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INSTITUTIONAL BRIDGING: HOW LARGE LAW FIRMS ENGAGE IN GLOBALIZATION

JOHN FLOOD*

Abstract: This Article introduces the “Born Global” concept into the discussion of law firms and lawyers. Born Global firms are companies that globalize at an accelerated rate. This Article illustrates that English and American law firms are the precursors to Born Global companies and highlights how the common law facilitated this process. It also demonstrates, through modern case studies, how lawyers and the common law continue to have a globalizing effect in the business world. Last, the Article argues that the disparity between U.K. and U.S. law firms created by the U.K. Legal Services Act of 2007 may create an opportunity for U.K. law firms to truly break out ahead of their U.S. counterparts.

INTRODUCTION

The aim of this Article is to show how, whether unwittingly or covertly, large law firms have always had some form of globalization in their organizational genes. It argues that law firms are predominantly responsive institutions rather than proactive institutions, as they react to clients’ demands instead of supplying their own initiatives to clients. Within the theme of globalization, there is a set of functional divisions in history that represent distinct periods of economic and social activity, although these are subject to critique.¹ These periods are exemplified by the Industrial Revolution of the nineteenth century, the age of war and decline of empire in the early twentieth century, and the growth of internationalization and globalization in the late twentieth and early twenty-first centuries.²

This Article introduces a new concept into the legal profession analysis—the concept of the “Born Global” or International New Ven-

* © 2013, John Flood, Leverhulme Research Fellow, Professor of Law and Sociology, University of Westminster. I am grateful to the organizers of the joint *Boston College Law Review/International & Comparative Law Review* Symposium, *Filling Power Vacuums in the New Global Legal Order*, and to the participants for their comments and stimulation.

¹ See generally DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999) (discussing globalization in various contexts and time periods); Dominique Martin et al., *The Sociology of Globalization: Theoretical and Methodological Reflections*, 21 *INT’L Soc.* 499 (2006) (critiquing the traditional definition and conception of globalization).

² This Article focuses on the early period (the nineteenth century) and the late periods (the late twentieth and early twenty-first centuries).

tures. The Born Global concept first emerged in management and business literature and is used to characterize companies that globalize at an accelerated rate as a result of their built-in global dimension. By contrast, traditional businesses acquire global attributes as they develop and mature by steadily acquiring resources over time. According to the literature on Born Globals, they are a new and original type of company that is a creature of globalization. This Article uses this model to show that law firms were the precursors to the Born Global concept as it is understood today.

Part I of this Article reprises the literature on law firms and their global ambitions, focusing on the promotion of New York and English law as the templates for transnational work.³ Next, Part II introduces the concept of Born Globals as an ideal type, and highlights how law firms and other global professional service firms have embodied elements of the Born Global structure from their early stages.⁴ Part III then presents case studies of types of work done by law firms in the global arena, based on case studies that I collected in my earlier work.⁵ Last, Part IV argues that regulatory changes based on competition policy within the global arena are having positive effects on the work of global law firms; yet, they are also causing dissension within the legal community as these changes upset many traditional community standards.⁶

I. THE RISE OF GLOBAL BIG LAW

Section A examines the rise of global big law, identifies some of the main characteristics, and compares law firms in the United States and the United Kingdom.⁷ Section B then discusses how to moderate the notion of global law firms expanding globally while simultaneously maintaining their local focus.⁸ Last, Section C considers how the common law has enabled the success of capitalism and legal practitioners in global law firms.⁹

³ See *infra* notes 7–84 and accompanying text.

⁴ See *infra* notes 85–135 and accompanying text.

⁵ See *infra* notes 136–274 and accompanying text.

⁶ See *infra* notes 275–289 and accompanying text.

⁷ See *infra* notes 10–47 and accompanying text.

⁸ See *infra* notes 48–53 and accompanying text.

⁹ See *infra* notes 54–84 and accompanying text.

A. *The Rise of Global Law Firms: The United States and the United Kingdom*

There are relatively few large, transnational law firms within the general population of law firms.¹⁰ They are, however, big: the largest of them have over 3000 lawyers located in offices throughout the world.¹¹ Nevertheless, they are small in comparison to the major accounting firms. For example, PricewaterhouseCoopers LLP has more than 180,500 professionals working in 160 countries.¹² In contrast, DLA Piper LLP has 4200 lawyers in seventy-seven offices in twenty-nine countries;¹³ Clifford Chance has 3400 lawyers in thirty-five offices in twenty-five countries;¹⁴ and Baker & McKenzie has over 4000 attorneys in seventy-two offices in forty-five countries.¹⁵

Despite the limited number of large, transnational law firms, the enormous growth in law firms has led to the intensification of specialization within law firms and between offices of the same firm.¹⁶ Firms have become a set of networks, with each department or section inside a firm becoming a firm within a firm.¹⁷ Thus, in addition to the competition between firms for clients and work, specialization within firms has led to intra-firm competition.¹⁸ Each of the departments within the firm is in constant battle with the others for resources and remuneration.¹⁹

¹⁰ *Compare Global Annual Review 2012: Facts and Figures*, PRICEWATERHOUSECOOPERS LLP, <http://www.pwc.com/gx/en/annual-review/facts-figures.jhtml> (select "People View" hyperlink) (last visited Apr. 19, 2013) (indicating that there are over 180,500 professionals working at the accounting firm, PricewaterhouseCoopers LLP), and *PwC Member Firm Locations*, PRICEWATERHOUSECOOPERS LLP, <http://www.pwc.com/gx/en/office-locations/index.jhtml> (last visited Apr. 19, 2013) (indicating all of PricewaterhouseCoopers' firm locations), with *About Us*, CLIFFORD CHANCE, http://www.cliffordchance.com/about_us.html (last visited Apr. 19, 2013) (noting that there are 3400 lawyers at the firm), and DLA PIPER LLP, <http://www.dlapiper.com> (last visited Apr. 19, 2013) (indicating that there are 4200 lawyers at the firm).

¹¹ *E.g.*, *About Us*, *supra* note 10; DLA PIPER LLP, *supra* note 10.

¹² *Global Annual Review 2012: Facts and Figures*, *supra* note 10; *PwC Member Firm Locations*, *supra* note 10.

¹³ DLA PIPER LLP, *supra* note 10.

¹⁴ *About Us*, *supra* note 10.

¹⁵ *Firm Facts*, BAKER & MCKENZIE, <http://www.bakermckenzie.com/firmfacts> (last updated Oct. 2012).

¹⁶ See John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 *IND. J. GLOBAL LEGAL STUD.* 35, 50 (2007).

¹⁷ See GERARD HANLON, *LAWYERS, THE STATE AND THE MARKET: PROFESSIONALISM REVISITED* 129–30 (1999); Flood, *supra* note 16, at 50.

¹⁸ Flood, *supra* note 16, at 50.

¹⁹ *Id.*

This is exemplified by one scholar's analysis of the firm-within-a-firm structures that operate to prevent fission.²⁰ The general move to "eat what you kill" remuneration, however, has militated against some of these preventative measures and served to intensify competition between lawyers, creating a far more fluid market for lawyers between firms.²¹ The *American Lawyer Global 100* shows that five of the top ten listed firms are based in the United Kingdom; the others are headquartered in the United States.²² Although the U.K. firms had been in the minority, they are now on par with U.S. firms.²³ All of the top firms gross over \$1 billion, and the top two gross over \$2 billion each.²⁴

Because the U.S. legal profession does not have artificial divisions of labor like the U.K. profession, U.S. lawyers are expected to offer a full range of services, which inevitably includes litigation expertise. A firm like Cravath, Swaine & Moore ("Cravath"), for example, handles full-scale capital markets work in tandem with defending the *New York Times* in court in high-profile First Amendment cases.²⁵ U.K. law firms, on the other hand, typically outsource the courtroom advocacy components of their litigation work to the Bar,²⁶ and are only beginning to acquire the capacity to take cases into court without using barristers.²⁷ Furthermore, when U.K. law firms have established offices in cities like New York, their inexperience in litigation and their difficulty in attracting good U.S. litigators have hindered their success in the U.S. market.

The distinction between the two legal cultures—the American and British—is important because of the way that business is now conducting its relationships. Engaging in disputes no longer necessarily means

²⁰ See EMMANUEL LAZEGA, *THE COLLEGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION AMONG PEERS IN A CORPORATE LAW PARTNERSHIP* 182–200 (2001).

²¹ Flood, *supra* note 16, at 50.

²² See *The 2011 Global 100: Most Revenue*, AM. LAW., <http://www.americanlawyer.com/ArticleTAL.jsp?id=1202514393371&slreturn=20130020111305> (last visited Apr. 19, 2013).

²³ Flood, *supra* note 16, at 50; see *The 2011 Global 100: Most Revenue*, *supra* note 22.

²⁴ *The 2011 Global 100: Most Revenue*, *supra* note 22 (indicating that Baker & McKenzie and Skadden, Arps, Slate, Meagher & Flom LLP were the top two grossing law firms in 2011).

²⁵ Flood, *supra* note 16, at 51.

²⁶ See John Flood, *Barristers*, in 1 *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 130, 131 (Herbert M. Kritzer ed., 2002) (comparing the work of English barristers, who argue cases before the court, and solicitors, who directly interact with clients); see also Flood, *supra* note 16, at 50–51 (stating that English law firms outsource the litigation components of their practice).

²⁷ Andy Boon & John Flood, *Trials of Strength: The Reconfiguration of Litigation as a Contested Terrain*, 33 L. & SOC'Y REV. 595, 595–96 (1999); see also Flood, *supra* note 16, at 50–51 (noting that England has only begun to permit solicitors to go into court without a barrister). The movement toward permitting lawyers in England to go to court without barristers remains an exceptional change. See Flood, *supra* note 16, at 50–51.

either: (1) ignoring the contract and thrashing it executive-to-executive without the intervention of lawyers, or (2) going to court and breaking the business relationship.²⁸ Rather, modern business is more likely to adopt the full range of techniques, legal and extra-legal, including litigation, arbitration, alternative dispute resolution, and negotiation, without anyone sounding the death knell to the business relationship.²⁹ In fact, clients expect their law firm to provide them with a full menu of legal services. U.S. law firms are structured to provide this range, whereas U.K. firms are lacking in key areas.

Although it may seem that litigation expertise is only of use within domestic jurisdictions and therefore plays a limited role for the global lawyer, the converse is actually true. Litigation expertise is required in arbitration and in other non-state forms of dispute settlement.³⁰ One pair of scholars has indicated that American law firms have succeeded in breaking the stranglehold of the old European notables in international arbitration by offering a formalized, U.S.-style approach—technocratic, as opposed to aristocratic—that is less dependent on personality and culture and more on rules.³¹

U.S. law firms, at their foundation, are supported by a large domestic law market.³² For them, becoming global is dependent on the sustained development of their original markets.³³ For example, successful global U.S. law firms, like Cravath and Wachtell, Lipton, Rosen & Katz (“Wachtell Lipton”), primarily concentrate on their home markets and use the networks of overseas law firms to build their international practices.³⁴

By contrast, U.K. law firms have never possessed the luxury of a big domestic market, which has required them to seek work outside the United Kingdom.³⁵ Imperialism provided conduits into profitable re-

²⁸ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60–62 (1963).

²⁹ Flood, *supra* note 16, at 52.

³⁰ *Id.*

³¹ *Id.* (citing YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 302 (1996)).

³² See Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093, 1099–1100 (2000).

³³ Flood, *supra* note 16, at 52–53.

³⁴ *Id.* at 53.

³⁵ *Id.*; see also LAURIE DENNETT, *SLAUGHTER AND MAY: A CENTURY IN THE CITY* 23 (1989) (noting that John Morris, one of the founders of the law firm Ashurst Morris Crisp, frequently ventured across the Atlantic for his work in the United States).

gions such as the Middle East and Asia.³⁶ As the globe has reconfigured itself, major regional associations, such as the European Union (EU), the North American Free Trade Agreement, and the Association of South Eastern Asian Nations, were established.³⁷ These big three regional associations represent the bulk of inward and outward foreign direct investment flows in the world.³⁸ Further, these regions have established their own ways of handling disputes.³⁹ Even organizations such as the World Trade Organization are developing their own jurisprudence through dispute panels.⁴⁰

In addition to their widespread domestic market, U.S. law firms also have the advantage of long ties with investment bank clients.⁴¹ The major investment banks that engage in capital market deals are headquartered in the United States, such as Goldman Sachs, Morgan Stanley, and Bank of America Merrill Lynch.⁴² This connection between law firms and the investment banks goes back more than one hundred years.⁴³ And strangely, despite the lawyer-client relationship undergoing the change from one-stop shop to transactional relations in recent years, some of these particular ties have endured.⁴⁴

Although some law firms have been able to rely on such traditional ties, the changes in the business landscape brought about by mergers and acquisitions and restructurings have made lawyer-client relations more tentative.⁴⁵ In-house counsel are stricter about legal budgets, of-

³⁶ Flood, *supra* note 16, at 53.

³⁷ *Id.*

³⁸ *Id.* (citing HELD ET AL., *supra* note 1, at 250–51).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See John Flood, *Capital Markets: Those Who Can and Cannot Do the Purest Global Law Markets*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 249, 254–55 (Richard P. Appelbaum et al. eds., 2001).

⁴² *Bank of America Corporation Company Information*, HOOVERS, <http://www.hoovers.com/> (select “Company Information” hyperlink; log-in required) (last visited Apr. 19, 2013) (indicating that the company is headquartered in North Carolina); *Contact Us*, MORGAN STANLEY, http://www.morganstanley.com/contact_us.html (last visited Apr. 19, 2013) (stating that worldwide headquarters is in New York City); *Who We Are: At a Glance*, GOLDMAN SACHS, <http://www.goldmansachs.com/who-we-are/at-a-glance/index.html> (last visited Apr. 19, 2013) (stating that the firm’s headquarters is in New York). Barclays Capital’s Americas headquarters is also located in New York City. *New York—Americas Headquarters*, BARCLAYS CAPITAL, <http://www.barclayswealth.com/contact-us/americas/new-york.htm#> (last visited Apr. 19, 2013).

⁴³ Flood, *supra* note 16, at 53; see also Flood, *supra* note 41, at 254 (noting that the relationship between Morgan Stanley and the U.S.-based law firm Davis Polk & Wardwell extends over 110 years).

⁴⁴ Flood, *supra* note 16, at 53.

⁴⁵ *Id.*

ten asking law firms to compete to obtain work.⁴⁶ Because of this, law firms have had to market themselves and enlist the aid of the state in opening legal markets for them.⁴⁷

B. *Moderating Acting Globally While Thinking Locally*

The idea of acting globally while thinking locally is permissible so long as a firm is not constrained by local mores. The crucial question is: to what extent are international law firms merely exporting English or New York State law instead of engaging in the practice of local law? An earlier U.K. Lord Chancellor said:

Our common law of contract is now a world-wide commodity. It has become so because it is a system that people like. In ever more complex, sophisticated and inter-related markets, English commercial law provides predictability of outcome, legal certainty and fairness. It is clear and is built upon well-founded principles, such as the ability to require exact performance and the absence of any general duty of good faith.⁴⁸

Thus, the large law firm's main alliance is with the Anglo-American nexus, which is composed of neo-liberal democracy and respect for property rights, among other things.⁴⁹ The firm, therefore, has to incorporate local norms into the overarching pattern devised in U.K. and U.S. law.⁵⁰

Devising solutions for dovetailing sometimes incommensurable systems has led to the globalization of legal education and training.

⁴⁶ *Id.*

⁴⁷ *Id.* For example, the retired Lord Chancellor Kenneth Clarke highlighted this in a speech to CityUK, an organization dedicated to promoting competitiveness in the U.K. financial services industry, when he was lord chancellor and minister of justice. See Rt. Honorable Kenneth Clarke MP, Lord Chancellor & Sec'y of State for Justice, Address at the CityUK Future Litigation Event (Sept. 14, 2011), *transcript available at* <http://www.justice.gov.uk/news/press-releases/moj/pressrelease140911a>. Clarke said:

The first is promoting industry. I place enormous value on UK legal services, which are world-class, but I think we can do more to ensure they thrive. I am almost as much of an enthusiast for English law as I am for English cricket. That's why I am keen to go in to bat with UKTI, the CityUK, the Law Society, the Bar Council and others, on your behalf.

Id.

⁴⁸ Lord Falconer of Thoroton, Constitutional Affairs Sec'y and Lord Chancellor, Keynote Address at the KPMG Annual Law Lecture: International Opportunities, London (Jan. 26, 2006), *transcript available at* <http://www.dca.gov.uk/speeches/2006/sp060126.htm>.

⁴⁹ Flood, *supra* note 16, at 54.

⁵⁰ *Id.*

Young lawyers from jurisdictions outside the Anglo-American legal tradition now find it essential to obtain an LL.M. degree at a major U.S. or U.K. law school; otherwise, they will not be conversant in global legal techniques.⁵¹ This view is reinforced by intergovernmental organizations, such as the World Bank, which usually insist that their lawyers possess a master's degree.⁵² Yet, as one big law firm partner said, "It doesn't matter where you got your legal education as basically we do the same thing over and over. Once you've been trained in the firm you have your skills."⁵³

C. *Common Law: The Facilitator of Law Firm Globalization*

The common law has had an integral role in the globalization of U.S. and U.K. law firms. Law firms desiring to become global needed creative lawyering to facilitate their firms' progress and to deal with the regulatory obstacles that were put in their way.⁵⁴ The type of law practice that facilitated business had to be expert, had to be well-connected with the regulatory authorities, and had to know how to invoke disputing practices as well as negotiating skills.⁵⁵

The sociologist Max Weber argued that the best form of lawmaking for modern capitalism is formally rational—internally coherent without having to appeal to any phenomena or noumena external to the system.⁵⁶ According to Weber, the formal rationality was idealized in the civilian system of lawmaking, yet the advance of capitalism did not occur in countries that subscribed to civil codes.⁵⁷

Instead, real progress was found within systems of substantive rationality—those that, although coherent, also appealed to external forces such as policy or custom.⁵⁸ The openness of these substantively rational systems provided a malleability unfound in the civilian sys-

⁵¹ *Id.* See generally Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or "I Like to Be in America,"* 80 *FORDHAM L. REV.* 2383 (2012) (summarizing empirical evidence on the careers of international law graduates who earned an LL.M. degree in the United States, and using the study to suggest the implications for the way the United States understands credentials and the global legal profession).

⁵² Flood, *supra* note 16, at 54.

⁵³ Interview with a Corporate Lawyer from Clifford Chance, in London, Eng. (Apr. 2005). The interview was premised on confidentiality.

⁵⁴ Flood, *supra* note 16, at 47.

⁵⁵ *Id.*

⁵⁶ MAX WEBER, 2 *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 641–43 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1922).

⁵⁷ Flood, *supra* note 16, at 47; see ANTHONY T. KRONMAN, *MAX WEBER* 118–46 (1983).

⁵⁸ Flood, *supra* note 16, at 47.

tems.⁵⁹ Because the financial markets were pushing at great speeds, lawmaking needed to respond with similar alacrity.⁶⁰

This substantively rational concept of lawmaking embodied a particular style of lawyering and reproduction of lawyers.⁶¹ The civilian codes attracted the academic lawyers who constantly sought to polish and refine their internally coherent systems.⁶² This push toward consistency in the civil codes was made at the expense of rapid response to situations as they occurred in real time.⁶³ Therefore, it is not surprising that academics took the principal role in producing the future generations of lawyers, imbuing in them a reverence for the sanctity of the code above all else.⁶⁴

Weber clearly observed the paramountcy of the English bar and the English common law in responding to commercial exigencies.⁶⁵ Unlike the civilian codes, the common law system was piecemeal and ad hoc, with no desire to be polished to some pristine state.⁶⁶ It was content to be rough, as were its practitioners who, although they did not entirely scorn the academy, frequently had degrees in subjects other than law.⁶⁷ The common law lawyers were trained through apprenticeship and by learning on the job.⁶⁸ Law was a craft skill, not a theoretical pursuit for philosophers.⁶⁹ As Weber put it:

Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craftlike specialization of the lawyers, but legal practice did not aim at all at a rational system but rather at a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations.⁷⁰

Thus, Anglo-American jurisprudence was unfettered and not beholden to law as an idealistic form.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Flood, *supra* note 16, at 47.

⁶⁵ 2 WEBER, *supra* note 56, at 787; Flood, *supra* note 16, at 48.

⁶⁶ Flood, *supra* note 16, at 48.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 2 WEBER, *supra* note 56, at 787.

The advantage of common law was that freedom of contract permitted the flexibility to construct contracts as freestanding documents not tied to the ambitions of a code. Typical contracts in jurisdictions following the civil tradition are only a few pages in length, whereas the English or American contracts typically consist of hundreds or thousands of pages.⁷¹ The English and American contracts leave nothing to external confirmation: if it is not in the contract, it does not exist. Thus, contracts create a system of private ordering that symbolically invokes the state but, in regards to actual conduct, obscures it.⁷² Under the common law, contract means the privatization of law, which in turn represents the comparative advantage of Anglo-American law and its practitioners. It is the reason why Anglo-American law has been so successful in the international arena.

Because contract allows for virtually any normative system to constitute its base, choice of law provisions are used for instrumental purposes rather than concerns of jurisdictional fidelity.⁷³ Further, if financial services are one of the key engines of globalization, then there are only a few jurisdictions with appropriate rules and norms.⁷⁴ For all practical purposes, there are only two appropriate jurisdictions: English law and New York State law.⁷⁵ These sources of law are represented by the city principalities of London and New York, and these cities are emblematic of their states' legal, financial, and cultural power and authority.⁷⁶ At some point, most transnational agreements are transcribed into one or both of these systems.⁷⁷ Thus, this provides New York and London law firms with distinct advantages over firms from other locales.⁷⁸

Moreover, New York and London law firms will actively market their jurisdictions to maintain their competitive advantage.⁷⁹ For example, the City of London Law Society, responding to the British gov-

⁷¹ Flood, *supra* note 16, at 48.

⁷² *Id.* See generally Mark C. Suchman, *The Contract as Social Artifact*, 37 L. & SOC'Y REV. 91 (2003) (arguing that contracts can be viewed as social artifacts that evidence both the private ordering of the parties that created them and the culture of those parties).

⁷³ Flood, *supra* note 16, at 48.

⁷⁴ *Id.*; see Flood, *supra* note 41, at 252; *supra* notes 39–42 and accompanying text.

⁷⁵ E.g., John Flood, *Capital Markets, Globalisation and Global Elites*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 114, 115 (Michael Likosky ed., 2002); Flood, *supra* note 41, at 252; Flood, *supra* note 16, at 48.

⁷⁶ SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* 4 (2d ed. 2001); Flood, *supra* note 16, at 48–49.

⁷⁷ Flood, *supra* note 16, at 49.

⁷⁸ *Id.*

⁷⁹ *Id.*

ernment's Green Paper on the work and organization of the legal profession promulgated in 1989, wrote: "The advantages of English law as a 'product' enable solicitors to contribute to this country's balance of payments some £25,000,000 per annum in invisible exports and constitute an important part of the attraction of the City of London as a world financial centre."⁸⁰

In addition to its internal benefits and strengths, there are other reasons for the dominance of Anglo-American law. One such reason is the concept of path dependence.⁸¹ Path dependence is the notion that current and future states, actions, or decisions depend upon the past.⁸² Under the theory of path dependence, where an entity already dominates the market, there are particular disincentives for others to enter the market because there are substantial transaction costs involved in the attempt.⁸³ The examples of the QWERTY typewriter keyboard and VHS videotapes confirm how sets of early and continuing adopters can create historical lock-ins that are difficult to change.⁸⁴ Thus, the flexibility of Anglo-American law in responding to the needs of emerging capital markets, Anglo-American law's strength in private ordering through contract, and the likelihood that Anglo-American law's market dominance has precluded market entry by other market competitors have all enabled law firms to act locally but operate globally.

II. THE BORN GLOBAL CONCEPT

The idea of "Born Globals" or "International New Ventures" derives from research undertaken on new companies that have developed in communications, software, bioengineering, and even clothing retail (e.g., Zara).⁸⁵ Born Globals tend to be small and adaptable to different environments.⁸⁶ The speed with which they advance in international

⁸⁰ See Flood, *supra* note 16, at 49 (citing CITY OF LONDON LAW SOC'Y, THE WORK AND ORGANISATION OF THE LEGAL PROFESSION: A RESPONSE TO THE GOVERNMENT'S GREEN PAPER 5 (1989)).

⁸¹ Flood, *supra* note 16, at 49.

⁸² See Scott E. Page, Essay, *Path Dependence*, 1 Q.J. POL. SCI. 87, 88 (2006).

⁸³ Flood, *supra* note 16, at 49.

⁸⁴ W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116, 116 (1989); Flood, *supra* note 16, at 49.

⁸⁵ E.g., S. TAMER CAVUSGIL & GARY KNIGHT, BORN GLOBAL FIRMS: A NEW INTERNATIONAL ENTERPRISE 11 (2009) (noting that one of the distinctive features of Born Globals is that they are found across most industries); Michael W. Rennie, *Born Global*, MCKINSEY Q., no. 4, 1993, at 45, 49 (showing the percentage of Born Global firms across the various industries in Australia). Although they are spread across industries, Born Global firms tend to be heavily concentrated in high-technology industries. CAVUSGIL & KNIGHT, *supra*, at 11.

⁸⁶ See CAVUSGIL & KNIGHT, *supra* note 85, at 11.

markets distinguishes them from traditional internationalization strategies of multinational enterprises.⁸⁷ This is not to say that they may not become large businesses; the technology market is replete with examples of such companies—Blackberry and Apple are two. Further, Born Globals have products or services with global market potential.⁸⁸ The products and services that Born Globals produce have unique technologies based on specific knowledge bases and a competitive advantage developed in the domestic market.⁸⁹

One group of scholars has attempted to delineate the characteristics and strategies used by Born Globals.⁹⁰ Those scholars have stated that the key attributes of Born Globals are: (1) their speed of action; (2) their quick response times; and (3) their ability to learn.⁹¹ They have further identified three main phases through which successful Born Globals travel: (1) introductory;⁹² (2) growth and resource accumulation;⁹³ and (3) break-out and required strategies.⁹⁴

A. *Born Global Phase One: Introductory*

In the introductory phase, Born Globals have inadequate organizational structures and limited resources.⁹⁵ Their capital consists of the talents and skills of their founders and key individuals.⁹⁶ The main channel for growth is through networking and attracting financing from venture capitalists.⁹⁷ The need for venture capitalist financing, however, functions uniquely in the law firm context.⁹⁸ U.S. law firms are prohibited from having non-lawyer ownership, whereas U.K. law firms are not barred from outside capital under the Legal Services Act of 2007.⁹⁹

⁸⁷ Rennie, *supra* note 85, at 45–46 (comparing traditional firms with Born Global firms).

⁸⁸ Mika Gabrielsson et al., *Born Globals: Propositions to Help Advance the Theory*, 17 INT'L BUS. REV. 385, 388 (2008).

⁸⁹ *Id.*

⁹⁰ *Id.* at 387–88.

⁹¹ *See id.* at 391–92, 397, 399.

⁹² *Id.* at 391–95; *see infra* notes 95–109 and accompanying text.

⁹³ Gabrielsson et al., *supra* note 88, at 396; *see infra* notes 110–117 and accompanying text.

⁹⁴ Gabrielsson et al., *supra* note 88, at 397; *see infra* notes 118–135 and accompanying text. In utilizing the Born Global as a model in the law firm and professional services context, we must be careful as not all parts of the model apply but significant parts do.

⁹⁵ Gabrielsson et al., *supra* note 88, at 391.

⁹⁶ *Id.*

⁹⁷ *Id.* at 391, 395.

⁹⁸ *See infra* notes 277–289 and accompanying text.

⁹⁹ *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(d); *infra* 275–289 and accompanying text (discussing the U.K. regulatory scheme as it applies to law firms). For U.S. law firms, Rule 5.4(d) of the ABA Model Rules of Professional Conduct prohibits non-lawyer ownership in-

At the introductory phase, it is imperative that Born Globals have strong internal resources with respect to talent but also solid links with clients.¹⁰⁰ There are many examples of law firms with charismatic and powerful leaders who created significant firms based on their skills and innate resources. Paul Cravath of Cravath¹⁰¹ and Russell Baker of Baker & McKenzie¹⁰² are key examples, as are modern counterparts, Joe Flom of Skadden, Arps, Slate, Meagher, & Flom LLP¹⁰³ and Marty Lipton of Wachtell Lipton.¹⁰⁴ In the United Kingdom, the preeminent examples are John Morris of Ashurst Morris Crisp,¹⁰⁵ William Captel Slaughter and William May of Slaughter and May,¹⁰⁶ George Allen and Thomas Overy of Allen & Overy LLP,¹⁰⁷ and Sir Nigel Knowles of DLA Piper.¹⁰⁸ Each of these individuals devised his own firm, developed strategies for

terests in a firm that provides legal services. MODEL RULES OF PROF'L CONDUCT R. 5.4(d). If a non-lawyer possesses an ownership interest, the law firm is in violation of the ABA's ethical rules. *See id.* Although not controlling unless adopted by a given jurisdiction, all fifty states have adopted a version of Model Rule 5.4(d). *See Horaist v. Doctor's Hosp. of Opelousas*, 25 F.3d 261, 266 (5th Cir. 2001) (stating that the Supreme Court of Louisiana's rules of professional conduct are identical to the ABA's Model Rules). *See generally Adoption of the ABA Model Rules of Professional Conduct and Comments*, AM. BAR ASS'N (May 23, 2011), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf> (cataloging which U.S. states have adopted the ABA Model Rules).

¹⁰⁰ *See* Gabriellsson et al., *supra* note 88, at 391.

¹⁰¹ *See generally* 1 & 2 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1947* (2006) (describing the origins and founding of Cravath, Swaine & Moore LLP).

¹⁰² *See generally* JON R. BAUMAN, *PIONEERING A GLOBAL VISION: THE STORY OF BAKER & MCKENZIE* (1999) (summarizing the origins and founding of Baker & McKenzie).

¹⁰³ *See generally* LINCOLN CAPLAN, *SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE* (1993) (examining the origins and founding of Skadden, Arps, Slate, Meagher, & Flom LLP).

¹⁰⁴ *See* William H. Starbuck, *Keeping a Butterfly and an Elephant in a House of Cards: The Elements of Exceptional Success*, 30 J. MGMT. STUD. 885, 898–901 (1993) (describing the origins of Wachtell and Marty Lipton's influence on the firm).

¹⁰⁵ *See* DENNETT, *supra* note 35, at 20–37 (describing John Morris's work and how he influenced and mentored William Slaughter). *See generally* JUDY SLINN, *ASHURST MORRIS CRISP: A RADICAL FIRM* (1997) (detailing the origins and founding of Ashurst Morris Crisp). In 2003, Ashurst Morris Crisp changed its name to Ashurst in an attempt to rebrand the firm. *Ashurst Morris Crisp Changes Name to Ashurst in Major Rebranding*, *ASHURST* (Dec. 8, 2003), http://www.ashurst.com/media-item.aspx?id_Content=571&expandOfficeList=true&id_queryContent=&showDeals=true.

¹⁰⁶ *See generally* DENNETT, *supra* note 35 (discussing the origins and founding of Slaughter and May).

¹⁰⁷ *See generally* HUMPHREY KEENLYSIDE, *ALLEN & OVERY: THE FIRM 1930–1998* (1999) (describing the origins of Allen & Overy).

¹⁰⁸ *See Our People: Sir Nigel Knowles*, *DLA PIPER*, http://www.dlapiper.com/nigel_knowles/ (last visited Apr. 19, 2013) (describing Sir Nigel Knowles' career and history with DLA Piper).

its development domestically and internationally, and had particular skills that were in scarce supply and high demand from clients.¹⁰⁹

B. *Born Global Phase Two: Growth and Resource Accumulation*

The second phase prepares the Born Global for globalization. At this stage, a Born Global must learn from its networks and its clients.¹¹⁰ In addition, it must accumulate financial resources for the push to internationalization.¹¹¹ The Born Global entity must select the countries to which it will extend, and, to an extent, must be entrepreneurial about its ventures.¹¹²

How a Born Global firm enters into and fares in a foreign market depends on cultural factors, developments in the market, relationships, and language.¹¹³ One of the most difficult challenges facing a Born Global at this stage is synchronization, or organizational entrainment: how do Born Globals and their clients overcome the psychological distance of foreignness with their international clients to create a temporal “fit?”¹¹⁴

Law firms have two ways of overcoming the barriers of temporal misfit. One is to have domestic clients lead the way into foreign markets for them.¹¹⁵ This is the client-led global move and is the most typical. The other option is to create a form of legal technology that can be employed to take clients overseas.¹¹⁶

English and American law firms have the singular advantage of being proximate to the world’s capital markets, which like to use their respective laws.¹¹⁷ Law firms with overseas offices therefore provide a conduit back into their domestic bases by providing access to a range of professional services in addition to their own.

¹⁰⁹ See *supra* notes 101–108 and accompanying text.

¹¹⁰ Gabriellsson et al., *supra* note 88, at 396.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ Svante Andersson, *Internationalization in Different Industrial Contexts*, 19 J. BUS. VENTURING 851, 855 (2004).

¹¹⁴ Susanna Khavul et al., *Organizational Entrainment and International New Ventures from Emerging Markets*, 25 J. BUS. VENTURING 104, 105 (2010); see Andersson, *supra* note 113, at 854–55.

¹¹⁵ See John Flood, *Megalawyer in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT’L J. LEGAL PROF. 169, 197 (1996).

¹¹⁶ Russell Baker’s expansion of the use of the Western Hemisphere Trade Corporation is an example of the creation of legal technology. See BAUMAN, *supra* note 102, at 22–26. See *infra* notes 161–167 and accompanying text.

¹¹⁷ See *supra* notes 73–80 and accompanying text.

C. Born Global Phase Three: Break-Out and Required Strategies

The final phase for the Born Global firm is the break-out phase, where it consolidates its strategies and has a coherent global vision.¹¹⁸ This phase typifies market acceptance and signifies that the Born Global has become an established global player. In the case of law firms, the establishment of firms as global players is apparent in the modern strategies that law firms use to attempt to dominate the global marketplace.

Law firms such as Clifford Chance, Baker & McKenzie, and DLA Piper are entrenched globally with the numbers of lawyers and offices they have established around the world.¹¹⁹ A few firms have resisted the physical globalization of establishing their own offices globally. Instead, these firms choose to remain domestically based but linked globally with networks of foreign law firms.¹²⁰ Examples include Cravath, and Slaughter and May.¹²¹

In order for Born Globals, and by extension globalizing law firms, to accomplish their entry into world markets, the temporal issues are crucially important.¹²² Organizational entrainment is a hurdle for firms.¹²³ The farther they go from their home countries, the more they must cope with difference in institutional structures and practices.¹²⁴

¹¹⁸ See Gabriellson et al., *supra* note 88, at 397.

¹¹⁹ See *About Us*, *supra* note 10; DLA PIPER LLP, *supra* note 10; *Firm Facts*, *supra* note 15; *supra* notes 13–15 and accompanying text.

¹²⁰ See, e.g., *Global Reach*, SLAUGHTER & MAY, <http://www.slaughterandmay.com/where-we-work/global-reach.aspx> (last visited Apr. 19, 2013) (describing that the firm's global approach is to work with other law firms that are leaders in their jurisdictions); *International Approach*, SLAUGHTER & MAY, <http://www.slaughterandmay.com/where-we-work/international-approach.aspx> (last visited Apr. 19, 2013) (describing the firm's international integrated teams' approach to dealing with clients in other jurisdictions); *International Practice Overview: Global Network of Law Firms*, CRAVATH, SWAINE & MOORE LLP, <http://www.cravath.com/practices/DetailExtended.aspx?FirmService=6> (last visited Apr. 19, 2013) (indicating that the firm works with a network of leading law firms throughout the world).

¹²¹ *Global Reach*, *supra* note 120; *International Practice Overview: Global Network of Law Firms*, *supra* note 120.

¹²² See Khavul et al., *supra* note 114, at 105.

¹²³ See *id.*

¹²⁴ See Andersson, *supra* note 113, at 885 (discussing the concept of psychic distance in the context of internationalization); Khavul et al., *supra* note 114, at 104–05 (providing an overview of organizational entrainment and how it factors into globalization); *supra* notes 48–53 and accompanying text (describing the concept of globalizing law firms acting globally while thinking locally).

Hence, there is a strong emphasis on learning and accumulating resources for the break-out, if it happens.¹²⁵

In order for law firms to deal with the differences in institutional structures, it is important for lawyers to understand institutional structure and analysis. According to at least one scholar, there are three elements to the institutional analysis: the regulative, the normative, and the cultural-cognitive.¹²⁶ Law firms must be adept at negotiating all three elements. The regulative element is typically a fundamental one in that not only must law firms adhere to foreign norms, but they must also bring them into line with their domestic rules.¹²⁷ These can affect firm formation: for example, which name or names can be used, who can be hired, who can become a partner, and more.¹²⁸ The normative element takes into account the conceptual aspects of lawyer-client relationships—long-term versus short-term—and the composition of law firms—large and bureaucratized or small and personal.¹²⁹ The cultural-cognitive element highlights differences between the lawyers taking the common law and those taking the civil law approach.¹³⁰ The former seek creative solutions for clients, based on business activities, whereas the latter interpret the law in line with the civil code.¹³¹

For law firms seeking to reach the break-out phase, moments of instability often provide valuable opportunities for law firms to enter new global markets.¹³² Law firms can insert themselves into temporal and regulatory gaps and disruptions that enable them to establish their models and modes of practice.¹³³ For example, one pair of scholars cites English law firms entering Germany after its unification.¹³⁴ Given the resistance Germany received from having rules that deterred English modes of practice, Germany re-regulated its legal profession in the

¹²⁵ See Gabrielson et al., *supra* note 88, at 396 (describing the importance of resource accumulation and organizational learning during the second phase of Born Globals—the phase immediately preceding the break-out phase).

¹²⁶ W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS 50–59 (2008).

¹²⁷ See *id.* at 52–54.

¹²⁸ See *id.*

¹²⁹ See James Faulconbridge & Daniel Muzio, Transnational Corporations and Institutional Change: Institutional (In)stability Determining Firm Strategy and Impacts. The Case of English Law Firms in Germany, tbl. 3 (2012) (unpublished manuscript) (on file with author).

¹³⁰ See SCOTT, *supra* note 126, at 56–59.

¹³¹ See *id.*; *supra* notes 54–83, 168–274 and accompanying text.

¹³² See Faulconbridge & Muzio, *supra* note 129, at 3–4.

¹³³ See *id.* at 6–10.

¹³⁴ *Id.* at 12–26 (describing the presence of English law firms in Germany between 1985 and 2010).

early 2000s to align itself more with Anglo-American practices, which allowed English law firms to become dominant players.¹³⁵ Thus, law firms may succeed in entrenching themselves in global markets by taking advantage of these gaps and disruptions in foreign markets, serving as an example to Born Globals of a possible means of achieving the break-out phase in their development.

III. LAWYERS AS A GLOBALIZING FORCE: CASE STUDIES OF GLOBAL LAWYERS' WORK

This Part demonstrates how lawyers and law firms took advantage of temporal disjunctions and normative gaps to facilitate their moves into foreign and global markets, in some situations quite radically.¹³⁶ The case studies used here emerge from research I have undertaken on the globalization of lawyers' work over the last twenty years. The ease with which lawyers have moved into these lines of work has particularly struck me. Section A of this Part discusses the juncture of public and private law's impact on globalization and highlights the issues for globalization under private law.¹³⁷ Section B examines some of the early examples of lawyers globalizing, and Section C discusses some modern examples.¹³⁸

A. *The Juncture of Private and Public Law in Globalization*

The process of globalization in law is not a smooth, graduated program. The reason for this is in the juncture of private and public law.¹³⁹ Ordinarily, law is thought of as being primarily local, dealing with domestic issues—whether corporate or individual. For example, two recent cases in the U.K. Supreme Court defied the trend toward globalization of law when the court held that foreign judgments would not be easily enforceable in the United Kingdom unless certain condi-

¹³⁵ *Id.* at 15, 20–26.

¹³⁶ See *infra* notes 137–274 and accompanying text.

¹³⁷ See *infra* notes 139–151 and accompanying text.

¹³⁸ See *infra* notes 152–274 and accompanying text.

¹³⁹ Private law is law concerning private persons, property, and relationships, whereas public law is law that deals with “regulating the relations of individuals with the government and the organization and conduct of the government itself.” *Private Law*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/private+law> (last visited Apr. 19, 2013); *Public Law*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/public+law> (last visited Apr. 19, 2013).

tions were met.¹⁴⁰ These two insolvency cases demonstrate the power and dominion of the public law sphere.¹⁴¹

Another example of this tension emerged in the operation of the *pari passu* clause in sovereign debt contracts.¹⁴² Every lawyer copied the same clause and believed it inviolate until a Belgian court ruled against it.¹⁴³ Curiously, that decision did not appear to change the behavior of the sovereign debt lawyers; somehow it went against their basic instincts.¹⁴⁴

This Section focuses primarily on the private law aspects of globalization. One major problem business people have in transnational business is overcoming their suspicions of “the other.” Where business people come from different cultures and legal systems, there are doubts, uncertainties, and problems creating trust. Arms-length contractual negotiations are a key way to overcome such difficulties. In order to succeed, the lawyers involved must be seen as trustworthy, either through their status or the longevity of their firm.¹⁴⁵ Moreover, court and arbitration systems must be calculated to be predictable, incorruptible, and fair.¹⁴⁶

¹⁴⁰ See *Rubin v. Eurofinance SA & New Cap Reinsurance Corp. v. A.E. Grant*, [2012] UKSC 46, [7], [10], [105]–[106], [115]–[132] (appeal taken from Eng.). The U.K. Supreme Court specifically noted that the common law “Dicey rule” was applicable to the foreign insolvency judgments. See *id.* Under the Dicey rule, a court outside the United Kingdom has the jurisdiction to issue an in personam judgment capable of enforcement in the United Kingdom if the person against whom the judgment was given: (1) was present in the foreign country; (2) was a claimant or counterclaimed in the proceeding in the foreign court; (3) submitted to the foreign court’s jurisdiction by voluntarily appearing at the proceedings; or (4) had, before the proceedings commenced, agreed to submit to the jurisdiction of that court. *Id.* at [7].

¹⁴¹ See *id.* at [7], [10], [105]–[106], [115]–[132].

¹⁴² See generally Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 L. & SOC. INQUIRY 72 (2013) (examining the use of the *pari passu* clause by corporate lawyers in contracts).

¹⁴³ *Id.* at 72–74.

¹⁴⁴ See *id.* at 72, 95–96.

¹⁴⁵ One means of establishing and burnishing status is for law firms to take on as partners or of counsel senior officials who have stepped down from government posts—this is a common practice among U.S. and U.K. law firms. See, e.g., Margaret Hilary Marshall, CHOATE, <http://www.choate.com/people/margaret-marshall> (last visited Apr. 19, 2013) (providing the biography of a former state court justice who is now of counsel at a U.S. law firm); Andy Richardson, *Ex Rat Catcher and Government Speech Writer Joins North-East Law Firm*, N. ECHO (Mar. 26, 2013 7:00 PM), <http://www.thenorthernecho.co.uk/business/law/10308386.print/> (describing a former government official’s move to a U.K. law firm). And regarding longevity, both countries have traditions of long-established law firms. See *supra* notes 10–47, 54–84, 101–109 and accompanying text.

¹⁴⁶ See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 3–4 (2008). The recent example of the *Berezovsky v. Abramovich* litigation in the U.K.

Additionally, there are other elements that should be taken into account in transnational business. Social networks can provide sufficient stability for contracting. For example, Jewish diamond merchants rely on strong ethnic networks to ensure contractual obligations are fulfilled.¹⁴⁷ Similarly, networks are present within industries that sustain more informal and flexible modes of stabilizing legal structures and support across borders.¹⁴⁸ These include the timber and software industries.¹⁴⁹

The concept of developing networks is an instance of transnational law—as opposed to international law—that has been an integral part of commercial life for many hundreds of years.¹⁵⁰ Although professionalism was a concept that emerged mainly in the eighteenth and nineteenth centuries, the essence of professionalism had been in existence much longer, and lawyers have been involved in these activities as counselors and advocates in one form or another.¹⁵¹

Commercial Court demonstrated the profound mistrust of the Russian legal system and courts. The case between Russian oligarchs had no real connection with the United Kingdom whatsoever, but the parties both acknowledged the jurisdiction of the English court, as it would be difficult for the plaintiff to receive a fair trial in Russia. *Berezovsky v. Abramovich*, [2012] EWHC (Comm) 2463, [2], [4], [38]–[89] (Eng.).

¹⁴⁷ Barak D. Richman, *Ethnic Networks, Extra-Legal Certainty and Contractual Certainty and Globalisation: Peering into the Diamond Industry*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 31, 35 (Volkmar Gessner ed., 2009) [hereinafter CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE].

¹⁴⁸ See generally Thomas Dietz & Holger Nieswandt, *The Emergence of Transnational Cooperation in the Software Industry*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE, *supra* note 147, at 87 (examining cross-border contractual agreements in the field of outsourcing software development); Wioletta Konradi, *The Role of Lex Mercatoria in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE, *supra* note 147, at 49 (investigating how commercial norms, contracts, and customs function in the self-governance of the timber industry).

¹⁴⁹ See generally Thomas Dietz, *Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry*, 37 L. & SOC. INQUIRY 25 (2012) (investigating contract enforcement institutions in cross-border software purchases); Dietz & Nieswandt, *supra* note 148, at 87 (examining cross-border contractual agreements in the field of outsourcing software development); Konradi, *supra* note 148, at 49 (investigating how commercial norms, contracts, and customs function in the self-governance of the timber industry).

¹⁵⁰ See Peer Zumbansen, *Transnational Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 738, 738–40 (Jan M. Smits ed., 2006) (stating that transnational law developed alongside international law but is itself a supplementary source of law).

¹⁵¹ See *id.* at 740. See generally David Scull, *Professions Before Professionalism*, 48 EUR. J. SOC. 121 (2007) (arguing that the visual academies in France exhibited professionalism prior to the eighteenth and nineteenth centuries). The fact that lawyers applied the early

B. *Globalizing Lawyers: The Early Examples*

An early documented instance of globalizing lawyers is John Morris of Ashurst Morris Crisp in the nineteenth century. The firm's commercial work focused on merchant banking, large-scale retail trading, and railways, and Morris "showed a particular flair for this kind of work."¹⁵² In fact, Morris was retained as advisor to the shareholders of the Grand Trunk Railway of Canada in the 1860s.¹⁵³ His contemporaries described him as "a 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 unraveling some vast complication in the American railway system.'"¹⁵⁴

Moreover, his firm had become very active in major company formations.¹⁵⁵ Because of his work for the large retailer, Morrisons, Morris gained experience in Argentina, Chile, and Uruguay.¹⁵⁶ An Argentinian newspaper of the period said:

In the last ten years nothing worth the name of "business" has been done in the River Plate without John Morris being consulted first. . . . When Mr. Morris has a mind to it, his clients will gather in 24 hours to form a syndicate for any undertaking whatever may be the capital required, and – still more curious – they will do it without taking the trouble of confirming that the business is a good one: Morris has arranged matters, and that is enough.¹⁵⁷

By the 1880s, John Morris acted for over 300 client companies, of which:

61 were involved in mining, and well over half of them were mining gold in Western Australia, Queensland, Matabeleland or the Transvaal. Another 29 were exploration and development companies seeking mineral wealth in those regions, and in Rhodesia. 31 were financial, land and investment companies, many active in the United States; 31 were concerned

ideas of transnational law is reinforced by one scholar's reference to the "rediscovery of the medieval law merchant." Zumbansen, *supra* note 150, at 740.

¹⁵² DENNETT, *supra* note 35, at 22.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 23.

¹⁵⁵ *Id.* at 24.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 25.

with commodities, both mineral and edible, world-wide; 27 were railway companies, active in various parts of the world, and another 27 were constructing or supplying gas and light, water or communication systems.¹⁵⁸

Like Morris and Ashurst Morris Crisp, most of the London law firms at this time reflected this international cast to their business. Another example is Norman Herbert Smith, progenitor of Herbert Smith.¹⁵⁹ His clients included the Honduras Banking and Trading Company, Arauco, a Chilean railway, and Hotchkiss Ordnance Company, which supplied machine guns to the U.S. military.¹⁶⁰ These English lawyers capitalized on London's success as the financial center of the world and the flexibility of English law to accommodate the needs of business.

American law was similarly adaptable as the founder of Baker & McKenzie, Russell Baker, demonstrated in the 1950s.¹⁶¹ After establishing that the law firm would be a global law firm, Baker found a way to internationalize its work quickly.¹⁶² The Western Hemisphere Trade Corporation ("WHTC") was part of the Internal Revenue Code, and Baker saw a way to extend its use.¹⁶³ The law essentially gave U.S. companies tax incentives to manufacture abroad.¹⁶⁴ With Baker's interpretation of English common law rules, American exporters could also receive the tax breaks of the WHTC for selling products abroad without manufacturing them abroad.¹⁶⁵ The difference between the nineteenth-century English lawyers and the American mid-twentieth-century ones was that the English lawyers saw no need to open foreign offices: they could direct affairs from London.¹⁶⁶ By the time of the post-World War II period, however, it was becoming necessary to follow business and clients overseas, which meant offices needed to be established there.¹⁶⁷

¹⁵⁸ DENNETT, *supra* note 35, at 25–26.

¹⁵⁹ See TOM PHILLIPS, A HISTORY OF HERBERT SMITH 29, 32–33 (2007).

¹⁶⁰ *Id.*

¹⁶¹ See BAUMAN, *supra* note 102, at 22–26.

¹⁶² See *id.* at 24–26.

¹⁶³ *Id.* at 24–25.

¹⁶⁴ *Id.* at 24.

¹⁶⁵ *Id.* at 25.

¹⁶⁶ Compare DENNETT, *supra* note 35, at 24 (describing how Morris was ready to travel from the firm in London to the United States at a few hours' notice), with BAUMAN, *supra* note 102, at 22–26 (describing how, post-World War I, the United States needed to play a global role and noting that this change sparked Baker's conception of his firm as one that reached other nations, not just one city).

¹⁶⁷ See BAUMAN, *supra* note 102, at 22–24.

C. *Modern Examples of the Globalizing Influence of Lawyers
and the Common Law*

Lawyers and the common law continue to have a globalizing influence.¹⁶⁸ This Section focuses on three major case studies: (1) settling the Maxwell bankruptcy;¹⁶⁹ (2) the sale of Celtel International B.V., an international mobile telephone company, to the Mobile Telecommunications Company (“MTC”);¹⁷⁰ and (3) the creation of the United Kingdom’s covered bond.¹⁷¹

I. Settling a Global Bankruptcy: The Maxwell Insolvency

A striking example of the globalizing influence of lawyers and the common law is in insolvency. As previously mentioned, the U.K. Supreme Court was perceived as turning the tables on developments in this field in 2012.¹⁷² Until recently, insolvency or bankruptcy law was very local and had little to no international dimension to it. But in the early 1990s, when financier and newspaper magnate Robert Maxwell died in mysterious circumstances, the first major multinational bankruptcy began.¹⁷³

Neither the law nor most lawyers were ready for such an eventuality. Maxwell’s companies were situated around the world, but the largest and most significant were in the United States and the United Kingdom.¹⁷⁴ On December 16, 1991, the directors of Maxwell Communication Corporation (“MCC”) filed for Chapter 11 bankruptcy in New York.¹⁷⁵ The next day, MCC applied for an Administration Order in the High Court of Justice in London.¹⁷⁶ These were simultaneous

¹⁶⁸ See *infra* notes 172–274 and accompanying text.

¹⁶⁹ See *infra* notes 172–192 and accompanying text.

¹⁷⁰ See *infra* notes 193–238 and accompanying text.

¹⁷¹ See *infra* notes 239–274 and accompanying text.

¹⁷² See *supra* notes 140–141 and accompanying text.

¹⁷³ See John Flood & Eleni Skordaki, *Normative Bricolage: Informal Rule-Making by Accountants and Lawyers in Mega-Insolvencies*, in GLOBAL LAW WITHOUT A STATE 109, 111 (Gunther Teubner ed., 1997); Bob Greene, *All the News That’s Fit to Fly*, CHI. TRIB., Jan. 28, 1992, at C1 (noting that Robert Maxwell was found dead in waters off the Canary Islands after falling off his yacht).

¹⁷⁴ See Steven Prokesch, *Sons File for Bankruptcy for Private Maxwell Companies*, N.Y. TIMES, Dec. 16, 1991, at D7 (highlighting some of Maxwell’s large assets); Jay Lawrence Westbrook, *Comment: A More Optimistic View of Cross-Border Insolvency*, 72 WASH. U. L. REV. 947, 948–49 (1994) (describing the structure of Maxwell’s assets under Maxwell Communication Corporation).

¹⁷⁵ See *In re Maxwell Commc’n Corp.*, 186 B.R. 807, 813 (Bankr. S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

¹⁷⁶ *Id.*

primary proceedings and the two systems were in opposition to each other.¹⁷⁷ Under the United Kingdom's administration proceedings, administrators who were insolvency professionals were appointed to replace the directors and management and to run the company directly.¹⁷⁸ Under the Chapter 11 proceedings, the management petitioned the court to appoint an examiner so that an appropriate rescue plan could be put to the court.¹⁷⁹

The two sides—the U.K. administrators and the directors of MCC—were prepared to battle it out through litigation, which would have been to the detriment of the creditors and the companies, including their employees and pensioners.¹⁸⁰ The U.S. Bankruptcy Court judge began to persuade the parties to negotiate.¹⁸¹ In order to help them along she appointed an examiner: Richard Gitlin of Hebb & Gitlin in Hartford, Connecticut.¹⁸² He was selected because, as one of the partners in the firm said:

We identified international insolvency as a field for the future back in 1980. We got active in international management and I became very involved in the International Bar Association's international banking sub-committee. Richard became active in INSOL and went to their first meeting in Monte Carlo in 1985. Considering they're mostly accountants, it was an honour when he became their first lawyer-chairman. You learn by reading a lot and meeting people and talking to them – most important is to sit down and talk to them about the problems.¹⁸³

Although no international bankruptcy had occurred until then, Gitlin and his firm had thought a lot about it, strategized with the International Bar Association (“IBA”) and INSOL International, a world-

¹⁷⁷ *Id.*; Flood & Skordaki, *supra* note 173, at 112.

¹⁷⁸ PRICEWATERHOUSECOOPERS LLP, *INSOLVENCY IN BRIEF: A GUIDE TO INSOLVENCY TERMINOLOGY AND PROCEDURE I*, 10–11 (2009), <http://www.pwc.co.uk/assets/pdf/insolvency-in-brief.pdf> (describing how administrations during U.K. insolvency proceedings work); see *In re Maxwell*, 186 B.R. at 813 (noting that the High Court appointed four administrators to MCC to function as corporate governance and run the company's affairs).

¹⁷⁹ See *In re Maxwell Commc'n Corp.*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (Bankr. S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996) (noting that the purpose of the examiner appointed to the Chapter 11 proceedings was to harmonize the U.S. and U.K. bankruptcy proceedings); Flood & Skordaki, *supra* note 173, at 118.

¹⁸⁰ See Westbrook, *supra* note 174, at 949.

¹⁸¹ Flood & Skordaki, *supra* note 173, at 117–18.

¹⁸² *Id.* at 118–19.

¹⁸³ *Id.* at 119 (quoting a partner at the former U.S. law firm, Hebb & Gitlin).

wide federation of insolvency professional membership associations, and essentially prepared a small group of global professionals to be ready when an international insolvency—like Maxwell—arose.¹⁸⁴ The difficulty lay in persuading the unprepared to commit to an alien activity, namely negotiating a solution without battling it through the courts.

The English lawyers suspected they might lose in the American courts and so agreed to talk.¹⁸⁵ Gitlin began to devise a Protocol, an instrument to share control and authority between the parties.¹⁸⁶ The Protocol was based on his work with the IBA's "Committee J" on international insolvency.¹⁸⁷ The lawyers on both sides had less than a month to formulate a working Protocol because, apart from an injunction against the Americans in the English court, the judge concerned was leaving for his vacation.¹⁸⁸ This was a drop-dead deadline. One of the lawyers described the final days and hours when tempers were blowing and threats were being issued:

The negotiations went to 3 in the morning of New Year's Eve. Gitlin was miserable; we all knew we'd had enough. We got together at 8 in the morning and cut a deal on the first draft and rushed it over to Lenny [Hoffman] who signed it and lifted the injunction against Shaffer [the U.S. CEO].¹⁸⁹

The banks agreed to the deal and the Protocol was flown to New York where the U.S. judge signed it.¹⁹⁰ Not long after the MCC insolvency was settled, Gitlin received a call from Weil, Gotshal & Manges LLP, which was dealing with the bankruptcy of Olympia & York—the then-owner of Canary Wharf—asking for a copy of the Protocol, as they had a case with similar circumstances to the Maxwell insolvency.¹⁹¹ The Protocol became a template, which eventually—after many years—worked its way into the United Nations Commission on International Trade Law (UNCITRAL) rules.¹⁹²

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 121–22.

¹⁸⁶ *Id.* at 123.

¹⁸⁷ Flood & Skordaki, *supra* note 173, at 123.

¹⁸⁸ *Id.* at 123–24.

¹⁸⁹ *Id.* at 124 (quoting a lawyer who was part of the Protocol team).

¹⁹⁰ *Id.*

¹⁹¹ Interview with U.S. Creditor's Attorney from a Large New York Law Firm Involved in the Olympia & York Bankruptcy (Nov. 1995).

¹⁹² *See* UNITED NATIONS COMM'N ON INT'L TRADE, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE 46–49 & n.210 (2012), available at http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf (stating that cooperation was one of the fundamental purposes behind the Model Law,

2. Selling an International Mobile Telephone Company: The Story of Celtel

By the twenty-first century, transnational deals were commonplace, and the big global law firms grew to accommodate these kinds of transactions.¹⁹³ In 2005, Celtel, a Dutch telecommunications company with 5.3 million cell phone subscribers in Africa, sold eighty-five percent of its company to MTC of Kuwait, one of the Middle East's largest telecommunications companies.¹⁹⁴ The lawyers who were instrumental in the transaction were from the international law firms of Clifford Chance, which acted for MTC, and Linklaters, which acted for Celtel.¹⁹⁵ The lawyer-client relationships, however, were not always fixed.¹⁹⁶

As the *Lawyer*, a legal news source, reported, Celtel was “Sub-Saharan Africa’s largest mobile provider, with coverage in 13 countries and more than five million subscribers.”¹⁹⁷ The buyer—MTC—had operations in Kuwait, Iraq, Jordan, and Lebanon.¹⁹⁸ Tim Schwarz of Linklaters said:

MTC has what it calls its “three-by-three-by-three strategy.” . . . During the first three years – from 2002 to last year [2005] – it invested in its home region. In the second three years it began to invest in its surrounding neighbourhood, buying Celtel. It’s the third three years that will be the most interesting. That’s

and noting that the approach taken in the Maxwell insolvency was one example endorsed by the United Nations).

¹⁹³ See James R. Faulconbridge & David Muzio, *Legal Education, Globalization, and Cultures of Professional Practice*, 22 GEO. J. LEGAL ETHICS 1335, 1349–57 (2009) (examining global law firms in the modern-day era of transnational business).

¹⁹⁴ John Flood, *Transnational Lawyering: Clients, Ethics, and Regulation*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 176, 184 (Leslie C. Levin & Lynn Mather eds., 2012).

¹⁹⁵ *Id.*

¹⁹⁶ See *infra* notes 232–238 and accompanying text. In the Celtel transaction, the lawyers’ firm affiliations did not remain constant. Flood, *supra* note 194, at 184. Given the size of these global law firms, lawyer mobility is high and transfers between firms of this scale are frequent and common, making the potential for conflicts of interest high. *Id.* The lawyers are as flexible as is the law.

¹⁹⁷ Joanne O’Connor, *CC and Linklaters Steer Celtel and MTC Through Acquisition*, *LAW.*, Apr. 4, 2005, at 7, available at <http://www.thelawyer.com/cc-and-linklaters-steer-celtel-and-mtc-through-acquisition/114625.article>.

¹⁹⁸ Flood, *supra* note 194, at 184.

when it plans to go global. It will be very interesting to see whether it makes it.¹⁹⁹

MTC's purchase of Celtel was occurring in the second phase of MTC's strategy.²⁰⁰ MTC approached Clifford Chance's Dubai office, which worked on the deal with the firm's London office.²⁰¹ As part of this deal, Celtel asked the investment bank Goldman Sachs to run a controlled auction.²⁰² According to MTC's lawyer, a partner in the London office, the bank sent letters "to anyone they could think of who might be interested in buying this business. Any mobile operator, any telecoms company, and private equity houses as well."²⁰³ The MTC lawyer further explained:

You start by getting the investment banks running the deals from London. And because they are based in London they will turn to the English firms because we have some of the biggest firms in the world and that means with size comes depth of experience. Sophistication naturally resides here.²⁰⁴

In the first stage of the deal, on Celtel's behalf, Goldman Sachs approached approximately one hundred companies with a rough outline of the deal.²⁰⁵ The next stage was for Celtel to select, out of a field of ten to twenty, four to submit binding offers.²⁰⁶ At the final stage, two bidders would negotiate the final terms.²⁰⁷ The final sale price was \$3.4 billion.²⁰⁸

As with all deals, there is always a possibility that this kind of deal could turn sour and not be completed. This is partially due to the complexity of the funding arrangements required for a transaction of this size.²⁰⁹ In addition, these transactions usually involve leverage in

¹⁹⁹ Matt Byrne, *Telecoms Specialists Look East for the Hottest M&A Action*, LAW., Mar. 13, 2006, at 13, available at <http://www.thelawyer.com/telecoms-specialists-look-east-for-the-hottest-maction/119160.article> (quoting Tim Schwarz).

²⁰⁰ Flood, *supra* note 194, at 184.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Interview with a Corporate Lawyer from Clifford Chance, *supra* note 53. This lawyer worked on behalf of MTC during the Celtel transaction.

²⁰⁴ *Id.*

²⁰⁵ Flood, *supra* note 194, at 185.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

the form of debt, and, therefore, all types of guarantees have to be arranged, default conditions prepared, et cetera.²¹⁰

Loans from four banks in the Middle East, the United Kingdom, Switzerland, and the United States funded this particular transaction.²¹¹ Those banks were National Bank of Kuwait, UBS, Credit Suisse First Boston, and Barclays, all of which were represented by a single law firm in London—Allen & Overy.²¹² Allen & Overy needed “to ensure that the banks’ interests were protected under English law. If the sale were to fail, the vendor’s lawyers were running a parallel track with the sale to place an initial public offering in the market.”²¹³ The lawyers hoped that the initial public offering of Celtel would be unnecessary.²¹⁴

Although Celtel’s operations were based in Africa, its headquarters was in the Netherlands.²¹⁵ No country in Africa “had the scale or sophistication in its legal market to handle such a large transaction.”²¹⁶ Some local African law firms, however, were used during the due diligence part of the transaction to monitor minor regulatory matters.²¹⁷ One English lawyer stated, “it used to be the case that there was little or no in-house regulatory capacity at many of the telecoms companies. Increasingly they’ve skilled up.”²¹⁸ English lawyers investigated local contracts because the content and not the law was at issue.²¹⁹ As English lawyers, they naturally used English law.²²⁰ MTC’s lawyer remarked:

We need a lingua franca and that’s English law. The governing law of a transaction—a share acquisition—doesn’t really matter that much. The terms and mechanisms are pretty much identical regardless of whether it’s English, German, French or Dutch law. Obviously you take account of the peculiarities of national law but the agreements will look the same and they will all be in the English language, even in France

²¹⁰ *Id.*

²¹¹ Flood, *supra* note 194, at 185.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Flood, *supra* note 194, at 185.

²¹⁸ *Id.*

²¹⁹ *Id.* The English lawyers believed that the contracts’ content would be too complex for the local lawyers. *Id.*

²²⁰ *Id.*

where it's technically illegal. But people pay the 300 euro fine and don't mind.²²¹

Even though Celtel had sixteen operating subsidiaries, MTC actually bought a single block of shares in a Dutch company in this transaction.²²² English law governed the share purchase agreement.²²³ The various minor, ancillary elements—such as the transfer documents which were Dutch shares—had to be done under Dutch law.²²⁴ The MTC lawyer said that, typically, share purchase agreements are drafted to be governed by local law.²²⁵ Yet, this was an exception because Celtel's business was pan-African and there were over one hundred shareholders who came from a variety of locations.²²⁶ In addition, as the purchasers came from different places, English law provided a common locus.²²⁷ Thus, there were a significant variety of laws at play for the regulatory issues, but they were relatively insignificant to the overall structure of the transaction.²²⁸

The Celtel transaction therefore consisted of a combination of relatively simple corporate law issues, complex regulatory matters, and complicated financing and tax issues.²²⁹ The lawyers were tasked with bringing these together into a set of coherent structures, which enabled the parties to complete the transaction under a range of headings that included private and state concerns.²³⁰ Additionally, the lawyers from the different law firms were accustomed to working with one another and the investment banks.²³¹ Thus, these enduring networks and institutional relationships were vital to the success of the transaction.

These relationships, however, were not as straightforward as they appeared.²³² Although Clifford Chance had a long-standing relationship with the acquirer, MTC, it had also previously advised Celtel on its plans to go public.²³³ On the other side of the transaction was Linklaters for Celtel, with whom Linklaters had a long-established rela-

²²¹ Interview with a Corporate Lawyer from Clifford Chance, *supra* note 53.

²²² Flood, *supra* note 194, at 186.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Flood, *supra* note 194, at 186.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*; O'Connor, *supra* note 197, at 7.

tionship.²³⁴ And, as previously mentioned, Allen & Overy represented all four banks.²³⁵ Shortly after the deal concluded, the Clifford Chance Dubai partner who brought in the deal to Clifford Chance left the firm to head Linklaters' Dubai office.²³⁶ This was, as one reporter described it, "A canny bit of talent spotting."²³⁷ Linklaters acted for MTC on subsequent acquisitions, thereby ousting Clifford Chance as MTC's counsel as a result of the lawyer's move.²³⁸

3. Creation of the U.K. Covered Bond

The creation of a special type of collateralized bond, known as "covered bonds," demonstrates yet another example of lawyers and the common law having a globalizing effect.²³⁹ Covered bonds are securities backed by mortgage loans that remain on the issuer's balance sheet,²⁴⁰ and "senior debt instrument[s] of the issuer having priority recourse to a pool of assets ringfenced from the other assets of the issuer[, which are] often regarded as substitutes for government debt."²⁴¹

Despite the crash during the recession in 2008, the secondary market in mortgages remains large.²⁴² In 2004, the European Central Bank ("ECB") reported that the volume of mortgage loans in Europe exceeded 4 trillion and was growing at a rate of eight percent a year.²⁴³ In 2011, the market was around \$25 billion.²⁴⁴ Yet, the covered bond market is an area with little European integration, and, as the ECB pointed out:

²³⁴ Flood, *supra* note 194, at 186.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Byrne, *supra* note 199, at 13.

²³⁸ Flood, *supra* note 194, at 186. MTC was acquired by another telecommunications company—Zain. *Id.*

²³⁹ See *infra* notes 240–274 and accompanying text.

²⁴⁰ *Covered Bond*, FIN. TIMES LEXICON, <http://lexicon.ft.com/Term?term=covered-bond> (last visited Apr. 19, 2013).

²⁴¹ Arjan Verbeek, *Understanding UK Covered Bonds: Development and Future Growth*, BARCLAYS CAPITAL (Oct. 25, 2005), <http://www.cml.org.uk/cml/filegrab/Funding-ArjanVerbeek.pdf?ref=4451>.

²⁴² Flood, *supra* note 16, at 58.

²⁴³ *Id.* (citing Gertrude Tumpel-Gugerell, Member of the Exec. Bd. of the European Cent. Bank, Speech at the European Mortgage Federation Annual Conference: Capital Markets and Financial Integration in Europe (Nov. 23, 2004), *transcript available at* <http://www.ecb.int/press/key/date/2004/html/sp041123.en.html>).

²⁴⁴ Mark Heschmeyer, *2011 Brings a Resurgent CMBS Market, More CRE Liquidity*, CoSTAR GROUP (Feb. 23, 2011), <http://www.costar.com/News/Article/2011-Brings-a-Resurgent-CMBS-Market-More-CRE-Liquidity/126682> (predicting that the covered bond volume would conservatively be \$25 billion in 2011).

Less than 40% of mortgages are financed via the capital market, the remainder is deposit financed. The two capital market instruments to fund mortgages—covered bonds and residential mortgage backed securities (RMBS)—are heterogeneous across countries because of differences in legal, tax and regulatory frameworks governing issuance in the respective jurisdictions. Those cross-country differences have prevented a geographic diversification to take place. So far mortgage loan portfolios that underlie covered bond issuance or are backing RMBS transactions have been purely domestic.²⁴⁵

In some European countries outside the United Kingdom, including Germany, France, and Ireland, legislation existed to issue covered bonds.²⁴⁶ The “Pfandbrief” is the mortgage-backed bond in Germany.²⁴⁷ In Germany, the bank issues bonds that are secured on a ring-fenced pool of mortgage-backed assets.²⁴⁸ Germany’s legislation protects the Pfandbrief so that, should the bank become insolvent, the bondholders are ahead of other creditors.²⁴⁹ The issued bonds have a low risk rating, and the assets have to match the outstanding claims, and, in fact, should exceed the assets to provide a cushion.²⁵⁰ Further, under the German Mortgage Bank Act of 1900, the bank is obligated to top up the assets as and when required.²⁵¹

By contrast, in the United Kingdom, no such legislation existed. One of the major investment banks, in conjunction with a commercial bank, approached a securitization partner in a large London law firm to structure a vehicle that would achieve similar results to the Pfandbrief.²⁵² The banks wanted to “issue bonds over a pool of assets held by a bank, which would have a 20 percent risk weighting.”²⁵³ Thus, a lawyer crafted a functional equivalent through contract, which, in the continued absence of specific legislation, had to be credible to city investors.²⁵⁴

²⁴⁵ Tumpel-Gugerell, *supra* note 244; *see* Flood, *supra* note 16, at 58.

²⁴⁶ Flood, *supra* note 16, at 58.

²⁴⁷ *Id.* The Pfandbrief was created by the German Mortgage Bank Act of 1900. *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 58–59. These bonds are particularly useful for regulated entities like insurance companies because of their safety, having a risk weighting of ten percent. *Id.* at 59.

²⁵¹ *Id.* at 59.

²⁵² Flood, *supra* note 16, at 59.

²⁵³ *Id.*

²⁵⁴ *Id.*

The lawyer's structure required the banks to issue bonds that were triple-A rated by the credit rating agencies.²⁵⁵ After that, a limited liability partnership (LLP) was created, and the bank made a loan to the LLP from the proceeds of the bank's bonds.²⁵⁶ The LLP then used the loan to pay the purchase price of a pool of mortgage loans, and the LLP guaranteed the obligations of the bank under the bonds.²⁵⁷ This permitted the bondholders access to the LLP's assets if the bank became insolvent, and the bank ensured that the pool of assets was "topped up."²⁵⁸

The lawyer chose to use an LLP rather than a special purpose vehicle to avoid the difficulties that trust law imposes and to keep it within the bank, as the deal was done on the balance sheet.²⁵⁹ As a lawyer at a large corporate law firm in London remarked:

We'd never drafted a mortgages trust before so we started by going down to the private client department that deals with trusts and trustees all the time. You start with a simple document and change it. There's lots of free drafting when you do something new. We rely on the other side to review it, and the rating agencies. And if there are real estate or tax issues my colleagues there will review it.²⁶⁰

In addition, the bonds were over-collateralized by the assets, being approximately fifty percent more than needed to cover the bonds.²⁶¹ The credit rating agencies imposed this requirement in exchange for giving the bonds a triple-A rating.²⁶² The bank, as a member of the LLP, had a greater share of equity because of the over-collateralization and received the excess back by virtue of a capital distribution.²⁶³ As the inventing lawyer pointed out, "It's quite tidy."²⁶⁴

The first covered bond in the United Kingdom was issued by HBOS (a U.K. banking and insurance company) in conjunction with

²⁵⁵ *Id.*

²⁵⁶ *Id.* The LLP functions as a tax transparent vehicle. *Id.*

²⁵⁷ *Id.*

²⁵⁸ Flood, *supra* note 16, at 59.

²⁵⁹ *Id.* at 60. In addition, if a special purpose vehicle were used, in order to protect the vehicle in the event of the bank's bankruptcy, the vehicle and its assets would have had to have been remote from the originating bank. *Id.*

²⁶⁰ Interview with a Banking Lawyer from a Large London Law Firm, in London, Eng. (Apr. 2005).

²⁶¹ Flood, *supra* note 16, at 60.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Interview with a Banking Lawyer from a Large London Law Firm, *supra* note 260.

Dresdner Kleinwort Wasserstein, Goldman Sachs, and Citigroup; it was worth 3 billion.²⁶⁵ HBOS needed to fund its balance sheet so, even though it used techniques of the securitization process, it was “structured not [to] be a credit product’ . . . The aim was to produce a true swaps/government bond substitute.”²⁶⁶ Preparing the covered bond was long and expensive because the “[r]ating agencies together required five legal opinions before giving [it] their top ratings.”²⁶⁷

At the time it was created, the U.K. covered bond raised considerable controversy.²⁶⁸ Because the U.K. bond was created with a view to U.K. insolvency law, it had greater protection than the German Pfandbrief.²⁶⁹ This meant that the returns on the U.K. covered bond were also greater, and this pulled investors from the Pfandbrief.²⁷⁰ The German mortgage banks vocalized their dislike of the U.K. covered bond, arguing that the U.K. covered bond was not in accord with an European Union (EU) directive.²⁷¹ Further, the English banks were uneasy because they wanted to reduce the risk weighting from twenty percent to ten percent.²⁷² As a result, the English banks lobbied the Treasury and the Financial Services Authority to legislate.²⁷³

Thus, lawyers and the common law continue to have a profound globalizing impact, which can be seen from the great international Maxwell bankruptcy to the creation of the U.K. covered bond.²⁷⁴

IV. OPENING UP REGULATORY SPACES IN LAW AND LEGAL PRACTICE

As lawyers and the common law have continued to be an integral part of globalization, the U.K. Legal Services Act (“LSA”) presents a

²⁶⁵ Flood, *supra* note 16, at 60. HBOS was a casualty of the recession and was taken over by Lloyd’s Bank in 2009 at the behest of the U.K. government. See David Hencke, *Government Slammed for Spending £80m on Bailout Consultants*, GUARDIAN (Nov. 30, 2009), <http://www.guardian.co.uk/business/2009/dec/01/bankofenglandgovernor-royalbankofscotlandgroup> (stating that the U.K. government was criticized for paying large sums of money to private consultants to advise the government on the bailout of HBOS); Jill Treanor, *Four Years Since News Broke of Lloyds’ Takeover of HBOS*, GUARDIAN (Sept. 17, 2012), <http://www.guardian.co.uk/business/blog/2012/sep/17/four-years-lloyds-hbos-takeover> (noting that Lloyd’s Bank took over HBOS, which received a bailout from the U.K. government).

²⁶⁶ Flood, *supra* note 16, at 60 (citation omitted).

²⁶⁷ *Id.* (citation omitted).

²⁶⁸ *Id.* at 61.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 62.

²⁷² Flood, *supra* note 16, at 62.

²⁷³ *Id.*

²⁷⁴ See *supra* notes 168–273 and accompanying text.

unique opportunity for U.K. law firms to surge ahead of their U.S. counterparts.²⁷⁵ This Part summarizes the LSA and articulates why it provides U.K. lawyers and law firms with an advantage over U.S. lawyers and law firms.²⁷⁶

The LSA was enacted in 2007.²⁷⁷ One of the aims of the LSA was to open up the legal services market to competition.²⁷⁸ Indeed, promoting competition was one of the driving forces behind the legislation.²⁷⁹ To accomplish this, the LSA opened up the English market for legal services to a range of alternative legal suppliers, termed Alternative Business Structures (“ABS”).²⁸⁰ In 2012, the Solicitors Regulation Authority licensed the first ABS.²⁸¹ About 150 applications for ABS approval are currently being processed.²⁸² Licenses provided by the ABS under the LSA has led to an Australian law firm, Slater & Gordon, listed on the Australian Stock Exchange, buying an English law firm, Russell Jones & Walker, along with its companion business, Claims Direct, a claims handling business.²⁸³ The new English venture has become the ABS.

²⁷⁵ See *infra* notes 277–289 and accompanying text.

²⁷⁶ See *infra* notes 277–289 and accompanying text. This last Part is more speculative than its precursors.

²⁷⁷ See Legal Services Act, 2007, c. 29 (U.K.).

²⁷⁸ E. Leigh Dance, *The U.K. Legal Services Act: What Impacts Loom for Global Law Firm Competition?*, LAW PRAC., July/Aug. 2008, at 35, 35.

²⁷⁹ *Id.*; see JOHN VICKERS, OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS, ¶¶ 54–56 (2001), available at http://www.offt.gov.uk/shared_offt/reports/professional_bodies/offt328.pdf (recommending that competition law should apply to all professions, including lawyers); see also John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 542–43 (discussing the Office of Fair Trading’s report and its effects).

²⁸⁰ See Flood, *supra* note 279, at 547–48.

²⁸¹ See *id.* at 554. Officially, the first ABS was licensed to the Council of Licensed Conveyancers on October 6, 2011, but their remit is narrow and limited. See Press Release, Council for Licensed Conveyancers, CLC Licenses First ‘ABS’ Law Firm on 6 October, (Oct. 6, 2011), http://www.clc-uk.org/pdf_files/Press_release_6_October_CLC_licenses_first_ABS_web.pdf.

²⁸² Flood, *supra* note 279, at 554. 150 applications are in stage one and 33 are moving to the second stage. *Id.* at 554–55. The first stage is a high-level summary application; the second stage is preparing a detailed application. See *What the Authorization Process Looks Like and What You Can Expect: Overview of the Application Process*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/authorisation-process-expect.page> (last updated Mar. 21, 2013). Some of the more significant have been licenses granted to supermarkets. See Flood, *supra* note 279, at 557 (describing the supermarket ABS construction); *Register of Licensed Bodies (ABS)*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/abs/register/?pg=1> (last visited Apr. 19, 2013).

²⁸³ *Slater & Gordon Awarded ABS License as It Unveils Plans for Further UK Acquisitions*, LEGAL FUTURES (Apr. 27, 2012), <http://www.legalfutures.co.uk/latest-news/slater-gordon-awarded-abs-licence-as-it-unveils-plans-for-further-uk-acquisitions>; *Slater & Gordon to Enter UK Market with £54m Purchase of Russell Jones & Walker*, LEGAL FUTURES (Jan. 30, 2012),

The impact of the Legal Services Act of 2007 is still being evaluated, and it is too early to say if it will have a considerable impact or little. Large U.K. corporate global firms have not been affected yet. This is probably due to the fact that they have not needed the access to external capital, and they fear reaction from U.S. legal regulators. The New York State Bar Association has determinedly come out against such moves for New York lawyers and firms, to the chagrin of the large New York City law firms.²⁸⁴ In its Younger Report, which evaluated the advantages and disadvantages of non-lawyer ownership, the New York State Bar Association Task Force on Non-Lawyer Ownership essentially accepted the arguments of small firm lawyers, who represent the majority of the bar, to oppose such heretical changes to American legal tradition.²⁸⁵

At some point in the future, possibly within the next five or ten years, larger U.K. firms will be attracted to external financing or taking the firm to market in an initial public offering. Then, the U.K. firms will have a significant advantage over the U.S. firms. Furthermore, this will give them considerable benefits in the global market. We only have to look at the success of the big accounting firms to see how this could be achieved.

In order for the U.K. firms to capitalize on this unique opportunity, they must latch on to temporal instabilities when they occur, as they provide the gaps through which to push for changes to their advantage.²⁸⁶ More than likely, they will be employing the strategies of the Born Globals to reach out into a new global field that could be far-reaching and multidisciplinary.²⁸⁷ Lawyers are inventive and creative in their work. If they combine with investment banks, or consulting firms, or accounting firms, they could leverage their skills and resources beyond their present limits.²⁸⁸ It will be interesting to see how law firms move into these new spaces and achieve their ultimate Born Global break-out.²⁸⁹

<http://www.legalfutures.co.uk/latest-news/slater-gordon-to-enter-uk-market-with-54m-purchase-of-russell-jones-walker>.

²⁸⁴ N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP 78–79 (2012), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=123065> (stating that the Task Force opposed New York enacting any form of non-lawyer ownership by a vote of 16–1).

²⁸⁵ See *id.* at 69–79.

²⁸⁶ See *supra* notes 110–114, 132–135, 169–274 and accompanying text.

²⁸⁷ See *supra* notes 85–135 and accompanying text.

²⁸⁸ See *supra* notes 23–44, 98–99 and accompanying text.

²⁸⁹ See *supra* notes 118–135 and accompanying text.

CONCLUSION

The structure of Born Globals has emerged as the modern type of company globalization. Unlike traditional companies that build slowly and then use their preexisting relationships to allow them to expand globally, Born Globals expand at an accelerated rate. Although the literature has recently started discussing Born Globals, law firms represent the precursors to the modern Born Global. At the Born Globals' introductory phase, strong internal resources are fundamentally important. The charismatic and powerful leaders of modern international law firms were able to build their firms' business through marketing their skills and through their innate resources. Further, the opportunity for private ordering in the common law tradition provides a flexibility and freedom that has enabled U.S. and U.K. law firms to enter global markets more easily than their code-based civilian counterparts. The case studies of the Maxwell insolvency, the sale of Celtel, and the establishment of the U.K. covered bond all highlight that law firms and their lawyers have established themselves as integral global players.

The U.K. Legal Services Act of 2007, however, sets up a unique opportunity for U.K. law firms to pull ahead of U.S. law firms in the global market. Whereas non-lawyer ownership of law firms is strictly prohibited in the United States by the rules of professional conduct, U.K. firms are not similarly limited. Thus, the opportunity to obtain an Alternative Business Structures license under the Legal Services Act of 2007 may provide them an opportunity to surpass U.S. firms in amassing capital and delivering global legal services. Whether the U.K. firms exploit this discrepancy to achieve their ultimate breakout is something the world will be awaiting.

