

2002

Changing Concepts of Rules: Global Corporate Assessment

Bernhard Grossfeld

Recommended Citation

Bernhard Grossfeld, *Changing Concepts of Rules: Global Corporate Assessment*, 8 LAW & BUS. REV. AM. 341 (2002)

<https://scholar.smu.edu/lbra/vol8/iss3/2>

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

Changing Concepts of Rules: Global Corporate Assessment

Bernhard Grossfeld

Table of Contents

- I. Introduction**
 - A. GLOBAL LAWYERLAND
 - B. SKEPTICISM
 - C. CORPORATE GOVERNANCE
 - D. COMPETING RULES
 - E. REMAINING PATCHWORKS
 - II. Does Law Matter?**
 - A. LAW OR WHAT?
 - B. RATIONALITY
 - C. LIMITS OF SIGNS
 - III. Knowledge Based Economy**
 - IV. Comparative Law**
 - V. Global Accounting**
 - A. CASH FLOW OF JUSTICE
 - B. STOCK OPTIONS
 - 1. *Effect on Earnings*
 - 2. *Managers' Interest*
 - 3. *Lobby*
 - C. SPECIAL PURPOSE ENTITIES
 - 1. *Securitization*
 - 2. *Collapse of Collateral*
 - 3. *Cash Flows*
 - D. COMPLEXITY
 - E. CHILLIER WORLD: NEW COMPETITION
 - 1. *Waterloo*
 - F. REGULATION
 - VI. Global Valuation**
 - A. NEW HOPES
 - B. GLOBAL DISTORTION
 - VII. Global Rating**
 - A. RATING AGENCIES
 - B. RATING AND LAW
 - C. NEW HIERARCHY
 - D. RATING TECHNIQUE
 - E. CROSS-BORDER RATING
 - 1. *Glocality*
 - 2. *Sovereigns Risks*
-

- F. RATING OF RATING
- G. REGULATING THE REGULATORS?
 - 1. *General Criteria*
- H. GENERALLY ACCEPTED RATING PRINCIPLES
- I. RISK ASSESSMENT

VIII. Global Logistics

- A. PUBLIC CHOICE
- B. CYBERSPACE
- C. SPACE/TIME
- D. GENETIC CONFLICT
- E. BUSINESS METHOD PATENTS
- F. POWER GOVERNANCE

IX. The Lawyers' Position

X. Conclusion

"I am thankful for boundaries. I am fond of having the lines drawn around me."¹

I. Introduction

"Therefore I gave them statutes that were not good, and ordinances through which they could not live."²

A. GLOBAL LAWYERLAND

"Law" has been largely associated with nation states or with regional organizations, for instance, with the European Community. But today "globalization" or "glocalization" has entered the lime light and, consequently, this raises the question of whether the concept of "law" will run parallel to these technical, economic, and political developments toward a more rule based, or rule of law oriented, approach. At times, lawyers seem to be quite optimistic about the outcome. The term "international" or "global" adds a kind of glamour to their status, and lawyers might hope for a global "lawyerland"³ that puts them, along with their semiotic system (words, words, words), on equal terms with the once powerful accounting firms.⁴ I will discuss the matter with regard to the international financial law that opens up a new field of law and economics.⁵

1. PAUL BELLOW, RAVELSTEIN 185 (2000).
2. *Ezekiel* 20:25.
3. See LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997); Pierre Schlag Boulder, *The Lawyerland Essays: Introduction*, 101 COLUM. L. REV. 1730 (2001); Sarah Krakoff, *Does "Law And Literature" Survive Lawyerland?* 101 COLUM. L. REV. 1742 (2001); Robin West, *Joseph In Lawyerland*, 101 COL. L. REV. 1775 (2001); Lawrence Joseph, *Working Rules For Lawyerland*, 101 COL. L. REV. 1793 (2001); Robert W. Martin, Jr., *Literature Reviews & Analyses*, 5-SEP NEV. LAW. 24 (1997).
4. See Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 WAKEFOREST L. REV. 167 (2001).
5. See RON HARRIS, *INDUSTRIALIZING ENGLISH LAW* (2000); Paddy Ireland, *History, Critical Legal Studies and the Mysterious Disappearance of Capitalism*, Lucian Arye Bebhuck, *Property*

B. SKEPTICISM

At first glance the prospects look great. We hear much about international sales laws, about a "new lex mercatoria,"⁶ and about international mediation⁷ and arbitration,⁸ both handled over the Internet. But we have to keep in mind that much of this talk is wishful thinking for a self-fulfilling prophecy. Many of the actors and writers in these fields are just looking for jobs, particularly as mediators and arbitrators. Even antitrust has lost its reputation, as nobody knows for sure what kind of market behavior in what markets, is in the public interest. Antitrust might well be the sixth finger on Adam Smith's (Bible-inspired) "invisible hand," a finger more often disturbing than helping.⁹ The failed General Electric/Honeywell merger from 2001 is a prominent example for this proposition.¹⁰

The World Trade Organization (WTO) might lead us onto more reliable grounds. There is no doubt that it nurtures a realistic hope for rule oriented global commercial exchanges. The landmark decision of the Appellate Body concerning Foreign Sales Corporations¹¹ is a clear step in this direction. But even here questions remain: Will these decisions be enforced? To what extent are they vulnerable to all kinds of diplomatic, commercial, and financial pressures? Belgium has already offered itself as a subterfuge for the U.S. Foreign Sales Corporations, and the European Community is again challenging the tax arrangement for breaking rules outlawing subsidies.¹²

C. CORPORATE GOVERNANCE

When we turn to the corporate governance field, we run into similar conditions. How are we going to cope with the present day quicksilver corporate order of high risks, high rewards, and stock incentives? We once had a dream for a global Code of Conduct for Transnational Corporation, as promoted first by the Organization of Economic Cooperation and Development (OECD), and later taken up by the United Nations. Fortunately or unfortunately, the United Nations stopped these efforts—apparently not believing in its chances. Codes of Conducts for Transnational Corporation have thus

Rights and Liability Rules. The Ex Ante View of the Cathedral, 100 MICH. L. REV. 601 (2001); Ellison S. Teisner, *Swallowing the Apple Whole: Improper Patent Use by Local Rule*, 100 MICH. L. REV. 640 (2001).

6. Klaus Peter Berger, *Lex Mercatoria Online*, RECHT DER INTERNATIONALEN WIRTSCHAFT 256 (2002).

7. See Internationales Online—Schiedsgericht und Online—Schlichtung der Just Fair, available at <http://www.justfair.de>.

8. See IntelliCourt, available at <http://www.intellicourt.com>.

9. See BERNHARD GROSSFELD, *EUROPAEISCHES ERBE ALS EUROPAEISCHE ZUKUNFT*, JURISTENZEITUNG 1 (2000).

10. James Kanter, *EU Is Likely to Keep Merger Rules*, WALL ST. J. EUR., Apr. 12, 2002 at A3.

11. World Trade Organization, United States—Tax Treatment for Sales Corporations—Recourse to art. 21.5 the DSU by the European Communities—AB-2001-8-Report of the Appellate Body, WT/DS108/AB/RW, (2002).

12. Bob Davis, *Why Europe Trails the U.S. in Technological Innovation*, WALL ST. J. EUR., Apr. 2, 2002, at A3.

passed their climax, though the present discussion about corporations and human rights might revitalize the underlying idea.¹³

There have been similar experiences with attempts for global corporate governance concepts, first with a proposal from the OECD, and quite recently with the German Corporate Governance Codex.¹⁴ There were many words and many gaps. The German weekly *Wirtschaftswoche* called them "The Great Bluff."¹⁵ Right now, great hopes are vested into the "High Level Group of Company Experts" recently appointed by the European Commission. This group is searching for a "Modern Regulatory Framework for Company Law in Europe." The main subjects, among others, are corporate governance, shareholder communication, alternative capital formation and maintenance rules, groups of companies, and corporate restructuring.¹⁶

So far we have barely discussed global corporate valuations,¹⁷ and the problems presented by global insolvencies, and global reorganizations of corporate groups or clusters.¹⁸ Swiss Air and Enron caught us by surprise,¹⁹ and others will follow.

D. COMPETING RULES

We might see a brighter picture when we turn to global accounting.²⁰ Our chance here is that all modern concepts of accounting are derived from one single source, namely from the Franciscan monk Pacioli's book, that was published in Venice in 1494. Thus, there is at least a common outline. But outlines might change their content when they are transplanted into different geographical environments. Europe made European views, and the United States made American views. Geography and law are inextricably bound to each other, and turn every globalization into "glocalization" (England remains an island, physically and psychologically, and the Continent remains "shut off").²¹ Progress is on its way, though. Presently, there are two systems left to compete: The International Accounting Standards (now accepted by the European Union as the International Financial Reporting Standards—IFRS), and the Generally Accepted Accounting Standards (still defended by the United States), they might be moving toward each other—not voluntarily, but under the pressure of market demands.

Even though both strings of ideas come from the same spring, and though both boast their "high quality" (is this more than just "quality"?), a deep rift opened to

13. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 433, 538 (2001).

14. Aktiengesellschaft 2002, 236.

15. *Wirtschaftswoche* Jan. 31, 2002 Nr. 6 at 66.

16. A Modern Regulatory Framework for Company Law in Europe. A Consultative Document of the High Level Group of Company Experts Set up by the European Commission, A:comm/internal_market/en/company/company/modern/index.htm.

17. Bernhard Grossfeld, *Global Valuations: Geography and Semiotics*, 55 SMU L. REV. 197 (2002).

18. ULRICH EHRLICHKE, ZUR GEMEINSCHAFTLICHEN SANIERUNG INSOLVENTER UNTERNEHMEN EINES KONZERNS, ZEITSCHRIFT FÜR DAS GESAMTE INSOLVENZRECHT 393 (2002).

19. Bernhard Grossfeld, *Global Corporate Reorganization*, 3 RICH. J. OF GLOBAL L. & BUS. (forthcoming 2002).

20. Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261 (2000).

21. Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510 (1984).

the observing eyes. It started with the now outdated and odd looking GAAP rules for "mergers among equals," destined to hide the real costs of the acquisition from the shareholders' eyes (a strategy followed in the Daimler/Chrysler deal).²² The rift became even deeper with the discovery (even before Enron), that share options accounting was used as another instrument of keeping costs from the balance sheet to attract money from innocent foreign shareholders. The footnotes in the companies' annual report, and the fine print in the 10-K-Papers submitted to the Securities and Exchange Commission, are not read by the shareholders. So the glamour of global accounting is gone, at least for the time being.

E. REMAINING PATCHWORKS

Certainly, we have rules that operate world wide, and might even set a universal standard. But this standard is mainly under the realities of a "pax americana,"²³ or a legal "bellum americanum" as some see it. Just consider antitrust, corporation law,²⁴ securities law, and Alan Greenspan. Delaware might also belong to this ranking list, in particular when the still controlling Continental seat theory looses its power. Much depends on the forthcoming decision of the European Court of Justice.²⁵ But with the mention of Delaware, a drop of skepticism is thrown into the stream of optimism. What distinguishes Delaware from Liechtenstein, from some Caribbean islands, from islands like Nauru or the Cook Islands, and other places far in the South Pacific? The closeness to New York? The belief that Delaware corporations do better on stock exchanges?²⁶ What about other "clusters," like "cyber corporations" that live "no place" in cyberspace, and follow cyber law rules? Does our concept of corporation law matter for them? A growing field of corporate governance, global insolvency, is still completely left to the patchwork world. So far, we do not have a single jurisdiction or venue for multinational corporations, but only more or less successful attempts of cross-border cooperation.²⁷

II. Does Law Matter?

"When there is a change of priesthood, there is necessarily a change of law as well."²⁸

22. Bernhard Grossfeld, *Cross-Border Mergers: Corporate Accounting/Corporate Valuation*, 101 ZEITSCHRIFT FUER VERGLEICHENDE RECHTSWISSENSCHAFT 1 (2002).
23. Mathias Reimann, *Droit positif et culture juridique. L'américanisation du droit européen par réception*, ARCHIVES DE PHILOSOPHIE DU DROIT 45 (2001) 61.
24. Gérard Hertig, WESTERN EUROPE'S CORPORATE GOVERNANCE DILEMMA, IN: LIBER AMICORUM RICHARD M. BUXBAUM 265 (Theodor Baums et al. eds., 2000).
25. See Landgericht Stuttgart, NEUE ZEITSCHRIFT FUER GESELLSCHAFTSRECHT 240 (2002); Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance—Internet v. Geography*, 34 INT'L LAW. 963 (2000); Harald Halbhüser, *National Doctrinal Structures and European Company Law*, 38 COMMON MKT. L. REV. 1385 (2001).
26. Robert Daines.
27. Bernhard Grossfeld, *Global Insolvencies*, 3 RICH. J. GLOB. L. & BUS. (forthcoming 2002); Ehricke, *Die neue Europäische Insolvenzordnung und grenzüberschreitende Konzerninsolvenzen*, EUROPÄISCHES WIRTSCHAFTS- und Steuerrecht 101 (2002).
28. Hebrew 7:12.

A. LAW OR WHAT?

This last doubt leads us to a more general issue: What matters when we ask whether law matters? What do we mean by "law" in global relations? Something different from, or more than, the law of the "patchwork" world structured by borders and states? This is where the real problems begins.

In commercial law, we do not have to discuss in detail our "September 11" shock. We just look at the term "law," and we will soon find out that this term is closely connected with the idea of nation states, or combinations of nation states, as in the European Union. Even today we are not willing to dissociate law from an authority that has the power to enforce it. Let's call the power "state" or "federation of states," or a coalition (of states) against terrorism. The German word "Rechtsstaat" (combining "law" and "state"), shows this combination quite realistically in particular when we compare it with "rule of law," not referring to "state."

Also consider whether the term "law" means the same before a jury, or before a learned judge. Is it the same meaning before a judge with long time, or even life time, tenure or before a judge with short time tenure dependant on ever renewed elections, financed by campaign contributions, particularly from lawyers appearing before him? From there, it is only a short step from Western concepts of law based on the alphabet, and the concept of equality to the Eastern concept, based, for instance, on Chinese writing and the concept of hierarchy.

B. RATIONALITY

This leads us to another problem. The term "law" is a kind of chameleon, the meaning of which changes from culture to culture. We find these inconsistencies even within Europe, as the never ending discussion about common law and civil law indicates. It is not astonishing that even basic methodological and epistemological concepts vary widely around the globe.²⁹ We are trying to comfort ourselves with rational approaches, referring in particular to law and economics. But even here doubts exist, partly due to new research into the human decision making process.³⁰ Law and economics, with it the belief in global rationality, has passed its climax due to the demise of the homo-economics under the attacks of "literature and law,"³¹ and the game theory that tries to explain how two or more adversaries would, or should, act during a conflict.³²

"Literature and law" tells us that we are "such stuff as dreams are made of," and game theory shows that a rational approach is not as effective as we have been made to believe.³³ The actors become predictable for the partner, and thereby fungible. A participant acting unpredictably, even irrationally, is often better off.³⁴ Market efficiency and

29. See Bernhard Grossfeld, *Comparative Accounting*, 28 TEXAS INT'L L. J. 233 (1993).

30. Haggard/Libet, 8 J. CONSCIOUSNESS STUDIES 47 (2002).

31. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

32. See Game Theory, available at <http://www.gametheory.net>; see also PETER JUERGEN JOST, *DIE SPIELTHEORIE IN DER BWL* (2001); MANFRED HOLLER/GERHARD ILLING, *EINFUEHRUNG IN DIE SPIELTHEORIE* (4th ed. 2000).

33. PRAJIT K. DUTTA, *STRATEGIES AND GAMES* (1999).

34. Dean Foster/Peyton Young, 98 NATIONAL ACADEMY OF SCIENCE 12848 (2001?).

low transaction costs are certainly important, but not all decisive. Just about everywhere we find legal rules that raise transaction costs: "poison pill" of the Delaware type,³⁵ "closed shops" in the trade union history, "close corporations" in the European tradition, in particular in Germany. This demonstrates that even the term "economic rationality" has different colors in different places.

Also, there exist grave doubts about the possibility of enforcing more and more legal rules abroad. Notwithstanding all our rational talk, law in international relations is still a kind of "lottery" that distributes the "lots."

C. LIMITS OF SIGNS

Finally, semiotic systems already within their own culture never reflect the full reality; even here we are lost in translation. But in a patchwork national environment we might have the power to squeeze reality into our semiotics systems, and into the ways they make us see and think about the world. Globalization takes this power away from us. Semiotic systems then look more reliable and more comprehensive than they are, even though the governing priests are constantly trying to keep us as uncritical believers. What really counts in global commercial activities is the question of trustworthiness. Whom can I trust as a partner? How can we find out? What can semiotics tell us about it?

III. Knowledge Based Economy

"Knowledge itself is power" (Francis Bacon, 1561–1626)

News is not a luxury anymore. Today we talk about a "knowledge based economy," referring to high technology and the Internet. But the term has a much broader meaning. Globality is another term for ignorance, since it stands for an environment that we cannot test with our senses, that we cannot "make sense of." But law relies on "sensible" approaches, as it should make "sense" in a particular environment. What we first need to know, is information, information, information as a basis for sensitive reactions. Call them law, customs, or responsible activities. So far lawyers are tuned to an environment, the feeling for which was taken for granted. They rely largely on the power of words, as the software bases of their culture's experience with reality. Lawyers, even flattering themselves, can talk professionally about everything, without any particular knowledge of the facts. Language and arguments are often regarded to be the name of their game. But this does not work within a global world, where words cannot be translated, where we are even more deeply lost in translation. We need additional information technologies. International transparency is the most important instrument for global controls. It should be our main concern to develop an information system of mutual trust, without which, regulations cannot work adequately.

35. SVEN HELMIS, *REGULIERUNG VON UNTERNEHMENSÜBERNAHMEN IN DEN USA, RECHT DER INTERNATIONALEN WIRTSCHAFT* 825 (2001).

IV. Comparative Law

Traditionally, comparative law has been offered as the proper instrument to find out about the degree of trustworthiness that we can expect abroad.³⁶ But our dreams did not bring as many fruits as we had hoped for. We relied on norms of social behavior that were expressed in a semiotic system, which we regarded in our own culture as authoritative carriers of normative orders, namely in writing. Law is what exists in writing. Unfortunately, this approach is now denounced as "textism" and as "bibliolatry," and rightly so. Just look at conflict of law rules based on governmental interest analysis. They are often used to circumvent forgotten rules, that all of a sudden, emerge like submarines and demand authority only because they are written. "What I have written, I have written"³⁷—this Pilate word is still the basis of our rational reasoning from the "letter of the law." Because of the importance of the "letter," the particular semiotic system in which law presents itself has attracted the interest of corporatists: Comparative legal semiotics have taken a centre-place in cross-cultural comparative work.³⁸ Thus, comparative law is an important bridge to understand the foreign world, but it is not sufficiently strong for huge amounts of critically vital connections.

V. Global Accounting³⁹

"Law, says the priest with a priestly look.
Expounding to an unpriestly people.
Law is the words in my priestly book.
Law is my pulpit and my steeple."⁴⁰

A. CASH FLOW OF JUSTICE

Until recently, accounting had turned out to be the most important institution for corporate governance,⁴¹ which is clearly linked to accounting procedures. Corporate governance is key in increasing investors' confidence, and accounting moves cash-flows around the world to the most trustworthy places—it triggers the "cash flow of justice." It defines the costs for equity and debt financing, and brings into play the tremendous power of interests and compound interests (consider the 72-rule: Divide 72 through the interest rate, and you arrive at the number of years in which a debt doubles). Indeed, accounting is a central pillar of any global corporate governance. It keeps investors willing to finance deficits, and it causes or softens foreigners' hopes or apprehensions about the quality of profits.

36. Bernhard Grossfeld, *Comparative Law as a Comprehensive Approach*, 1 RICH. J. OF GLOBAL L. & BUS. 1 (2000); *id.*, *Rechtsvergleichung*, Wiesbaden 2001.

37. John 19:22.

38. Bernhard Grossfeld, *Comparatists and Languages*, in: Pierre Legrand/Roderick Munday (forthcoming 2002).

39. See Grossfeld, *supra* note 21.

40. WYSTAN HUGH AUDEN, *LAW LIKE LOVE*, COLLECTED POEMS 262 (1991).

41. Werner F. Ebke, *Accounting, Auditing and Global Capital Markets*, LIBER AMICORUM 113 (Richard M. Buxbaum et al. eds., 2000).

But even though accounting is at the forefront of many investors' minds (slowly conquering also the lawyers' minds,⁴²) unfortunately, it does not meet all our hopes. I already mentioned the intricacies and deficiencies of merger accounting, but Enron taught us even more irritating lessons. Enron's demise wiped out billions of investor dollars, and costs thousands of jobs,⁴³ in what is probably a deep mire of naiveté and deception (and naiveté first). It is a particularly ironic feature that "Enron's executive ranks were populated with accountants."⁴⁴ But we have to be careful, it might be that Arthur Anderson's "integrated audit," and its client friendly attitude was the culprit. This clubby relationship,⁴⁵ seems to have blurred the line between auditing and involvement, in the business meshing the systems seamlessly.⁴⁶ It is certainly a matter of concern, that recently Enron disclosed \$3 billion in write-downs resulting from "possible accounting errors or irregularities."⁴⁷ But so far, neither Enron nor its executives, have yet been charged with a crime. So we should not talk about "fraud" prematurely.

B. STOCK OPTIONS⁴⁸

As already indicated, Enron also taught us a lesson about stock options for management.

1. Effect on Earnings

Stock options give employees the right to buy a company's stock, in the future, at today's price. The more the stock price rises in the meantime, the more valuable the options become.⁴⁹ But there is another feature with stock options: They help companies pump up the earnings figures they report, because they don't have to be treated as an expense. Options don't reduce profits. Enron Chief Executive Jeffrey Skilling described them as an egregious way to inflate reported earnings. They reduce the compensation expense and increase profitability. The cost of issuing options must be reported only as a footnote in the annual financial reports; the implied zero valuation is at least a vast understatement.⁵⁰

42. Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for "Dirty Pooling" and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141 (1997).

43. Bryan Gruley & Rebecca Smith, *Enron Chief Rose and Fell on Power of Blind Optimism*, WALL ST. J. EUR., Apr. 26, 2002, at A1.

44. Anita Raghavan, *How a Bright Star at Andersen Fell Along with Enron*, WALL ST. J. EUR., May 16, 2002, at A1.

45. *Id.* at A1.

46. Ianthe Jeanne Dugan et al., *Tapes Show Just How Close Ties Between Enron, Andersen Were*, WALL ST. J. EUR., Apr. 16, 2002, at A6.

47. Mitchell Pacelle, *Enron May Write Down Assets*, WALL ST. J. EUR., Apr. 24, 2002, at M5.

48. Holman W. Jenkins, Jr., *Blame Stock Options, or Stock Prices?* WALL ST. J. EUR., Apr. 26, 2002, at A7; ANN KRISTEN ACHLEITNER & PETER WOLLMERT (HRSG.), STOCK OPTIONS, (2d ed., 2002).

49. For an intense discussion see Jacob M. Schlesinger, *Collapse of Enron Revives the Debate over Stock Options*, WALL ST. J. EUR., March 26, 2002, at A1.

50. Joseph E. Stiglitz, *Accounting for Options*, WALL ST. J. EUR., May 6, 2002, at A12.

This “optional accounting”—even if it does not cost the company—certainly costs shareholders, because it alters how the pie is divided. Equity, as well as earnings per share, are diluted once options are exercised. But we have to take into account, that upon the exercise of the option, the company receives a cash payment from the option holder, which increases equity per diluted share. That is why stock-options must be reported in financial reporting as “earnings (or equity) per diluted share,” reflecting the impact of future dilution from stock options. But do investors (in particular foreign investors) focus on this remark? It could be argued that markets probably can sort out these costs and adjust share prices accordingly; just about everyone focuses on earnings per share (EPS). Also, corporations would have to report very high losses, even from option grants that have expired, or will expire worthless.

2. *Managers’ Interest*

We also learned that loading managers with stock options, does not necessarily align them with the interests of the shareholder. Stock options were developed to remedy the principal-agent problem. They were designed to make managers focus on the bottom line, and to give them incentives to maximize shareholder wealth. But there is plenty of evidence that options did not enhance earnings, but serve management’s interest in other ways. For example, paying dividends reduces stock prices and options, stock repurchases exert upward pressures on stock prices, and on options. Managers tend to grant options just before the release of good news, with a subsequent increase in stock prices. Enron taught us that managers can reap profits from their options while shareholders are losing their equity stake. Chairman Kenneth Lay received \$123 million in 2000 by exercising his options.⁵¹ Canceling options and replacing them with lower priced ones (“re-pricing”) still rewards bad performance. The anxiety turns around a fear that options-motivated managements are behind “optimistic” earnings expectations (“earnings game”). The Wall Street Journal Europe, concludes that the current practice of granting options does not align managers’ interests with shareholders. “This is a polite way of observing that options have certainly focused managers on the bottom line—only it’s their bottom line, not the shareholders.”⁵²

3. *Lobby*

Enron was not, and is not, a lonely rider; it had, and has, plenty of company. The proportions are gigantic. In 2001, the stock option costs for the thirty corporations in the Dow Jones Index amounted to \$11.8 billion. There are still many supporters. One of the most prominent supporters is Senator Joseph Lieberman. Proponents of stock options argue that options don’t cost the company any cash (bolstering the cash flow statement), and that they cannot be accurately expensed because their value is hard to calculate. This latter argument, however, is weak. Companies can use sophisticated models, developed by economists Fischer Black and Myron Scholes, to project the long term value of stock option grants (Scholes later won a Nobel Prize for the model). Now, the International Accounting Standard Board considers requiring companies around the

51. Frankfurter Allgemeine Zeitung, No. 80 Apr. 6, 2002, at 25.

52. Susan Lee, *Taking Stock: The Ugly Option*, WALL ST. J. EUR., Apr. 11, 2002 at A10.

world to expense stock options. But there is strong lobbying, and thousands of campaign dollars, against the idea in Washington.

C. SPECIAL PURPOSE ENTITIES

The hidden "Special Purpose Entities" that hide billions of assets and debts as "off balance sheet assets" from investors, are also characteristic of many corporations. These corporate off-balance sheet entities are used to shield liabilities. They were designed to provide an influx of cash from outside investors, and move debt off the balance sheet. This is even more satiric in Enron's case, since the firm strongly emphasized its "No Secrets Policy." In the final analysis, these entities doomed the company. In the second half of 1999, such transactions generated earnings and cash flows of \$229 million to Enron. They fabricated a structure by which a transfer of assets could be called a "sale," thereby increasing earnings and cash flows. The expression "special purpose" was cleverly chosen, as it was instrumental in excluding these transactions from the consolidated financial statements, and providing higher earnings and cash flows. Sometimes, they were only used temporarily and artificially, to bulk up earnings and to conceal the changing financial picture from investors, but nobody calls them a "sham." That helped to create complex and misleading financial structures—always declared as being "true and fair" under "high quality" accounting standards.

1. Securitization

These "off-the-books partnerships" ("off-balance-sheet transactions") gained popularity with "securitization."⁵³ Their popularity depends on the assumption that as long as the originating company had no control over the affiliate, it didn't have to consolidate its debts into the consolidated account. The technique can be used by the corporation to hide debt, in order to get a higher rating, and thus lower the cost of acquiring capital.⁵⁴ The Special Purpose Entities received the pool of loans as a sale in return for cash, and then issued their bonds.⁵⁵ Investors were willing to pay a premium because of the higher rating. The bonds were backed by assets that were legally separate from the business risks of the parent. The total outstanding value of such asset-backed debt in the United States is now at least \$1.3 trillion (€1.487 trillion).

To qualify as independent of Enron, the legitimate hedging vehicles outside investors, were required to hold at least three percent of the equity. But it appeared that some investors turned in \$30 million, and quickly got back roughly \$40 million. Was it a return on their investment, or a return of their investment?⁵⁶

53. See Jonathan C. Lipson, *Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?* 11 J. BANKR. L. & PRAC. 1 (2002).

54. Sarah McBride, *Off-the-Books Deals Gain Popularity*, WALL ST. J. EUR., Jan. 22, 2002, at 19.

55. Glenn R. Simpson, *Enron, Andersen Had a Lot of Help Fighting Regulation*, WALL ST. J. EUR., Apr. 10, 2002, at 1.

56. Kathryn Kranhold et al., *FBI Steps up Pressure for Enron Indictment*, WALL ST. J. EUR., Apr. 30, 2002, at A1.

2. Collapse of Collateral

But there was a problem that accountants might have overlooked (blinded by their own expertise). Enron had pledged assets (such as foreign power plants or its common stock) as collateral. Unfortunately, earnings did not rise in proportion with revenues, and the "buffer" equity became relatively smaller. The portfolio of foreign assets had lost as much as half its book value,⁵⁷ when the stock price was declining below a certain "trigger" level, the investors in the partnerships could demand payment from Enron. There were also conflicts of interests, as some Enron executives had personal holdings in the company's Special Purpose Entities. Even if the parent was not directly, or indirectly, legally responsible, investors rely on the parent's reputation. Normally, many companies implicitly guarantee their entities, because if they fail, the company's standing in capital markets might be hurt. So a bad rating may force the parent to intervene. They are required to prop the entity up with cash or shares of their own stock. Enron was aware of these aspects, but tried to keep them from the public eyes. It argued that disclosure could lower the trading price for Enron's common stock. It predicted that a \$15 million reduction would cascade into aggregate losses for shareholders of nearly \$250 million. Enron was caught in the old debtor-creditor trap, by putting volatile income against fixed rates.

Unfortunately, this kind of financial architecture has a lot of helpers opposing regulators, in particular the Financial Accounting Standards Board. Arthur Andersen argued that a disclosure of more information would contribute to disclosure overload, and would go "too far in terms of sheer volume." Other lawyer "gurus" or "lobbyists," prophesized that if the parent were not legally responsible, it would be "a mistake of logic" to require a disclosure. What counts well, or sounds well, is good! Believing in their own constructions and their control over signs, these priests take their self-defined logic for reality. Even today we are still waiting for a fast-track action on Special Purpose Entities.

3. Cash Flows

Skepticism toward words and numbers floating in a cultural atmosphere of discretion was first seen with suspicion in valuation proceedings,⁵⁸ and explained a dramatic switch in valuation techniques from future earnings, to future cash flows. Cash flow valuation is moving ahead in cross-border valuation, and seems to have a bright future within the process of creating a European Corporation ("societas europaea").⁵⁹

But here again, we do not always get for what we hope. Top financial institutions and lawyers sometimes "create" high cash flow statements.⁶⁰ The temptation is particularly strong for companies trading derivative contracts, with which they buy and sell commodities in the future. They must record today, the value of these trades, even though the actual transactions take place years later. The result is a rise in "unrealized gains"

57. Rebecca Smith & Kathryn Kranhold, *Enron Knew Foreign Assets Had Declined*, WALL ST. J. EUR., May 6, 2002, at A1.

58. Samuel C. Thompson, *A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions*, 21 IOWA J. CORP. L. 457 (1996).

59. BERNHARD GROSSFELD, *EUROPÄISCHE UNTERNEHMENSBEWERTUNG*, (2002).

60. See Jathon Sapsford & Paul Beckett, *Project Alpha Burnished Dynegy's Profile*, WALL ST. J. EUR., April 5, 2002, at A3.

as part of net income. This is a standing invitation for overvaluing, as companies have wide leeway for their assumption about the direction of the market.

There is, as we learned from Enron, also a negative effect. Net income is the starting point for calculating cash flow. But since the "unrealized gains" did not represent a cash inflow, the cash flow figure had to be adjusted downward. This created a growing discrepancy between net income and cash flow, indicating that those contracts do not generate cash. Therefore, the discrepancy might indicate higher risks and, consequently, a lower rating. Companies might be induced to beef up reported cash flow numbers by a complicated series of financial and accounting steps, the details of which are beyond the scope of this presentation.⁶¹

In any event, cash flow should not be overrated against earnings. Earnings help create equity, which serves as a buffer in hard times. This is important for the equity-debt relation that tells us a lot about the future financial stability.

D. COMPLEXITY

The complexity of corporate accounting has grown exponentially.⁶² "The result has been a rise in so-called black-box accounting: financial statements . . . that are so obscure that their darkness survives the light of day."⁶³ Apparently, there are a lot of potential problems lurking in balance sheets. Financial statements are not the safe haven ("safety in numbers") many investors believe them to be. Enron might encourage other companies to tighten up their accounting standards, and to depress reported earnings and cash flow in the future. But can we build the future on such hopes?

E. CHILLIER WORLD: NEW COMPETITION

The implications of the present deficiencies—which are not American, but a universal phenomena⁶⁴—go beyond technical repairs. The Generally Accepted Accounting Principles (GAAP) have lost their glamour. America preached the virtue of its accounting standards, only to find out that the world is laughing at Enron and the quality of U.S. profits. The International Accounting Standards might now be winning over the GAAP, and the European Union is pressing its International Financial Reporting Standards (IFRS) against the Securities and Exchange Commission. The whole world of accounting and auditing will become chillier in the wake of Enron.⁶⁵ As potential conflicts of interests and audits enter into the focus, calls for less stringent requirements will be deflated. Independent board members are encouraged to be more active watchdogs—not lapdogs. This will contribute to higher costs for audits, accountants, corporate executives, and outside board members. Multinational firms, in particular, will feel the burden.

61. See *id.*

62. Steve Liesman, *Deciphering the Black Box: Complex Accounting Adds Confusion*, WALL ST. J. EUR., Jan. 24, 2002, at 13.

63. *Id.*

64. Ulric Papendick & Dietmar Student, *Mehr Schein als Sein*, MANAGER MAGAZIN, May 13, 2002, at 144–45.

65. David Woodruff, *For Auditors and Clients, a Chiller World Dawns*, WALL ST. J. EUR., Apr. 12, 2002, at A1.

1. Waterloo

The international implications will be enormous, not only for accounting, but also for accountants and their liability. Right now Arthur Andersen's global partners and the acquiring rivals are struggling to minimize the spillover of the fallout.⁶⁶ An emerging "global operation" theory could lead to a world-wide liability concept. American law already makes people nervous everywhere in the world—and accountants might feel it most.⁶⁷ The long arm of American courts, and the attachments to campaign contributions from the plaintiffs' bar will do the job. They will make more overnight millionaires than almost any other business.⁶⁸

But how far can we go with regulating, regulating, regulating? Do we create even more constructions that sound and look nice, but might not reach global reality? Let's be honest, accounting is a product of the *mos mathematicorum* that came into Europe with the introductions of the Arabic numerals in the Middle Ages.

But our belief in the comprehensive rationality of numbers came to its Waterloo. The underlying assumptions are built on shifting sand, and even on quick sand. Do we still need accountants as watchdogs, if they cannot fill the expectation gap? Accountants have a public mandate that guarantees them business in return for holding a public trust. But are these two aspects still in balance? Is there too much pressure on accountants to go with the flow, and to acquiesce in the clients' questionable maneuvers as "client pleasers"? Do we have to admit failure, and should we eliminate the mandatory public audit altogether? The chances are slim. The present "accounting outrage will end like all the others, with hand wringing and empty gestures. That is, if we're lucky the gestures will be empty, rather than destructive."⁶⁹ With regard to the conflict of interests issue, we might be reform-skeptics for still another reason. "SEC Chairman Harvey Pitt used to work for the accounting industry, and he's a big fan of auditing and consulting for the same client The industry also seems justified in its confidence that the White House won't lobby for reform; its campaign contributions in 2000 went heavily to George W. Bush."⁷⁰

F. REGULATION

Now we might hope for better regulation. But can the Securities and Exchange Commission do the job with only three thousand people, and a high fluctuation rate? The Eupropean "Fédération des Experts Compatibles" proposes the English Financial Reporting Review Panel (FRRP) as a model for effective national enforcement bodies.⁷¹ Such private panels with representatives of preparers, users, accountants, and academics acting under an appropriate public supervision in the context of a European Enforcement

66. Sarah McBride, *Companies: Andersen's Global Partners Aim to Minimize Spillover*, WALL ST. J. EUR., Apr. 29, 2002, at A4.

67. George McGovern & Alan K. Simpson, *Common Cause: Reaping What You Sue*, WALL ST. J. EUR., Apr. 18, 2002, at A12.

68. *Class War*, WALL ST. J. EUR., Mar. 26, 2002, at A8.

69. Jenkins, *supra* note 48.

70. *Volcker's Andersen Triumph*, WALL ST. J. EUR., Apr. 24, 2002, at A10.

71. Discussion Paper on Enforcement of IFRS within Europe, Apr. 2002.

Coordination (EEC), might be a good idea, but do they have the economic power and independence to enforce their concepts? Independence within a cash flow of justice is a very rare quality.

VI. Global Valuation⁷²

"Valuation is an art rather than a science"⁷³

A. NEW HOPES

Accounting has no "stand alone" position any more. Intrinsic valuation has stepped on a similarly high pedal. This is first due to a change in merger accounting under the American GAAP. Now mergers are no longer seen as mergers of equals, but as sales transactions for which the acquired goodwill has to be shown on the balance sheet. Goodwill is any intangible advantage, such as a brand name or symbol that gives a particular firm a chance to earn better profits.⁷⁴ Following mergers, goodwill represents the amount that the acquiring company paid in excess of the acquired company's book value. To avoid mechanical charges over time against earning, the United States has adopted an annual impairment test (FASB No. 142). Goodwill can no longer be smoothed out evenly, over up to forty years, through routine amortizations. Instead, companies can leave goodwill on their balance sheets indefinitely—as long as it is not impaired.

Therefore, companies have to perform an "impairment test" each year of the acquired goodwill, to arrive at the company's fair value. They have to write down its value if the acquired company is no longer expected to generate enough cash flow to support the goodwill.

The preferred approach for estimating fair value is a discounted cash flow model. Hundreds of companies will take write-downs this year. Enterprise intrinsic valuation techniques have become a regular part of accounting. However, the model is not as reliable as it looks on first glance, because it depends upon management's assumptions about the future cost of capital and cash flow growth.⁷⁵ Again there is no safety in numbers!

B. GLOBAL DISTORTION

So far, we have not yet arrived at global valuation views, as we learned from the Dutch company Ahold NV. Under Dutch rules, Ahold showed a net income of €1 billion, but under GAAP it was only €120 million. The major part of the difference, stemmed from the fact that under Dutch accounting standards, goodwill must be charged routinely over time against earnings. It might be discussed whether this approach is "true and fair,"

72. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); U.S. Inspect, Inc. v. McGreevy, 57 Va. Cir. 511 (Va. Cir. Ct. 2000); See also Grossfeld, *supra* note 17; Thompson, *supra* note 58.

73. *In re Shell Oil Co.*, 607 A.2d 1213, 1221 (Del. 1992).

74. See Hill, *supra* note 42.

75. Henny Sender, *Companies Plan Write-Downs*, WALL ST. J. EUR., Apr. 25, 2002, at M4.

as the U.S. write-off resulted from the reduced value of Ahold's majority stake in an Argentinean corporation, which was badly affected by the devaluation of the peso.⁷⁶

VII. Global Rating⁷⁷

"Da mihi facta, dabo tibi ius." ("Give me the facts, I will give you the law.")

A. RATING AGENCIES

As indicated several times above, we need more than global accounting to get a full understanding of present global corporate governance aspects. We have to look at ratings by rating agencies (be it Moody's, Standard & Poor's, or Fitch). Ratings today are the decisive factor for a firm's financial standing, and its financial resources (financial assessment). Ratings are the financial passport in cyberspace. Rating agencies are independent third parties that try to overcome asymmetric information between creditors and debtors, according to standardized quality categories. They are the arbiters in the eternal conflict between these two groups that characterize the financial world. They are part of a private certification industry⁷⁸ about a debtor's creditworthiness in view of a future insolvency risk. They profoundly impact the ordering of global financial markets.⁷⁹

Whereas accounting shows primarily the past, ratings try to make an educated guess about the future. Some of their standards can be found in Standard & Poor's Corporate Ratings Criteria 2001.⁸⁰ Rating agencies emphasize that their evaluation is their subjective opinion, not verifiable by courts. Their publications contain many liability disclaimers.

Rating agencies offer soft information. Therefore, the agencies teach us that ratings are not recommendations to purchase, sell, or hold a particular security. They do not comment on the suitability of an investment for a particular investor.

So far, there is no legal mechanism to mandate the quality of these ratings. Their authority depends on the agencies' reputation. The industry stands for the spontaneous evolution of high quality information without state intervention. By the same token, they command power without accountability. They are not just passive observers, but have a deep impact on management's decisions and strategies.⁸¹

-
76. Dan Bilefsky, *Companies: Ahold Will Report Under Both Dutch and U.S. Standards*, WALL ST. J. EUR., Apr. 9, 2002, at A4.
 77. Anthony Saunders, *Credit Risk Measurement*, Ralf Presber/Kive Steengert, Kreditrating, Stuttgart: Schäffer-Poeschel, 2002; Bank for International Settlement, *Basle Committee on Banking Supervision, Consultative Document, THE NEW BASLE CAPITAL ACCORD*, Jan. 2001.
 78. Christoph Kuhner, *Financial Rating Agencies: Are They Credible? Insights into the Reporting Incentives of Rating Agencies in Times of Enhanced Risks*, 53 SCHMALENBACH BUS. REV. 3 (2001).
 79. Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 UNIV. ILL. L. REV. 1 (2002).
 80. See Newly Released Ratings, Rating Charges and Affirmation, <http://www.standardandpoors.com/ratings>. See also Jan Pieter Kranen & Martin Weber, *Generally Accepted Rating Principles: A Primer*, 25 J. BANK. & FIN. 3 (2001).
 81. Richard Cantor & Frank Packer, *The Credit Rating Industry*, FED. RES. BANK NY QUARTERLY, SUMMER—FALL 1994, at 1.
-

B. RATING AND LAW

The agencies' ratings want to provide a framework of creditworthiness for market participants. They are based on intrinsic and external factors that affect financial strength and risk exposure. When markets believe in ratings⁸² (as they presently do, though Enron raised questions marks also in this respect), it will affect the cost of debt financing of all kinds. In addition, stock markets react to changes in ratings, though the precise effect depends on further information about the cause of the change.

Unfortunately, lawyers have not discussed the issues so far. Notwithstanding this location in a "no laws country," lawyers run into rating issues when discussing risk adjusted discount rates for the intrinsic valuation process. It goes without saying that the risk premium should be lower for a triple A corporation (higher value), and higher for a triple B corporation (lower value). In any cross-border valuation, the sovereign's rating for the country of domicile has to be assessed. Are we not just using a black box as long as we do not know how ratings are done, and what factors are taken into account, and to what degree?

Also, management's actions and fiduciary duties might be reviewed for how they influence the ratings. Did management fulfill its duty of care with regard to the ratings? The same might be asked for other details of corporate governance. Is the governance sufficiently transparent to express a reasonable distribution of power and a decent control? How does the choice of corporate forms affect ratings (for example, the choice between closely held, or publicly held corporations, between corporations and mutual companies)? Does the attempted regulation and harmonization collide with concepts of antitrust?⁸³

Thus, an important part of the focus is on governance. The proposed Basle Guidelines (Basle Accord) about capital adequacy as part of banking regulations,⁸⁴ spreads rating into all fields of lender/creditor relations. It will certainly give rise to much litigation.

But the trend has already gone beyond. Many financial arrangements contain "triggers." These are clauses that can force a debtor to come up with cash to repay the debt, or to raise the interest rate for it. Among the most common triggers is a credit-rating downgrade (besides stock drops or earning downturn). Therefore, credit deterioration may turn even a moderate downgrading, into a severe cash crunch and a catastrophic liquidity crisis. Such clauses create serious vulnerability⁸⁵

C. NEW HIERARCHY

Ratings establish a new hierarchy of social norms. Here again, Enron opened our eyes. It presented itself as follows: "Enron's credit rating is critical to the maintenance

82. Kuhner, *supra*, note 78.

83. Dieter Schneider, *Wettbewerbswidrige Regulierung durch Basle II*, BEILAGE 1 ZU HEFT Apr. 2002, at 2.

84. Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord and the New Framework*, 56 BUS. LAW. 767 (2001).

85. Gregory Zuckerman, *Debt Downgrade May Pinch Number of Big Companies*, WALL ST. J. EUR., May 16, 2002, at M1.

and growth of its existing dominant market share position.”⁸⁶ Consequently, Enron was “rating rule,” not “accounting rule” driven. To say the least, it bended the accounting rules to the requirements of rating. And “rightly” so. When Enron’s rating was cut to junk last year, “triggers” forced it to immediately repay \$3.9 billion (€4.32 billion).⁸⁷

Ratings are also ever more often used by public authorities in a regulatory context. The prime example is the newly proposed Basle Guidelines, to be applied on a consolidated bases for “internationally active banks” “at every tier within a banking group.”⁸⁸ It defines the total minimum capital requirements for credit, market, and operational risk. One feature, is that legal opinions must be obtained confirming the enforceability of the collateral arrangements in all jurisdictions.⁸⁹ New standards of corporate governance appear on the horizon.

D. RATING TECHNIQUE⁹⁰

Ratings are based on certain principles, which exert very strong regulatory and disciplinary effects that might lead to legal implications. Rating refers to the general creditworthiness of an obligor, or the creditworthiness with respect to a particular financial obligation. A global rating requires a consistent discipline on all cross-border analysis by still positioning the debtor in its local context. The most critical focus, is on cash flow adequacy for interest or principal payments, having to be made with cash. Cash flows cannot be serviced from earnings, which is an accounting concept. Cash flow patterns may reveal a stronger, or weaker, debt-service capability than earnings numbers.

The factors to be taken into account are business risk (competitive environment), corporate governance (shareholder value), financial risk (future earnings and cash flows), balance sheet distortions (different asset valuation practices), net debt (cash flow to net debt, net debt to capital), earnings differences (long or short term basis), and contingent liabilities (off-balance-sheet obligations, pensions). Material lawsuits against the firm, or threats of such suits, are also taken into account. These suits may decrease cash and deter suppliers or customers, and they can also impair the company’s access to capital.⁹¹ In addition, there are national and regional factors, such as state ownership, local ownership blocks, and access to local sources of capital.

Stock market values get relatively short thrift. The stock markets emphasize growth prospects on a short-term horizon, which can be very volatile. Such factors do not directly affect a company’s ability to service its debt. The results are then treated under ratio guidelines that make explicit the linkage between financial ratios and the levels of business risk.

86. Anita Raghavan, *Is Enron’s McMahon a Hero or a Collaborator?* WALL ST. J. EUR., Apr. 10, 2002, at M1.

87. Zuckerman, *supra* note 85.

88. Basle Accord, *supra* note 77, at Nos. 1, 3.

89. *Id.* at No. 70.

90. For general information see Project Finance Portal, available at <http://www.hbs.edu/projfinportal/ratingagencygeneral.ht>.

91. Standard & Poor’s, Corporate Ratings Criteria, 2001, at 29.

In the Basle Guidelines, corporate exposures are characterized by the ongoing operations of the borrower, rather than the cash flows from a project or property.⁹² For the internal ratings-based approach, the risks are weighted with estimates about the probability of default, the loss given default (senior or subordinated claims), and maturity (in years). This mix is then treated according to (at least for lawyers) a rather arcane mathematical formula.⁹³ The rating decision should consider financial and other information, and it should "move beyond accounting information as needed."⁹⁴ The qualitative standards include, among others, "active involvement of the board of directors."⁹⁵

E. CROSS-BORDER RATING

1. Glocality

Global rating is a challenge for comparatists. It imposes a consistent common discipline on cross-border analysis by assessing the firm, in its local context, at the same time. The search is for global equivalence of credit quality. This demands an international outlook, industry expertise, and knowledge of the country of expertise. Industries are viewed differently according to whether they are exposed to local or to global competition. The analysis is based on the firm's own accounting framework; and it is not translated to another framework (for instance, GAAP). Cash flow, not earnings or equity, is king. The fundamental analysis is then "performed with an appreciation of relevant industry and financial characteristics of a specific country or region."⁹⁶ Country risks, particularly in emerging markets, take on added importance. Globality and locality merge into glocality.

2. Sovereigns Risks

As defaults of debtors can stem from a sovereign default, sovereign credit risk is a key consideration. The main elements that are decisive for the sovereign's own rating are the economic and cultural environment.

Another factor to be considered is the sovereign's power to intervene into the firm's ability to meet its obligations toward foreign creditors. In this respect, the law governing a specific debt may be relevant. But there is a proviso: "Standard & Poor's exercises caution in placing weight on the legal factor. When sovereign powers are involved, issues such as conflicts of law, waivers, and permission to hold and use funds held outside the country of domicile are confused, at best, and would likely be tested and solved by the courts only after, rather than prior to, a default."⁹⁷ Law loses meaning!

F. RATING OF RATING

Thus, "fair rating" is of overwhelming financial, regulatory, and, therefore, legal importance. Though it is essentially a "subjective" assessment, it requires "calibration," that is, consistency. But here again, we cannot always take objectivity for granted.

92. Basle Accord, *supra* note 77, at No. 181.

93. *Id.* at Nos. 171-234.

94. *Id.* at No. 261.

95. *Id.* at No. 563.

96. Standard & Poor's, Corporate Ratings Criteria, 2001, at 30.

97. *Id.* at 39.

Socio-cultural bias (often as "home bias") is a matter of concern. Developing countries, for instance, complain that the regulatory use of the proposed Basle Guidelines has a detrimental impact on developing countries' economy. They are strongly linked to the sovereign ratings for the country. This leads to asymmetrical consequences for the private sector when the sovereign rating changes. A downgrade would bring greater changes in capital allocations than an upgrading. This would call for larger capital requirements, at the very time when access to capital is more difficult.⁹⁸

Macroeconomic concerns are not the only issue. Microeconomic aspects are likewise relevant. Cooperatives and mutual banks, or insurance companies, ask whether they are rated fairly. They argue that rating agencies might take shareholder value as the only value, disregarding the member values that go along with all forms of mutuality.⁹⁹

It should also be mentioned that the rating assumptions are not as firm as they look at first glance. They rely on past experiences to make educated guesses about the future, and again, Enron tells us that situations and standings can change in a minute. Some equate them to "superstition" and "lion trainer's language" as a kind of "tranquillizer."¹⁰⁰ Sometimes it is too tranquillizing, as we also learned from Enron: One week before the abrupt demise, it had still a triple A rating.

The consequence of rating might be frightening. By a rough guess, every step in rating, up or down, reduces or increases the debtor's interest by ten to twenty basis points; that is, by one-tenth to one-fifth percent.

G. REGULATING THE REGULATORS?

1. General Criteria

Given the fact that ratings might be a matter of life or death, and, thus, given the enormous power of rating agencies, the question is raised whether the agencies can stay "free" from law. Do we have to regulate them? Their distance from law, turned around the picture they paint of themselves of only subjective opinions, no objective advice. But they know, and they do, want that creditors and investors to follow them, because trust in them is the basis of their economic existence. Standard & Poor's "Corporate Ranking Criteria" (2001)¹⁰¹ tells us: "Over the years, these credit ratings have achieved wide investor acceptance as easily usable tools for differentiating credit quality, because a Standard & Poor's credit rating is judged by the market to be reliable and credible."¹⁰²

This market profile is exactly what the agencies want to achieve, notwithstanding all "soft" talk which is a "probation facta contraria," a verbal announcement that is falsified by contrarian facts. It is foreseeable that Basle II will lead rating into a world

98. Giovanni Ferri et al., *How the Proposed Basle Guidelines on Rating-Agency Assessments Would Affect Developing Countries*, WORLD BANK, WASH. D. C.

99. Klaus P. Fischer & Ridha M. Mahfoudi, *Do Agencies Rate Mutual Banks Fairly?* Centre de recherche en économie et finance appliquées (CREFA), CREFA WORKING PAPER N. 01-12. Jan. 2002.

100. Dieter Schneider, *Wettbewerbswidrige Regulierung durch Basle II, Beilage 1 zu Heft Apr. 2002*, at 2.

101. *Id.* at 3s.

102. *Id.*

of regulatory laws, where believers will insist that agencies follow the rules which they themselves propagate. Conflict of interest issues might come up. Why should rating agencies be better off than accountants and securities analysts that mislead investors with overly optimistic research, when they hype stocks to win lucrative investment-banking work from corporate clients, and highly rated stocks later nose-dive?¹⁰³

What is the difference between accounting, analyzing, and rating? What about their product liability? Are they working in "a client-controlled environment" like accountants?¹⁰⁴ Risk sharing and support agreements among banks (guaranty funds) start to distribute the annual contributions, according to external and internal ratings litigation is in the pipeline.

But all this does not mean that we need a regulation by public authorities. It all depends on whether we hold the "market" as sufficiently free and informed to do the public job. Let's stay skeptical. We have tried to pile up lawsuits on accountants, but that has not turned them "into the whistleblower of public expectation."¹⁰⁵

H. GENERALLY ACCEPTED RATING PRINCIPLES¹⁰⁶

Do we need generally accepted rating principles, or even a code of conduct for rating agencies? At least standards are developing. The Basle Accord sets forth "Eligibility Criteria" for "external credit assessment institutions" (ECAI). They must satisfy each of the following six criteria:¹⁰⁷

1. Objectivity: The methodology must be rigorous, systematic, and subject to some form of validation based on historical experience.
2. Independence: The institution should not be subject to political or economic pressures. The assessment process should be free of conflicts of interest that could arise from the composition of the board of directors, or the shareholder structure of the institution.
3. International Access/Transparency: The assessments should be available to both domestic and foreign institutions at equivalent terms. The general methodology should be publicly available.
4. Disclosures: This refers to the assessment methodologies, the definition of default, the time horizon, the meaning of each rating, the actual default rate of each category, and the likelihood of downgrading over time.
5. Resources: The institution's personal resources should allow for substantial ongoing contact with senior and operational levels within the entities assessed.
6. Credibility: The reliance on the institution's external credit assessments by independent partners (investors, insurers, trading partners); internal procedures to prevent the misuse of confidential information. But it is not necessary that the institution assess firms in more than one country.

103. Charles Gasparino, *Lawyer Target Salomon Analyst after Merrill Case*, WALL ST. J. EUR., Apr. 15, 2002, at M6.

104. *Bily v. Arthur Young & Co.*, 834 P.2d 745, 762 (Cal. 1992).

105. Jenkins, *supra* note 48.

106. Krahnen & Weber, *supra* note 80.

107. Basel Accord *supra* note 77, §46.

This last criteria brings us back to the regulatory power of the market. Market acceptance is evidence of the credibility of the assessment!

I. RISK ASSESSMENT

We also find general and specific rules on the risk assessment process for the internal rating.¹⁰⁸ It should be conservative, should consider the quality of financial and other information, and should move beyond accounting information as needed. Risk factors must be assessed for the future, and in view of limited data, with a "conservative bias" to the analysis. As a minimum, the bank should look into the following factors:¹⁰⁹

1. Historical and projected capacity to generate cash to repay the debts.
2. Capital structure and the likelihood that unforeseen circumstances could exhaust the capital cushion.
3. Quality of earnings, that is the degree to which revenue and cash flow emanate from core business operations.
4. Quality and timeliness of information about the availability of audited financial statements and the applicable accounting standards.
5. Degree of operating leverage, and the impact that demand variability would have.
6. Financial flexibility resulting from access to the debt and equity market.
7. Depth and skill of management to effectively respond to conditions, its aggressiveness v. conservatism.
8. Position within the industry and future prospects.
9. Risk characteristics of the country in which the firm is operating, and the impact on the ability to repay (including transfer risk), where the borrower is located in another country.

This leads us to the question whether market forces provide sufficient restraint on rating agencies, or whether a public sector regulation is warranted. But due to the global aspect, the answer is far from clear. It is feasible for individual nations to regulate multinational entities of this type? Will there be a universal acceptance? Probably, we might be better off without government interference. First, the agencies' profitability is directly tied to their reputation. Second, public regulation could subject them to political manipulations.¹¹⁰ Campaign contributions should be remembered—as in accounting, so in rating?

VIII. Global Logistics¹¹¹

"We, in the ages lying,
in the buried past of the earth,
built Ninive with our sighing,
and Babel itself with our mirth.

108. *Id.* §261s.

109. *Id.* §265.

110. Schwarcz, *supra* note 79.

111. David Wessel, *Stock Bubble Magnified Changes in Business Mores*, WALL ST. J. EUR., June 20, 2002, at A1.

And overthrow them with prophesying
to the old of the new world's worth,
for each age is a dream that is dying,
or one that is coming to birth."¹¹²

A. PUBLIC CHOICE

The foregoing discussion tells us that all our regulatory efforts fall short of global reality. The only really globally active control mechanism, is the invisible hand of the global market itself. It was this market that recognized Enron's triple A dressing as the "emperor's new clothes," though the question whether the media blew the news out of proportion is left open. Regardless, additional regulation as a knee-jerk reaction may be harmful, and may become overkill.

B. CYBERSPACE

That leads us to the Internet as the means of communication and device of control. Regulation is fine and sounds very reasonable. But information comes first, as the real risk is the information risk. If we do not concentrate on information first, we create an expensive bureaucracy, and social losses through reduction of competition through innovation. That is a very serious question for any form of regulation. Bureaucracy cannot be a substitute for market self-regulation.

That is why we have to enter the world of cyberspace. The ubiquitous network environment produces far more unfettered ways of receiving, sending, and sharing information. Websites such as Napster and Gnutella, allow the global public to exchange a wide range of information among themselves, and file sharing around the world is the order of the day for multinational corporations.

As information exchanges become more and more widespread through the Internet, the socio-economic system is rapidly becoming network-oriented and digitalized. The marketplace for bits is global. As always, when specific costs change, specific structural changes follow. The new instruments change the view of the world from market place to market space. This new background defines the cultural standing, and provides for another implicit character of knowledge, which we take for granted. It is indispensable to adjust and improve laws and regulations to this new logistic system of information and communication. The ubiquitous network connects everybody, at any time to the Internet, providing simplified procedures to obtain and use global information. This leads us to global licensing issues for using software, patents for business methods¹¹³

C. SPACE/TIME

Law is a web for the exchange of information about common values; it is also an instrument to enforce conventional behavior as a prerequisite of mutual trust. Legal semiotics and legal logistics form the core of the information highway of this vital network.

112. Arthur William Edgar O'Shaunessy, *The Music Makers*.

113. Bernhard Grossfeld & Josef Hoeltzenbein, *GLOBAL POWERS: INTERNET PATENTS, KOMMUNIKATION UND RECHT* (2002).

All these terms, and the rules for which they stand, have a space/time structure and space/time orientation, which they create, to which they refer, and which shapes them. Thus far, the underlying reality for law was a patchwork world, distance and physical borders were important factors of the "legal landscape."¹¹⁴ New digital technologies and the rapid proliferation of computer software programs, brought about a revolution towards knowledge based economy.¹¹⁵ In addition, the rise of transnational corporations,¹¹⁶ and the growth of cyberspace through the Internet, have confronted us with a massive scale-change.¹¹⁷ Due to the dramatic decrease in transportation costs for information, the net itself is the relevant space/time. It is actually a "no place,"¹¹⁸ and a brave new world.¹¹⁹

Though this world is new, human needs and ambitions turn from "place" to "no place," from geography to cyberspace. The competition is for power and for control, no matter what the subject of interest is called. Men are territorial in their instincts, even beyond the limits of "territory." They know from experience, that whoever controls the net of communication controls the world. That is why the old battle for survival easily finds a new environment, and leads to attempts to get "deeds to cyberspace domains,"¹²⁰ as cyberspace is software, and software is a tool to manipulate information. Software patents are the new name of the old game.¹²¹ We are not going to discuss their pros and cons in general;¹²² we will only discuss them in view of the trans-border, international implications that they bring about.¹²³

114. David G. Post, *Napster, Jefferson's Moose, and the Law of Cyberspace*, available at <http://www.temple.edu/law/school/dpost/Napster.htm>; Michael E. Porter, *The Role of Location in Competition*, 1 J. ECON. BUS., 1 35 (1994).
115. DAVID R. KOEPEL, *THE ONTOLOGY OF CYBERSPACE: LAW, PHILOSOPHY AND THE FUTURE OF INTELLECTUAL PROPERTY* (2000); JOHN H. DUNNING, *REGIONS, GLOBALIZATION, AND THE KNOWLEDGE-BASED ECONOMY* (2000); PHILIPP GERBERT & ALEX BIRCH, *DIGITAL STORM. FRESH BUSINESS STRATEGIES FOR THE ELECTRONIC MARKET PLACE* (2000).
116. *THE NATURE OF THE TRANSNATIONAL FIRM* (Christos N. Pitelis & Roger Sudgen eds., 2d ed. 2000); BERNHARD GROSSFELD, *INTERNATIONALES UND EUROPÄISCHES UNTERNEHMENSRECHT*, (2d ed. 1995).
117. See TIM BERNERS-LEE, *THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* (1999).
118. *Id.* See World Intellectual Property Organization, *The Management of Internet Names and Addresses: Intellectual Property Issues. Final Report of the WIPO Internet Domain Name Process*, Apr. 30, 1999, WIPO Publication no. 439, available at <http://wipo2.wipo.int>; International Telecommunication Union/World Intellectual Property Organization Multilingual Domain Names: Joint ITU/WIPO Symposium, Geneva—Dec. 6 and 7, 2001.
119. VERNETZTES RECHT, (Hohle et al. eds., 2002); Markus Koehler & Hans-Wolfgang Arndt, *Recht des Internet*, 3. AUFL., HEIDELBERG 2001.
120. *Id.*
121. Bernhard Grossfeld & Josef Hoeltzenbein, *CyberLaw and CyberControl: Software Patents*, in *FESTSCHRIFT FÜR DRUEY* 225 (2002); JULIAN WALMSLEY, *PATENTING FINANCE: FINANCING PATENTS* (2001).
122. Rochelle Cooper Dreyfuss, *Examining State Street Bank: Developments in Business Method Patenting*, *COMPUTER UND RECHT INT'L* 1(2001); David Bender, *BUSINESS METHOD PATENTS: AN ALTERNATIVE VIEW*, *id.* at 65.
123. See Report Presented by the Intellectual Property Committee of the Industrial Structure Council, Dec. 2001, available at <http://www.kantei.go.jp/jp/it/index.html>; LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD*.

D. GENETIC CONFLICT¹²⁴

There is a genetic conflict between the traditional concept of a national patent and the global world of cyberspace. A traditional patent, by definition, has territorial limitations,¹²⁵ while cyberspace does not. A patent is a kind of legal monopoly that a state authority grants for the state territory over a limited period of time.

The first English patent law enacted in 1624 was known as "Monopoly Act" which defined the basic concepts that guide the interpretation of patents up to today. Outside of its territorial limits, the patent does not exist. Thus, a patent has clear cut borders in space, and is conceived in view of its limitations. It is regarded as being territorial in nature.

This genetic characteristic is supported by the fact that patents traditionally refer to technical inventions. Technique is more than just an idea or an outline of an idea. It refers to a kind of structure in the real world—a structure that needs a place to sit. This territorial center is the cornerstone for imposing territorial limitations. If the patent had no locality, and no territorial roots, it could not be defined in terms of territory.

Software patents are released from the constraints of geographical space. The Internet opens up an interactive channel for worldwide markets that are globally networked. Since they are not localized in a particular place, Internet patents do not just put up legal fences to manage exploitation, but reserve the whole networked marketplace as their home turf to be protected by virtue of threats of legal enforcement. They control the "switches," "roundabouts," "channels," and "narrows" (to use a word from the law of the high seas). A particular patent patchwork law becomes the world sheriff.¹²⁶

The word "patent," all of a sudden covers two vastly different realities—the word is a typical "*faux ami*" ("false friend").¹²⁷ The double edged use of the word "patent" serves a useful purpose. Patent protection is "taken for granted" and the new content needs no defense: "Power runs with ideas that only the crazy would draw into doubt. But the challenge is to sow doubt."¹²⁸

E. BUSINESS METHOD PATENTS

The change in technology and the Internet, as one giant copying machine, made a "pro patent world" more appealing. This only recently emerged concept was once regarded as being too "fuzzy" to become part of the law.¹²⁹ Now it is the order of the day in the United States of America. This was facilitated by the fact that the U.S Patent

124. Paul Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 DUKE J. OF COMP. & INT'L L. 69 (1998); Robert Pitofsky, *Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L J. 535 (2001).

125. David S. Chisum, *Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law*, 37 VA. J. INT'L L. 603 (1997).

126. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84.

127. Vikki M. Rogers, *Beware of Faux Amis: The Importance of Uniform Technology in International Sales Law*, in LAW AND PRACTICE OF EXPORT TRADE MÜNSTER 29 (Center for Transnational Law ed., 2001).

128. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

129. *In re Schrader*, 22 F.3d 290, 297 (Fed. Cir. 1994).

Act of 1952 does not refer to the patenting of computer programs. The awareness for business methods is constantly increasing.

The new patent "theater" received public attention in Europe through the case *Amazon.Com. Inc. v. Barnesandnoble.Com. Inc.*¹³⁰ Amazon alleged that Barnes & Noble illegally copied Amazon's "one-click" patent. It allows repeat customers to make purchases with one mouse-click. They don't have to re-enter their credit card or address information. Barnes & Noble, therefore, had to replace it with a system that required two mouse clicks. Critics saw this as a first step in vitiating the web. Barriers to entry were raised not only for competitors, but for technical innovators in general. Mark A. Lemley warned against "the space debris of cyber space."¹³¹ The patent-infringement litigation has now ended in a settlement, the terms of which were not disclosed.¹³² In November 2001, the Japanese Patent Office turned down the Amazon "one-click" patent on the grounds that prior art exists.¹³³

To describe it loosely, a business method is more concerned with interpersonal, societal, and financial matters than with engineering. The "flavor of the patents involved"¹³⁴ might be "smelled" from the following examples: in the WMS Gaming decision, the court upheld a patent for a wax of cutting the odds of winning on a three-reel slot machine.¹³⁵ The application for the Compton Multimedia patent¹³⁶ tried to cover almost all means of providing a multimedia system. Fortunately, a second look showed it to be a mere rearrangement of old elements, which made the patent invalid on the basis of "prior art." The Canadian Halifax Bank tried to patent its Intelligence Financed web-based mortgage account. Merrill Lynch obtained a patent for a "Securities brokerage-asset management system," turning around a "central reference facility for coordination of all transaction processing."¹³⁷ Citibank was successful with a "Method and system for improved collateral monitoring and control, provided for improved collateral monitoring and control"¹³⁸ Morgan Stanley held a patent "data processing system and method for financial debt instruments... for implementing and control of a financial instrument, which is issued for a limited period of time." "The instrument is based on an underlying basket of stocks, optimally selected to track an established capital market, and its price also reflects accrued investment income and maintenance expenses."¹³⁹

There seems a tendency to develop, and to patent even pure mathematical algorithms,¹⁴⁰ which leads us to the question of who controls numbers?

130. For details see Grossfeld & Hoeltzenbein, *supra* note 121.

131. Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NWU. L. REV. 1495 (2001).

132. Nick Wingfield, *Amazon, Barnes & Noble Settle Patent Lawsuit*, WALL ST. J. EUR., Mar. 8, 2002.

133. Patent Abstracts of Japan, application no. 10-260502: Method for issuing purchase order of item.

134. WALMSLEY, *PATENTING FINANCE*, *supra* note 121, at 21.

135. *WMS Gaming Inc. v. Int'l Game Technology*, 184 F.3d 1339 (Fed. Cir. 1999).

136. U.S. patent no. 5,241,671.

137. U.S. patent no. 5,940,809.

138. U.S. patent no. 6,018,721.

139. U.S. patent no. 6,092,056.

140. Paul de Laan, *Patenting Mathematical Algorithms: What's The Harm? A Thought Experiment in Algebra*, 20 INT'L REV. OF LAW & ECON. 187 (2000); William Greene, *Speculative Schemes*, STERNBUSINESS, Fall/Winter 2001, at 30, 33.

The clear result, is that finance itself will be "patented," because patents control the global bloodstream of our culture. Past attempts to get such programs patented have been numerous in the financial services sector, and in the Internet business field (B to B, B to C). This has alarmed those involved in e-commerce, given its inherently global nature. According to an "on dit," General Electric now has 300 lawyers working full time on patenting a number of its business methods.

E. POWER GOVERNANCE

The problems with Internet business method patents, goes far beyond the details of patent law. It affects the Internet's ability to act as an instrument of a wider power governance concept. The Internet is a new network, formed from technique and new semiotics. It is a kind of "nonwoven fabric,"¹⁴¹ with diverse and exciting potentials. It is extremely versatile, and can be variously applied to a wide variety of uses. It is integrated into a multitude of power relations, often hidden from the public view. It is a problem solver to the same extent to which it is a problem creator. New uses will constantly be found, and there seems to be no end to their variety.

The Internet's new concept of space and time create new market dimensions, with ever more powerful space/time independent global players, organized as cyber corporations.¹⁴² For them, the Internet is not only a matter of chance, but likewise an instrument of corporate governance.

New market powers can only be successfully controlled by countervailing powers from the same market, because power never stops before arguments, only before other powers. Thus, only free and open markets can activate the ever-present statistical dimension, to govern global corporate actors that transcend any individual power. Therefore, it is of overwhelming importance that the Internet, as a market and as an instrument of observation, controls the sanctioning. This is our only chance to keep these mighty transnational and global actors within the limits that are necessary in the common interest to balance powers. The invisible hand of the Internet provides a better informed, and more neutral arbitrator on global market than any national authority can do. It is our only chance to prevent that "the island of Tobago" (or any other "name") rules the world.¹⁴³

Such pretension may lead us into serious antitrust problems, and into new kinds of damage claims. It is still open for discussion whether art. 81 and 82 of the EC Treaty (undue restriction of competition or abuse of a dominant position) can be used as "swords," but the recent Crehan judgment of the European Court of Justice¹⁴⁴ might open the way for damage claims for infringements of these provisions. There the Court

141. The term is originally taken from pathbreaking developments at the forefront of textile advancements. Non-wovens are fabric-like materials in which the fibers are arranged in pattern or at random, and bonded together by some means. See TIM LEIGH PEMBERTON, *NONWOVENS* (1984).

142. Bernhard Grossfeld, *Cyber Corporation Law: Comparative Legal Semiotics/Comparative Legal Logistics*, SMU L. REV. (2002).

143. Lord Ellensborough, C. J., in: *Buchanan v. Rucker*, (1808) 9 East 192, 194; English Reports 103, 546, 547.

144. C-453/99, *Crehan* (2001), available at <http://curia.eu.int/jurisp/>.

extended the Francovich principle horizontally, to cases where a firm that is not a state entity had committed a breach of the competition rules. Injunctions, and anti-suit injunctions across the Atlantic, might see a new future.¹⁴⁵

IX. The Lawyers' Position¹⁴⁶

"Nowhere a man so busy of his class.
And yet he seemed much busier than he was.
All cases and all judgments could he cite.
That from King William's time were apposite.
And he could draw a contract so explicit.
Not any man could fault there from elicit.
And every statute he'd verbatim quote."¹⁴⁷

In global relations, reading alone cannot match the challenges. Lawyers need experience outside the narrow paths of legal literature, court decisions, and legal logic. Global markets do not care so much for letters or numbers, or for the logic deducted from them. Before trying to regulate, lawyers have to understand what is going on from a face to face encounter.¹⁴⁸ They must be trained to gauge the global economy, not just from letters and statistics.¹⁴⁹

However, this does not mean that I want to propagate multidisciplinary practices.¹⁵⁰ Also, in this respect, Enron is a wake-up. The dependence on the client, the art of what to tell him and what not to tell him, the risk of losing the whole flow of revenue from the firm, is different in different lines. But so far, we have relied too much on our own world built from words, numbers, and letters which we regarded as having a universal standing. The lawyers' narrowness in these fields has too long been hailed as their main talent and main ability. But they have to learn more than just reading and understanding cases. They have to understand the function of markets and their effects on structures: From micro justice to macro justice!

The global world has shown us that traditional lawyers can only work effectively within a traditional, relatively stable territorial environment. As soon as the concepts of space and time change, our semiotic instruments loose their basis and their meaning. It is no longer possible to drop the magic words of having "a lawyer call" to solve a problem (a consequence of the American rules on legal costs that favor the plaintiff). It is no longer sufficient to pretend to know, and being able to sit through interminable

145. See *Turner v. Grovit* (2001) UKHL 65 (H. L. Dec. 12, 2001); Christian Thiele, *Antisuit Injunctions im Lichte europäischen Gemeinschaftsrechts, Recht der Internationalen Wirtschaft* 2002, 383.

146. Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 WAKE FOREST L. REV. 167 (2001).

147. Geoffrey Chaucer, *The Canterbury Tales*, THE LAW. (1340-1400).

148. *Exodus* 33:11.

149. See G. Thomas Sims & Christopher Roads, *Longer Taxi Waits, Thicker Newspapers to Signal Recovery*, WALL ST. J. EUR., Apr. 3, 2002, at 1.

150. Grossfeld, *Lawyers*, *supra* note 146.

meetings without any new ideas. Lawyers have to first find out about the new reality, before talking about it and building verbal and literal constructions.

The same skepticism refers to treaties. The Wall Street Journal Europe just gave us the following lesson: The test should be whether they serve U.S. interests, rather than whether they were once signed. Americans have a deep mistrust against international tribunals, remembering *Marbury v. Madison* that gave a fledgling U. S. Supreme Court authority over the other branches of government. They do not want to give other tribunals similar power over "America's democratic decisions and global leadership."¹⁵¹

X. Conclusion

"Let me ride over wide.
Open country that I love.
Don't fence me in!"

To meet the challenges of a new socio-economic pattern, where knowledge and information are sources of added value and power, we have to find new regulatory answers. Lawyers tend to be trained victims entrenched to believe in semiotic systems. But we have to be aware of the silent and invisible assumptions, and of the inevitable limits, of our systems. We have to develop distrust towards systems handled by priests. There is a saying: "I only believe in those statistics which I have falsified myself," and Disraeli (1804–1881) told us: "There are lies, damned lies, and statistics." Fortunately, some of us have already lost confidence in large parts of our intellectual semiotics and logistics. Under global conditions, we have to rely on all our senses,¹⁵² beyond numbers and geometry.¹⁵³

To find out what makes "sense" in the partly new world, we need all our "senses," our "Fingerspitzengefühl" ("gentle feeling with our fingertips"). No "system" can give us the answer, we are thrown into "trial and error," to various approaches that—hopefully—support and correct each other. We will find our way somewhere between chaos and cosmos, between shifting patterns of disorder and order. We cannot pinpoint reality through words, numbers, letters, and individual cases.

151. *A Permanent Global Persecutor?* WALL ST. J. EUR., May 8, 2002, at A10.

152. Bernard Hibbitts, *Coming to Our Senses: Communications and Legal Expression in the Performance Cultures*, 41 EMORY L. J. 873 (1992).

153. Bernhard Grossfeld, *Comparative Law as a Comprehensive Approach*, 1 RICH. J. GLOBAL L. & BUS. 1 (2000).
