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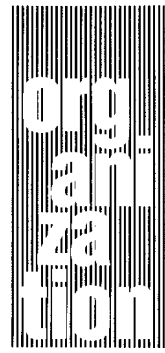
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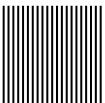
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Legal Professionals and Transnational Law-Making: A Case of Distributed Agency

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Abstract. *In institutional theory, it is a challenge to explain how rule-setting occurs in transnational contexts with high rule ambiguity and distributed agency. In this article, we address this problem by arguing that emergent and deliberate institutional strategies, though often treated as exclusive opposites, need to be considered in concert. This is demonstrated by analysing transnational law-making in the context of commercial and corporate law. Transnational law-making is thereby conceived as a process driven by the practical problem-solving and sense-making efforts of legal practitioners in large international law firms and international legal associations. Focal actors can exploit the results of this process to deliberately influence the development of law. A concept of two nested cycles of incidental and strategic law-making is employed to explain how dominant influences of common law become interwoven with influences from multiple other legal traditions that eventually trickle up. This article highlights the role of professionals as practice-based experts engaging in practical and political actions, the effects of which shape transnational rule-setting. **Key words.** distributed agency; globalization; institutional theory; law; professions; rule-setting; standardization*



The organizational literature on global rule-setting frequently highlights the role of 'soft' rules in international standard-setting (Ahrne and Brunsson, 2006; Brunsson et al., 2000; Garsten, 2003; Tamm Hallström, 2004).

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'Hard' regulations such as those found in international, supranational and transnational law have received much less attention. There are, however, important interactions between 'soft' regulations with potentially 'hard' consequences (Djelic and Sahlin-Andersson, 2006: 377) and 'hard' regulations with relatively 'soft' implementation (Suchman and Edelman, 1996). Further investigation of these interactions is required in order to fully understand the 'organizing of the world'. The analysis of transnational law-making can contribute to this aim because it represents global institution building that involves continuous transformations between 'soft' and 'hard' regulation.¹

This article will therefore examine transnational law-making from the perspective of organizing and will highlight the mechanisms by which various individuals and organizations engage in processes that create, maintain and change legal rules at the transnational level.² The main focus is on the impact of legal practitioners, law firms and law associations in the field of commercial and corporate law on transnational law-making. Unlike intergovernmental negotiations (Maguire and Hardy, 2006), international and European courts (Alter, 2001; Slaughter, 2004) and arbitration boards (Dezalay and Garth, 1996; Lehmkuhl, 2003), the role of legal practitioners in this field of law has been subjected to relative scholarly neglect.³

At the theoretical level, a key puzzle of global institution building is: how do rules emerge in a setting where there is so much ambiguity about which institutions should guide action in the first place and where multiple actors from different jurisdictions interact?

In order to address these issues, the article proposes a new conceptualization of transnational law-making as a process driven mainly by practical problem-solving and sense-making by legal practitioners in contexts where there is high regulatory ambiguity and distributed agency. It illuminates how the byproducts of professional problem-solving gradually accumulate into non-binding legal rules that, in turn, can be strategically used as input in the transnational law-making process. The interaction between incidental and strategic law-making unfolds within two nested cycles that will be delineated in this essay.

The new conceptual framework was shaped by re-evaluating the existing literature and evidence connected with the organizational theory perspective. It draws on some streams of institutional theory that acknowledge institutional multiplicity and contradiction (Djelic and Quack, 2003; Djelic and Sahlin-Andersson, 2006; Seo and Creed, 2002) and on others with pragmatic approaches towards institutions (Emirbayer and Mische, 1998; Suchman, 1995) and combines these approaches with valuable insights on sensemaking (Czarniawska, 2004; Weick, 1995).

The main argument is that in the face of weak or 'loose' government at the international level, the development of transnational legal norms follows a pattern of dispersed rule-setting that is manifested in the common law system and led by legal practitioners in large law firms and an internationalized legal profession. The emerging transnational commercial



law has, for historical and functional reasons, an affinity with English and American law. Nonetheless, other national heritages can trickle up depending on their specific appropriateness or expertise and are eclectically combined with common law traditions.

This analysis contributes in three ways to theories of global institution-building. Firstly, it accentuates the prominent role of professionals as practice-based experts constructing rules that govern the world. Secondly, it shows that emergent and deliberate institutional strategies, though often treated as exclusive opposites, need to be considered in concert. Thirdly, the study illustrates how pragmatically oriented interaction and sense-making create a relatively stable though hierarchically structured mode of transnational rule-setting in the absence of a shared meaning system.

In the following sections, we will discuss the theoretical assumptions of the proposed framework, portray briefly the landscape of relevant professional organizations and specify the role of legal professionals in different phases of the law-making process. The final section reflects on the theoretical implications of the findings and sketches an agenda for future research on transnational-law making.

The Transnational Legal Field: Strategizing or 'Muddling Through'?

During much of the 20th century, legal fields were centred in the nation-state, and their normative order originated from state law. Now, the emergence of a transnational legal field has significantly widened their scope. Building on the concept of social fields (Bourdieu, 1987; Trubek et al., 1994: 411), the transnational legal field is defined here as the ensemble of actors, practices and institutional processes that are involved in the creation, maintenance and change of the 'law which regulates actions or events that transcend national frontiers' (Jessup, 1956; see also Friedmann, 1996) and is predominantly generated (though not necessarily enforced) by private actors (Fischer-Lescano and Teubner, 2004; Teubner, 1997). In this understanding, the field of transnational law extends beyond classical international law that applies to inter-state relationships only.

The transnational legal field represents a revealing case of an opportunity hazy field (Dorado, 2005: 392) with distributed agency (Garud and Karnøe, 2003: 277). In many aspects, it resembles the transnational governance fields studied by Djelic and Sahlin-Andersson (2006: 22ff). The field is relatively open to new ideas and practices from other fields (Greenwood and Hinings, 1996) and forms part of a larger whole in which multiple interacting institutional rules operate at several levels (Seo and Creed, 2002). Various codified legal rules and non-codified sources of law from a multiplicity of national and international jurisdictions apply.⁴ Cross-border and international transactions are, in the words of Frankel (1998: 255), often [in a unified sense] 'without law, but not lawless'. The work of legal professionals in the transnational legal field therefore involves a considerable



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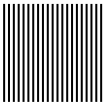
degree of ambiguity in decision-making since there is often disagreement as to which rules apply in specific cases.

This ambivalence is amplified by the multiplicity of actors at various levels of inclusion and with different interpretative mindsets. There is a division of labour between lawyers, courts and regulators as well as a great spread of organizations and institutions within each functional group. Moreover, professional organizations and individuals involved in transnational law-making originate from different national legal systems with distinct legacies of legal reasoning, professional organization and professional ethics (Abbott, 1998). They cannot expect that their international colleagues will have the same understanding of legal categorizations and arguments that they consider to be self-evident.

Under these conditions, it can be difficult to establish clear means-ends relations that allow focal actors to deliberately influence institutions in ways that favour their own position (Beckert, 1999). This, however, is the dominant concept of institutional entrepreneurship in the literature. The institutional contradictions, diversities of actors and action modes and differences in meaning systems apparent in the transnational legal field have not been adequately delineated in the literature. Many authors focus on institutional change in mature and highly institutionalized fields (DiMaggio, 1988; Greenwood et al., 2002; Greenwood and Suddaby, 2006), whereas others emphasize the strategizing of a few focal actors in emerging fields (Fligstein, 1997; Lawrence, 1999; Maguire et al., 2004). Most studies are situated in local or national settings that lack the multi-level structure of transnational fields (Scott, 2001). Although the gradual and cumulative effects of institutionalization are acknowledged (Barley and Tolbert, 1997; Tolbert and Zucker, 1996), they are predominantly seen as isomorphic pressures leading to a taken-for-granted status of rules. However, the equivocality of law contradicts the notion of taken-for-grantedness.

Studies that acknowledge contradiction and diversity as a source of institutional change and which highlight praxis and sensemaking as the prevalent modes of action under conditions of high ambivalence and distributed agency are more helpful (Dorado, 2005; Garud and Karnøe, 2003; Holm, 1995; Seo and Creed, 2002). In line with pragmatist action theory, they emphasize the self-awareness and reflectivity of the involved actors, even when performing routine-based activities, and their capability to collectively reconstruct existing social arrangements (Emirbayer and Mische, 1998; Joas, 1996; Mead, 1932). These authors focus on the ability of the actors 'to artfully mobilize different institutional logics and resources' (Seo and Creed, 2002: 240) and to engage in bricolage, that is, to fit together different pieces of different national legacies (Djelic and Quack, 2003: 26).

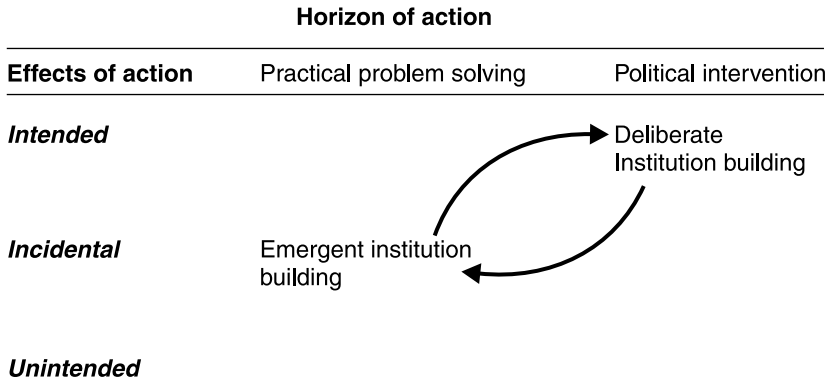
When analysing the concept of praxis, particularly in reference to professionals, it is useful to differentiate between two horizons of action and their effects on institutional dynamics (see Figure 1). On the one hand, professional activity is driven by actual problem-solving for a client that unfolds within a specific institutional context. Several authors call for



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Figure 1. The double nature of professionals' institutional work



more attention to the effects of such micro-level work activities on field structuring and institutional dynamics (Lawrence and Suddaby, 2006; Smets, 2005a). Incidental byproducts of professionals problem-solving, i.e. effects that are not directly targeted but lie in the broader range of intentions, are of particular interest when studying emergent institutional strategies that ‘involve a pattern of organizational action that affects or influences institutional structures while being associated with some other intentions’ (Lawrence 1999: 167f). On the other hand, professionals engage in deliberate strategies aimed to shape and modify the institutional rules under which they operate in their everyday problem-solving. Discussions about the activities of institutional entrepreneurs usually focus on intended outcomes.

Holm (1995: 400) refers to these two different horizons of action as the ‘practical mode’ and the ‘political mode’. Carruthers and Halliday (1998: 518ff) speak of bargaining in the markets and courts and ‘meta-bargaining among groups within the polity’. Here, ‘bargaining’ represents everyday ‘muddling through’ in a complex institutional environment, whereas ‘meta-bargaining’ refers to deliberate strategizing to influence parts of this multiplex institutional context. According to Holm (1995), emergent and deliberate institution-building are likely to interconnect and to influence each other in feedback loops. Small and gradually accumulating variations in practical actions with incidental or unintended results can lead to rather far-reaching effects in terms of institution-building (Djelic and Quack, 2003: 309). This is particularly true in contexts with a diversity of actors and institutional rules. These emergent rules can, in turn, be used by focal actors to pursue more deliberate institutional strategies (Carruthers and Halliday, 1998).

Given the different institutional backgrounds of the actors involved, both action modes of professionals in the transnational field are likely to involve a fair degree of contention over meaning and interpretation. Weick’s (1995) concept of sensemaking helps to conceptualize the intellectual



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dimension of these struggles. Individuals must take the interpretations and actions of others into account while they try to make sense of a situation. By doing so, they filter, frame and render factual specific perceptions of reality. When attempting to explain what their interaction is about, people tend to generate a story line that connects different interpretations and translations (Czarniawska and Joerges, 1996; Sahlin-Andersson, 1996) without necessarily implying shared meanings. Although sensemaking can unfold in face-to-face interaction, it also takes place through artifacts disembedded from one context and reimbedded in another (Czarniawska, 2004; Czarniawska-Joerges, 1992).

The conceptualization proposed in this article builds on these theories of praxis and sensemaking. We suggest that the analysis of work-related problem-solving activities of legal professionals in connection with their efforts to make sense of what they are doing leads to the establishment of 'workable relations' (Blumer 1969: 76) that enable actors to pursue more deliberate strategies towards law-making. Furthermore, we propose that the incidental byproducts of the ongoing problem-solving activities of legal practitioners gradually accumulate into legal artifacts that provide inputs for more deliberative strategizing towards transnational law-making. The institutionalization of binding legal rules, in turn, affects the praxis and sensemaking of professionals in the field.

While the focus is on interaction and sensemaking, we do not deny that actors who bring an external order frame and sufficient power resources to an opportunity hazy field can employ deliberate strategies to dominate parts of the field (Dorado, 2005: 399). Still, even these actors need to engage to some extent in interacting and sensemaking with other participants in the field. This is reflected in the contradictory logic of dominance and multiplicity that characterize the transnational legal field.

Contradictory Logic of Dominance and Multiplicity

The literature on transnational law-making seems to converge on an implicit assumption that the development of transnational law is strongly shaped by American and British law traditions when government is weak or absent. Notable exceptions, such as European Union law or the United Nations Convention on Contracts for the International Sale of Goods (CISG), seem to reinforce this assumption since they have developed in the context of a supranational construction or intergovernmental negotiations (Hartnell, 1993).

According to Braithwaite and Drahos (2000: 80ff), regulation of contractual relations across borders developed during much of the second half of the 20th century through bottom-up processes of norm-building similar to those seen in common law. The customary rules of business communities and the legal practices of specific professions underlie these processes. Shapiro (1993) argues that there is an affinity between American and English civil case law and the open and undetermined situation of transnational commercial



and contract law in that lawyers from these countries have a competitive advantage over lawyers from Continental Europe.

Other authors have suggested that, much of the so-called 'globalization' of law can be more aptly defined as the exportation of American law to Europe and other parts of the world (Dezalay and Garth, 1996; Kelemen and Sibitt, 2004; Trubek et al., 1994). The American model of law production has been characterized as 'legal entrepreneurialism' (Trubek et al., 1994) and 'adversarial legalism' (Kagan, 1997). American lawyers take a proactive approach to structuring, negotiating and drafting deals, they have a litigant style of conflict resolution and take sides when preparing legislation. This approach is manifested in mega-law firms (Galanter, 1983), which employ large numbers of lawyers and exhibit a strong division of labour and hierarchy between partners and associates. The global triumph of the North American legal model is a joint product of global business hegemony, educational imperialism of US law schools, and the internationalization of American law firms (Dezalay and Garth, 1996; Flood, 2007; Shapiro, 1993; Silver, 2000).

The assumption of unilateral American and British dominance in transnational law-making has been challenged by critics. Gessner (1994) argues that the discourse is misleading because it abstracts from the cultural and institutional dimensions of law. In this view, the ambiguity inherent in any kind of law thwarts a 'formal dictate of law' (Suchman and Edelman, 1996: 929). Instead, lawyers, judges, enforcers, and target populations are said to negotiate the meaning of law in each application. Therefore, any attempt at cross-border transfer of law will presumably be subjected to a considerable degree of cultural and institutional translation and adaptation, if not resistance, by the receiving actors (Levi-Faur, 2005; Teubner, 1998) when there are significant differences in legal systems and styles between the involved common and civil law countries, notwithstanding the variety within each group. Kagan (1997) argues that the recruitment and professional ethics of European judges thwart a more litigant style. Morgan (2006) and Dezalay (2007) point out the limited capacity of US law firms to deal with European regulatory agencies in Brussels. Other authors call attention to the difficulties that US American law firms faced when trying to establish themselves in Germany and Great Britain (Morgan and Quack, 2005; Lace, 2001; Silver, 2000).

To address these disparities, a more differentiated analysis of the professional organizations and processes involved in transnational law-making is needed in order to better understand how the countervailing logic of dominance and multiplicity works at the root of the transnational legal field.

The Landscape of Professional Organizations

The actors involved in the transnational legal field are quite different from those in most national fields, particularly in countries with a civil law



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tradition (Dezalay and Garth, 1996; Gessner, 1995; Trubek et al., 1994). In international law-making as opposed to national law-making, private law firms, professional associations and legal networks play the leading roles while politicians, members of parliament and judges move to the background. This is particularly true in commercial and corporate law. These organizations and their representatives engage in inter-organizational relationships and relational networks that help them deal with the rule ambiguity of the transnational legal field. This, in turn, helps them to interpret, recombine and shape legal norms in the cyclical processes of transnational law-making described in the following section.

International Law Firms An objective review of the literature on international law firms and their inter-organizational relationships paints a more varied and diversified picture than the prevailing view of US American dominance in the transnational legal field would have us to expect. While there is strong evidence that a small elite of New York law firms controls the legal market for the largest international financial deals (Dezalay, 1995; Flood, 2002; Silver, 2000),⁵ other studies indicate that different types of law firms with different international lawyering strategies coexist under different conditions.

Morgan and Quack (2005) identify three types of internationally active law firms: US mega-law firms, large European law firms, and medium-sized non-US law firms. Most US mega-law firms have operated in the past as 'exporting law firms' with a limited number of foreign offices that primarily provide advice on US law. The large European law firms created through British-German mergers follow a more integrative model (see also Empson, 2007). They have more foreign offices and generate more income abroad than the US law firms, their business activities are more diversified, and their workforce has a broader profile of multi-jurisdictional qualifications. Medium-sized non-US international law firms generally become internationalized by means of independent organic growth or by establishment of 'best friend' networks, and they tend to focus on specific segments of the market (Quack, 2003; 2006; Sosa, 2006).

On behalf of their clients, international law firms elaborate transnational solutions to problems that usually require collaboration between lawyers from several jurisdictions. These lawyers may be situated within the same firm or in other law firms. These inter- and intra-organizational interactions are crucial in a context where multiple and sometimes contradictory sets of rules apply. Smets (2005a, 2005b) shows how the business deal is often used to connect different streams of approach and understanding arising from distinct national traditions of legal training and thinking. Common law is clearly the superordinate paradigm from which the story line is developed and to which legal practitioners from other jurisdictions need to connect. Lawyers often get a second opinion on critical cases by 'talking through' problems with colleagues in other jurisdictions (Faulconbrigde, 2007). Inter-firm mobility is another channel of communication between lawyers in the transnational legal field (Galanter, 1983;



Morris and Pinnington, 1998). The most important channels of exchange of understanding, translation and editing, however, are international professional associations.

International, National and Local Bar Associations The seminal study by Greenwood et al. (2002) describes professional associations as an important yet rarely studied arena of theorization of institutional change processes. In particular, the strategies that bar associations pursue to shape the law (Carruthers and Halliday, 1998: 8f) have received much less attention than traditional jurisdictional policies (Abbott, 1988; Halliday et al., 1993; Rueschemeyer, 1973). This gap in research is particularly evident in the case of international bar associations.

An explorative analysis of the web pages and official documents of international professional law associations suggests that international bar associations are more heterogeneous in organizational form and membership than their national counterparts. The International Bar Association (IBA), a classic type of international federation that fits the definition of meta-organization proposed by Ahrne and Brunsson (2006), is a prime example. Some national and urban professional associations from 'global cities' also strive to be international players. Examples include the American Bar Association and the City of London Law Society, respectively. Many legal associations do not limit their membership strictly to legal professionals. The multi-jurisdictional nature of the work in the field of international insolvency law, for example, has prompted the International and European Federations of Insolvency Practitioners (INSOL International and INSOL Europe) to admit members from adjacent professions (Flood, 1996; Halliday and Carruthers, 2007). Finally, global professional service firms have formed their own interest groups to lobby political institutions (Arnold, 2005).

These different types of international associations perform two important roles in the transnational legal field. Firstly, international law associations provide a forum for *sensemaking and social networking* about the interpretation and use of law. Their conferences, committees and internet-based communication platforms allow lawyers from different jurisdictions to discuss and exchange their opinions about new developments in various specialized practice fields and to collectively make sense of these trends (Faulconbridge, 2006).

Secondly, international bar associations act as *experts in practice-based law-making*. International professional associations play an important role in 'meta-bargaining' the rules used by lawyers in daily practice (Carruthers and Halliday, 1998: 5; Günther and Randeria, 2001; Halliday and Carruthers, 2007: 1182; Riles, 2000). International bar associations maintain various committees that provide guidance to international organizations and international policy networks. Their influence is based primarily on the expertise of the committee members, who are respected legal practitioners in close contact with novel developments in the field of transnational transactions.



Transnational Legal Networks with Private and Public Actors The inter-organizational and relational networks described in this section also extend to other transnational organizations of legal scope, namely, international arbitration courts (Lehmkuhl, 2003), the European Court of Justice (Alter, 2001), intergovernmental organizations such as the Bank for International Settlement (BIS), the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO) (Carruthers and Halliday, 2006), non-governmental business organizations such as the International Chamber of Commerce, and national governments and regulatory agencies. Networks also extend into epistemic communities (Djelic and Kleiner, 2006; van Waarden and Drahos, 2002). These interorganizational and relational networks provide an enlarged interaction context in which legal practitioners can build and develop their understanding of transnational law. In the following section, we will consider how these sensemaking activities play out in the process of transnational law-making.

Transnational Law-making Process

Transnational law-making is a case of distributed agency, not only in terms of actors, but also in terms of activities. This becomes evident when law-making is conceptualized as a recursive cycle in which written legal norms are modified when enacted into practice, and when practice feeds back into the cycle of formulating or amending written law (Carruthers and Halliday 1998: 53). In such a cycle, different actors may be involved in different phases or the same actors may contribute to several phases of law production. Distributed agency in terms of actors *and* activities is particularly likely to be found in the transnational sphere, where the production of non-binding legal rules by legal practitioners provides important input into the overall law-making cycle (Halliday and Carruthers, 2007).

When attempting to conceptualize the cycle of transnational law-making, it is useful to distinguish between contractual innovation, legal standardization and legal normalization. Lawyers are involved in different roles in each phase. In the first stage, they act predominantly as advisers and draftspersons producing contract-based legal innovations for their clients. In the second stage, lawyers function as intermediaries and 'proselytizers' to promote the dissemination of such contractual legal innovations. This may result in the emergence of model contracts and other legal standards (often referred to as 'soft law'). In the third stage, lawyers act as public experts in hearings or as lobbyists in negotiations when strategically pushing for a rule to become legally binding in form or effect, or for existing law to be amended. This usually requires recognition by a national sovereign authority or, increasingly, by a transnational authority. The process may stop at any level, and the phases may run parallel or interconnect. In the following, we will review the available literature on this subject.



Contractual Innovation: Lawyers as Advisers and Draftspersons

Law practice in international law firms routinely consists of drafting and crafting contractual arrangements. This activity is largely driven by the lawyer's and the law firm's perception of emerging client needs in specific practice areas (Powell, 1993). As stated above, much of the contracting and drafting in large law firms evolves with reference to the common law concept of private contract, which accords great autonomy to the contracting parties. Much of this activity is routine-driven, but there are also many instances requiring the development of novel solutions that may contribute to 'the business of changing the law' (Nelson, 1988: 452). Lawyers are particularly likely to produce innovative contractual arrangements: (a) when attempting to stretch and bend existing law; (b) when constructing contractual solutions in a regulatory void or (c) when coordinating expectations of different actors across jurisdictional boundaries. All three conditions are more prevalent in transnational contexts than in national contexts.

Legal innovation originating *from bending existing law*, or 'professional subversion' (Carruthers and Halliday, 1998: 60; Schanze, 1995), occurs when lawyers work to find loopholes that allow their clients to circumvent existing law, or when they engage in legal arbitrage at the borders of multiple jurisdictions. Legal innovation at the edge of the law is particularly frequent in transnational tax, financial and corporate law (Picciotto, 1995).

Legal innovation is likely to arise when there is *a regulatory void* in newly emerging markets, transnational pioneering or unique cases for which there is no existing precedent. Suchman and Cahill (1996) highlight the role of lawyers in shaping the venture capital arrangements that became a key device for dealing with the uncertainty inherent to financing this 'virgin' capital market in California's Silicon Valley. The invention of the floating charge (Flood, 1996) illustrates how such a regulatory void was filled in cross-border banking law at the transnational level.

Finally, the recurrent necessity to *coordinate different jurisdictional expectations* across borders is also likely to evoke contractual innovation. Securitization is such an example. Actors in cross-border securitization 'compete by creating unique innovative structures, contracts and country combinations' for financial intermediation schemes (Frankel, 1998: 255). The construction of contracts for international credit derivative trading (Günther and Randeria, 2001; Huault and Rainelli, 2006; Morgan, 2007; Morgan and Kubo, 2006), cross-border insolvency agreements (Flood and Skordaki, 1997), and much of the legal business involved cross-border privatization and international merger and acquisitions of companies provide similarly procreative ground for contractual novelties (Flood, 2002).

While unfolding in a common law context, contractual innovation in the transnational sphere tends to involve a fair amount of translating and editing legal concepts between different jurisdictions. Especially when there are discrepancies in private contract law in the respective jurisdictions, lawyers



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use a pragmatic approach to get around certain issues (Smets, 2005b: 14) in order to open up new opportunities for contractual innovation.

Legal Standards: Lawyers as Disseminators and Standard Setters

Contractual innovation creates a private legal order for the parties involved. Legal standards, on the other hand, are non-binding legal norms that are followed voluntarily by a broader community of legal experts and their clients (Abbott and Snidal, 2000; Nobel, 2005). They are usually referred to as 'soft law'. There are two routes through which legal professionals contribute to the transformation of contractual innovation into legal standards. Firstly, legal professionals contribute to bottom-up processes of de facto standardization that unfold predominantly in the private sphere. Secondly, their practices and expert opinion influence standardization projects organized by public or semi-public organizations. We will concentrate on the first type now and on the second mode in the following section.

There are many ways by which legal practitioners contribute to the dissemination of contractual innovations and thereby lay the ground for private de facto standardization. Dissemination occurs due to interorganizational mobility of lawyers (Galanter, 1983; Morris and Pinnington, 1998; Schanze, 2005) and interaction between lawyers in the course of their work (Powell, 1993; Suchman and Cahill, 1996). International law conferences organized by prestigious law schools and publications in professional journals also contribute to such bottom-up standardization in transnational law-making. With the support of business law firms, model contracts and master agreements for transnational business transactions are often developed by international business associations (see Huault and Rainelli, 2006; Morgan, 2007; Morgan and Kubo, 2006 for international derivative trading) and international bar associations (see Halliday and Carruthers, 2007, for international bankruptcy law).

This gradually cumulative process of standard-setting is predominantly driven by the commercial interest of international law firms to find solutions for their customers. When competitive advantage is at stake, the dissemination of contractual innovations by the inventing law firm is sometimes unintended yet unavoidable. In many cases, however, law firms appear to make their invention accessible to other firms intentionally because more frequent use of the new contract form will lower the judicial risk involved for their clients and thereby expand the market (Frankel, 1998: 271). In this case, standardization is an incidental byproduct of contractual innovation.

Transnational Legal Norms: Lawyers as Public Experts and Lobbyists

Transnational legal norms often develop from the bottom-up through model contracts, master agreements and legal standards. Actors aiming to make these norms binding must convince the wider public and the transnational



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authorities of the advantages of having such binding rules and mobilize the necessary support to achieve this goal. Transnational law-making at this stage is therefore characterized by the deliberate strategic efforts of 'institutional entrepreneurs' (DiMaggio, 1988) to design new laws or change existing ones. Legal professionals, law firms and international bar associations act as initiators or supporters of such institutional strategies. At this stage, however, there is still a considerable portion of decentralized activity arising from the multiplicity of sensemaking activities required and the variety of counterparts to be addressed in order to gain the third-party recognition required for a legal rule to be considered binding.

Law firms engage in such institutional projects in their own commercial or jurisdictional interest and in their clients' interest. International bar associations have a dual role of being experts in practice-based law-making and representing the commercial and jurisdictional interests of their members. At this stage, their key activities consist of diagnosing problems, framing issues, negotiating solutions, and mobilizing policy networks (Halliday and Carruthers, 2007: 1150). Each of these activities may involve struggles and conflicts with other professional actors or third party law-making authorities.

Various examples of such intervention by international law firms and professional associations in transnational law-making are documented in the literature.⁶ Morgan (2006) describes how large US law firms lobbied the European Commission to align its approach to competition law to that of the American Anti-Trust-Commission. Lawyers from the International Competition Network proposed and promoted the idea of having a flexible notification date for mergers to be adopted by the EU (Djelic and Kleiner, 2006). Law firms and professional associations play a pivotal role in backing international business practices in financial markets with a transnational legal framework that relies on the recognition of netting clauses in national financial law (Günther and Randeria, 2001; Riles, 2000). The International Bar Association (IBA) and the International Federation of Insolvency Practitioners (INSOL) were both actively involved in the United Nations Commission on International Trade Law (UNCITRAL) project of drafting a model law regulating major corporate bankruptcies across national borders (Halliday and Carruthers, 2007: 1173).

In their attempts to shape transnational law, professional actors usually need to address several counterparts who possess the authority to render legal rules binding. The main groups of involved actors include supranational and international organizations that draw legislative authority from their intergovernmental character (European Union, World Trade Organization, international financial institutions, etc.). Secondly, there are a number of semi-public standard-setting bodies whose standards can become quasi-binding when recognized by court decisions; these include the International Chamber of Commerce, International Institute for the Unification of Private Law (UNIDROIT), and the Commission of European Contract Law (Nobel, 2005). In addition, voluntary transnational legal standards may gain legal



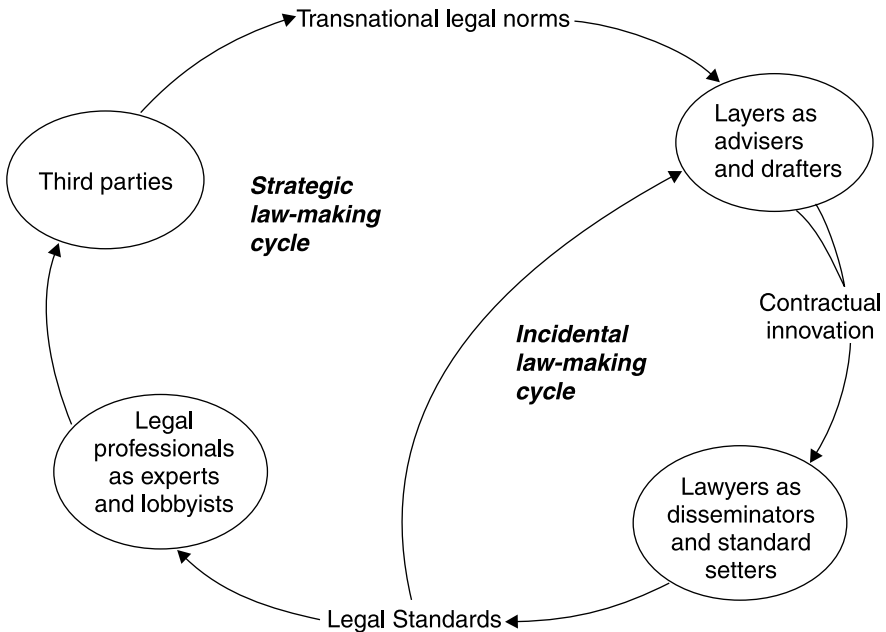
recognition when integrated into national legal reforms in a significant number of countries (Halliday and Carruthers, 2007: 1191). Finally, international courts and arbitration tribunals have the authority to transform non-binding legal standards into recognized sources of law (Hartnell, 2006).

Nested Cycles of Professional Law-Making

By analysing the three stages of transnational law-making, we can now identify two nested cycles of professional law-making (see Figure 2). They will be described and compared with an alternative cycle of transnational law-making based on intergovernmental negotiation.

In the *incidental law-making cycle*, lawyers creatively apply ambivalent legal rules to solve their clients' problems, thus leading to the invention of novel contract forms which, when disseminated and used by others, gradually transform into a de facto standard. Such standards, in turn, are used as reference points for future contract drafting. When confronted with novel problems, these standardized practices tend to be interrupted by new contractual inventions, giving rise to the next incidental law-making cycle. The prominent actors in this flow are lawyers in large international law firms who operate at the cutting edge of their field in response to client demand. There may be some political action involved when it is useful to be a first-mover in the standard-setting process. However, legal practitioners are generally oriented towards problem-solving for the specific case at

Figure 2. Professionals in nested cycles of transnational law-making





hand and not towards law-making as such. The non-binding legal rules produced in this cycle have a strong affinity towards common law, although they require some translating and editing for adaptation to other legal traditions. Obviously, countervailing forces of contractual innovation and standardization are at work in this cycle. This type of law-making is likely to unfold on a recurrent basis as long as the transactions involved provide legal practitioners sufficient incentives for contractual innovation and the uncertainty of the transnational context leads to dissemination and imitation of contractual innovations (see Frankel, 1998).

The *strategic law-making cycle* usually contains a nested incidental cycle, but goes beyond that. Contractual innovation and de facto standardization are followed by episodes in which international law firms or professional associations diagnose a need for transnational legal norms of a more binding character. Subsequently, the involved actors engage in deliberate persuasion and lobbying of their peers and of governmental or transnational authorities in order to create or change a legally binding norm. If successful, this transnational legal norm will become part of the written law and can be used as reference point for further legal engineering by practitioners, eventually giving rise to a new cycle of incidental or strategic law-making. In this cycle, legal professionals need to gain the backing of third parties within a transnational legal authority. Professional actors explicitly strategize to change the laws they use in everyday practice. The binding legal rules produced in this cycle incorporate many model contracts and standards arising from the incidental cycle and therefore tend to have strong common law influences. The strategic law-making cycle, however, also incorporates subcycles (described below) of intergovernmental law-making that are more open to multiple influences. While the generation of binding legal norms aims to homogenize transnational law, the generality and airiness of such norms provides ample ground for different interpretations and further contractual innovations by legal practitioners.

Since legal professionals, private law firms and professional associations are the main players in both cycles, intergovernmental negotiation shall be briefly discussed as an alternative mode of transnational law-making. The United Nations Commission on International Trade Law (UNCITRAL), with its various conventions, principles and guidelines, is a prominent example of an intergovernmental actor. Its debates and working parties are formalized and participative. Official delegations from a great number of countries participate. Though this type of law-making incorporates outputs from the two law-making cycles presented above, the procedures are closer to statutory law-making at the national level. In this context, legal professionals from non-Anglo-Saxon law traditions appear to be able to capitalize on 'reconciliation strategies' (Maguire and Hardy, 2006: 24) if other actors consider their suggested solutions to be an apposite solution (DiPalma, 1999; Hartnell, 1993; Moss, 2004).



Conclusions

Understanding how transnational law evolves is a challenge to institutional theories of rule-setting in highly ambiguous and uncertain contexts. The present analysis suggests that the ways in which legal professionals shape the legal rules pertaining to their client-related work are a neglected source of transnational law-making. It also indicates that, in the absence of strong government, transnational law develops, to a significant degree, from decentralized rule-setting led by legal practitioners in large law firms and international professional associations.

Examination of the subfields of commercial and corporate transnational law revealed two cycles of law-making based primarily on incidental and strategic rule-setting. The incidental law-making cycle is nested in the latter. Analysis of both contributes to a better understanding of *how* legal practitioners and their organizations influence transnational law in procedure and substance. The decentralized activity of many legal practitioners is critical for invention and standardization in the first cycle, while strategizing and expertise-based persuasion by focal actors is featured in the second cycle.

This nested cycle concept provides a framework for understanding *why* the transnational legal field is characterized by apparently opposed logics of domination through common law influence and eventual trickling up of elements of multiple legal traditions. The incidental law-making cycle is strongly based on common law for reasons of path dependence and structural affinity. The strategic cycle of law-making incorporates many de facto standards produced by this logic as well as legal rules generated by inter-governmental procedures. In consequence, the aggregate outcome of law-making activities of legal professionals in the transnational sphere leans towards the common law concept of contract. Because the first cycle includes a fair amount of translating and editing and the second cycle is more open towards actors familiar with the civil law tradition, influences from other legal traditions are eclectically merged and combined with this dominant logic. Considering the power resources of different actors, the cycles presented in this article can also help to specify under *which* circumstances common or civil law influences are likely to prevail.

This nested cycle concept emphasizes the interlocking nature of both law-making cycles. A key element of this model is that the forces pushing towards standardization and harmonization seem to be countervailed by equally strong forces driving towards diversification of legal practices through translation, editing and contractual innovation. The ambiguity inherent in the transnational legal field therefore appears to be reproduced in a '*perpetual motion machine*'.

This concept has some limitations. While legal practitioners and private professional organizations are at the forefront of the specific area of transnational law studied in this article, intergovernmental organizations, international financial and political institutions may be more prominent in other areas. Therefore, not all elements of the conceptualization may be



applicable or apply to the same extent to other subfields of transnational law. However, it seems plausible that at least some of the processes delineated here will be observable in other subfields of transnational law, particularly considering the rising importance of private law firms as governments advisors and international financial advisors, although the relative influence of legal professionals in other subfields may differ (Dezalay, 2007; Halliday and Carruthers, 2007). Comparative analyses of different subfields of transnational law must be performed to clarify this issue.

Another limitation of this study arises from the scarcity of research data on the transnational activities of legal professionals and law firms originating from countries other than the US and Great Britain. As plausible as the dominance of the common law tradition may appear against the background of a general 'first mover advantage' (Djelic and Sahlin-Andersson, 2006: 396), research bias towards the obviously stronger and more powerful actors in the field may also play a role. There is a pronounced need for future research on the transnational activities of law firms from civil law countries, the participation of professionals from these countries in international professional associations, and the mechanisms by which transnational law-making unfolds in areas that are less spectacular than the world's largest financial transactions but nevertheless of economic significance. The rise of emerging economies like India and China provides another potentially fruitful field for future research.

This article touches upon many important issues in global institution-building. Firstly, it highlights the role of professionals as practice-based experts in transnational rule-setting and the transformation of 'hard law' into 'soft law' and vice versa. They engage in translation, editing and recombination activities to soften 'hard laws' and make them applicable to specific cases. Professionals also play a central role in the gradual 'hardening' of soft rules, that is, their de facto standardization and transformation into written law.

The concepts delineated here also contribute to the discussions on institutional emergence and change in fields with a relatively high degree of rule ambiguity and contradiction. Our analysis shows that the frequent practice of distinguishing between institutional entrepreneurship by a few actors (deliberate institution-building) and emerging modes of institutionalization based on the practice of many (emergent institution building) runs the risk of missing important combinations and interactions between the two. Examples presented in this article show that actors may be involved in both types of institutional work simultaneously, that the two types may occur successively in subsequent phases, and that the one type may reinforce or neutralize the other.

Finally, we have shown that sensemaking provides a useful concept for analysing rule-setting in diffuse, complex and nested fields of transnational governance with distributed agency and unpredictable outcomes. Transnational law-making is an archetypal example of how the continuous and



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recurrent efforts of multiple professional actors to make sense of their legal transactions generate a working level of relationships while all of the actors maintain their distinct cultural and institutional reference frames. In producing and using legal artifacts, actors adapt to each other in terms of their actions and interpretations although they may not necessarily share the same basis of understanding. While the rule of law doctrine and common law concepts provide a strong guiding ideology for these efforts, it appears far from fully pervading the perceptions and understandings of professionals outside the common law countries. As suggested by this study, the 'shared experience of interconnected action' (Czarniawska-Joerges, 1992: 188) may be an important force in the structuration of transnational fields of governance in situations where shared understanding cannot be taken for granted.

Notes

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- 1 The term institution is used here to cover both a structural dimension, including formal rules and systems and an ideational dimension, including normative and cognitive patterns. Whereas these two dimensions have been often treated separately, they should be brought together to study processes of institutional emergence and change (Djelic and Quack, 2003: 18).
- 2 The focus is on law-making rather than on law enforcement.
- 3 Lawyers associated with international nongovernmental human rights and environmentalist organizations (Boli and Thomas, 1999) are also actively involved in creating and promoting transnational legal norms (see Dezalay, 2007; Yamin, 2001), but this cannot be covered in the scope of the present article.
- 4 The field of law illuminates that institutional rules usually apply to the social behaviour of people belonging to a specific jurisdiction and that contradictions arise wherever the boundaries of jurisdictions are unclear or overlap and actors can establish referents to several institutional rules.
- 5 The small circle of New York capital market law firms exemplifies Dorado's (2005: 399) argument that powerful actors drawing on external frameworks can structure opportunity hazy fields in ways that enable deliberate ends-means strategizing. One could even extend the argument to path-dependent routine behaviour (i.e. limited interaction with a small number of other well-known law firms) oriented at uncertainty reduction.
- 6 Suchman and Cahill (1996) describe the influence of professional associations on law-making in regard to venture capital within the two-tiered US federal law system.



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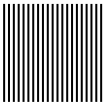
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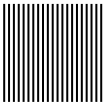
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