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INAUGURAL LECTURE

International Commercial Law Today: Old Habits and New Challenges

Alberto Mazzoni*

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1. Introduction

These are not happy days for international commercial law. The anti-protectionist winds that started to blow in Bretton Woods back in 1945 have by now lost much of their vigour. With that, vast sectors of public opinion are no longer convinced that free commerce and multilateral economic cooperation at a global or regional level are a powerful factor of peace and prosperity.

There are, of course, several very complex reasons behind this dramatic change in the world's political and economic atmosphere. Be assured, however, that no attempt will be made here to offer a detailed analysis of them. The magnitude of the task would exceed my time, purpose, and above all, my capabilities.

What I intend to do in this lecture is simply to offer a few remarks on a related, yet more circumscribed issue. The issue is whether this change in the world's political and economic atmosphere might threaten, in the foreseeable future, the role and the

* We regret to report the death of Professor Alberto Mazzoni in May 2019 before this inaugural lecture was published. Professor Mazzoni, who at the time of his death was President of UNIDROIT and Professor Emeritus of Commercial Law at the Catholic University of Milan, was an outstanding lawyer, a fine President and a much-loved man who played a crucial role in the establishment of the Queen Mary-UNIDROIT Institute of Transnational Commercial Law. He will be greatly missed by all who knew him.

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perspectives of international commercial law and, if so, to what extent. Ultimately, my purpose is to show that, although the *acquis* of this branch of the law is now somehow put at risk, the reason for preserving and defending at least certain aspects of such *acquis* have not at all disappeared. On the contrary, in addition to building on existing instruments whose merits continue to be universally recognised, new challenges—prompted in part by the needs of promoting sustainable growth wherever possible and in part by the ongoing rebalancing of the global distribution of economic power—require a strengthening rather than a passive contraction of the role of this law.

In order to illustrate the above, I will first discuss diversity and uniformity in international commercial law. Then, I will describe the main supporters of the statocentric vision of the law. Lastly, I will analyse the new challenges and continuing needs to foster the development of international commercial law.

2. Diversity and uniformity in international commercial law

For purposes of the reasoning that I will develop in this presentation, two general aspects of international commercial law deserve to be emphasised. The first one is the strongly heterogeneous character of the rules composing it. The second one is the underlying need of cross-border uniformity or harmonisation, which is satisfied by these rules and which constitute their *raison d'être*.

On the first point, with the deliberate intent to skip entirely the subtleties of certain insoluble academic quarrels, I confess from the very outset that I will refer to the notion of international commercial law in a very broad and realistic sense.

Essentially, what is meant in my mind by international commercial law is the conglomeration, taken as a whole, of the various principles, rules, standards, and, more generally, legal instruments which actually govern or are capable of governing as 'law in action' cross-border transactions in which at least one of the parties, if not both or all, is a private entity or a private individual.

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Conceptually, there are two main features of this notion: on the one hand, the direct involvement of private players, which is the feature distinguishing this branch of the law from public international law and; on the other hand, the non-national origin of the rules encompassed by it, irrespective of their subsequent reception or non-reception within the national legal order of any one or more sovereign States.

Having regard more specifically to their relationship with the various national legal orders, it is important to keep the following in mind. While a few of these rules have an equal or an even higher ranking than the ordinary rules of State law—typically, treaty-based rules may be given such a higher ranking on constitutional grounds in many national legal systems—the vast majority of them have a much less formal nature.

Indeed, they may be no more than recommended soft law solutions or specific examples of professional self-regulation, that appear to have, at first sight at least, a *per se* minor, if any, legal force or a definitely weaker status than law in the ordinary, statocentric sense. At the risk of restating the obvious, however, it is undeniable that these non-State and non-treaty rules are in practice the real and effective law regulating certain international transactions: suffice it to mention, as universally known examples, the International Chamber of Commerce (ICC) Incoterms 2010, the ICC Uniform Customs and Practice for Documentary Credits (UCP), the ICC Uniform Rules for Demand Guarantees (URDG), the International Federation of Consulting Engineers' (FIDIC) Model Construction Contracts, or the standardised model contracts elaborated by certain trade associations, such as The Grain and Feed Trade Association (GAFTA) or the Federation of Oil, Seeds and Fats Associations (FOSFA).

Last, but certainly not least, I cannot refrain from mentioning in this regard the UNIDROIT Principles of International Commercial Contracts (UPICC). Although the Principles constitute more an opportunity for promoting future international uniformity than the evidence of an already achieved uniformity in practice, it is undeniable that they have, *inter alia*, a clear aspiration to be treated as an internationally uniform contractual law. Indeed, the Preamble clearly self-proclaims the Principles' ability to be used not only as terms of an international contract, but also, if the parties so agree, as the governing law of such a contract, as an alternative to any otherwise applicable State law.

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Significantly, this self-proclaimed ability is no longer a unilateral ambition. Article 3 of the Hague Principles on the Choice of Law in International Commercial Contracts has recently endorsed and provided authoritative support to the feasibility and validity of clauses choosing the UNIDROIT Principles as governing law of an international contract.

Unquestionably, the parallel existence of State and non-State rules potentially applicable to international contracts may create numerous situations of competition or conflict. Of particular interest are the situations in which freedom of contract is not restricted by mandatory rules of any State law, and non-treaty based rules of international commercial law claim to be applicable for gap-filling purposes in lieu of the dispositive or default rules of the otherwise applicable State law (i.e. the State law that would be designated as the governing law of the contract if the ordinary conflict-of-laws method of designation were used).

When this is the case, the final practical outcome of the competition or conflict depends on the interaction between two factors: on the one hand, the extent to which party autonomy is concretely used so as to clearly and effectively shape the deal at stake in accordance with current international standards; on the other hand, whether the judicial or arbitral forum, to which the issue is subject or submitted, considers itself to be strictly bound or, on the contrary, not to be strictly bound by an overarching State law approach.

In the first case (which is typically the situation arising before State courts), the most likely outcome will be the preference granted to the domestic solution offered by the default rules of the State law found to be applicable pursuant to the conflict rules of the *lex fori.*

In the second case (which typically arises in the context of an international arbitration), there is a very substantial chance that, on the contrary, decisive weight will be given to the practical results pursued by the will of the parties (including their implied will). On that basis, the gap may well be filled by resorting to an alternative non-State law solution, as a more appropriate response to the needs of the case, given the intrinsically international nature of the transaction.

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On the whole—and this is the crucial point I wish to make—there is structurally an inherent potential tension between predominantly domestic values and interests that are protected by State law and possibly different values and interests that are protected in a broader context or scenario by international commercial law.

The balance struck at any point in time between these competing forces is not a static, one-for-ever solution. It is, on the contrary, a multifaceted equilibrium subject to historical variations and to being upset whenever hit by deep, underlying movements of great political and economic significance, such as those that we are now facing. Unsurprisingly, therefore, after a protracted period during which the pendulum was swinging in favour of the expansion of international commercial law, there is now an ongoing process causing the pendulum to swing in the opposite direction, namely towards the revisitation of the postulate that the ultimate, realistic supremacy belongs to State law. I will soon revert to this observation with a number of more specific remarks that I will develop later.

On the second general point that I mentioned earlier, namely the appetite for uniformity as a characterising *raison d'être* of international commercial law, the main observation that I wish to offer concerns the extremely significant economic benefits that may be associated with it, of which the players in the international economic arena are very well aware.

It is tempting to think of uniformity as the fulfilment of a philosophical desire, stemming from the postulate that ideally law and justice should be made up of the same rules having universal cross-border application. Merchants, however—that is, contemporary businessmen and managers not less than their medieval predecessors—have always had a much more pragmatic and cost-oriented perception of what law should be and should do in the arena of international trade.

Briefly stated, law should, first of all, avoid taking by surprise the economic players that must use it. Secondly, and accordingly, law should eliminate or reduce as much as possible the transaction costs involved in getting to know it and in assessing the risks under it. As a consequence, cross-border uniformity of rules, standardisation of

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contract models, and guidance provided by internationally known and accepted standards and principles are highly desirable and sought to be obtained through all potentially available channels. It follows that, in realistic terms, binding State law rules deriving from international treaties constitute only one of these desirable channels and, on the whole, not even the most important one, having regard to the existing objective disproportion between the extremely limited coverage afforded by the rules codified in international treaties and the magnitude and variety of the additional needs and interests to be otherwise tackled or satisfied.

Thus, international commercial law is by definition caught in the middle of an apparent paradox. While in terms of goals it is constantly bound to seek uniformity, in terms of means for achieving them, it must realistically accept a great variety of diversified and heterogeneous solutions. Bearing always in mind this apparent paradox, the attention may now be turned to the analysis of the core themes of this lecture.

3. Today's main supporters of the statocentric vision of the law

The idea that law is essentially State law (or international law governing relationships between or among States) is not a philosophical novelty. On the contrary, it is the revival of an ancient line of thought that reached the peak of its evolution in the 19th century when legal nationalism and legal positivism celebrated their triumph.

In a way, therefore, this revival could attract the comment that nothing is new under the sun: today's supporters of the statocentric vision of the law might simply appear as the heirs of old and very persistent ideological positions. Upon a closer look, however, the matter deserves to be analysed somewhat more carefully in an attempt to better identify the present significance and relevance of this revival.

Although the statocentric vision of the law never ceased, from its conception onwards, to enjoy support among both scholars and practitioners, it is a fact that for more than fifty years—ie from Bretton Woods until the financial crisis that broke out in 2008—the advocates of this vision were somehow forced by the prevailing circumstances of political correctness to play a sort of defensive game in remaining faithful to it. In other

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words, the statocentric approach was typically used as a line of resistance against the day-to-day expansion of international commercial law rather than being called to play the role of the affirmative keystone upon which the idea itself of law should rest.

As an example of the mood that has been prevailing in this period, reference may be made to the evolution that occurred in the selection of their projects by the three major international organisations, whose institutional mission was and still is to promote uniformity and harmonisation of international commercial law, ie UNCITRAL, UNIDROIT and the Hague Conference on Private International Law (HCCH). Significantly, all of these organisations (the HCCH, however, only very recently) have progressively shifted their focus in selecting their projects from the pursuit of hard law objectives (typically draft conventions) to soft law objectives (typically principles, legislative guides, and model laws or rules). There is no doubt that this choice was made in recognition of two concurring factors, namely (i) the awareness of the cost-benefit analysis favouring soft law over hard law, and (ii) the belief in the ability of soft law effectively and realistically to promote international uniformity and harmonisation, notwithstanding the apparent weakness stemming from its lack of inherent binding force.

Although as of today nothing has officially changed in the approach that the international organisations continue to adopt for purposes of selecting their projects, the context in which they operate has experienced severe turbulence and the faith in the role and relevance of international commercial law—particularly in the soft law dimension of it—has greatly diminished.

Recalling the image that I have already offered, the pendulum is now swinging back towards the position of the hard-line advocates of the statocentric vision of the law, who are obviously at the same time also the main opponents of the view placing international commercial law on a superior or at least equal ranking by comparison to various national laws. The time has now come to identify more clearly who these champions of State law and opponents of non-State law are in today's real world.

It is submitted that they may be divided into three main categories. Specifically, by reference in particular to their pro-active attempts to reverse the prior trend in favour

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of it, I believe they may be characterised as cultural opponents, professional opponents, and political opponents of non-State law.

Turning to the first category, the typical cultural opponents of non-State law are the followers of the traditional academic view on the goals and logical steps of the conflicts-of-law method. Not only do these scholars move from the postulate that there cannot be a legally binding contract unless such contract is linked into a systemic container having the nature of a complete legal order, but they also assume that there cannot be any adequate (sufficiently complete) legal order other than a State law. Thus, party autonomy may only choose State law as proper law of a contract. The choice of non-State rules of law as governing law must be held either as radically invalid or, at most, capable of being given effect only if (and only to the extent to which) the conflict rules of the *lex fori* consider such 'atypical' choice as permissible.

Ultimately, party autonomy, in general, and party autonomy in the choice of law, in particular, are not conceived as expressions of an original, inherent freedom of the players in the international trade arena. They are rather envisaged as expressions of a granted or authorised freedom, ie *une liberté octroyée*, whose boundaries and contents are always subject to the philosophically higher ranking of any State law with which the exercise of party autonomy may come into contact.

The main consequence of this cultural approach is that any cross-border transaction—irrespective of how 'international' it is by nature—is necessarily 'nationalised' as a result of its unavoidable attraction within the scope and the systemic architecture of one or more applicable State laws.

This is not a purely theoretical conclusion or observation. On the contrary, radically different practical consequences may flow from the acceptance or, respectively, non-acceptance of the aforesaid postulate on the overall ultimate supremacy of State law.

In particular, cases where the parties expressly reject the application of the respective national law and do not agree on the choice of any third State law or cases where the parties expressly choose a well-defined set of non-State rules of law as the governing law of their contract may give rise to vastly different outcomes, if the approach

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favouring the progressive denationalisation of international contracts is reversed and replaced by the reattribution of primacy to the opposite State-law approach.

The second typical opponents of non-State law are those who are reluctant to make use of it for professional reasons. The allusion is clearly directed to the generality of practising lawyers and encompasses not only the vast majority of those whose practice is entirely or predominantly domestic, but also a significant number of those who have great familiarity with international practice.

The main reason of distrust towards non-State law that is common to all of these lawyers, irrespective of their different degree of exposure to international practice, lies in the intimate persuasion or at least in the admitted perception that State law is, in realistic terms, more certain and more predictable than the rules of any allegedly existing transnational system of contemporary *lex mercatoria*.

Arguably, this view is not entirely correct and, more specifically, does not warrant the conclusions that are superficially derived from it on the assumed vagueness and consequential unreliability of international commercial law. However, as long as this view continues to be prevailing in the culture of the legal profession, it will indeed constitute a powerful factor contributing to the ideological comeback of State law primacy.

A somewhat different sort of consideration applies to a particular subcategory of practicing lawyers, namely the specialists in international trade law who are partners in large international law firms or act as in-house counsel for multinational enterprises.

These professionals are certainly not hostile to the idea and practice of contractual uniformity under international commercial law instruments. However, most of them have their own pragmatic idea of what is or should be meant by this term. In substance, from their standpoint, international commercial law is the actually achieved uniform legal regime of certain standardised transactions or certain standardised contractual models, irrespective of the nature of the format through which the result of such uniformity has been obtained in concrete terms. Thus, a well-tested model of financial contract, whose subject matter is a syndicated long-term loan aligned with current international practice

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and expressly governed by English law or New York law, is in this perspective part of international commercial law not less than internationally uniform ICC Rules on documentary credits or demand guarantees.

The fact that both State law and non-State (rules of) law are in many instances capable of fulfilling the same role as providers of uniformity with respect to international contracts may lead to concluding that both types of law are substantially equivalent for the purposes and needs of international trade, so that (it would seem) no prejudice to the development of such trade should be feared as a result of an increased, re-expanded role of State law in its regulation.

This conclusion is probably wrong and certainly dangerous. As will be more fully argued later, the continuing development of international trade is *per se* beneficial from the standpoint of the aggregate global welfare. In order to foster such development, internationally uniform non-State rules of law have arguably a much more promising future than State law.

Lastly, mention must be made of the most numerous, aggressive, and vocal opponents of the idea that international trade should be fostered by resorting to the use and expansion of non-State rules of law.

The allusion is to the political opponents of political and economic multilateralism, in other words to the supporters of the various movements that in different parts of today's world strongly advocate full repossession by the national States of their entire sovereignty, by claiming restitution of any share or bit of it howsoever transferred to any global or regional multilateral institution in accordance with existing treaties.

The hostility against international commercial law is not a direct objective of these political demands but rather an inherent and unavoidable consequence of advancing them. Essentially, the champions of the neo-sovereign supremacy reject the idea that open terms of international trade and competition on a global scale are beneficial to individual national communities. Accordingly, they vigorously claim a national 'right to regulate', which not only justifies the re-imposition of both tariffs and non-tariff

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obstacles, but also implies a hostility in principle towards 'excessive' party autonomy in cross-border transactions and a parallel favour in principle for applying the domestic national law to international transactions as well.

It is, I believe, unnecessary to elaborate further on all the potential implications of this political attitude. The attention must rather be turned at this point to the issue of whether the ongoing process of return to State law supremacy is likely to be irresistible and without exceptions or simply broad and strong but subject to significant exceptions. The latter, it is submitted, is the correct answer for the reasons that shall now be outlined.

4. New challenges and the continuing need to foster the development of international commercial law

A rational approach to legal analysis requires the drawing of distinctions reflecting fundamental differences. For purposes of this lecture, bearing in mind the ongoing process whereby State law supremacy is making its ideological and practical comeback, it is helpful to identify and distinguish the areas in which international commercial law is likely to be stopped or forced to retreat as a result of this process and, on the contrary, the areas in which its development remains possible and is indeed desirable, not to say required by actual compelling reasons.

With a conscious understatement, it may be said that there are very limited chances to see the occurrence in the near future of any substantial development of the law aiming to promote political integration or to implement further liberalisation of market access rules among States that are parties to multilateral agreements, such as the World Trade Organisation at the global level or the European Union, North American Free Trade Agreement, or MERCOSUR[1] at the regional level.

Most likely, the legal framework created by multilateral agreements of this sort – i.e. agreements with broader political ambitions than the mere facilitation of private trades – is not going to be officially dismantled but will rather be kept on hold or frozen

[1] MERCOSUR is a South American trade bloc that was established in 1991 by the Treaty of Asunción, and subsequently by the Protocol of Ouro Preto in 1994. MERCOSUR's full members are Argentina, Brazil, Paraguay, and Uruguay. Venezuela is a full member, however its membership was suspended in August 2017.

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at least for some time, presumably until the present turbulences will have ceased and new balances will have been found.

This chilling effect is likely to operate not only at the level of the interpretation and application of the primary provisions of the basic treaties, but also at all lower or contiguous levels of secondary rules, regulations, and practices linked to or inspired by such primary provisions. In other words, the entire system of the multilateral political treaties, including the consequential rules that are applicable to transactions involving private parties, is going to be adversely affected either by a slowdown of the drive towards a global legal order based on multilateralism or by the acceptance of the idea that significant reorganisations of the system must be agreed and carried out as a condition for the continuity of its existence.

In very practical terms, not only is it unreasonable to expect any further significant progress of liberalisations, but it is also likely that the threatened imposition by certain major players of protectionist restrictions will trigger the well-known reactions of retaliation against foreign imports or investments. In parallel, certain areas of competition law, such as market abuses by dominant national champions and State aids (subsidies) to strategic industries, are also likely to receive a (de facto at least) exemption from proactive enforcement of the rules prohibiting and sanctioning them or a significant relaxation of their enforcement policies and standards.

In other areas, however, there are no reasons, even from the standpoint of the staunchest advocates of State law supremacy, to block the application and the expansion of international commercial law.

Three areas in particular come to mind, all of which provide a most telling illustration of this point. Unsurprisingly, all of them have attracted the attention of UNIDROIT, and all of them have consequentially been selected as fields in which UNIDROIT projects and efforts can be suitably developed.

The first area is that of international recognition and enforcement of secured transactions. The second area is that of the private law instruments reflecting international standards conducive to the making of international investments capable of

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promoting sustainable development. The third area is that of the promotion of an internationally uniform legal framework for international commercial contracts.

It is a well-known fact that cross-border movement of an asset, over which a security interest has been created in accordance with the law of the original situs, may give rise to the unenforceability of such security in the State of the new situs. In the case of high-value movable assets, such as airplanes, trains, space satellites, and other sophisticated material or equipment, the risk of unenforceability in a State other than that of the situs at the time of creation of the security is a factor triggering a significant increase in the costs of financing. An international convention providing for easy recognition and protection in all other Contracting States of the security created in accordance with the law of one Contracting State is a legal instrument, which may result in the elimination of such additional costs and the improvement of legal certainty to the benefit of the main players involved (buyer, seller and financing institutions taking a security on the asset). This is the background that prompted UNIDROIT to work on one of its most successful products, namely the Cape Town Convention of 2001 on International Interests in Mobile Equipment together with the Protocol thereto on Matters Specific to Aircraft Equipment.

The Cape Town Convention together with its Aircraft Protocol is a perfect example of the kind of multilateral, purely commercial (non-political) convention, which should go through the present turbulence of international commercial law without running the risk of being adversely affected by it. On the contrary, the flexible modular approach adopted by the Convention (a set of basic provisions ensuring the principle of cross-border recognition and protection of the security, followed by an asset-specific Protocol, taking into account the special features of each category of assets and the regulatory needs connected therewith) is particularly apt to allow an easy extension of the Convention to further categories of assets.

In fact, right now, UNIDROIT is actively supporting the work of a committee of governmental experts, who are in the process of finalising the drafting of a new Protocol to extend the Convention to another category of assets, in particular high-value mining, agricultural and construction equipment. Moreover, additional future extensions are

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conceivable: in particular, on the assumption that certain motives of traditional resistance in favour of the status quo will eventually be overcome, it would be logical to expect a further expansion of the Cape Town Convention through a Protocol covering secured financing in the maritime field (typically, maritime mortgages granted to the lenders having financed the construction of the vessel).

Another area that is likely to enjoy a sort of immunity from the supervening temptations of legal nationalism is the conglomeration of economic, political, and legal issues generated by the universally acknowledged need of promoting sustainable development on a global scale, in particular within the context of developing States.

This is not to say that individual developing States are expected or required to abandon their own national policies and legislation aimed at fostering growth and to replace them entirely with the adoption of international programmes. Rather, what is suggested here is that there will not be an interruption of the process of progressive voluntary acceptance, by developing States as well as by international investors, of the internationally uniform standards that have been and will continue to be elaborated as effective means of promoting sustainable development. As a result, it may be expected that not only public law instruments, but also private law instruments, will be offered, typically in a soft law format, as elements of an overall legal framework that, in each developing State, should help to create a better atmosphere for the attraction of responsible foreign investments, particularly in certain very sensitive fields such as agriculture and other similar primary activities (fisheries, forestry, mining), involving also special needs of protection of social and environmental interests and values. In other words, an important role may be played by private law instruments in helping to strike a fair balance between modernisation and growth through higher efficiency of certain basic sectors, on the one hand, and protection of the primary needs and cultural heritage of the poorer players, on the other hand. While, unfortunately, the now blowing neo-protectionist and neo-nationalistic winds make it realistic to fear a non-negligible cut of the financial aid to emerging countries, it would be unreasonable and short-sighted from the standpoint of the international organisations to withdraw from their mission of setting

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international private law standards supportive of all surviving initiatives aiming to foster sustainable development on a global scale.

It is true that, strictly speaking, these uniform private law instruments of non-binding nature (such as the UNIDROIT/Food and Agriculture Organisation of the United Nations/International Fund for Agricultural Development *Legal Guide on Contract Farming* launched in 2015 by UNIDROIT and the future instrument on private law aspects of agricultural land investment contracts upon which UNIDROIT is presently working) are not part of international commercial law in the traditional sense. But this is simply a formalistic observation, depending on a much too narrow definition of the meaning of 'commercial law', which has been inherited from the past when agriculture was envisaged as a separate economic sector, scarcely affected by commercial rules and practices in the strict sense. Be that as it may, as of today, the rationale behind such narrow definition no longer exists. The crucial relevance of international trade and international investments in agriculture as core elements of the global sustainable development objectives fully justifies these remarks, substantially treating uniform international standards in this field as part of international commercial law.

The last topic to be addressed is the one which is perhaps the most important. Essentially, the query is whether the present trend in favour of the primacy of State law will cause, inter alia, a retreat or perhaps even the stoppage of international commercial law in the area of international commercial contracts. In other words, do we have to expect in the foreseeable future the return of State law as the sole conceivable governing law of any and all international contracts? Or may we consider that there will remain a wide-open space for the possibility of expansion of an internationally uniform contractual law, based on non-State rules of law such as the UNIDROIT Principles?

For sure, most advocates of the superiority of the State law approach would answer the first question in the affirmative. Consistently with the initial postulate that they accept, they would claim that this has always been the correct answer, so that the present trend should be seen as nothing more than an a fortiori contemporary confirmation of an already solidly founded conclusion.

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It is submitted, however, that this view deserves to be rejected, essentially because the new challenges triggered by changes in the distribution of economic power on a global scale suggest a different and less dogmatic answer.

History and a realistic assessment of the present status and future perspectives of the world's affairs support the conclusion that the US-EU duopoly that has dominated international trade until now will not continue—at least not in its present form—and will presumably be replaced by a polycentric structure, as a result of new emerging economies (such as, in particular, China, Russia, India, South Africa, and the South-East Asian 'tigers') claiming recognition of their role as global economic players.

The future polycentric structure of the world's economic power will have an impact not only on the governance of international economic institutions and on economic and political relationships between and among sovereign States. It will also have an impact on the individual commercial and financial transactions involving private parties. In particular, it can be reasonably assumed that it will also have an impact on the issue of the choice of the applicable law.

In practical terms, the more that the statocentric approach will be insisted upon as the sole or main answer to the various legal issues depending on or connected with the choice of the applicable law, the more the likelihood will increase of very important international transactions becoming subject to the law of one of the States belonging to the narrow group of the new economic powers.

In theory, this is not *per se* a reason for considering this outcome as unacceptable or undesirable. In practice, however, it is submitted that the matter should be analysed, not only having regard to an a priori preference for the statocentric approach, but also in the light of considerations inspired by legal realism.

Until now, although in principle there has been very wide international recognition and protection of the freedom to choose the applicable law and the consequential interest in negotiating choice-of-law clauses, the truth of the matter is that only in few cases have such negotiations actually occurred. Furthermore, in virtually all cases where there has been a real negotiation of the choice-of-law clause, the contracts at

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stake have been of a considerable economic value, and the parties thereto have been assisted by experienced international practitioners of very high standing.

The practical result of the earlier described situation has been until now the frequent—not to say exclusive—adoption of certain State laws for the most important international contracts: typically, English law or New York law for financial contracts and either of these laws or the law of a few other European or Western States for a broad range of non-financial international contracts.

Whenever genuinely and seriously negotiated, the underlying reason for the choice of the law of one of these States as the governing law cannot be simply explained by making reference to the superior bargaining power of the contracting party having insisted upon it. Typically, a non-negligible concurring factor has also been the persuasive force of the argument that the law of that State was on its merits particularly appropriate for the purpose of governing that intrinsically international contract, since the well-developed legal culture underlying the chosen law could be considered as a guarantee of its ability to provide adequate answers not only to the needs of purely domestic cases but also to those of a particularly significant international transaction, such as the one at stake.

It is submitted that the frequency of this outcome in many cases and for a long number of years has become a tacit factor in support of the statocentric view. In other words, support of that view may be explained not so much on philosophical grounds, but rather on the implied assumption of its continuing to operate substantially in the same way as it has been operating until today, i.e. by ultimately restricting the choice of the applicable law to a narrow number of 'major' laws, which are fully familiar to practitioners at top international law firms.

Since, however, it is unlikely, as mentioned earlier, that this situation will continue to prevail, a more realistic forecast requires consideration of three future, quite different and competing scenarios, namely (i) primacy of the State law philosophy and practical results similar to those that have prevailed until recently, ie choice in most cases of a 'major' law (eg English law, New York law, Swiss law, or the like) as governing law

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notwithstanding the increased economic and political weight gained by the new emerging powers; (ii) primacy of the State law philosophy and practical results reflecting the rebalanced distribution of the world's economic power, that is more and more frequent choice of the law of an emerging economic power as the governing law of many important international contracts, irrespective of its adequacy or inadequacy from the standpoint of the needs of international trade; and (iii) weakening of the primacy of the State law approach and spreading of the idea that non-State rules of international commercial law may be validly and wisely chosen as governing law in lieu of any specific national law, particularly and increasingly so the more the traditional scenario (under sub (i)) has difficulties prevailing over the emerging economies scenario (under sub (ii)).

There is no doubt in my mind that the future polycentric structure of the world's economic power will inevitably favour a progressive success of the third scenario; a scenario which will increase the neutrality and the objectivity of the legal rules actually governing international trade, thus helping it to fulfil its function as a vehicle of prosperity and peace.

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