

# **Ambiguous Allegiances in the Lawyer-Client Relationship: The Case of Bankers and Lawyers**

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(Final Draft)

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## INTRODUCTION

Business transactions are always contingent and their realm of uncertainty is extensive. Uncertainty may be affected by the rules in particular jurisdictions; it may be affected by the availability of capital or the vagaries of tax regimes; or it may be affected by the quality of legal expertise and nous. Skordaki and Flood (this volume) have shown how law firms, in particular, create enabling structures in real estate finance that transcend the limitations of jurisdictional borders.

The perspective of this chapter is different. My argument is that the actors occupied in the creation of privately managed orders, overcoming and sidestepping the behavioural and normative obstacles that face them, do so by constructing a symbolic universe in which they participate. These actors are part of a small and exclusive club that has erected extremely high barriers to entry to outsiders. The fundamental members are bankers and lawyers who are frequently, but not always, in a lawyer-client relationship. The chapter examines what happens when the prototypical lawyer-client relationship is deconstructed and examined in the light of the relationships that occupy this small world. If we are to understand the role of law firms as support structures in the uncertain world of business transactions, it is essential to understand the nature of its core components. The lawyer-client relationship is one of them.

I start with a story that is emblematic of my thesis. In 2003 Canary Wharf, a campus of skyscrapers in the Docklands, was placed on the auction block. Two

key bidders for its assets were syndicates led by Morgan Stanley and Paul Reichmann, the founder of Canary Wharf. Over a period of 10 months the syndicates made 11 bids and counter-offers that resulted in the sale of Canary Wharf for \$8.6 billion (Jones Day, 2004). During the bidding Reichmann's syndicate, Brascan, objected to the sale of parts of the property to Royal Bank of Scotland (RBS), which Morgan Stanley was insisting on as part of its requirements. Brascan's legal advisers, Freshfields Bruckhaus Deringer refused to act for its client against either RBS or Morgan Stanley, as did two other major law firms that were advising members of the syndicate. Indeed, Brascan discovered that *no* City law firm would initiate litigation against them. At that point, RBS paid out £160 million a year on legal services among its panel of law firms, which numbered 25. RBS says in the 'General Requirements' of its law-panel tender document: 'Due to the close nature of our relationship and the fact that you are, or will become, privy to much confidential information concerning the Group, we would be unable to continue instructing you if you were to commence or threaten to commence litigation against any member of the Group'. The only choice left for Brascan was to instruct the bar direct (The Lawyer, 2004).

What happened? The answer is simple: *fear*. No law firm wanted to, or to be suspected of, being antagonistic towards banks. Banks are the *über*-client. Upset them and law firms can expect to see a significant part of their fee income evaporate. This story indicates how deeply embedded each institution is in each

other's lifeworld. It also suggests that the lawyer-client relationship has fault lines running through it that require careful examination.

The aim of this chapter is to re-evaluate the lawyer-client relationship and reconstitute it within the business context that most transactional lawyers operate in. My central argument is that to portray the relationship in its traditional way as a 1:1 dyad consisting exclusively of lawyer and client is to miss so much as to misrepresent the reality of the situation. One of the reasons we find ourselves in this state is because much, if not most, of the research on lawyer-client relationships (e.g. Sarat and Felstiner, 1995; Flood 1991; Hosticka, 1979) has examined these associations within the personal plight hemisphere rather than the corporate hemisphere (Heinz and Laumann, 1982: 322). Because the professional-client relationship is one in which it appears that power is typically exercised asymmetrically, it has been important from a social action perspective to understand it and if possible redress the balance (cf. Abel, 2006). In short, this is the one-shot player versus the repeat player problem where it is believed that businesses have few problems in handling professional-client relationships because they are continuously engaged in them. The story of the Canary Wharf auction implies that, even at the most elite level, difficulties in resolving professional-client relationships are found (Johnson, 1972; Regan, 2004).

The relationship between banks and law firms is long-established. In my reading of biographies and histories of law firms we observe enduring relationships being laid down in the throes of the Industrial Revolution. Indeed

the relationship was often symbiotic. Freshfields owes its very existence to the birth of the Bank of England (Slinn, 1983). Movement of personnel between law firms and banks was fluid: John J McCloy, former proconsul of Europe, migrated from his senior partnership at Milbank Tweed to the chairmanship of its major client, Chase National Bank, which as Tweed said, ‘the law firm operated under “the Rockefeller surveillance”’ (Bird, 1992: 274).

Students of the legal profession and the sociology of law rarely examine this nexus (but see Regan, 2004; and cf. Laux, 2001; Krishnan and Laux, 2007), instead leaving it as a taken-for-granted item among the residuals of lawyer-client relationships. I consider it a crucial one that needs theorizing and explication. The chapter examines the association between banks and lawyers through the nature of the relationships that bankers and lawyers form and the way they structure their work. Through this lens we can see how the work of establishing legal certainty, or at least minimising it, and providing enabling support structures is accomplished (see Gessner, this volume). Essentially I adopt a theoretical perspective that incorporates Simmel’s examination of dyads and larger groups with Berger and Luckmann’s construction of symbolic universes and Luhmann’s analysis of the management of expectations. Each helps elucidate the complexities of business relationships and how they affect the legal processing that occurs.

The research in this chapter is based on a series of ongoing interviews with lawyers in private practice, inhouse counsel, and bankers, and ethnographic

observation. The primary perspective adopted is that of the lawyer in the process. One final point: the research and its findings produced here are a preliminary outline of a different way of characterising the lawyer-client relationship. More detailed work is necessary before a complete picture of the complexities of lawyer-client relations in business can be elaborated.

## BACKGROUND

The histories of law firms and banks show a remarkable closeness and similarity in form between the two. Law firms and banks consisted of partners, a small coterie, with the support of a large number of clerks. Both belonged to the professional class. The main class of banks were established by Protestants, but a number of merchant (investment) banks, in London and New York, were constituted by outsiders, often Jews, and their relationships to governments, especially through the financing of wars helped to enfold them into the community (Ferguson, 2003). Rothschild's established its reputation and fortune by

taking charge of transferring British government funds, needed partly to pay the Duke of Wellington's troops and partly to meet the subsidies granted to Britain's allies. Nathan [Rothschild] benefited from backing in high places and so was entrusted by the British government, even though he was still relatively unknown, with a responsibility for the war effort that was both crucial and highly profitable, thanks to the commissions received on transfers and arbitrage transactions on foreign exchanges (Cassis, 2006: 21).

By the second half of the 19<sup>th</sup> century London had become the pre-eminent financial centre with merchant banks including the likes of Barings, Hambro, Schröders, Peabody, and J S Morgan. All were closely linked through networks,

frequently based on family ties. Also clustered into the square mile of the City of London and tightly connected to the banks were many brokers, insurers, arbitragers, accountants as well as lawyers (id, 84).<sup>1</sup>

One other remarkable feature is the degree of entrepreneurialism that both banks and lawyers displayed in their work and practice. The railway industry, born in the first half of the 19<sup>th</sup> century, demanded large injections of capital for its development: its appetite was insatiable and investors were eager to commit their funds. The banking centres of London, Paris, Germany and the United States were vibrantly involved in the railway adventure, both in primary and secondary markets. In law, for example, John Morris, solicitor and founder of Ashurst Morris Crisp, was reported to be the director of '13 successful public enterprises...who had frequently been employed...to start at a few hours' notice, on a voyage across the Atlantic to assist in unravelling some vast complication in the American railway system' (Dennett, 1989: 23; see also Slinn, 1997). Morris' disciple, William Slaughter, founder of Slaughter and May, forged links with merchant bankers, such as Emile Erlanger, Schröders and Seligmans. Clients were involved in mining in the Far East and South Africa; in developing railways in several continents including South America; and in many of these Slaughter was highly active in promoting the companies, especially at their flotations, as well as being on their boards. Similar alliances existed in the United States. William Nelson Cromwell, co-founder of Sullivan & Cromwell, had J. P. Morgan as a client in the 19<sup>th</sup> century and invested his own money in Morgan ventures (Lisagor and Lipsius, 1988: 34-35). And, indeed, banks had their lawyers sitting

on their boards as did Schröders with John Foster Dulles (id, 139). There is a sense that law firms and banks grew and matured together, which is exemplified by the relationship between the Bank of England and the City law firm Freshfields, whose activity with the Bank may date from 1716 (Slinn, 1984: 12) and endures to the present.<sup>2</sup>

The nature of banks was less inherently stable than that of lawyers. Their business was risk and their tasks were to lend money, underwrite issues and defaults could injure them severely. Although Barings crashed at the end of the 20<sup>th</sup> century, it was not the first time the ‘Queen’s banker’ had to be rescued. The Bank of England had to persuade Rothschild’s to bail out Barings in the 19<sup>th</sup> century (Hobson, 1990: 43; see also Ziegler, 1988; Fay 1996). Nevertheless, most endured and cemented their professional relationships through work, City activities, and membership of clubs and lodges.

Until the 1950s, in the UK, large initial public offerings (the issuing of public shares, known as IPOs) were largely managed by the lawyers, stockbrokers and accountants with the banks providing the technical backup (Slinn, 1984: 168). Because UK partnerships were capped by statute at 20 partners, until 1967, law firms were forced to export able lawyers into other institutions. The banks also wanted to take over the running of IPOs and grab the burgeoning mergers and acquisitions market and so raided law firms for lawyers to handle the work in house. Slaughter and May, for example, lost partners to Hill Samuel, Guinness Mahon, Morgan Grenfell, and Schrodgers (Dennett, 1989: 228). The lawyers’

situation was not helped by law firms' tendency to give partnerships mainly to family members rather than outsiders (Slinn, 1997). Thus the balance of the relationship changed with banks assuming the lead roles in financial transactions. Nevertheless, corporate law firms and banks continued to work together.

A number of significant changes occurred that boosted London's claims to being a major financial market. One was the growth in the accidental Eurodollar and Eurobond markets in the 1960s that came about because of America's swingeing corporate taxes. The second was the effect of 'Big Bang' in London that enabled big American banks to escape the strictures of the Glass-Steagall Act of 1933 by locating in London. The third was the development of the derivatives and securitization markets (including 'junk bonds' [Burrough and Helyar 1990]) from the 1970s onwards (MacKenzie, 2006). For Cassis (2006: 249-250) 'Derivatives are indeed the most important financial innovation of the late twentieth century and a true symbol of the triumphant market.' Of course London was not the sole beneficiary. New York and other financial centres celebrated a boost to their fortunes and the map of the financial world was as described by Saskia Sassen (1991)—essentially composed of three cities: New York, London and Tokyo (see also Thrift 1996). Although London is the most international financial centre, the biggest is New York measured by the indicators of asset management, international banking transactions, the capital market and other markets including the foreign exchange market (Cassis, 2006: 264).

Law firms have nominally remained partnerships during the 19<sup>th</sup> and 20<sup>th</sup> centuries, but virtually all investment banks have jettisoned partnership for corporate structures limiting liability and easing the facilities for raising external capital. And the banks have grown vastly in size and consolidated.<sup>3</sup> Moreover, after Big Bang most British investment banks were unable to resist the bear hug of American banks. Thus law firms and banks have migrated in two different directions. Banks have grown big and diverse, but more consolidated. Law firms, although they have grown, remain small institutions compared to other professional service firms, and generally less dispersed.

The other feature of law firm development that is relevant is the huge growth in inhouse corporate law departments (Heinz *et al*, 2001). In order to slow rising costs, much routine legal work has been brought inside, with more specialist work being done by external counsel. Inhouse counsel have also taken on the role of gatekeepers for the corporation, monitoring costs, setting budgets for transactions, establishing panels, and ensuring quality assurance (Suseno *et al*, 2006).

The map of the financial world is one that is dominated by capital markets, i.e. where is it possible to gain access to capital and institutions that facilitate the processes involved (Valdez, 2003). Capital markets are combinations of private and public spheres of influence and potential. The appropriate investors must be present along with the financial institutions, such as law firms, banks, stock exchanges, accounting firms, and latterly private equity groups, and hedge funds.

But for these to interact successfully and realise investors' and borrowers' desires, the appropriate regulatory, legal, and policy arrangements must be in place.

Another way of characterizing the situation is to say that without a core of expert labour across a number of activities and disciplines, markets are incapable of evolving and responding to modern needs for finance.<sup>4</sup> London and New York, between them, contain the highest concentrations of financial, accounting, banking, and legal expertise of anywhere in the world. The crucial step is that this expert labour is not only facilitating the markets, but it is also creating new markets for investors. Clear support for this claim is evidenced by the phenomenal growth of the securitization and derivatives markets of the latter part of the 20<sup>th</sup> century (Flood, 2002; Cassis, 2006). These markets were responses to perceived needs for capital and off-balance sheet financing, and leveraging scarce sources of liquidity. Another example can be found in the creation of the distressed debt market (Flood, 2001). The means of satisfying these demands were the products of the expert labour within these centres who created structures that produced the required results.<sup>5</sup>

The nexus of interest, law firms and banks, constitutes a small, exclusive world (cf. Flood, 1996; 2002; 2007a). The major law firms number at most about 50 and the main investment banks are also small in number, of which three predominate: Goldman Sachs, Merrill Lynch, and Morgan Stanley.<sup>6</sup> The following table illustrates the connections between some of the major investment banks and law firms. As we can see, the same law firms appear time after time.

**Table 1: Major Investment Banks and Their Legal Advisers**

<b>INVESTMENT BANK</b>	<b>LAW FIRM</b>
<b>Merrill Lynch</b>	Brown & Wood (NY)
	Cravath Swaine & Moore (NY)
	Davis Polk & Wardwell (NY)
	Skadden Arps (NY)
	Freshfields (London)
<b>Credit Suisse First Boston</b>	Cravath Swaine & Moore (NY)
	Davis Polk & Wardwell (NY)
	Skadden Arps (NY)
	Shearman & Sterling (NY)
	Simpson Thacher & Bartlett (NY)
	Weil Gotshal & Manges (NY)
	Clifford Chance (London)
	Allen & Overy (London)
<b>Goldman Sachs</b>	Cravath Swaine & Moore (NY)
	Davis Polk & Wardwell (NY)
	Freshfields (London)
	Allen & Overy (London)
	Cleary Gottlieb (NY)
	Sullivan & Cromwell (NY)
<b>Morgan Stanley</b>	Brown & Wood (NY)
	Davis Polk & Wardwell (NY)
	Freshfields (London)
	Shearman & Sterling (NY)
	Weil Gotshal & Manges (NY)

(Source: Flood, 2002: 129)<sup>7</sup>

There are a number of reasons for this particular profile. One is historical: e.g. Goldman Sachs has long ties with Sullivan & Cromwell (Lisagor and Lipsius, 1988). Another relates to insurance, or more accurately, path dependency. Having established enduring relationships, the banks, working to tight deadlines ('drop dead deadlines') find it difficult to invest in a new set of relationships that would require an expenditure of resources to discover if a law firm meets their standards. Lawyers are thus rent their reputation to transactions, as do investment bankers, and by virtue of being associated with particular transactions and banks, indirectly certify the business taking place (Laux, 2001: 5). Thus the key criterion becomes the acquisition and maintenance of social capital that endows institutions with the capability to be selected repeatedly (Flood, 2007b; Suseno *et al*, 2006). Moreover, Uzzi (1999: 501) reinforces aspects of this view when he argues that 'non-contractual social relationships and network structure' play key roles in forging and maintaining relationships between banks and firms. One effect of embedded relationships is that clients, i.e. banks, usually obtain lower fees in return for steady volumes of work (Uzzi *et al*, 2007: 105). Interestingly, in the table above, there are two relatively new law firms, compared to the remainder, namely Skadden Arps and Weil Gotshal. They are exceptional in that they used particular skills and attributes to enter the market in the 1970s (Caplan, 1993). Skadden enjoyed high status in the mergers and acquisitions market and Weil Gotshal was a leader in the bankruptcy field. They were able to leverage these qualities to overcome their original status of outsider and become embedded in the investment banks' networks (Flood, 2007b).

## PARTICIPANTS

The relationships of the participants are multivalent, by which I mean that because all the participants are essentially repeat players, and there is a tendency to take on various roles that require specific role-related action and behaviour. Johns (2007: 127-28) talks of deals evoking 'a collective allegiance among participant-makers that sets it apart from relations among them, however fraught.' For example, lawyers acting for banks are concerned to protect the bank's credit worthiness, while lawyers acting for the borrower want to ensure loans are secured on the best terms for their clients. The same lawyers, however, switch roles according to the nature of the transaction.

The density of these relationships is significant. Because the participants are repeat players, there are steep barriers to entry. This means that the same law firms and lawyers are used by the banks repeatedly, which continues the historical trends already mentioned above. One lawyer<sup>8</sup>, for example, who joined a new firm already had a relationship with a bank and brought the bank in as a client, whereas other lawyers in the firm had never been able to cultivate the bank having had no previous links. Another lawyer who regularly undertook big securitizations for banks said that his law firm was one of four firms that *could do* this type of work, although what he meant was that the banks were not prepared to instruct other lawyers and take risks rather than there being a dearth of expertise.

One lawyer characterized the relationship between banks and lawyers thus:

Banks are pretty good because what they do is provide a transaction or document person, and often its someone who spent three or four years in Allen and Overy. Some banks don't use lawyers, they use people in the back office who have a good feel for it. And they can provide a better service than lawyers, because there aren't many areas in a loan agreement where you're going to be breaking the law, so of more significance is the commercial deal you get. These people have a list of all the transactions that have gone wrong and the reasons why and they are much more focused and have a better view of the documents. On the borrowers' side, it really depends on the client. Some are professional, others...well...

The first step is establishing the relationship between bank and law firm. In addition to long term strong ties based on networks, the panel has come to the fore. Here the bank says it wishes to appoint a set of law firms from which it will choose to do particular kinds of work. The practice varies enormously from bank to bank. The Royal Bank of Scotland has an extensive set of panels of 25 law firms, including international, regional, national, and specialist firms among others as referred to in the story at the beginning of this chapter. Many lawyers consider the number to be too large to be worthwhile. HSBC, however, as one lawyer explained, has a small number of firms on its panel and this elevates the panel's status to more than a mere listing exercise. Panels possess the capacity of convenience. As one banker said, 'As soon as the deal comes to me, I choose two firms from our panel and get two fee quotes.' Each law firm will know it is one of two selected and therefore in a competition with the other when asked for a fee estimate. The effect for the bank is to exert downward pressure on legal fees. Yet even within panels there are network ties that help particular panel members at the expense of others. Despite the panels' existence, they are not exclusive. One

bank lawyer remarked that her bank's usual regulatory adviser was Clifford Chance, but that Linklaters had produced an innovative MiFID advisory product on a country by country basis so Linklaters had been receiving increasing amounts of regulatory work on this topic from the bank.<sup>9</sup> But in the situations where law firms do not possess the enduring ties with banks, they are perceived as 'being as good as their last deal'. Their reputations lie in their performance and their abilities to judge what needs to be done to win the favour of the bank.

Despite the existence of panels, relationships between banks and law firms are generally based on 'deep relationships' where each 'feels comfortable' dealing with the other. As one inhouse counsel said, 'I can instruct this Magic Circle firm because they know our institution and it's a safe pair of hands and I won't need to get involved when problems arise because they're people who are confident.' Inhouse counsel also provide opinions for their bankers where external counsel refuse. Another inhouse lawyer said that English law firms were more reluctant to think in commercially-minded ways compared to American lawyers and therefore preferred to deliver a range of options for the bank to choose from, i.e. 'generic advice' as he termed it. He would then have to provide the necessary opinion in order for the transaction to progress. He also felt it was necessary to educate English law firms in the organizational structure of the bank and where banks were international, make the lawyers aware of the impact of US securities and banking regulations.

Because a law firm is not a member of a panel does not signify it will not receive work. In part, this is a result of internal contests between bankers and inhouse lawyers. The bank's inhouse counsel often mediate between the internal dynamics of the organization and the external world; they balance the banker's desire to continue working with the lawyer he or she has used in the past with the need to avoid conflicts and obtain best value for money. Inhouse counsel are mostly composed of lawyers who have moved from the major law firms to the banks. Their expertise is in the banking sector and, indeed, some of them will have served secondments within banks' inhouse legal departments. Two main routes appear open to lawyers to join bank legal departments: one is to stay on after the secondment has finished. Thus sending a young associate on secondment carries a potential risk for a law firm.<sup>10</sup> The second route entails an associate leaving private practice after several years and moving inhouse, which is the more normal route.<sup>11</sup>

Bankers come from a more varied set of backgrounds since there is no single route into the field. Moreover, they may not even possess degrees, although this is increasingly rare.<sup>12</sup> However, if they do then the range of degrees is vast from arts to natural sciences. Both Lewis (1989) and Partnoy (1997) had entered graduate training programmes at their respective investment banks and Knee (2006) joined the industry after taking both a JD and an MBA. Just as lawyers move to inhouse positions as lawyer or banker, bankers can move in house as analysts or financial officers, or move into consultancy, or even legal practice.

Bankers are often used to working with particular lawyers on deals and know what responses to expect from them. The degree of trust that obtains helps reduce the need for explanation and provides the basis for a kind of occidental *guanxi* to flourish (Chung and Hamilton, 2001; and see Suseno *et al*, 2006). Each therefore is able to ask favours that work to cement the relationship between them. Accommodating these particularities may entail compromising the panel system from time to time. Contests like these, when internal procedures need to be compromised, are raised through the bank hierarchy until sufficient forces are heavily mustered in favour of one side or the other. Their resolution can result in the bank's board having to decide who should be employed. Generally, though, the bankers start with an edge because they are characterized as the profit centres, while inhouse lawyers are considered the overhead costs. But the situation is not one of pure contest between the two. Bankers rely on their inhouse counsel to mediate between them and external counsel when problems arise. Bankers will ask if a decision is correct and seek protection by 'using the legal department as a sounding board for making risk decisions.' One counsel said he had to be aware of how the bank might be situated in the market: 'Does it want to make a certain concession in a document and be the first to lead the market in that direction?'

#### WAYS RELATIONSHIPS ARE COORDINATED

I have argued elsewhere that the role of large law firms in the processes of globalization is to provide a sacred validation of the enterprise (Flood, 2007a). Law firms are analogous to the Jesuits redeeming the world for the divine. The

success of capital markets work indeed depends on the inscription of the scriptures being read and accepted as the correct version of events. In the beginning was the word, *logos*. The scribes are of course the lawyers who provide the documentation which recreates the intricacies of the transaction, the financial details, the timing of the interest payments, courses of action in the event of default, and so forth. In representing the transaction this way, lawyers objectify it, they make it real whereas before it was evanescent. Most of the transactions between lawyers and bankers revolve around the creation and reiteration of documentation. The documents are drafted and redrafted after countless criticisms from the parties until they come to represent a form of reality that everyone to the deal can live with (See Skordaki and Flood, this volume).

The process of initiating a transaction is routine but contingent. A banker described it thus:

The originator in the bank brings in the transaction, that is he gets the borrower. Once the deal gets credit approval from the committee, then it goes to the transaction team where I choose the law firm. When their estimate is in, I square it with the client and we prepare the documentation. The lawyer receives a term sheet which specifies key terms such as amount to be lent, how, its purpose, fees, hedging, maturity, governing law, etc, and the credit agreement.<sup>13</sup> Our lawyer then drafts a loan document which incorporates the contents of these two documents.

Now this sounds quite simple, but it can get complicated here. I go through the document and mark up the points which I think need attention then we discuss it. Our viewpoints can differ significantly because he sees it from the legal side and I'm looking at it as a commercial transaction.

The comments are incorporated and the second draft is circulated to the borrower and his lawyers who comment. They may query the length

for default or the arrangement fee. I may have further comments, which are discussed and usually some of which are then incorporated into the final document. If the borrower and I can't agree then I will go back to the originator and ask him to talk to the client and sort things out. If he can't do it, then we have to go back to the credit approval committee. This can sometimes go on for days trying to get an agreement.

We can accept that the emphasis in transactions is on the relational aspects of lawyering as opposed to legal structures and solutions, which Sosa confirms in his research on mid-sized law firms (this volume). Bankers and lawyers co-exist in a near continual state of uncertainty which they attempt to contain by carefully calibrating their responses to each other. Because much of their work is contingent on a widely dispersed set of actors agreeing to coordinate their respective behaviours—credit rating agencies, clients, banks' credit committees, clients' lawyers, regulators, to name some—stabilizing expectations is difficult. Luhmann depicts two types of expectations, cognitive and normative (1985: 33). Cognitive expectations are mediated and controlled through successive disappointments in the world: the process is ongoing and inchoate but nevertheless introduces new modes of interaction as expectations are managed and resolved. Normative expectations, however, are not amenable to such relatively quick responses. Norms at best fix a narrow range of behaviour that is deceptively simple in the face of the complex reality of the world, yet they do not lose their validity in the face of disappointment, which they must incur. Both cognitive and normative expectations are managed through the generation of typified solutions that rest on different forms of support structures. Typified solutions are represented in this instance by the formation of complex agreements that stipulate conditions, warranties, obligations, etc. They are

created by law firms that engage in a continual stream of transactions that take clients' expectations and transform them into typified solutions. The primary support structure, then, is a set of law firms that have the scope and expertise to undertake these transformations successfully: primarily the large law firm (see Gessner, this volume).

The process of creating typified solutions is protracted, but essentially a pragmatic activity, as the banker described above. This is not, however, creation *ab initio*; each evocation of the documentation is mimetic, rendered through the use of standard terms and templates. As layer upon layer is added, the documentation becomes more and more encrusted and lengthy. In one transaction, for example, the list of definitions of terms ran to over 50 pages and began with the definition of a day as 24 hours. Lawrence Lederman writes about his work at Cravath preparing the documentation for financial transactions thus:

There is very little law in the job. Most deals were a repeat of other deals, and the associate's job was to find the appropriate bound volume where a similar deal had been previously documented and then mark up copies of the papers collected in the volume...In financing transactions in which corporations borrowed money, someone had thought through all the legal aspect a long time ago. It was hopelessly difficult to separate the substance in the forms from the compulsive gestures of pinched minds. Your job, however, was not to deviate; otherwise you were in uncharted waters where you took foolhardy risks with millions of dollars (1992: 16-17).

There is, in addition to the drafting, a considerable amount of negotiation among lawyers and among lawyers and bankers. The labour of inscription is essentially collaborative although there are leadership roles that determine the

main direction of the transaction (Johns 2007). Whichever side in the transaction initiates it is the one to provide the first draft of the agreement. This in a sense creates an author-critic relationship between the parties, although in this case the critics materially affect the outcome. Often there is brinkmanship in the negotiations as the transaction approaches its final stages where participants can start holding out on provisions fully aware that the deadline is approaching. As one lawyer said, 'Sometimes you get the impression that the other side's lawyer is prepared to scupper the deal in order to win a point.' In most situations, however, it is the lender's lawyers who initiate the first draft, which reinforces the domination of the bank.

This idea of 'co-working' stimulates a different way of conceiving lawyer-client relationships. In essence they are usually perceived as dyads—the individual lawyer and the individual client. While in the prototypical lawyer-client relationship that two-way distribution obtains, the reality in the corporate sector is rather different. The process of financial transacting coordinates a number of parties who have both coinciding and conflicting interests, sometimes within the same party. Simmel (1950: 122-128) notes that the dyad has special features because of its numerical condition, especially triviality and intimacy. Triviality connotes frequency of interaction, repetition, and speaks to the immediacy of interaction. Intimacy speaks to reciprocity so that the dyad does not grow beyond its elements: it refers to the way in which individuals distinguish themselves from others and that they share a specific content, obscured to outsiders, which is their centre. In a dyad, each is confronted by the other only

and not by some superordinate group that stands above them, and this is what gives dyads their special character. Traditionally we tend to observe the lawyer-client relationship in this way, and similarly the relationship between banker and lawyer. Once the dyad is broken by becoming a triad or greater, the character of the relationship is irredeemably altered. Larger groups allow factions to form, majorities and minorities, for and against. Sociologically, then, groups of three or more are significantly different from groups of two (id. 140-141). Within the kinds of business transactions outlined here, these larger groups of actors are the norm, which is where the 'typical' lawyer-client relationship becomes distorted and we observe different types of allegiances coming to the fore.

In effect the corporate lawyer-client relationship has to be recast as 'multipolar', with interests distributed across a number of constituencies. While in real terms, the lawyer's fee may be paid by a particular client, the actual relationship, as it exists in the transaction, extends beyond that simple contractual obligation. It introduces a series of effects that can produce both positive and negative feedback into the relationships lawyers form with their clients. The same repercussions also play out with bankers. For example, in *Eat What You Kill* Milton Regan explored the decline of a company being advised by Goldman Sachs and its affiliates. The key banker advising the company eventually became head of a Goldman vulture fund whereby he was perceived to be preying on clients while advising them (Regan, 2004: 67-94). Both clients and the parent bank found the multiple identities too tangled to endure, which led the

banker to establish his own vulture fund that became the antagonist of the distressed company.

In the case of lawyers, the tensions are evident. Banks mediate on behalf of corporate clients, recommending courses of action and advising on who the legal experts should be. In some situations, the recommendations to use particular law firms may override the explicit desires of the corporate client. The corporate client may be told that the usual lawyers are insufficiently experienced for this type of work and would drag the transaction thereby increasing the costs to the client. Often it will be a simple matter of the bank having a solid relationship with its preferred law firm and having no relationship, nor desiring one, with the clients' usual firm of lawyers. The corporate client is then switched from one law firm to another, with the hope that the client will be captured by the new firm and retained to generate new work for both law firm and bank. It is not exactly 'bait and switch', but there are resemblances.

These behaviours place the relationship between corporate client and lawyer in an uncertain and tentative position. While the client is responsible for generating the actual work, the client's presence in the transaction is due to the bank. To whom, therefore, is the actual loyalty owed? Codes of professional conduct give obvious answers, but the reality is otherwise. The true allegiance is between law firm and bank, which the Canary Wharf story at the start underscored. The art of lawyering under these circumstances relies on being able to gloss the realities of the true relationship that underlies the transaction.

Jonathon Knee (2006: 68-73) illustrated the ambiguity of the situation in the auction of West Publishing Company by Goldman Sachs. West was a privately held corporation but the owner had given 50 per cent of the stock to employees, therefore the sale had to be treated as if it were a public company. The lawyers, Wachtell Lipton, were concerned about the impact of the 'Revlon' decision by the Delaware Supreme Court which said the duty of directors was to maximise stockholders' value during a sale (Dunne, 1997). West's owner wanted to sell to a particular bidder, the Thomson Corporation, in the auction and a price of \$3.35 billion was agreed. Another bidder found out and offered \$3.4 billion. The frustrated owner had to return to Thomson and tell them that they would now have to pay \$3.45 billion for the company, which they agreed. Knee reflects on this sale by commenting on the bank's ideal and actual relationships with clients as opposed to potential clients:

Although there was no real 'harm' done here—after all [the owner] sold the company to his preferred buyer and got more money—this episode highlights an important and inherent conflict between banker and client in sales processes. After a successful transaction, the client disappears and any future business will come from the universe of suitors. This creates a sometimes irresistible incentive to provide, or give the appearance of providing, some form of subtle preferential treatment to those most likely to offer something in return at a later date. In this case, the strategy backfired as Thomson was convinced that we had done something that cost them an extra \$100 million. And although [we] had not...Thomson smelled a rat and refused to do business with Goldman for quite some time (2006: 73).<sup>14</sup>

How can we interpret what banks and lawyers are doing? One answer is that they are constructing modes of support through typified solutions that help define and manage expectations (Luhmann, 1985). We can extend this answer by

incorporating Berger and Luckmann's (1966) idea of the symbolic universe and its role in legitimating forms of action. Legitimation occurs at ascending levels of sophistication and comprehensiveness. 'Legitimation is best described as a "second-order" objectivation of meaning. Legitimation produces new meanings that serve to integrate the meanings already attached to disparate institutional processes' (id. 110). Moreover,

Legitimation 'explains' the institutional order by ascribing cognitive validity to its objectivated meanings. Legitimation justifies the institutional order by giving a normative dignity to its practical imperatives. It is important to understand that legitimation has a cognitive as well as a normative element....legitimation is not just a matter of 'values'. It always implies 'knowledge' as well (id. 111).

For Berger and Luckmann the ultimate level of legitimation is the symbolic universe 'that integrate[s] different provinces of meaning and encompass[es] the institutional order in a symbolic totality' (id. 113). The symbolic universe, then, extracts the deal's performance from the abyss (Johns, 2007: 121) and integrates the diverse institutional and normative discourses and portrays them as coherent texts.

Although banks and lawyers function independently at the different levels of legitimation, it is at the ultimate level of the symbolic universe that they are able to construct a lifeworld, an ontology, that transcends difference and creates meaning for all the actors: banks, lawyers, corporate clients, regulators, and rating agencies. The art of the transaction is centred on the documentation of the transaction: it has its own ontological force. It is the deal. And this is the core of

the relationship between these two institutions: the preparation of massively complex documents that intertwine various parties' activities within a symbolic universe, or structure, for a defined period. Expectations are managed, ends defined, procedures planned and organized—everything is coordinated and orchestrated within a system of privately managed order. To some extent, the relationship between lawyer and client is brought into harmony at the end of the deal when the new symbolic universe is created. It will, of course, fall apart as the next transaction is entered into.

Fortunately, for Anglo-American institutions the normative structures that constitute and regulate transactions are inherently flexible and malleable. They represent and embody Weber's (1968) notion of substantive rationality as opposed to the civilians' formal rationality with the rigidity that it implies. This begins to explain the dominance of New York state law and English law. They have never surrendered to the total regulation of the state: their success is located in the interstices of legal regimes. Through the adoption of techniques that mean one can circumvent awkward regulations and the like, contract is capable of constructing private regimes that live alongside without usurping state systems (see Suchman, 2003).<sup>15</sup>

For example, an English lawyer was negotiating the final stages of a transaction on behalf of a bank that was to lend money to a French company. With only a few hours to go to the completion signing, one of the French parties introduced, unexpectedly, a series of regulatory requirements that had the

potential to derail the transaction. To comply with the regulations would have normally taken several weeks. While he was clearly annoyed by this late interjection, the English lawyer was able to create a solution through the drafting of a 'side letter' that allowed the transaction to continue and enabled the regulatory requirements to be delayed until after completion without compromising the integrity of the transaction. The French lawyer who had been responsible for raising the regulatory obstacles was horrified and expostulated, 'That may be fine in practice, but will it work in theory!'

#### EXAMPLES AND PRACTICE

In this section I introduce some of the ethnographic data to tease out some of the dynamics of these multipolar relationships. These data are based on communications between various parties involved in deals. Not everything is self-evident, however. For example, conversations between banks and lawyers can be quite subtle at times. One lawyer commented how a banker told him that more and more of their deals were being done in Europe than in the UK. The lawyer's firm had no offices outside the UK, preferring to use networks. The difficulty for the lawyer was that he had not broached the idea of working in countries such as Slovakia, Slovenia, and Bulgaria before. But as the bank was keen to enter these markets, he would have to develop networks rapidly if he wanted to capture this work, which the bank had hinted that it would give to him if he had the support structures in place. This lawyer realised his rainmaking was going to have to include trips around Europe to cultivate lawyers and networks in these countries. Initial contacts would be somewhat speculative until proved in actual transactions (cf. Suseno *et al*, 2006). Since the lawyer already had a busy

practice, this extra demand caused considerable anxiety, but ultimately could not be ignored.

I have alluded earlier to the strange character of the client, which could be rephrased as ‘who is the client?’ In the constellation of characters involved in these transactions, this can be difficult to determine. There is the banker, external counsel, inhouse counsel, corporate parties, credit rating agencies, and so on. At any time the relations between them may shift and alter. For inhouse counsel there are choices between representing a particular banker or the bank itself. For external counsel there is the need to ensure that credit rating agencies’ demands are satisfied in order to obtain a ‘Triple A’ rating, which may mean altering his client’s position a little. Each party therefore varies character, alliance, loyalty as the situation demands, redolent of Schnitzler’s *Der Reigen*.<sup>16</sup>

In the two examples that follow, we observe a series of exchanges by email between lawyers, clients and bankers. While I have mostly discussed the issues in terms of the larger picture, it is by examining a set of microstructures that we can understand how the complexities of the relationships are handled by the participants themselves through small yet salient interactions. It is then possible to link these microstructures to the larger field.

In the first example, a transaction involving a bank providing financing for the purchase of a company and its commercial property is coming towards its conclusion. This is always a delicate stage to manage in transactions because each

side is trying to minimize its liabilities and the borrower is facing deadlines imposed by the vendor that will entail substantial interest costs and penalties if missed. The borrower is expecting to complete the transaction by the next day, Friday, otherwise he will incur interest payments of £60,000 if the deal is delayed to the following week. The borrower's (=the client) task and that of his lawyers is to move the process along swiftly. The lender, however, is under no such pressure and sometimes the bank's internal bureaucracy can inadvertently slow down procedures, if technical hitches are perceived, real or not. And, indeed, the lender's lawyers can magnify these perceptions. The emails track the discussions over the span of a few hours starting at 6pm on Thursday.

---

**From:** Borrower's Lawyer

**To:** Lender's Lawyer

**Cc:** Client, Other Lawyers, Borrower's Financial Advisers

**Subject:** Re: Revised Agreement

As you know our clients have now agreed all outstanding commercial points and aim to proceed for completion of the XXX acquisition tomorrow (Friday). When will you be circulating final drafts of the necessary finance documents? We have commented on all the documents but if you think there is something you need from us before final drafts please let me know as a matter of urgency.

\*\*\*\*\*

**From:** Different Lawyer at Lender

**To:** Borrower's Lawyer

**Cc:** Client, Other Lawyers, Borrower's Financial Advisers, Lending Bank

**Subject:** Re: Revised Agreement

Thanks for your message to Y, but he is out of the office this afternoon.

I understand that the bank and your client are still discussing the tax schemes and the lack of any opinions. As a consequence there are open issues with respect to the agreement relating to the tax schemes. Once we have a final resolution on this issue we can let you have what will hopefully be a final draft agreement.

In the meantime I thought it might useful to let you know that the bank will need a signed agreement before accepting a request and they need two days notice for funding [i.e. before the money is released].

We will distribute revised conditions precedent tables shortly this evening, obviously we will need the outstanding documents as soon as possible to allow your client to draw as soon as it can.

\*\*\*\*\*

**From:** Client (Borrower)

**To:** Bank's Lawyers; Client's Lawyer and Others in Firm; Borrower's Colleagues; Bank; Vendor; Client's Financial Advisers

**Subject:** Re: Revised Agreement

[Email addressed directly to lawyer above] This is totally unacceptable and I am sure does not reflect your client's [i.e. bank] instructions. This is turning into a shambles. Given that you know we are on notice to complete on XXX it's a little

late to be telling us you need 2 days to fund. We will sign the agreement tomorrow morning and send the utilisation request accordingly and expect the outstanding points to be settled by mid-day tomorrow by all parties.

The points in relation to the opinion on the tax scheme will be covered by a satisfactory opinion and will not affect the agreement; this document has been drafted to death and should be ready for signature. It is an understatement to say we are keen to avoid funding over £60k of interest over the weekend. Nobody seems to be concerned by the urgency here.

\*\*\*\*\*

**From:** Another Lawyer in Bank's Lawyers Firm [who Knows Borrower and Is Not Connected to Deal]

**To:** Client (Borrower)

**Subject:** Re: Revised Agreement

Anything I can do to assist?

\*\*\*\*\*

**From:** Client (Borrower)

**To:** Another Lawyer in Bank's Lawyers Firm

**Cc:** Client's Lawyer

**Subject:** Re: Revised Agreement

Thanks. Could you see if you have enough troops around your end for an all party conference call this evening on conditions precedent?

\*\*\*\*\*

**From:** Client's Lawyer

**To:** Client (Borrower)

**Subject:** Re: Revised Agreement

We really need the bank's lawyers to work on and circulate the finance documents this evening—it's not just the conditions precedent.

\*\*\*\*\*

**From:** Bank (Lender)

**To:** Client (Borrower); Bank's Lawyers; Client's Lawyer

**Cc:** Client's Financial Advisers; Bank (Lender) Colleagues; Bank's Lawyers

**Subject:** Re: Revised Agreement

We have obviously spoken, and I can assure you that we understand the fact that you are on notice and accruing significant costs.

Thinking aloud, I suspect that we are probably a little bit away from being able to complete, and that it might be more beneficial to have a call tomorrow [Friday] morning on the basis that it will give more time tonight for conditions precedent to be satisfied, docs to be finalised and the like. I feel, and hopefully this is agreeable to yourself and [your partner], that I would prefer both [our lawyers] and [your lawyers] to concentrate on the above, rather than using time that could otherwise be spent completing and ticking of conditions precedent by sitting on a con[ference] call. I understand that a good proportion of the outstanding conditions precedent are to be satisfied in the CIs, so there might be limited value in a conference call tonight in any event.

Progress is being made at our end—I suspect that we are close to satisfying ourselves on the tax scheme subject to full disclosure to [the tax authorities] and the provision of a letter of undertaking with regard to any future liability. We would propose that an indemnity be provided here (the above of course subject to final confirmation from New York).

I hope this is OK. I understand that [our lawyers] will circulate a revised credit agreement later tonight, and will circulate details of a conference call to take place tomorrow morning. I will of course be available in the interim if needed—please give me a call if you'd like to discuss.

---

In this example the relationships are continually in flux. Alliances form and reform rapidly. There is little the client can do, except fume. The lender does not bear the impending interest costs and so can afford to take time. Similarly the bank's lawyers feel the same. And so there is little that the client or his lawyers can actually do to force progress quickly. The danger here is that the bank's lawyers establish a reputation for slowness or less than expected diligence. One of the difficulties in this example was caused by the intervention of the lawyer from the bank's firm who was not involved directly in the deal. He was minding it for another and had little vested interest in the transaction. To him it mattered little and minding it meant no more than tiding it over until the original lawyer returned from his break. Usually, no lawyer wants a reputation of a spoiler; that could vicariously affect the law firm. One interesting point to emerge was the later interjection by the lawyer not connected to the matter. He earned reputation

points with the client and with the bank and mitigated some of the ill-feeling being generated. Finally, the client has to pay the interest costs as the transaction is not completed the next day as he hoped. None of the lawyers, client's and bank's, was unduly concerned: to them it was just business, and the client would need them again before long (cf. Cutler, 2003: 220-222).

The next example shows that banks take notice of what law firms think of each other. It is essential that they observe each other given the small size of the club to which they all belong (cf. White 1981). Every law firm that belongs will at some stage be a lawyer for a borrower or lender and therefore be in a series of evolving reciprocal relationships, where informal expectations have to be carefully managed. In the following example, a series of emails between a lawyer and a banker discuss how the fees for a transaction should be determined. It displays the essential ambiguity of the relationships between lawyers and bankers and their respective clients. It discloses the subtle negotiations and ploys that come into play as these relationships evolve. In this exchange the transaction has effectively completed and it is presented in chronological order. The names have been changed:

---

**From:** Banker

**To:** Lawyer

**Subject:** Acquisition

I just wanted to confirm your bill for the *HHH* work [the client]. John mentioned that it would overrun from the initial £50k towards the mid-late £50s. Is this how it ended up? Let me know. I understand £50k should have made its way to you already.

\*\*\*\*\*

**From:** Lawyer

**To:** Banker

**Subject:** Acquisition

I have now received the updated time costs and disbursements to date—the figures are as follows: incurred time costs of £81,580. This does not include any post completion work (such as registrations, bibling,<sup>17</sup> etc). In respect of post completion work, we anticipate a further £3,000 time costs. Given our commitment to you to help you in every way we can to build strong relationships with your clients, I would like to offer to issue our invoice for £82,000 and absorb any post completion work ourselves. Would that be acceptable?

\*\*\*\*\*

**From:** Lawyer

**To:** Banker

**Subject:** Acquisition

A detailed breakdown of figures per lawyer are supplied.

\*\*\*\*\*

**From:** Banker

**To:** Lawyer

**Subject:** Acquisition

I have let *HHH* know that there is an outstanding issue on these fees, which they asked me to follow up. I will need to broker something here given our relations with both of you. Is there a gesture in it on your side to make it a bit easier to swallow? As with *YYY* [another client], there will be follow-on deals which should help to sweeten it from your side. I would prefer to make a small gesture on this and not on *ZZZ* [another deal] at all if we could manage it that way.

\*\*\*\*\*

**From:** Lawyer

**To:** Banker

**Subject:** Acquisition

I propose a 10% reduction of our time costs of £85,000 (including our work for the registrations). Also, in this matter, we will not charge for bibling time costs. This would mean an invoice for time costs of £76,500. Does this proposal enable you to broker a solution that facilitates more *HHH* business for you?

\*\*\*\*\*

**From:** Banker

**To:** Lawyer

**Subject:** Acquisition

Ok, let me go back on that. It certainly helps with our relationship with them, but also in being able to ask you to do the future work for us. Their feedback on your firm has been positive I would add, and I have been pleased that the relations between *QQQ* [law firm on other side] and yourselves have been quite productive.

\*\*\*\*\*

**From:** Banker

**To:** Lawyer

**Subject:** Acquisition

I have had some dialogue back and forth on this now. *HHH* are not very happy with the level of fee increase that has occurred. The fee estimate was increased to £50k once it became apparent that there was substantially more work required than anticipated, and they were led to believe that was a reasonable estimate. On the day of completion I let them know this had increased to £58k which was accepted. The significant increase from that amount is regarded as a surprise. They make the point that if all their costs overran by 50% they would have a real problem and feel that they need to control their acquisition costs. They have proposed that they would pay £65k, rather than the £75 you proposed. From the Bank's perspective, I would like to get this settled to both sides satisfaction ASAP. We have used you on the last 3 *HHH* deals and are pleased with the results. I should add there is scope to make some fees back on the new deals in the next few months.

\*\*\*\*\*

**From:** Lawyer

**To:** Banker

**Subject:** Acquisition

I am very keen to reach a position where all parties (especially the Bank) feel there is a good working relationship.

\*\*\*\*\*

**From:** Banker

**To:** Lawyer

**Subject:** Acquisition

Can you as agreed please issue bill for £67k.

---

The various interests are negotiated from a number of standpoints including the lawyer's relationship with the bank and banker, with the bank's clients, and even with the opposing lawyers. The one recurring point is the continuation of the relationship between the lawyer and the bank: how can it be maintained and developed without compromising too much? The negotiations indicate the depth of the relationship—previous work done—the esteem in which the lawyer is held—*QQQ*, the firm on the other side, applauds his work and suggest that the issue of the fees is fairly easily resolvable. This is clinched when the client's views are brought in.

#### CONCLUSION

The lawyer-client relationship in the corporate sector is not typically the dyadic relationship as it is traditionally portrayed. Simmel explained that when relationships exceed two people the dynamics of the relationship are irredeemably altered. This is very much the situation where banks and law firms are involved. The constant interaction of bankers and lawyers creates a club for them in which clients are occasional visitors. These institutions have grown up together and matured. Their interlinking and allegiance is profound and deep: it strongly resembles *guanxi* relationships.<sup>18</sup> It is based on knowledge of each others' expertise and how it is to be employed in transactions. This expertise is manifested through the production of complex documentation that frames the deal (see Gilson 1984). Indeed I argue that the documentation represents the deal

itself. It creates a symbolic universe which legitimates the business. The law firms act as support structures managing the expectations and uncertainty that arise in business transactions. Although this provides some solace for clients, they have to live with the brute fact that in the modern business world the bank will always trump the client.<sup>19</sup>

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## APPENDIX 1

Example of a Term Sheet for a Transaction between Bank and Borrower showing main aspects:

ZZZ plc [borrower]

XXX Bank [lender]

Key Terms for  
€250 million Short and Medium Term Secured Credit Facilities, Drawn in Two Stages

Subject to Contract

We set out below (subject to all internal credit committee approvals, due diligence and documentation) key terms for a secured credit facility to be entered into between ZZZ and XXX or any affiliate as lender and hedging counterparty.

Facility Amount: €250,000,000 is to be drawn in two stages (followed by description of two stages).

Purpose: This facility is to be made available in two stages to assist in the purchase of companies.

Guarantee: The stage two undrawn commitment will be backed in full by a guarantee.

Maturity: Five years.

Margin: YYbps pa.

Margin Ratchet: In the event that by the time of the second drawing the asset owning companies have not been converted into QQQ and merged with ZZZ, the margin on the portion of the facility not secured will increase to 150bps pa.

Arrangement Fee: KKKbps pa

Payment/Cancellation Fee: % of amount to be prepaid/cancelled in year 1, 2, thereafter.

Governing Law: English.

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<sup>1</sup> The activity of the London market is measured by the volume of acceptances on the London market, controlled by the merchant banks, which rose from £50 million in 1875 to £140 million in 1913 (Cassis, 2006: 85).

<sup>2</sup> Freshfields acted for the Bank of England when the liquidators of BCCI brought an action alleging dishonesty on the Bank's part. As part of the case the House of Lords had to make determinations about the scope of legal professional privilege between the Bank and Freshfields. See *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* (2004) [2004] UKHL 48, <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>.

<sup>3</sup> For example JPMorgan Chase has over 6,000 employees in India. Goldman Sachs Bangalore office has 1,200 employees and will soon overtake the 1,500 in Tokyo. *Financial Times* 19 Sept 2006: 30.

<sup>4</sup> Bankers come from a wider variety of disciplinary backgrounds than do lawyers often majoring in economics or finance, with an MBA. Even law itself is a recognized route into banking.

<sup>5</sup> The main work areas of investment banks can be categorized as: mergers and acquisitions, corporate finance, structured finance (securitization), derivatives, and sales and trading of financial instruments,

<sup>6</sup> This picture is changing as hedge funds and private equity firms have become more prominent in financing regimes (see Tett, 2006; Tett and Hughes 2006). But the essential names have not changed, see also Vault Top 50 Rankings: Investment Bank and Commercial Bank Employers,

[http://www.vault.com/nr/finance\\_rankings/finance\\_rankings.jsp?finance2007=2](http://www.vault.com/nr/finance_rankings/finance_rankings.jsp?finance2007=2); and Thomson Financial IFR Awards 2006, [http://www.thomson.com/content/pr/tf/tf\\_inv\\_banks/2006\\_12\\_18\\_IFR\\_2006\\_Awards](http://www.thomson.com/content/pr/tf/tf_inv_banks/2006_12_18_IFR_2006_Awards).

<sup>7</sup> This configuration of ties between banks and law firms is confirmed by most observers of global financial markets. Thomson Financial's quarterly legal tables shows the same set of legal advisors appearing repeatedly with little variation. See

[http://www.thomson.com/solutions/financial/investbank/leaguetable\\_home/](http://www.thomson.com/solutions/financial/investbank/leaguetable_home/).

<sup>8</sup> Where I use phrases such as 'one lawyer', 'another lawyers', 'a banker', etc, these refer to interviews carried out by me in the past year.

<sup>9</sup> MiFID is the Markets in Financial Instruments Directive which provides a regulatory framework for financial services and affects, in particular, investment banks. See

<http://www.fsa.gov.uk/Pages/About/What/International/EU/fsap/mifid/index.shtml>.

<sup>10</sup> This feeling is intensified by the fact that the law firm usually continues to pay the salary of the intern while on secondment, and also loses the associate's contribution to its business plan.

<sup>11</sup> Direct outplacement in the Cravath mode is not prevalent in the English context. The reason is located in the way the partnership track is articulated in American and English law firms. Whereas most US associates are aware of the partner probation period and are evaluated along its course, in the UK associates only learn about their partnership potential late in their associateship, usually after five years. This delay enables associates to leave law firms without being too concerned about their partnership prospects. I should add that senior lawyers also move from private practice into banking. The recent example of Harvey Miller, dean of bankruptcy at Weil Gotshal, moving to Greenhill, an M&A and restructuring bank, is a case in point.

<sup>12</sup> The extent to which bankers are professional is discussed by Hughes (2000).

<sup>13</sup> See Appendix 1 for an example of a term sheet.

<sup>14</sup> With the scale of banks and law firms today conflicts of interest are an everpresent, situational difficulty. In a discussion at Tulane Law School's Corporate Law Institute, Vice Chancellor Leo Strine of the Delaware Court of Chancery said, in relation to takeovers, 'I question bringing in a Mickey-Mouse-size bank...I still err on the side of repeat players' — meaning banks that may already have an interest in a company or a deal — who 'know the tricks of the game' (Dealbook, 2007).

<sup>15</sup> For example, London is one of the main centres of Islamic finance where *sukuks*, Islamic bonds are issued. This business has thrived for a number of years and only recently has the UK government decided to introduce legislation to ease the issuance of these bonds and cement the UK's role in them.

<sup>16</sup> Set in C19th Paris, *Der Reigen (aka La Ronde)* charts the love lives of a series of inter-related characters whose complex and frequently very brief relationships eventually join them all together to create a loop mirroring the merry-go-round (*Der Reigen*) which the narrator controls.

<http://www.kinocite.co.uk/13/1356.php>.

<sup>17</sup> Bibling refers to producing copies of the full and complete documents for all participants.

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<sup>18</sup> A recent statement by a vice president of Morgan Stanley about the universe of big banks is telling: ‘We are totally conflicted — get used to it’ (Dealbook, 2007).

<sup>19</sup> This does occur in other spheres of law as Abel’s (2006) story tells, and Connelly’s tale of the criminal lawyer (2005).