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

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INTRODUCTION

Business and financial transactions have elements of the contingent within them. Their uncertainty might be affected by, among others, the rules in particular jurisdictions; by the availability of capital or the vagaries of individual tax regimes; or by the quality of legal expertise. My argument is that actors who are occupied in transactions—the creation of privately managed orders (Hadfield, 2009)—overcome and sidestep the behavioural and normative obstacles that face them by managing uncertainty through the provision of typified solutions (Flood, 1991; Flood & Sosa, 2008). These actors are usually part of a small and exclusive club that has erected high entry barriers to outsiders. Its key continuing members are bankers and lawyers who are frequently, but not always, in a lawyer-client relationship. Other members include borrowers who are also located within a lawyer-client relationship.[1] The article examines what happens when the ideal-typical dyadic lawyer-client relationship is deconstructed and examined in the light of the relationships that occupy this small world of financial business. If we are to understand the role of law firms as support structures in the world of business transactions (Sosa, 2007; Flood & Sosa, 2008), 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, London was placed on the auction block. Two key bidders for its assets were syndicates led by Morgan Stanley, the investment bank, 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), on which Morgan Stanley was insisting as part of its requirements. Brascan's legal advisers, Freshfields Bruckhaus Deringer refused to act for its client against either RBS or Morgan Stanley,[2] as did two other major law firms that were advising members of the syndicate. Indeed, Brascan discovered that *no* City law firm when approached by them would litigate on its behalf against the banks.

At that time, RBS paid out £160 million a year for legal services among its panel of 25 law firms. RBS stated 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; Flood & Whyte, 2008).[3]

Why did this happen? The answer is simple: *fear*. No law firm wanted to, or to be suspected of, being antagonistic towards banks. Banks have been the *über*-client. Upset them and law firms can expect to see a significant part of their fee income evaporate. The *Financial Times* has even said: "A place on a bank's panel (its list of approved law firms) was the ticket to bumper profits. It was a measure of the banks' revered status as clients that no top law firm ever wanted to litigate against them" (SenGupta, 2009).[4]

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. My central argument is that to portray the relationship as a 1:1 dyad consisting exclusively of lawyer and client, which is the most prevalent depiction within the literature on lawyer-client relationships, is to miss a great deal and to misrepresent the reality of the situation.[5] Indeed, there are a number of interveners, e.g., insurance companies are common, into the lawyer-client relationship that ought to be taken into account.[6] What is important are the sets of relationships and networks formed by the participants of this world.

THEORETICAL ASPECTS OF LAWYER-CLIENT RELATIONSHIPS

One of the reasons we find ourselves in this state is because much, if not most, of the sociological research on lawyer-client relationships has examined these associations within the personal plight hemisphere of individual one-shot clients and their lawyers (e.g. Parsons, 1954; Blumberg, 1967; Rosenthal, 1974; Cain, 1979; 1994; Hosticka, 1979; Katz, 1982; Mungham & Thomas, 1983; Griffiths, 1984; Maynard, 1984; Olson, 1984; Flemming, 1986; McIntyre, 1987; Sarat and Felstiner, 1995) rather than the archetypal repeat player corporate hemisphere (e.g. Gilson, 1984; Mann, 1985; Nelson, 1988; Alfieri, 1991; Flood, 1991; Wheeler 1991; Simon, 1998; Gordon, 1998; Griffiths-Baker, 2002; Shapiro, 2002; Liu, 2006; Burnett & Ward, 2007; Flood & Sosa, 2008; Smets, 2008; Sosa, 2009).[7] Characteristic of the individual client-lawyer relationship is the perceived dominance of the lawyer over the client by virtue of the degree of control the lawyer can exercise. 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). This is the classic case of professional control according to Johnson (1972) where the producer-consumer tension is resolved in favour of the producer.

The studies of business client-lawyer relationships portrayed in the Chicago bar studies (Heinz and Laumann, 1982; Heinz *et al*, 2005) and Regan's analysis of the collapse of the Bucyrus-Erie Company (2004) combined with the story of the Canary Wharf auction above indicate that, even at the most élite level, the difficulties in resolving the tensions within professional-client relationships are far from smooth.[8] Elements of both collegiate and patronage control (Johnson, 1972) are found in business lawyer-client relationships as each attempts to impose their pattern of resolution on the relationship. While knowledge asymmetry favours the one party, but not always; the commissioning ability for future business favours the other. As inhouse legal departments have grown, for example, they have taken greater control of legal budgets especially expenditures on outside counsel. When banks (and other institutions) become involved in these relationships, the balance can tip. While they are not directly intermediaries in the sense proposed by Johnson—as his third mode of resolution (heteronomy)—they have some of the characteristics.[9]

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). And even in present times the law firm has a close relationship with the Bank.[10] Movement of personnel between law firms and banks was fluid: John J McCloy, former proconsul of Europe after World War II, 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 explanation. The article examines the association between banks and lawyers through the nature of the relationships that bankers and lawyers form, the way they structure their work, and how the provision of enabling support structures is accomplished (see Gessner, 2009).

The basis for this approach is found in the nature of lawyers' work. In an earlier analysis of business lawyer and client relationships I argued the key role played by lawyers was *managing uncertainty* both for themselves and for their clients (Flood, 1991). I derived my notion of uncertainty management from the ethnography of Renee Fox, the medical sociologist (1957; 1959). Fox posited two types of uncertainty: incomplete grasp of knowledge and that based on the limits of current knowledge. She then derived a third type, that caused by inability of actors to distinguish between the first two (1957: 208-9). Her presentation of the uncertainty variable arose in the context of doctors' training and the ways they began to recognize and acknowledge its existence. Fox intertwined uncertainty

into the training trajectory: “With the growth of [the student's] knowledge and skill…and the widening and deepening of his experience, a student's perspective on his own uncertainty changes” (ibid: 219).

I suggested that the uncertainty of legal practice was dependent on particular situations lawyers and clients are placed within and their means of defining them (Goffman, 1959; Flood, 1991: 44). Lawyers’ uncertainty is analogous to that of doctors, i.e., incomplete grasp of knowledge and limits on knowledge (Bosk, 1992). There is, in addition, the uncertainty that arises from the politics of the law firm and the lawyer’s place within it (e.g., to what extent can a lawyer command resources—associates, committee leadership—within the firm? [Lazega, 2001; see also Smigel, 1969; Nelson 1988]). This type of uncertainty largely depends on the business client relationships and networds a lawyer has established and the quantity of business brought into the firm by the client. In some ways this uncertainty is the most fraught for lawyers because so much depends on its management—status, firm position, and remuneration.

These uncertainties can be managed in two main ways. First, by the establishment of cooperation between actors and institutions through the structuring of social networks which helps create trust (Granovetter, 1985; 2005; Knorr-Cetina & Bruegger, 2002; cf. Shamir 1995). Actors ascribe symbolic value to their associations with others, which Callon *et al* (2002) argue creates attachments stabilizes expectations and uncertainty. These symbolic values are not evenly distributed; rather the values are often attached to the status of the institution, whether provider or consumer. For example, a loan document’s value will vary according to whether it is created by a firm like Allen & Overy or

Eversheds (Flood 2007a). Beckert (2009: 256) observed that "the existence of a recognized status order among producers leads to value differentiations because the status of the producer is 'contagious'; it is symbolically transferred to the consumer".

The second process of managing uncertainty arises from the means by which behavioural and normative expectations are stabilized (Luhmann, 1985: 109). Since any exchange is replete with insecurity, thus mechanisms are necessary to develop stable expectations with regard to the behaviour of interaction partners (Flood & Sosa, 2008: 490). Luhmann (1985: 42-43) points out that disappointments can be dealt with in cognitive or normative ways. In the first case, expectations are adapted to reality when disappointed. In the second case, expectations are not adapted.

Although much of the current literature supports Max Weber's (1978: 328-29) thesis that the state legal system provides the central support structure in modern economies, the stabilization of behavioural expectations on the basis of general legal provisions is possible only if adequate legal structures exist. And there is now considerable research to show that within the international and also the national spheres support at the level of the system is inadequate, not the least because of the time lags between demand for new structures and their implementation (see Gessner, 2009). Actors have therefore to turn to relational structures to coordinate business transactions. The role of the lawyers becomes crucial to the stabilization of expectations by virtue of their supplying sets of typified solutions that represent explicitly formulated behavioural expectations. Typified solutions are formulated in a legal language: rights and obligations of

the parties are supplemented by extensive warranties, delay, renegotiation, default and termination clauses. The appearance of enforceability is generated by the use of choice of law, jurisdiction, and arbitration clauses (Flood & Sosa, 2008: 495). Within the international trade area, in particular, typified solutions are primarily developed by the midsized and large law firms. Thus expectations are generated by clients, but it is lawyers who transform these expectations into typified solutions. Consequently, lawyers play a role in the development of normative expectations and thereby reducing uncertainty.[11]

METHODS AND DATA

The research in this article is based on a series of ongoing interviews with lawyers in private practice, inhouse counsel, and bankers, and ethnographic observation. It also uses textual sources such as lawyers' biographies, studies of law firms, and histories of banks. The specifics of the fieldwork are that within the period 2004 to 2008 I conducted approximately 250 interviews with lawyers in large law firms in London, New York, Chicago, Toronto, Miami, Palo Alto, and Washington, DC among others.[12] Within the same period I interviewed about 15 bankers and 5 inhouse counsel. The ethnographic observation has been conducted less systematically than the interviews. I have relied on the opportunities to "hang out" in law offices and observe interactions either face to face or over the telephone. These have ranged from formal daytime meetings to transaction closings taking place at midnight. I was also given access to various email interactions in order understand the negotiations between lawyers, clients, and bankers. These form some of the case studies of this article. One note of caution here: the observations and email materials are of the order of "found

objects" which happened to come my way rather than being systematically sought.[13] Much of ethnographic work is exploratory and relies on chance since one is "collecting data" in real time rather than recording past events via recollection as in interviewing (Flood, 2005).

BACKGROUND

The histories of law firms and banks show a remarkable closeness and similarity in form between the two and their relationship has been symbiotic. 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. By the second half of the 19th century London had become the pre-eminent financial centre with merchant banks including the likes of Barings, Hambro, Schröders, Peabody, and J P 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 (Cassis, 2006: 84).[14]

One other remarkable feature is the degree of entrepreneurialism that both banks and lawyers displayed in their work and practice. For example, the railway industry, born in the first half of the 19th 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. Moreover, the lawyers were acting on their behalf ensuring that legislation would be enacted to encourage investment and financial activity. English law was among the most permissive in Europe with

the Joint Stock Companies Acts and the Limited Liability Acts (St George, 1995: 84-5). 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 19th century and invested his own money in Morgan ventures (Lisagor & Lipsius, 1988: 34-35). And, indeed, banks had their lawyers sitting on their boards as did Schröders with John Foster Dulles (ibid, 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.[15]

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, Guiness Mahon, Morgan Grenfell, and Schröders (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, something which is even stronger today. Nevertheless, corporate law firms and banks continued to work together. In the US, however, where no such restrictions on partnership numbers existed, the relationship between the banks and the law firms has been more dynamic and less that of underlabourer (law firm) to master (bank).[16]

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 (Nelson & Nielsen, 2000; Suseno *et al*, 2006).

The nexus of interest, law firms and banks, constitutes a small, exclusive world (cf. Flood, 1996; 2002; 2007a). The major law firms are fewer than 50 and the main investment banks are also small in number, of which three predominate: Goldman Sachs, Merrill Lynch, and Morgan Stanley. [17] 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: Legal Advisers of the Major Investment Banks

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

(Source: derived from Flood, 2002: 129)[18]

There are a number of reasons for this particular profile. One is historical: e.g. Goldman Sachs has long ties with Sullivan & Cromwell (Lisagor & 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 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).[19]

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. Often lawyers are identified as specialists that essentially take on a specific role. Being a plaintiff's medical negligence lawyer, for example, means it is highly

unlikely that that lawyer would ever act for defendant organizations, e.g., insurance companies.[20] Yet finance lawyers are less committed to particular roles such as borrower's counsel or lender's counsel although neither is mutually exclusive. 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 which institution they are acting for in a transaction. But they are also aware of the effects of their current actions on the likelihood of future work from their networks.

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,[21] for example, who joined a new firm already had a relationship with a bank and was able to bring in the bank as a client, whereas other lawyers in the firm had previously never been able to cultivate the bank despite their efforts. Another lawyer who regularly undertook big securitizations for banks said that her law firm was one of only four firms that *could do* this type of work, although what she meant was that the banks were not prepared to instruct other lawyers and take risks rather than there being an actual dearth of expertise. A 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…[22]

TRANSACTIONS AND RELATIONSHIPS

When Gilson wrote his article, 'Value Creation by Lawyers', in 1984 he used an example of a corporate acquisition to test his hypothesis. This was in the period when the rise of junk bonds and leveraged buyouts was taking place (Burrough & Helyar 1990; Lewis, 1990), but Gilson ignores these aspects. With the rise of the derivatives and securitization markets and the "originate and distribute" model of investment banking, financing became key to any form of acquisition (Tett, 2009). A typical transaction is one where the borrower, whether investing in stocks, property portfolios, or something like football clubs, is mindful about limiting her direct exposure. Her aim therefore is to borrow as much as possible—leverage by ramping up the debt. This is the classic approach of private equity funds, the principle being that future sales will cover present interest payments. Once the financing is obtained changes in economic conditions can be dealt with through restructurings which benefit both the lenders and their professional advisers. Of course this line of action depends on a reasonably buoyant economy and becomes increasingly unsustainable in times of deep crisis. Although each transaction appears to be a discrete venture, it becomes part of an iterative

process as the restructurings occur, as Regan's study so clearly demonstrates (2004).[23] The role of the banks and lawyers is to create the reality of the transaction by satisfying the actors' cognitive and normative expectations through the creation of sets of typified solutions.

In brief, the process of a transaction is, a borrower, if a repeat player, will already have relationships with lawyers and banks. The borrower will approach a bank through an originator who will make the initial evaluation and if the proposal appears sound it is put to a credit control committee which approves or disapproves. Once these steps have been taken, a transaction manager takes over and seeks estimates from law firms for the transaction document work. The borrower also has her own lawyers.

With a term sheet (see Appendix 1) in hand the bank's lawyers start to draft the documents for the loan, which are then reviewed both by the bank and the borrower's lawyers. Each negotiates over terms until the final draft is accepted. These transactions are always carried out under draconian deadlines usually imposed by the bank, because at a certain point the borrower will incur interest charges.

Most of the transactions between lawyers and bankers revolve around the creation and reiteration of documentation as I have stated above. 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 (Flood 2007a; Flood & Skordaki, 2009).

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.[24] 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 (2007) confirms in his research on mid-sized law firms. 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, borrowers, banks' credit committees, clients' lawyers, regulators, to name some—stabilizing expectations is difficult (cf. Till, 2009). The primary support structures are law firms that have the scope and expertise to undertake these transformations successfully through the construction of typified solutions (see Gessner, 2009).

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.

FORMING THE RELATIONSHIP

How then are these relationships managed? The first step is establishing the relationship between bank and law firm. This is often formed on the basis of network ties between bankers and lawyers. In addition ties based on networks, the law firm panel has come increasingly to the fore. Here the bank, via its inhouse counsel, says it wishes to appoint a set of law firms, after a "beauty parade", from which it will choose to do particular kinds of work.[25] 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 article. Many lawyers consider the number to be too large to be worthwhile.[26] 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 strong network ties that help particular panel members at the expense of others. As lawyers move around firms, they strive to maintain their links with banks especially if, for

example, they move from a Magic Circle firm to a smaller one. The bank has to consider carefully the extent to which it can rely on the lawyer in a new context.

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.[27] But even in the situations where law firms 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, interactions 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." This also includes the "bet the company" category where in important matters inhouse counsel feel impelled to use the top firms.

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.[28] The

second route entails an associate leaving private practice after several years and moving inhouse, which is the more normal route.[29]

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.

Bankers, however, become used to working with particular lawyers on deals and know what responses to expect from them. This degree of trust helps reduce the need for explanation and provides the basis for longer term relationships to flourish (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 if it dictates a different choice of lawyer. 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. Contests like these, when formal selection 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 which lawyer should be employed. Generally, though, the bankers start with an edge because they are characterized as profit centres, while inhouse lawyers—the managers of the panel—are considered the overhead costs.

But the situation is not purely one of 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, detrimentally or otherwise: "Does it want to make a certain concession in a document and be the first to lead the market in that direction?"

EXAMPLES AND PRACTICE

In this section I introduce some of the ethnographic data to tease out some of the dynamics of these 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 "best friends" 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 *Reigen* (2001).[30]

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 know the bank is not under the same pressure as the borrower. 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 (Y)

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 (V)

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.

This is an unexpected response by the bank's lawyers which creates considerable anxiety in the borrower.

From: Client (Borrower)

To: Bank's Lawyers

Cc: 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 (V) 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] (W)

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 (W) 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. When the banker finally enters the conversation, he makes it clear that the borrower must work to their schedule not his. There is an element of "cooling the mark out" by the banker as he attempts to assure the borrower that events are not as sticky as he has portrayed them (Goffman, 1952). Finally, the client, despite the banker's assurances, had to pay interest costs as the transaction was not completed the next day. 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). This is probably the most anxious time for the client, and, indeed, there was little attempt on the lawyers' parts to assuage the client's feelings of uncertainty during the closing moments of this transaction, which illustrates the ambiguity of the lawyers' roles.

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 to the club 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, they discuss how the fees for a transaction that is completed should be determined. It further 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: Bank

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,[31] 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?

It is not unusual for costs to rise during transactions because of unexpected occurrences, but since much of this type of work is done on "fixed" fees steep rises such as this one (£30,000+) become a cause for concern.

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 [i.e., lawyer and borrower]. 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.

There is real pressure here on the lawyers to "swallow" a significant portion of the overrun on their fees.

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.

The lawyer realises what must be done and will have to justify the reduction to his firm as well.

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 through the previous work done and the esteem in which the lawyer is held. The banker's mention of *QQQ*, the firm on the other side, has an interesting subtext in addition to its overt meaning. First, the bank is keen to see the work done quickly and efficiently without the appearance of overweening egos interfering in the process. The relationship between the lawyer's firm and *QQQ* shows that has been achieved and should be applauded. Second, since *QQQ* has shown itself to be a firm committed to seeing the task through, it can be relied upon to do future work. The lawyer is being notified that his firm's interests are both allied with *QQQ* and also in competition with them. The lawyer's firm is not irreplaceable. Although the banker says he is pleased with the productive relations between the two, his choice as to which to use in future work is dependent on the lawyer's resolution to the fees issue.

This is clinched when the client's views are brought in. Ultimately the lawyer knows that future work is probable if he can absorb the costs on this transaction. This has two effects at least. One, on the economic side, is the likelihood of future work which will keep the lawyer's team in play. And the second, on the political side, is that the client remains a client of the firm thereby

cementing the lawyer's reputation as a rainmaker and therefore someone of importance within the partnership.

This idea of collaborative 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, as mentioned earlier. In financial transactions, however, a number of parties, who have both coinciding and conflicting interests, sometimes within the same party, must effect coordination. Once the dyad is broken by becoming a triad or greater, the character of the relationship is irredeemably altered.[32] More complex groups allow factions to form, majorities and minorities, for and against. We have at minimum three sets of relationships interacting with each other:

(1) lawyer and client (borrower)

(2) bank and client (borrower)

(3) lawyer and bank.

In addition, there is another set of lawyers who represent the "other side", i.e., the bank, who, as we have observed, insinuate themselves into the relationships outlined. This is to view these groups at their simplest. Once they become multi-party, the complexity can grow exponentially.[33]

Within the kinds of business transactions outlined here, these varying groups of actors are the norm, which is where the typical lawyer-client relationship gets distorted and we detect different types of allegiances coming to the fore.[34]

In effect the corporate lawyer-client relationship has to be recast as multivalent, 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. This a far more subtle configuration than that adumbrated by contract: although it is co-extensive with contract it is network sensitive and seeking to maintain all the connections.

In the case of lawyers, the tensions are evident. Banks frequently mediate on behalf of corporate clients, especially those less experienced in the ways of finance, recommending courses of action and advising on which legal experts should be selected. In some situations, their recommendations to use particular law firms may override the explicit desires and normal relationships of the corporate client. The client is told that the usual lawyers are insufficiently experienced for the type of work and would drag the transaction thereby increasing the costs to the client. More 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 her usual law firm to the bank's preference, with the expectation that the client will be captured by the new firm and retained to generate new work for both law firm and bank. The bank's network is more important than that of the client's.

These behaviours place the relationship between corporate clients and lawyers 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. This appears to override all other relationships.

The same repercussions also play out with bankers. For example, in *Eat What You Kill* Regan (2004: 67-94) explores 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. 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.

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) illustrates 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).[35]

CONCLUSION

In his book, *Architecture Depends*, Jeremy Till (2009: 153) tells how he asked a number of his colleagues what the letters "RIBA" meant. Only some of them knew the letters stood for The Royal Institute of British Architects and not Architecture. Till even suggest the true meaning is actually "Remember I'm the Bloody Architect". While the first iteration speaks to the role of the professional as rational and expert, the second to the orientation towards the discipline and field, the last one evokes the loss of authority felt by many architects. Till summarizes these feelings thus:

> The profession of architecture and the practice of architecture are clearly different but often treated as if they are the same. The profession of architecture is internally defined and necessarily self-contained; the practice of architecture is a set of external networks, and necessarily dependent (2009: 161).

There are parallels with the law here. The legal profession is internally defined but the practice of law is created through sets of external networks, which makes the practice of law necessarily dependent. This occurs in all fields of legal practice. Criminal law depends on relationships with courts, their staff, prosecutors and the funders of legal aid. Bogira's (2006) close study of the criminal court in Chicago constantly emphasizes the contrary nature of practice. If all cases were to go to trial, the system would collapse under the effort; therefore the system's members must collaborate with each other in order to keep the system afloat.[36] Corporate lawyers create networks to facilitate their work. They seek to join corporate legal panels and they participate in industry organizations such as the International Swaps and Derivatives Association. They thrive in contingency so they can subtly manage their relationships without appearing manifestly to favour one over the other but are nonetheless able to signal their allegiance.

The original conception of uncertainty management revolved around knowledge questions—access and limits. The uncertainties I have spoken of are less to do with knowledge limits but everything to do with relationships: securing them, maintaining them, and managing their contradictions. What I have not commented on directly is the way the roles of lawyers and bankers have irrevocably shifted. My description of the networks of banks and lawyers in the 19th century portrayed bankers and lawyers as co-equals delivering the capital and techniques that made capitalism thrive. By the late 20th and early 21st centuries the relationship has shifted to one where the financial institutions, the banks, are the leaders and the lawyers are, in effect, the under-labourers. This is

not to deny the authority of lawyers and their firms, but the balance of power is with the financiers. For an illustration of this we only have to see how law firms are laying off many of their lawyers as banks withdraw their business. This is dependency.

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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: ?bps 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: 150bps pa

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

Governing Law: English.

[1] Corporate lawyers are often found on one or other side of a set of relationships: lawyers can be "lenders'", "borrowers'" or "creditors'" lawyers; sometimes they play both sides.
[2] There could be an argument that Freshfields was conflicted out of this aspect of its relationship with Brascan because of prior work done for the banks. However, the one check that most major law firms carry out in respect of new work and clients is whether or not they have a conflict of interest with prior and current clients. Assuming that Freshfields checked, they either decided there was no conflict in which case they could accept Brascan as a client. And they presumably informed Brascan that the firm could work for them. Or they sought disclaimers from their former/current banking clients to allow them to take on Brascan. Or they imposed limits on the range of work that could be undertaken for Brascan. In light of the story, the latter is unlikely as is the seeking of exemptions. See Griffiths-Baker (2002).
[3] One form of explanation for the law firms' behaviour is their avoidance of conflicts of interest as Griffiths-Baker (2002) has analyzed. But law firms and banks are notorious for their relaxed attitude towards conflicts, recognizing and dismissing them as the situation demands. For example, in a discussion at Tulane Law School's Corporate Law Institute (Dealbook, 2007), "Robert Kindler, vice chairman of investment banking at Morgan Stanley, referring to the universe of big banks such as his own...said: 'We are totally conflicted — get used to it.'" See also Shapiro (2002).
[4] RBS has begun a review of its panel with criteria focusing on fixed fee pricing rather than hourly rates (Legal Week, 2009a). Barclays has gone further with its litigation panel which is being asked to be "creative with suggested billing methods and other value-added services, with Barclays keen to move away from hourly rates". The bank is also demanding senior, partner-level secondments over the normal associate ones (Legal Week, 2009b).
[5] The latest versions of the ABA Model Rules of Professional Conduct adhere to the traditional conception of lawyer-client relationships even when they refer to law firms. See e.g. Wald (2007).
[6] I am specifically excluding actors such as judges or police officers or others such as doctors and probation officers. Nor am I looking at others like insurance companies which tend to have close relationships with certain law firms.
[7] On the hemispheres theory of the legal profession see Heinz and Laumann (1982: 322). I realise that theories of the legal profession have evolved since the original publication of the Chicago study and that the profession is now more fragmented (Heinz *et al* 2005), but for analytical purposes the hemisphere model has value here. I am also excluding the huge literature on the ethical aspects of lawyer-client relationships since this is not the pertinent concern of this article.
[8] The credit crisis (Tett 2009) precipitated by the subprime mortgage debacle in the US has begun to revise some law firms' perceptions of whether it is appropriate to act against banks, not always to their advantage. Linklaters, a Magic Circle City law firm, acts for many banks including both J P Morgan and Barclays. Before the September 2008 bank crisis Bear Stearns was an independent investment house. Following Bear Stearns implosion, it was sold to J P Morgan. Linklaters was caught between Barclays and J P Morgan. It could not drop Barclays as a client with the result that J P Morgan dismissed Linklaters as one of its preferred suppliers (Thrope 2008).
[9] Sciulli (2008: 50) argues that "all professions ultimately are heteronomous, not autonomous."
[10] The Bank of England appointed Freshfields Bruckhaus Deringer former managing partner Graham Nicholson as its new chief legal adviser: he is also adviser to the governor of the Bank of England, Mervyn King. Nicholson. <http://www.bankofengland.co.uk/about/people/biographies/nicholson.htm>.
[11] Other modes of uncertainty reduction include creative lawyering (McBarnet, 1994) and transaction engineering (Gilson, 1984).
[12] Interviews (semi-structured) with participants ranged in time from about 30 minutes to over 3 hours. Although attempts were made to record interviews, in a number of cases this was not feasible. It should be added that these interviews covered a range of topics of which the subject of this article was one.
[13] I have been given over time various documents including agreements, drafts, and email correspondence. These were usually prefaced with the remark, "This is how we do this...."
[14] 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).
[15] 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>.

[16] London, as a financial centre, has benefited from a number of developments. 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 & 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).

[17] This picture is changing as hedge funds and private equity firms have become more prominent in financing regimes (see Tett, 2006; Tett & 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; and Thomson Financial IFR Awards 2006, http://www.thomson.com/content/pr/tf/tf_inv_banks/2006_12_18_IFR_2006_Awards.

[18] 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/.

[19] Interestingly in Table 1 there are two law firms with less traditional connections to the big investment banks, 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 original qualities to overcome their early status of outsider and become embedded in the investment banks' networks (Flood, 2007b).

[20] Many corporate lawyers undertake pro bono work which puts them among clients who are outside their normal purview.

[21] 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.

[22] There is increasing mobility for bankers and lawyers who cross boundaries. 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. Sir Victor Blank, retired chairman of Lloyds Bank, started as lawyer with Clifford Turner before joining Charterhouse bank (http://en.wikipedia.org/wiki/Sir_Victor_Blank). 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.

[23] For examples of transactions see Flood (2007a) and Flood & Sosa (2008).

[24] See Appendix 1 for an example of a term sheet. For an innovative means of creating term sheets for venture financing, see Wilson Sonsini's term sheet generator at <http://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/termsheet.htm>.

[25] Sainsbury's is using the "Dragons' Den" contest format (http://www.bbc.co.uk/dragonsden) to challenge law firms against each other in order to gain a place on its panel (McLeod-Roberts 2009: 1).

[26] It is, however, a useful device for potentially conflicting out law firms. One example used in professional responsibility courses and materials books in US law schools is that of a divorce client visiting a number of divorce lawyers in order to prevent the spouse from retaining any of them. Shapiro (2002) also shows how repeat player clients effectively manipulate the conflict of interest rules by distributing work around a number of law firms.

[27] 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.
[28] 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.
[29] 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.
[30] 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>.
[31] "Bibling" refers to producing copies of the full and complete documents for all participants.
[32] It may be that with the growth in managerialism in government and elsewhere, there are more intervening actors into the traditional lawyer-client relationship than hitherto recognized. For example, the Legal Services Commission and insurance companies are two such actors whose roles significantly affect the relationship (cf. Shapiro, 2002).
[33] See, e.g., "Case Studies A. Selling a London Office Building" in Flood & Sosa (2008: 513) for an example of party complexity.
[34] For example, Sida Liu's (2006) ethnography of Chinese lawyers and clients demonstrates how clients connected to state owned enterprises have much stronger relationships with the lawyers than do private enterprise clients because of their connections with the state.
[35] With the scale of banks and law firms today conflicts of interest are an ever present, 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).
[36] See Abel's (2006) story and Connelly's tale of the criminal lawyer (2005).