contexts intended for the application of law*, thereby bridging the gap, or *unevenness of levels*, between global space and territoriality of norms'. In this perspective see, eg, E King-Utz and M Albrow (tr), N Luhmann, *A Sociological Theory of Law* (Taylor & Francis, London 1985); R De Giorgi, M Silbernagl (tr), N Luhmann, *La differenziazione del diritto* (orig *Ausdifferenzierung des Rechts*; Italian trans edn Il Mulino, Bologna 1990) and also, as an extreme expression of positivism, A Febbrajo (tr), G Teubner, *Il diritto come sistema auto poietico* (orig *Recht als autopoietisches System*; Italian trans edn Giuffrè, Milan 1996). Differently oriented are the criticisms of Zolo (nt 38) 279 ff, and the proposals of Ferrarese, *Le istituzioni della globalizzazione* (nt 1) 117 ff and 131 ff, who underlines how those concepts which are valid to interpret national provisions fail and result inadequate in front of that *Great Deconstructor,* which is the globalization.

[46] Galgano (nt 39) 316 ff.

tions. There exists no international treaty, and it is probably not even imaginable, binding all states to enact a new and all-encompassing legal order[47]. Such an idea would end up reproducing, on an exponential scale, the same great Enlightenment illusion which led to the creation of the *Code* and would carry, from its very birth, the seed of its fated dissolution. A utopia that could only be achieved through another utopia, that of a universal legislator, which itself needs to be the expression of a planetary State. A new legal system consecrated in a 'supercode', the latter being the expression of a worldwide State, would be a Titanic-sized mirage which would carry, multiplied by virtue of the different scale, all that rigidity and those flaws which caused the crisis of the modern State and which would, therefore, equally doom it to failure.

On the other hand, the law of globalization is not, and cannot be, that of a specific State or the law imposed by force by a superpower to all countries. This hypothesis, too, which would lead to a 'concentration of power in the hands of a new and supreme organ which, in its relationships with other States, has the same monopoly on the use of force that it has with its citizens'[48], resembles more a utopia than a realistic project. The creation of a 'new global form of sovereignty'[49], i.e. 'a *decentered* and *deterritorializing* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers'[50] which would sponsor a supranational law willing to 'penetrate and reconfigure the domestic law of the nation-states'[51], and perhaps destined to inherit sovereignty, is a visionary representation of the future. As such, it seems more like a hope than a visible and existing trend. And still, being simply a 'new' form of national law, even if it were realized, it would still be subject to all the shortcomings discussed above.

---

[47] Kant's idea of cosmopolitan law, which he proposed in his writing *Zum ewigen Frieden* (Reclam, Leipzig 1881), of a cosmopolitan law, of a *Weltburgerrecht*, was mentioned also by R Falk, *Human Rights and State Sovereignty* (Holmes & Meier, New York 1981); N Bobbio, *Il problema della Guerra e le vie della pace* (Il Mulino Bologna 1979); L Ceppa (trs), J Habermas, *L'inclusione dell'altro* (orig *Die Einbeziehung des Anderen*; Italian trans edn Feltrinelli, Milan 1998) 177 ff.

[48] Bobbio (nt 47) 80.

[49] M Hardt and A Negri, *Empire* (Harvard University Press, Boston 2001) xii.

[50] *Ibid*.

[51] *Ibid* 17.

And after all, as regards international or transnational negotiations on the globalized market, even the national legal system with its civil code would not meet the needs arising from such negotiations, or it could even be an obstacle to the resolution of conflicts amongst entrepreneurs of different nationalities. If the economic force of the parties is substantially equivalent, or at least not seriously unbalanced, no one will succeed in imposing on the other its own rules, the laws of its country. The national legal system (the statutes, the Constitution, the codes, the regulations of territorial levels of government) seems functional to the settlement of disputes which arise in the national territory, while it does not seem appropriate when a case is the expression of a globalized economy. At most, it can be argued that a role for national law within globalization is regained through the common phenomenon of forum shopping[52]. The parties, either because they are not able or because they do not want to impose their own national legislation on each other, agree, by virtue of a specific contractual clause, that the law of a third country shall apply in case of any dispute that arises between themselves.

The prevailing trend, however, is not to refer to a closed and rigid system, like that of a particular country, but rather to more open and flexible forms - capable of dealing with new, often unforeseen, situations - unknown to the individual national systems; forms that are better suited to fulfil the need for justice in the individual case. Namely, actors on the global market prefer to adopt the rules and principles which have formed and gradually established themselves in international business practice within a given sphere of the economy. This is the case of custom, of trade practices, of usages generally and constantly practiced in a given sector. These rules which entrepreneurs abide by may, totally or partially, derive from the statutory provisions of a particular country (or, on the contrary, may have been, at a certain point in time, transposed into statutes at the national level), but they remain independent from any written law and they find application because they are deemed, by legal operators, more authoritative than any statute. This complex of trade practices has been called *lex mercatoria*: a (non-written, customary) law practiced by *mercatores*, by economic operators[53]. In reality, besides a common core (*pacta*

[52] On the issue of forum shopping, see Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 86 ff; F Galgano and F Marella, *Diritto del commercio internazionale* (CEDAM, Padua 2004) 79 ff; A Zoppini (ed), *La concorrenza fra gli ordinamenti giuridici* (Laterza, Rome-Bari 2004) 13 ff.

[53] B Goldman, 'Frontiéres du droit et la lex mercatoria' (1964) 9 Archives de Philosophie du Droit 177; R David, 'Il diritto del commercio internazionale: un nuovo compito

(segue)

sunt servanda, neminem laedere and so on) it is possible to find different *leges mercatoriae* governing the different fields of the economy, which are known to the experts of the sector and which are practiced by those who work in that sector. For example, the *lex mercatoria*—or, better yet, the *consuetudo mercatoria* - the trade usages and practices of international procurement gathered in the FIDIC (International Federation of Consulting Engineers) texts do not coincide with the standard practices of maritime and aerial transport, and so on[54].

It is worth noting that the more careful legal scholars have shown to be fully aware of the crisis affecting the State, national codifications and

---

per i legislatori nazionali o una nuova lex mercatoria?' (1976) 22 Rivista di Diritto Civile 577; MJ Bonell, *Le regole oggettive del commercio internazionale* (Giuffrè, Milan 1976); F Galgano, *Lex mercatoria. Storia del diritto commerciale* (Il Mulino, Bologna 1993); F Galgano, 'Lex mercatoria' in *Enciclopedia del Diritto*, vol V aggiornamento (Giuffrè, Milan 2001) 721 ff; Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 56 ff; F Marella, *La nuova lex mercatoria. Principi di Unidroit e usi nei contratti del commercio internazionale* (CEDAM, Padua 2003); Catania (nt 32) 75 ff; A Catania, 'Trasformazione del diritto in un mondo globale' (2006) 11 Ars Interpretandi 71; L Pannarale, 'Delocalizzazione del diritto e lex mercatoria. Linee guida per una politica dei diritti in una società transnazionale' (2005) 32 Sociologia del Diritto 309; S Patti, 'La "globalizzazione" e il diritto dei contratti' (2006) 22 Nuova Giurisprudenza Civile Commentata 149; Ferrarese, *Diritto sconfinato* (nt 1) 76 ff, 102 ff; Ferrarese, *Le istituzioni della globalizzazione* (nt 1) 59 ff. According to PG Monateri, 'La costruzione giuridica del globale e lo scontro delle giustizie' (2007) 25 Rivista Critica del Diritto Privato 677, 679, the *lex mercatoria* is an obsolete formula, a sort of aesthetic metaphor, disconnected from historical concreteness and prefers to stress the role of the new institutional actors exerting their *governance* on a planetary scale, such as the G-8, the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank, Non Governmental Organizations (NGOs) and so on. The idea of a global law displaying a 'horizontal structure' (F Ost and M Van der Kerchove, *De la pyramid au réseau. Pour une théorie dialectique du droit* (Publications des Facultés universitaires Saint-Louis, Bruxelles 2002)), in a 'flat world' (TL Friedman, *The World is Flat* (Farrar, Straus & Giroux, New York 2005)), is intended to convey the surpassing of the vertical and pyramidal configuration of Kelsen's model of 'command and control'. In reality, as it has been said, globalization did not eliminate the concentric planes representing the laws of territorial entities (federations, regions, provinces, municipalities and so on), but has superimposed another plane, corresponding to the law adopted by the protagonists of the global market.

[54] On the theme of the sources of law in the global market see M Dionigi, *Globalizzazione e fonti del diritto* (Cacucci, Bari 2006); Cassese (nt 36), on which commentary is provided by MR Ferrarese, 'Il diritto orizzontale' (2007) 38 Politica del Diritto 639 and, more in general, in G Alpa, *Trattato di Diritto Civile*, vol I: Storia, fonti interpretazione (Giuffrè, Milan 2000); G Alpa, A Guarneri, PG Monateri, G Pascuzzi and R Sacco, *Le fonti del diritto italiano*, vol. II*:* Le fonti non scritte e l'interpretazione (UTET, Turin 1999), and the recent volume of N Lipari, *Le fonti del diritto* (Giuffrè, Milan 2008).

written law produced by the sovereign and legislating State, and above all of the needs ensuing from the new transnational and globalized economy. For this reason, they have tried, in different ways, to enhance the role of these new (yet ancient) sources of law and to find new paths. A straightforward example of this awareness is the scholarly effort to collect all the rules regarding international commercial law (Unidroit)[55]; or the drafting, by a group of European jurists (SGECC), of *Principles*, i.e. a complex of provisions regarding contract and economic relations more generally[56]. These jurists have proposed some operational rules considered to be technically preferable. This, they have done after studying the different solutions adopted by codes, case law and national legal systems more generally, both in the *civil law* and the *common law* families, and after weighing the costs and benefits of the different options adopted by national legislation. These rules will be open to adoption, in full or in part, by operators as a guide during negotiations and/or as a tool of dispute settlement.

VII. MEDIATION AND ARBITRATION OF DISPUTES

In the global economy we are not only faced with the transition from the law written in a Code to rules of different origin, and particularly with a sort of resurrection of custom as a principal - or however not ancillary - source of law. Another distinctive character of hew global economy is, in fact, the departure from the complicated jurisdictional bureaucracies of national States towards more efficient and speedier forms of adjudication. It is a fact that nowadays the most important international disputes in which the biggest multinationals are involved hardly ever end up before a national judge. There are many companies operating worldwide which are specialized in the *mediation* process: they are entrusted with the task of studying the case, setting aside the most controversial aspects of the dis-

[55] MJ Bonell and F Bonelli, *Contratti commerciali internazionali e principi Unidroit* (Giuffrè, Milan 1997); MJ Bonell, 'Unidroit Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law' (2004) 9 Uniform L R 5; Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 64 ff.

[56] See C von Bar, E Clive and H Schulte-Nölke (eds), Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Principles. Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (outline edn Sellier, Munich 2009); O Lando, H Beale (eds) and Commission on European Contract Law, *Principles of European Contract Law—Parts I and II* (Kluwer, The Hague 2002); C Castronovo and M Mazzamuto, *Manuale di diritto privato europeo* (Giuffrè, Milan 2007).

pute and finding a solution (in financial, technical and commercial terms) that may quickly bring the disagreement to an end[57]. If this process fails, or if parties rule it out from the start, it is possible to have recourse, by mutual consent, to *arbitration*, where an award will be made by professional jurists chosen by the parties[58]. Arbitration is a procedure that better suits these types of controversies, and most importantly these types of parties, in light of the undisputed advantages it offers over national jurisdictions. First of all, one must consider that arbitrators are appointed by (and not assigned to) the parties for their personal qualities, and in particular their expertise in the subject matter, taking into consideration their recognised international prestige and their undoubted professional integrity. Moreover, arbitration is a private procedure - unlike national legal proceedings, which are public - thereby allowing parties to settle their conflicts in a discreet and confidential manner. Last, but not least, it is a (relatively) quick procedure, which does not suffer from the typical burdens and delays of ordinary trials, and can be administered, if the parties so wish, by specific international arbitration Chambers ensuring, at relatively affordable prices, a quick and reliable management of the proceedings. Arbitrators are sometimes vested with the power to decide the dispute in an equitable manner, *pro bono et aequo*.[59]. This means that the parties, rather than relying on specific written or customary provisions, prefer the Solomonic intuition of arbitrators, their sense of justice and their wisdom stemming from their juridical intelligence, technical wisdom, general education, ethical compass, prudence and professional experience.

In the advent of globalization and with the crisis of traditional legal forms, we are facing not only a return of custom (the Cinderella of all legal sources) on a worldwide scale, but also a revival of the role of jurists.

---

[57] G Cosi and MA Foddai, *Lo spazio della mediazione* (Giuffrè, Milan 2003); P Barcellona and others, *Nuove frontiere del diritto* (Dedalo, Bari 2001); F Molinari and A Amoroso (eds), *Teoria e pratica della mediazione* (Franco Angeli,Milan 1999); J Carbonnier, *Flexible droit* (Librairie Générale de Droit et de Jurisprudence, Paris 1995)

[58] See A Frignani, *L'arbitrato commerciale internazionale* (CEDAM, Padua 2004). MR Ferrarese, *Diritto sconfinato* (nt 1) 117 ff speaks of 'judicial ubiquity', with reference, however, to 'quasi-judicial' international institutions. On the other hand, Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 93 ff and 115 ff, states that, in the globalized economy, contract has taken the place of statutory law and the judge the place of the legislator.

[59] On the very controversial issue of arbitration in equity, see C Tenella Sillani, *L'arbitrato di equità* (Giuffrè, Milan 2006), who, in contrast with unanimous legal scholarship, seeks to fade out the differences between arbitration in equity and arbitration in law. In particular, see *ibid* 694 ff, on the role of *ex bono et aequo* arbitration within globalization.

Namely, the latter have once again become creators and ministers of law, in the capacity of both counsellors of the *mercatores* and adjudicators of their controversies[60]. The specific legal knowledge of jurists goes a long way in explaining this revival. In addition to that, there has also been a formidable comeback of private law. After being held captive by the State for centuries, it has been reclaimed by the *ipermercatores*. The *ius privatorum*, which the State (especially in civil law countries) had confiscated from individuals through the supremacy of statutory law and the triumph of codification, is now being returned to businesspeople. In the hypermodernity of the global market there has been a turn towards antiquity, meaning a revival of the supremacy of the parties' will and of that very interpretation already at the heart of the *ius civile*, which many common law systems are heir to, and which was described by the great jurist Pomponious as 'that which, absent a written rule, is only based on clever interpretation' (*quod sine scripto in sola prudentium interpretatione consistit*)[61]. So, nowadays, civil law, or better yet its tools, such as the will of the parties, their autonomy, the concept of legal transaction (often referred to under the German term *Rechtsgeschäft*), contract and so on, seem to have become the modern non-territorial law, the modern *ius gentium*, the law of globalization. The law of the *civitas*, that is of the nation-State, of the territorial organization and of the local community consists, on the other hand, of public law, constitutional law, criminal law, procedural law and tax law.

As the global society asserts itself, the stiff, rigid statutory law is left behind, in order to welcome a more flexible system based on legal knowledge: from the legislator's will to the doctor's *prudentia*.

---

[60] Grossi, (nt 15) 161, MR Ferrarese, *Le istituzioni della globalizzazione* (nt 1) 131; Zolo (nt 1) 391; Galgano, *La globalizzazione nello specchio del diritto* (nt 10) 119; Monateri (nt 53) 694.

[61] D. 1. 2 .2. 12. (Pomponius). On the creative role of jurists in the formation of Western law, see A Schiavone, *Ius. L'invenzione del diritto in Occidente* (Einaudi, Turin 2005) 29 ff, 155 ff and 341 ff. In particular, on the Pomponious excerpt and on his *Enchiridion*, see L Lombardi Villauri, *Saggio sul diritto giurisprudenziale* (Giuffrè, Milan 1967) 7 ff. During the Roman era, civil law was that of the *civitas*, rooted in custom and local traditions, *quasi ius proprium civitatis* (Gaius, *Institutes*, book I, [1]) was the *nomos* of the land, while the *ius gentium* was 'what natural reason establishes among all men and is observed by all peoples alike ... as being the ius which all nations employ' (*ibid,* translated in SP Scott, 'Gaius' Institutes in English', accessed 18 May 2009 at http://faculty.cua.edu/pennington/Law508/Roman%20Law/GaiusInstitutesEnglish.htm).

VIII. UNSOLVED PROBLEMS

This new reality which is slowly establishing itself on a global scale—amongst contradictions, countertrends, and twilight zones[62] - presents many critical, or even worrying, aspects which are at least worth mentioning.

1. The first is that law demands not only the scale, but also the sword. Rules, arbitral awards, agreements and so on have to be complied with. This compliance—which the State tries, albeit not always successfully, to enforce—represents a serious problem in a global dimension. The only sanction which would be effective for unfair and non-performing parties would be the exclusion from the global business stage. This certainly represents a severe sanction since it affects the company's vital interest of being able to operate on the market and would not certainly be feared by prospective transgressors less than a punishment decided by a national court after a decade of costly and exhausting legal proceedings. However, States would inevitably retain competence on criminal matters and for interim relief measures[63].

2. Consumer protection is a second aspect that is relevant to the law and appears to be problematic from the perspective of a globalized economy. For a market to work well, it is necessary that fairness govern not only horizontal relations, meaning those among different competitors, but also vertical ones,

---

[62] While the State undergoes a crisis and globalization spreads on a planetary level, a countertrend of renewed attention towards the relationship between the individual and his territory is gaining strength, along with the valorisation of localism and of the 'roots' which nurture the individual's way of life.

[63] Irti (nt 8) 634, declares that the only answer to the problems of globalization – knowing that it cannot consist in a simple 'return to the *nomoi* of the land' – consists 'in *the political use of legal sophistication*, that is in inter-state agreements, valid beyond the borders of individual States'. Adding that 'only inter-state agreements are capable to *take economic affairs back in the contexts intended for the application of law*, thereby bridging the gap, or *unevenness of levels*, between global space and territoriality of norms'. This 'return to land' would be necessary for legal norms to take effect and especially for 'the exercise of the power of coercion'.

meaning those between companies and their consumers. It seems, however, hard to imagine effective consumer protection at a supranational level[64].

3. Another problematic aspect has to do with worker protection. Putting aside pretty utopias (including the famous international workers' union) it seems unrealistic to assume an effective protection of workers' interests if one cuts out the labour unions which operate within a country or a territorial organization[65].

The most problematic aspect of the globalized economy is that a market economy can exist, and continue to operate through time, only if there is an authority which can preserve it and defend it from itself. The game must necessarily continue without ever stopping on the chessboard, competitors must battle continuously in a never-ending game so that no one succeeds in expelling all the others. The danger hanging over the market consists in those 'fierce battle' dynamics which lead first to oligopolies and then to monopolies, a situation of economic dictatorship which is the opposite of the entrepreneurial pluralism characterizing a flourishing and vital market.[66] The market needs an authority with both the power and the tools (law and the enforcement thereof) to remove the obstacles and the disruptive factors that can alter competition. Not an authority that act as an entrepreneur, but rather one with the ability to guide the market, operating as an attentive and authoritative referee vis-à-vis competition between companies. From this macroeconomic perspective of political economy, custom, standard procedures, *consuetudo mercatoria*, trade usages and, more generally, the new, flexible, convenient, efficient sources of law of the globalized economy are not able to solve all problems.

---

[64] See Pesce (tr), Bauman (nt 25) 89 ff; S Rodotà, 'Diritto, diritti, globalizzazione' (2000) 51 Rivista Giuridica del Lavoro 773

[65] On the relationship between globalization and democracy , see L Ceppa (tr), J Habermas, *La costellazione post–nazionale. Mercato globale, nazioni e democrazia* (orig *Die postnationale Konstellation. Politische Essays*; Italian trans edn Feltrinelli, Milan 1998) 105 ff; R Dahl, *Sulla democrazia* (orig *On Democracy*; Italian trans edn Laterza, Rome-Bari 2001) 122 ff; A Baldassarre, *Globalizzazione contro democrazia* (Laterza, Rome-Bari 2002) 299 ff; Zolo (nt 38) 145 ff; Cavallini (tr), Stiglitz (nt 11) 310 ff, Irti (nt 8) 631.

[66] The risk, in short, is that the caterpillar doesn't succeed in turning into a butterfly, meaning that the current global 'market hype' does not result, as it would be desirable, into a mature and accomplished global market economy.