

## *Draft paper*

GABRIELLA SAPUTELLI\*

### *The European Union, the Member States and the lex mercatoria*

#### **Abstract**

Phenomena linked to "internationalization" and "globalization" of the economy push toward the demand of a uniformity legal framework in the supranational governance and encourage forms of "self-regulation". This spontaneous attempt toward the harmonization of law at the supranational level is often prepared by market forces and comes to exist alongside the classical models of discipline and leads to the emergence of a new *lex mercatoria*.

The aim of the paper is to analyze the openings of the European system to the transnational production of law identified under the term "*new lex mercatoria*", by verification of all those factors which make the entrance in the European legal order of its sources of law possible. The division of competences between Member States and European Union in this area will be also analyzed, as well as all their implications in terms of sources of law.

The research aims to address the relationship between the spontaneous and the institutional attempts towards the regulation of markets, as well as their implications, risks and impact on the national legal system. In fact, even if they are mainly related with commercial transactions, they involve questions linked with the rule of law and the protection of rights, which require the composition between private and public interests.

#### **1. Globalization and *lex mercatoria***

Globalization and internationalization of the economy convey the need to unify laws<sup>1</sup>. Precisely in a globalized market, business-people that interact from different States make it necessary to lay down uniform rules governing international trade. This need for the uniform law can be done in a variety of ways.

The first method is the process of "conventional uniformization" which recognizes the preeminent role of the State, though in a relationship of interstate cooperation. Since States cannot regulate market globalization individually, they are induced to delegate or transfer the production of laws to supranational entities.

---

\* Ph.D. in Italian and European Constitutional Law and Researcher at the Institute for the Study of Regionalism and Self Government ("ISSiRFA") of the National Research Council ("CNR") in Rome.  
Email address: [gabriella.saputelli@cnr.it](mailto:gabriella.saputelli@cnr.it).

<sup>1</sup> About the effects of globalization on the unification of law see: F. Galgano, *La globalizzazione nello specchio del diritto* (2005); F. Galgano-F. Marrella, *Diritto e prassi del commercio internazionale* (2010); S. Cassese, *Lo spazio giuridico globale* (2003); M.R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale* (2006); M.R. Ferrarese, *Le istituzioni della globalizzazione* (2000); M. D'alberti, *Poteri pubblici, mercati e globalizzazione* (2008); Y. Dezalay, *I mercanti del diritto* (1997); N. Irti, *L'ordine giuridico del mercato*, Roma-Bari (1998).

The rise of economic globalization has begun to encourage forms of *self-regulation* whereby rules are often drawn up directly by private entities involved in international trade, such as large corporations, law firms and banks (sometimes with “contractual customs having international value”) that have their own dispute settlement mechanisms embodied mainly in arbitrators, but with which national judges also interact (“spontaneous uniformization”). These rules are obviously “*transnational*” and significantly affect sources of law, by challenging the State’s monopoly on the production of laws, and threatening the hierarchy of legal sources.

*Lex mercatoria* is synthetic expression to indicate this spontaneous production of law in global market: it was first used during the 1960s, spread throughout scientific circles, and eventually became commonly used, despite the lack of a univocal definition<sup>2</sup>. According to an Italian famous legal scholar, the expression “new *lex mercatoria*” is used to indicate the “*law created by the business community without the mediation of the legislative powers of the States and formed by rules intended to regulate in a uniform manner, beyond the political units of the States, the commercial relations that are established within the economic sphere of the markets.*”<sup>3</sup>

The term immediately evokes comparison with the medieval *lex mercatoria*, even though the more accepted literature views such comparisons as possibly misleading in light of the contextual changes in the components of the *lex mercatoria* since medieval times.<sup>4</sup> For example, the ancient *lex mercatoria* preceded the advent of the modern State, while the current *lex mercatoria* operates within a world characterized by the dominance of States,<sup>5</sup> with the function of going beyond fragmentation due to the political division of markets.<sup>6</sup>

In spite of the different evaluations of the sources of *lex mercatoria*— which reflect the different ways that it is conceived—the most commonly used reconstructions

---

<sup>2</sup> The use of the terminology “*lex mercatoria*” to describe the modern phenomenon is traced back to Berthold Goldman (See Berthold Goldman, *Frontières du droit et “lex mercatoria,”* 9 *Archives De Philosophie Du Droit* 177 (1964); *Lex mercatoria*, in 3 *Forum Internationale* (1983)); on the theme see also K.P. Berger, *Lex Mercatoria And Arbitration: A Discussion Of The New Law Merchant* (Thomas E. Carbonneau ed., 1998) (discussing the origins and development of the theory of *lex mercatoria* in the literature, legislation, international conventions, and jurisprudence); A. Kassis, *Théorie Générale Des Usages Du Commerce: Droit Comparé, Contrats Et Arbitrage Internationaux, Lex Mercatoria* (1984); Francis D. Rose, *Lex Mercatoria: Essays On International Commercial Law In Honour Of Francis Reynolds* (2000); Filali Osman, *Les Principes Généraux De La Lex Mercatoria: Contribution A L’étude D’un Ordre Juridique Anational* (1992); Filip De Ly, *International Business Law And Lex Mercatoria* 207 (1992).

<sup>3</sup> See F. Galgano, *Lex Mercatoria: storia del diritto commerciale* 219 (1993). F. Galgano, *The New Lex mercatoria*, in *Annual Survey of International & Comparative Law*, 1995, vol. 2, 1, 99-110.

<sup>4</sup> See generally Adaora Okwor, *Lex Mercatoria as Transnational Commercial Law: Is the Lex Mercatoria Preferentially for the “Mercatocracy”?*, in *Theory and Practice of Harmonisation* 393 (Mads Andenas & Camilla Baasch Andersen eds., 2011) (comparing the new and old *lex mercatoria*).

<sup>5</sup> See Ferrarese, *Le Istituzioni Della Globalizzazione*, at 149–50 (describing the diversity of economic and legal context that undermines the comparison between the “ancient” and the “new” *lex mercatoria*).

<sup>6</sup> See Galgano, *Specchio Del Diritto*, at 57 (emphasizing the fact that the new *lex mercatoria* affects the legal system of the State).

identify the following elements within the *lex mercatoria*<sup>7</sup> : (1) usage and practices of international trade; (2) uniform contractual models; (3) arbitration case law; and (4) general principles.

The modalities in which *lex mercatoria* is formed evoke the characteristics of customary sources and raise questions about its role in contemporary State orders, and specifically in trade traffic, and with respect to the efficacy that they have within the State<sup>8</sup>.

Beyond these discussions, it should be noted that there is a multiplicity of sources — private and public, as well as supranational and international — which do not interact according to pre-established structures. This multiplicity of sources generates a network-like structure, rather than a pyramidal structure.

A system of sources of law is not a formal question but is strictly linked with the rule of law. For this reason, a change in the hierarchy of the sources of law could cause negative effect on the rule of law, that is to say on the democratic system and on the protection of rights.

The phenomena described above, in fact, are not restricted to the international level, but have an ever-increasing influence on national legal orders as well. They form not only in spaces left free by State law, but also in regulated areas thus competing against state law if its rules are more advantageous for commercial exchanges.

The main questions which arise from these considerations are: what are the relationships between these spontaneous sources of law (es: customary law) and State law? and what are the effects on the States systems?

The *lex mercatoria's* impact on State legal orders has led experts to maintain that its efficacy is partly the result of the open sovereignty of States, and partly because its transnational nature does not allow the State—which seems to be impotent in its presence—to exercise any form of control over it.

Some experts' assertions survive scrutiny from economic and sociological standpoints but, from a purely legal or constitutional standpoint, such statements require a dogmatic foundation in positive law. In a public or constitutional perspective, it is necessary to verify the efficacy attributed to this transnational law in the Member States constitutional system by analyzing the openness of the new form of democratic, pluralistic State *vis-à-vis* its various legal sources<sup>9</sup>.

---

<sup>7</sup> For an analysis of the sources of law of international trade law, specifically *lex mercatoria*, see De Ly *International Business Law And Lex Mercatoria* 207 (1992); Jan Dalhuisen, *Dalhuisen On Transnational Comparative, Commercial, Financial and Trade Law, Introduction—The New Lex Mercatoria and its Sources* 137, 281 (4th Ed. 2010); F. Galgano, *Specchio Del Diritto*, At 58–59; M. J. Bonell, *Lex Mercatoria*, In 9 *Digesto Delle Discipline Privatistiche: Sezione Diritto Commerciale* 11–17 (1993); F. Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*, diretto da F. Galgano, Padova, 2003.

<sup>8</sup> See J. H. Dalhuisen, *Custom and its Revival in Transnational Private Law*, 18 *Duke Journal of Comparative & International Law*, 2008, 339-370, and L. Bernstein-F. Parisi (eds.), *Customary Law and Economics*, Edward Elgar, 2014.

<sup>9</sup> See G. SAPUTELLI, STATO UNIONE EUROPEA E LEX MERCATORIA (2015). G. Saputelli, *The role*

## 2. State and *lex mercatoria* : historical overview.

A brief historic overview can help to solve these questions by describing how the role of transnational law (customary law) has changed as the form of the State has evolved<sup>10</sup>.

A historic survey shows that the general legal system has always attempted to delimit and reduce the efficacy of spontaneously formed law—that in most cases has taken on the form of usage and customs. In observing the relationships between the main sources of law in some medieval legal systems various attempts made to delimit the efficacy of customs, or to establish an overriding role of the political sources over it, can be identified.

With the gradual concentration of the power of *imperio* (full authority), the law has become inseparably tied to the concept of sovereignty. Sovereignty, unlike other manifestations of power—such as the executive or judicial powers, the power to declare war, etc.—has been associated mainly with the power of law-making. In the 16th Century, Jean Bodin explained that the sovereign is the supreme legislator because it has the power to modify the law and is the ultimate legal authority to which all the others are subordinate<sup>11</sup>.

At this time, the conception of State created deep changes in the way social groups were organized, which caused a deep fracture in legal tradition. It reduced the efficacy of the spontaneous forms of laws (hence of the source that *par excellence* is produced directly by the social group: usage and customs) and enhanced the role of political sources, which emanate from a political authority. From the assertion of this new form of political organization, the degree of closure of the legal order—from the standpoint of the production of laws and the relationship between imposed sources and sources arising from the social sphere—has become closely related to the form of State that came about in a given historic moment. The form of State in this sense signifies the

---

*of customary law and the new Lex Mercatoria in Countries with Civil Law Tradition: the Italian case, Transnational Law & Contemporary Problems Journal, Volume 25, Summer 2016.*

<sup>10</sup> For this historical overview several sources has been consulted: J.M. Kelly, *A short history of western legal theory*, Oxford, 1992, 139; C.K. Allen, *Law in the making*, Oxford, 1964; J.H. Baker, *The Common law tradition, Law and History*, London, 2000; B. L. Benson, *The Spontaneous Evolution of Commercial Law*, in *Southern Economic Journal*, 1989, 55, 644-661; H. J. Berman, *Law and Revolution: The Formation of Western Legal Tradition*, Harvard, 1983; M. Caravale, *Alle origini del diritto europeo*, Bologna, 2005; A. Cavanna, *Storia del diritto moderno in Europa*, vol. II, Milano, 2006; C.M. Cipolla *Storia economica dell'Europa pre-industriale*, Bologna, 1974; J.K.Galbraith, *Storia dell'economia*, Milano, 1990; P.Grossi, *Società, diritto, Stato. Un recupero per il diritto*, Milano, 2006; L.Trakman, *The law merchant: the evolution of commercial law*, Littleton, 1983.

<sup>11</sup> Jean Bodin was one of the most important proponents of the theory of sovereignty in the 16th Century. In his famous book, *Le Six Livres de la Republique*, he explains that it is in the nature of every independent State to have supreme legislative power. See generally JEAN BODIN, *LES SIX LIVRES DE LA REPUBLICQUE* (Scientia Verlag 1977) (originally published 1583).

relationship between authority and freedom and the opening up to phenomena occurring outside the State's borders.

Under the liberal State, at least in Europe, the legal order was taken to be self-sufficient and the political sources of law prevailed over customary law. Ever since, the efficacy of customary law within the State cannot be derived from the imposition of this phenomenon, irrespective of an evaluation—albeit implicit—of the phenomenon by the State. This new form of political organization had some unique characteristics that set it apart from other legal orders, such as exclusiveness and impenetrability, which materialized in a state monopoly of law-making and was representative of one of the main points that embodies sovereignty.

In Europe, this process coincided with the codifying processes between the end of the 15th and first half of the 18th Centuries, which led to the drafting of official customary law texts. Additionally, statutes issued by the representatives in Parliament delimited the efficacy of customary law, downgrading it to the status of a residual source of law.

*Common law* systems, which are often mentioned as a paradigm of legal orders in which primary importance is attributed to customary law, were no exception to this evolution. A closer analysis reveals that the efficacy of usage and practices undergo a conditioning that is similar to what occurs in civil law systems, as a result of the importance initially taken on by *case law* and, in more recent times, statutory law.

### **3. The contemporary State, the European Union and the *lex mercatoria*, in a global context**

Democratic state, which is an evolution of the liberal state, and mostly its participation to the EU integration process, presents new cause for reflection. The specific structure of the pluralist-democratic State, specifically its openings to international and European law, may have a direct impact on sources of law, and may partially change the approaches inherited from the structure of the liberal State.

For example, the new wording of Article 117, paragraph 1 of the Italian Constitution – which proposes a subordination of domestic sources of law to “the constraints deriving from EU legislation and international obligations”, with different consequences and different control modalities – have a direct impact on the system of sources of law, because it is possible that any opening towards EU and international sources of law (in particular by international agreements) may lead to such sources merging with Italy's domestic law.

Clauses of this type could enable custom-formed law (spontaneous law) to be “conveyed” into national law through international and European sources. The practical effect of this merge is that the “customs of international trade,” which represent a considerable portion of the *lex mercatoria*, acquire weight and authority that do not correspond with the level rank of custom in the domestic hierarchical system of law.

The mechanism for incorporation is always usage and practice *secundum legem* (“according to the law”) that springs into motion when a source refers to customs for the integration of its content. According to the most common reconstruction, through this mechanism, custom will take on the same regulatory force and position in the hierarchical scale as the sources that cite it (its authority comes purely as a result of the cross-reference itself).

The efficacy of transnational usage and practices may enjoy the prevalence of European and international law on the system of domestic sources, which may lead to the overcoming of an explicit prohibition contained in a State or regional statute.

This effect could pass through provisions of European ‘private’ law and European private international law, or EU trade agreements (e.g. TTIP), especially when considering that EU has an exclusive competence in trade matters.

*Lex mercatoria* has recently raised many doubts, because through this system of law strong parties could impose rules that are congenial to them, by passing principles of the rule of law as they have been conceived in civil law systems, which are expressed in a specific system of sources of law.

The recent financial crisis—caused primarily by the financial market—and the severe repercussions it had on national systems showed the risk of deregulation, and the need to recover a ‘*public law dimension*’<sup>12</sup> instead of a ‘*global law without a State*’<sup>13</sup>.

In a globalized contest a State’s action may still play a significant role in guaranteeing and protecting rule of law, thus protecting the characteristics of constitutionalism. This can be done directly through a State’s domestic law or indirectly through instruments of international law or forms of supranational associations, such as the EU.

First of all, as limitation of the prevalence of international law and European law the Italian and German Constitutional Courts have provided the ‘counter limits’ doctrine in case of violation of fundamental principle of the Constitution<sup>14</sup>.

The approach described considers the ‘judge’ – namely the person who interprets national law and confirms the efficacy of the phenomena that produces transnational rules – as main guarantor of the rule of law and reflects the role the judges are increasingly playing in the contemporary system. By carrying out this function, the judge may also use many instruments provided by “internationalization” or “Europeanization” of fundamental rights that arguably offset the loss of sovereignty that commonly follows globalization. This approach tends to make the continental system closer to the common law system, but it is not sufficient in civil law systems, where

---

<sup>12</sup> A. Bogdandy-S.Dellavalle, *The Lex mercatoria of System Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective*, in *Transnational legal theory*, 2012, 4 (1), 59-82.

<sup>13</sup> G. Teubner (ed.) *Global law Without a State*, Dartmouth, 1997.

<sup>14</sup> See S. Mangiameli, *Unchangeable core elements of national constitutions and the process of European integration. For a criticism to the theory of the “controlimiti” (counter-limits /Schrannen-Schrannen)*, in *Teoria del diritto e dello Stato*, 2010, 1, 68 ss.

remedies cannot be shifted solely onto the role of judges but an evaluation of the representative bodies (parliament) is required.

However, it is almost evident that in a globalized context the State role is still important but it is not sufficient. Supranational organizations are better suited for this role than States, which are incapable of regulating global economy, as they did in the past.

In the European context, the prevalence of EU law and the EU competence in trade matters bring to the consideration that the EU has become the main place of the dialogue between law and market. The equilibrium between rule of law and free markets (until now guaranteed by State) should be found also at EU level: this will help to re-evaluate a *public law dimension*.

This is more important if we consider the peculiarities of EU markets compared to global market: art. 3, par. 3 TEU: “3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”.

For these reasons, the relationship between political (or institutional) sources of law and spontaneous sources of law has to be found at EU level.

Also in the EU the efficacy of spontaneous sources of law cannot be derived irrespective of an (explicit or implicit) evaluation by the EU (through the sources of law).

The goal of creating a common market has brought with it the need to harmonize, standardize, and unify the law of the various European countries, with some advantages for MS in regulating globalization effects. This phenomenon takes place in a global context. Even though this was not the original aim of the European order, creating a single market has indirectly controlled and reduced the “spontaneous” sources of law by market operators in a given geographic area.

An exam of the European system of law through some significant indicators – Marginal role of spontaneous (customary) sources of law by EU law; EUCJ case law about *lex mercatoria* (see judgement 9th June 2011, C-87/10); choice of law in European private international law (e.g.: debate on the Regulation 593/2008); the consideration of customary law by European Private law proposal of PECL and CESL – shows a restrictive position of EU legislator toward sources of *lex mercatoria*.

It is possible to state that in a global market a stronger EU could help to guarantee rule of law in European context, if EU rule of law is guaranteed.

In fact, a guarantee-oriented approach of this type requires that the limits inherent in this order be solved: firstly, the limits inherent the EU role in the global context, and its relationship with international actors, States, big corporations, lobbies; secondly, the well-known limits related to EU institutional structure and process: transparency of the EU decisions making process, democratic deficit and accountability.