Corporate and Financial Markets Law: A New Section

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Being invited to coordinate this new section on 'Corporate and Financial Markets Law' in the *Italian Law Journal* prompted me to reflect on my own experiences in comparative law and academic adventurism.

Almost twenty years ago, when I was a young researcher aspiring to an academic career, a fortunate combination of professional coincidences and personal events offered me the opportunity to divide my time between Italy and the US, not a common choice, especially in those years and for a junior scholar. More generally, this somewhat unusual schedule allowed me to consistently allocate time to research and teaching in different countries. During my travels, together with the excitement of new ideas and perspectives, I also experienced the conflicting feelings familiar to the most recent generations of wandering jurists: longing for the motherland when away, and longing for broader horizons when back home.

One thought was particularly persistent, and mildly frustrating. The Italian scholars and the academic debate in this country I was familiar with, while surely not free from limitations and defects, presented often a level of sophistication and depth of analysis, an historical awareness, a wealth of ideas, and comparative culture that was frankly rarely seen even at the most prestigious and well known foreign institutions. Another valuable feature of Italian scholarship was and is the ability to combine theoretical analysis with practical insights, possibly also due to the intense dialogue that still exists between and among scholars and judges, regulators and attorneys. In addition, the Italian legal system, for its history, its ability to borrow institutions and rules from other jurisdictions and adapt them in original ways to the local circumstances, and due to its position in the EU, was and is an inherently interesting object of research.

Notwithstanding these attributes, in the 1990s (the period I am referring to), Italian contributions were largely ignored at the international level for a simple and mundane reason: the fact that the vast majority of Italian scholars, especially in my field, did not – with notable but limited exceptions – write and easily communicate in English, combined with the correlated unavailability of Italian secondary sources abroad. Paradoxically, but also due to the tragic

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events of the Fascist period, Italian business law scholars of a previous generation were more influential abroad: think about Tullio Ascarelli and Mario Rotondi, to mention just two names. The same linguistic barrier prevented a broad international circulation of statutory and regulatory materials, and case law.

On the other hand, it may be fair to say that while Italian legal scholarship had a lot to contribute in terms of analysis, attention for the comparative and historical background, and capacity to bridge theory and practice, it was not particularly innovative in terms of methodological approaches. All this changed dramatically over the last decade, and the *Italian Law Journal* nicely epitomizes this evolution and its possible future trajectory, as nicely described in previous contributions (*see* eg Guido Calabresi and Pasquale Femia in issue 1/2015). On this occasion, allow me to add a few words specifically on business law, intended also as a program for the section on Corporate and Financial Markets Law.

Possibly also due to the limited availability of positions at Italian universities and law schools, an entire cohort of young business law jurists – and not only – has started to seek and obtain positions abroad, from the US to Russia, from Ireland to France, from the Netherlands to China. A cursory search on most public repositories of legal scholarship will now return a consistent and growing number of international publications, generally written in English by Italian scholars, and the same is true perusing foreign and international law journals. Italian regulators (The Bank of Italy and Consob – the Italian Security and Exchange Commission – are excellent examples) have started publishing papers in English and convening international conferences, something not so common just ten years ago. Italian universities today offer a great number of law courses and programs in English (even if case law debates this possibility, and see Italian Constitutional Court, case no 42 of 2017, in this issue), and are more open than before to hiring colleagues who have or have had positions abroad. The evaluating commissions of public competitions to obtain a professorship in law consider – with dwindling exceptions – publications in foreign journals favorably. The other side of the coin of this growing internationalization of Italian scholars and scholarship has been a better understanding of Italian law and has sparked the curiosity of our foreign colleagues about our legal system. Just to mention one example in the area of corporate governance, consider the attention reserved in international circles for 'Italian-style list voting' for the election of directors in listed corporations.

On the methodological side, to the extent that a gap existed with other countries, Italian scholars have quickly eliminated it by engaging in a plurality of approaches in addition to the more traditional ones, from *behavioral law & economics* to *empirical legal studies*, from *law & literature* to other types of '*law and…*'.

Until recently, however, no specific outlet existed to host work in English on Italian law.

A couple of years ago, I was tinkering with the crazy and intimidating idea of launching a journal focusing on Italian business law, along the model of the *German Law Journal* and other similar initiatives, with the aim of fostering awareness on and attention to Italian law and scholarship. The founders of the *Italian Law Journal*, whom I did not know personally at the time, were faster, more determined and effective. Undeterred by the daunting nature of the task, they launched this initiative with a new approach not only in terms of content, but also in the way in which the *Journal* is disseminated, following the best international practices in terms of selection of manuscripts and editorial work. During that period, I came across the first issue of the *Journal* you are now reading, and I immediately recognized the value of the project, with a sense of relief and gratitude for the trailblazers who preceded me. A few months later, my path crossed with one of the editors of the *Journal*, and they were generous enough to propose a section specifically dedicated to business law, which I was glad to coordinate.

Within the spirit of the *Italian Law Journal*, the idea is to offer both scholars and readers an easy-to-access forum specifically dedicated to scholarship in English discussing Italian business law or issues that have a direct relevance for the Italian legal system. The section is of course open to scholars from all over and, needless to say the challenge for legal scholars, in our area as well as in others, is to combine the best of their national traditions with new methodological approaches coming from other jurisdictions. Obviously enough, writing for a broader audience and more generally creating or participating in an international discussion, is not simply a matter of language. This end cannot simply be achieved by 'translating', more or less literally, work also destined for Italian sources. Especially in legal scholarship, where language is both form and substance, the international circulation of ideas requires also a methodological shift. It requires the ability to understand what foreign colleagues and readers, less familiar with local technicalities, might be interested in or, more precisely, how to convey effectively the importance and relevance of the issues examined, and how to present the analysis in an intelligible but not superficial manner.

Our work and this project in no way intend to minimize the importance and relevance of publishing in Italian and using the somehow different codes and approaches of 'local' scholarship. In fact, with possibly a few exceptions in specific fields, I doubt the validity of the concept of a 'global' jurist indifferently operating anywhere, in a sort of legal vacuum. On the contrary, I believe that today's scholars from different jurisdictions must be able to 'compete' in two related but different 'markets' that should virtuously operate like communicating vessels. For lack of a better expression, these 'markets' are the 'international one', generally in English; and the 'internal ones', in their own language (whatever that might be), remain useful if not essential also to interact with and influence judges, legislatures and regulators.

An international and comparative perspective is particularly apt for the study of corporate law and financial markets regulation. The cross-border nature of business activity requires an approach able to go beyond single jurisdictions, compare and contrast different solutions, understand regulatory competition phenomena, and deal with both top-down harmonization and spontaneous, bottom-up convergence. As the concept of *ius mercatorum* confirms, history clearly shows that both the practice of business and the study of the rules governing it have always had this transnational flavor, this intolerance for being confined to specific legal systems, and it is not surprising that the topics of our section have always been at the forefront of internationalization. Once again, however, while general principles and issues can be examined from a very broad point of view, with limited forays into the technicalities of a single legal system, I personally believe that the most valuable analyses do not shy away from scrutiny of municipal rules, cases and reality. Business law lives and thrives, more than in the quietness of law libraries, in bustling marketplaces, in exotic ports of call, in wood-paneled boardrooms and in hectic courthouses. These are all places that exist in specific locations, are governed by local rules and customs, and have a distinct local color and smell. Business lawyers, back in the old days as well as nowadays, must be able to use all the different lenses in the inventory of the professional photographer: from the wide-angle necessary to capture general transnational trends, to the zoom required to freeze specific actions, to – occasionally – macro lenses for a close-up of hidden but revealing details.

In this perspective, we are particularly glad to christen the launch of our little ship with four very interesting contributions by colleagues who, each with his or her own personal style and voice, exemplify the best of this approach.

The first article, by Luca Enriques and Matteo Gargantini, critically examines the duty to act in the best interest of the client in providing financial services under Mifid II, discussing both its meaning in the system designed by EU rules aimed at protecting investors, and its application in Italy. The piece concludes by showing the limitations of the principle in the law in action. The second contribution, by Francesco Denozza and Alessandra Stabilini, offers a comprehensive re-evaluation of agency theory in corporate law that combines a more theoretical perspective with an insightful discussion of the concrete implications of this approach. The authors focus in particular on the shortcomings of agency theory and its derivative concepts, such as fiduciary duties, opening the door to future research on the role of stakeholders other than shareholders, and to additional rights and protections that might be granted to them. Miriam Allena and Francesco Goisis discuss a specific recent statute, putting it however in a broader framework that is related to the issue of the purpose of the corporation and the role of different stakeholders examined also by Denozza and Stabilini. Their work focuses in fact on a 2016 Italian statute regulating corporations participated by public entities, to investigate the often-elusive border between

private law and public law and how agency theory and the pursuit of profit should be intended in business organizations owned by the state or municipalities. Finally, our selection includes a paper by Federico Pernazza on the recent Italian delegating law on the reform of insolvency law, and more specifically on the so-called 'early warning' procedures that impose on directors specific duties when a risk of crisis appears on the horizon. Through a detailed comparison with the French experience with the '*procédure d'alerte*', Pernazza highlights possible shortcomings of the new Italian approach in a timely fashion, since the delegated legislature could consider the insights emerging from comparative experiences.

We are particularly grateful to the colleagues that have accepted the challenge of the *Italian Law Journal* and provided us with excellent materials to start this adventure. I also must deeply thank the editors and the team that contributed to this project and mention specifically, at least, Camilla Crea and Demetrio Maltese who, in their different capacities, have relentlessly and with rare enthusiasm worked with me in the last few months.

Like the inaugural episode of a new television series, generally referred to as a 'pilot', used to sell the show to a television network, this section is also a standalone experiment to test audience interest. The success of this venture will depend, ultimately, on you, the readers, possible future authors of (also) the *Italian Law Journal*. We very much hope that in the next few years this venture will see an increasing number of submissions and contribute, together with the rest of the *Journal*, to the dissemination of scholarship on Italian law internationally and to the debate on business organizations and financial markets transcending national barriers.