The Future Legal Structure of International Law Firms – Is the Experience of the Big Five in Structuring, Auditing and Consulting Organizations Relevant?

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A. Introduction

A sequence of coincidences led the author to come to the conclusion that the issue of the creation of an international legal structure is a strategic issue for certain international professional service firms. The author has been involved in several exercises of designing the organizational and legal structures of multinational service firms, the major reason being that the Swiss legal system has special qualities and merits. A multitude of multinational service firms among others in the area of telecommunication, sports and strategic services industry, in particular in the auditing and consultancy fields, chose Swiss legal vehicles such as associations (*'Verein'*) or co-operatives (*'Genossenschaft'*) as their international legal structure for the professional service firms operating on an international and global scale. The major reasons for choosing Switzerland as a home jurisdiction, after state-of-the-art comparative law

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analyses, were multifaceted. In the foreground was the fact that the Swiss legal system, within the *'numerus clausus'* of corporate legal forms, provides corporate vehicles which are particularly geared to the purposes of international professional service firms. The major favourable elements usually were: providing for a far-reaching flexibility of internal organization; providing for limited liability; allowing owning assets and intellectual property rights; conferring an ability to enter into contracts with third parties; offering the quality of being 'recognized' under aspects of conflict of law in key legal systems in which the international professional service firms operate; providing for a valid and recognized choice of law in respect of all contractual relationships entered into by the organization or its members; providing for an acknowledged and modern regime in commercial and procedural law and not being litigious or litigation prone; providing for a legal system under which the business incorporated could be a signatory of key multilateral treaties on intellectual property; as well as providing for arbitration and viable dispute resolution mechanism on legal disputes within the organization and between the organization and third parties, and enjoying an acknowledged reputation as a place of arbitration. For such and other reasons, the majority of international organizations of sports and telecommunications are incorporated in such Swiss vehicles. In the area of audit and consulting there are still three of the Big Five that are constituted in Swiss vehicles, Arthur Andersen Worldwide, KPMG and Deloitte Touche Tohmatsu.[1]

The author has been teaching on the 'planning and structuring of legal transactions' at the University of St. Gallen, a modern, reality-oriented University, specializing in the teaching and research in management, economic and legal science. Based upon consulting experiences, in the winter semester of 1997/1998, the author together with Günter Müller-Stewens, organized a special seminar at the University of St. Gallen dealing with a series of issues concerning A.T. Kearney, Gemini Consulting, Arthur Andersen, Coopers & Lybrand, Price Waterhouse, Baker & McKenzie and Egon Zehnder International, with the participation of high level representatives of these organizations. The teachers attempted to develop a new field of teaching and a new field of research at the University of St. Gallen, called 'Professional Service Firms', and new core subjects of management science, by using an integrative, interdisciplinary and international method of co-teaching. The teachers focused more on the commonalties than on the differences between the international professional service firms analyzed. The special seminar was followed by a PhD candidate seminar in summer semester of 1998 with the title, 'Special Aspects of the Strategic Organization of Multinational Service Firms, with Particular Reference to Law'. This time the PricewaterhouseCoopers merger transaction was at the centre of the seminar. In that seminar the teachers used a specific interdisciplinary and transactional teaching method in which major transactions are recreated, the actual consultants and actors of the transactions

[1] Coopers & Lybrand International before the merger with Price Waterhouse, used to be a Swiss Verein.

and the original files being in the centre of the special seminars.[2] The teachers had to wrestle with the fact that the conceptual frameworks from a management as well as from a legal perspective, with regard to multinational enterprises, have basically been developed after the model of multinational industrial firms and were in many respects not attuned to international professional service firms. There was no way around, in reality, not accepting that the issue of the design of the international legal structure at a certain point of the life cycle of the international service firm and in particular in connection with certain events such as mergers, restructurings and divestitures, is an issue of strategic dimension. The authors have tried to reason this in the general introduction of a Reader for Professional Service Firms, published in the aftermath of the above mentioned seminars, with the title '*Branchenmerkmale und Gestaltungsfelder des Managements*'.[3]

This text takes this analysis one step further by first arguing that certain international law firms at this stage of the development are to be considered as international professional service firms with respect to which it is a fruitful working hypothesis to argue, that basic findings with respect to management as well as legal organization in other areas of international professional service firms are relevant and applicable to international law firms as professional service firms as well, the specific content of such analogies to be determined in further research and writing. We thereby start with two charts contained in an article of The Economist of 25 February 2000 with the title 'Lawyers Go Global, The Battle of the Atlantic'. The first chart's motto is 'The biggest and the best', the one of the second chart 'Who's global'.

This internationalization of the legal services and the law firms has largely been brought about by a notion of the international practice of law as an entrepreneurial activity, which is performed by business organizations. These law firms obviously have grown in number and size and geographic reach and have greatly increased their international character by multiplying lawyers' foreign jurisdictions. There are presently more than 10 international law firms with more than 1,000 lawyers operating internationally in a more or less global market. These international law firms seem to be roughly equal in size to the international legal networks of the Big Five. Most of them strive to operate as 'one-firm' and are constituted as 'one enterprise'. The developments have substantially changed by the increased use of external growth through mergers such as the Clifford Chance/Rogers & Wells/Pünder Group White & Case/Feddersen Laule and Freshfields/Bruckhaus/Deringer transactions of 2000.[4]

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[2] The method is described in Jens Drolshammer, 'Ein didaktisches Experiment an der Universität St. Gallen und ein Plädoyer für eine transaktionale Lehrmethode im modernen Wirtschaftsrecht' in *Solothurner Festgabe zum Schweizerischen Juristentag* (1998) pp. 391–411; see also Jens Drolshammer, 'Der Anwalt als Hochschullehrer?' in *Schweizerisches Anwaltsrecht* (Festschrift SAV 1998) pp. 531–545.

[3] See *supra* note 1.

[4] (2000) *The Wall Street Journal Europe*, p. 4, Wednesday, 21 June.

The biggest and the best

Firm	City	Profits per partner, USDm	Revenue USDm	Number of partners	Number of lawyers
Wachtell, Lipton, Rosen & Katz	New York	3.11	269	65	143
Cravath, Swaine & Moore	New York	2.05	334	77	334
Sullivan & Cromwell	New York	1.65	427	119	454
Cahill Gordon & Reindel	New York	1.60	–	55	204
Davis Polk & Wardwell	New York	1.53	435	124	464
Simpson Thacher & Bartlett	New York	1.50	386	123	490
Skadden, Arps	New York	1.38	890	285	1187
Debevoise & Plimpton	New York	1.20	255	90	379
Slaughter and May	London	1.16	268	102	590
Milbank, Tweed, Hadley & McCloy	New York	1.11	243	81	372
Cleary, Gottlieb	New York	1.08	366	136	492
Shearman & Sterling	New York	1.05	426	140	683
Willkie Farr & Gallagher	New York	0.96	237	108	376
Freshfields	London	0.93*	463*	275	1448
Allen & Overy	London	0.93	413	175	1136
Weil, Gotshal & Manges	New York	0.89	400	160	640
Clifford Chance	London	0.84	1000	570	3100
Linklaters	London	0.81	479	207	1210
White & Case	New York	0.67	352	172	742
Baker & McKenzie	Chicago	0.56	785	535	2330

* Pre-merger Post-merger estimates Based on 1998–99 results for Clifford Chance and 1998 results for Rogers & Wells and Pünder, *American Lawyer Legal Business*, International Centre for Commercial Law; *The Economist*

Who's global

Firm	Lawyers outside home country, %	Number of countries
Baker & McKenzie	79.6	35
White & Case	46.8	24
Clifford Chance*	62.0	20
Linklaters	na	17
Allen & Overy	34.5	17
Freshfields*	51.1	15
Skadden, Arps	7.6	11
Shearman & Sterling	25.0	9
Cleary, Gottlieb	32.9	8
Sullivan & Cromwell	12.6	7
Weil, Gotshal & Manges	18.6	6
Slaughter and May	13.2	6
Davis Polk & Wardwell	12.7	6

Sources: American Lawyer Legal Business; The Economist *Post-merger

As regards the question of the analogous applicability of findings in connection with the creation of an international legal structure by the Big Five firms concerning the audit or consulting organizations on the issue of international legal structure to international law firms, we note as a starting point the following: The changes in the demand structure as a result of globalization in the area of audit and management organizations of the Big Five has brought about demands for substantial adaptations to the international legal structure of these professional service firms, as well. Obvious emphasis therefore has been placed in planning and structuring these organizations in practice in the recent years on issues of legal structuring as well, especially if these adaptations were affected by acquisitions or mergers or by far-reaching internal restructuring operations and eventually far-reaching divestments (see Section C:I *post*). This can be shown in the area of the original Big Six (Arthur Andersen, Coopers & Lybrand, Deloitte Touche, Ernst & Young, KPMG and Price Waterhouse) which have been increasingly engaging in global operations and thereby looking for adequate international legal structures. This need has in recent years given rise to the creation of a new generation of professional service firms. The dynamics of changes in the organizational structure, leading to parallel changes in the international legal structure, is dramatically evidenced by the most recent reverse developments under the heading 'Breaking up the Big Five?', the PricewaterhouseCoopers transaction in 1998 marking the turning point. Since December 1997, Arthur Andersen pulled into public dispute with sister firm Andersen Consulting over revenue sharing in governance, the international arbitration might lead to a break-up of Andersen Worldwide. In January 1999, KPMG's plan to float part of its consultancy arm was effectively stalled by the US Securities and Exchange Commission. In December 1999, the global CEO of Deloitte Touche Tohmatsu ruled out a break-up. In December 1999, Ernst & Young in turn revealed that it was in talks with Cap Gemini aimed at the sale of its consultancy arm. In February 2000, PwC announced a split to two or more businesses. All these restructurings will again raise the issue of the adaptation and the creation of yet a new generation of the respective international legal structures. At the same time, all of the Big Five have associated international legal networks of comparable size to the biggest international law firms. A comparative look at those organizations is particularly warranted because these networks are in direct actual and potential competition on substantive relevant markets with the international law firms. All of the Big Five have publicly announced that they will follow a strategy of rapid and aggressive growth in those markets. The majority of the Big Five are in the process of changing the legal structure of the international legal networks, as described below,[5] by using their entrepreneurial experience and organizational sophistication gained in restructuring the auditing and consulting organization to achieve organizational and legal structures as close to those organizations as feasible and legally possible, irrespective of the outcome of the primarily SEC-driven

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[5] See *infra* Section C:I.

unbundling of the service lines of the Big Five. It therefore seems to be wise and prudent from a perspective of independent attorneys organized in international law firms – at least for those operating as 'one firm' – willing to compete on the market with the Big Five, to think about the need for an international legal structure and the similarities and dissimilarities between the issues involved in developing an adequate legal structure between an international professional service firm – such as the Big Five in general – and the international legal network of such firms and an international law firm made up of attorneys.

The text argues that the creation of international legal structures of the Big Five in the area of audit and consulting organizations as well as in the area of international legal networks merits careful comparative attention, despite the fact that the majority of the international law firms replying to a questionnaire of the author argued that they are not looking to the Big Five to find an adequate legal structure but are of the opinion that they will not have to look for a new international legal structure in the near future, despite the fact that business and culture-wise the international law firms are arguing that they are more sophisticated than the international legal networks of the Big Five. Yet again despite the fact that the majority of the law firms stated that they consciously structured the law firm from a legal point of view and that they have become an international law firm had a decisive influence as to how they structured their law firm legally. The Big Five are used here merely as a motivating and legitimate 'working tool' to explore synergies in the development of professional knowledge of the design of international legal structures. *The author argues that there is a need for the development of a state-of-the-art knowledge on questions of international legal structures, which is transparent and accessible to all international professional service firms interested and concerned.* He constantly is reminded by the fact that McKinsey & Co. in 1997/1998 expressly declined to participate in the above mentioned seminars at the University of St. Gallen by arguing that they did not want to disclose, even in closed University circles, their know-how on the organization and management of professional service firms, which they basically had developed perfecting their own organization. In the meantime, McKinsey is known to consult leading international law firms and thereby, at least in a commercial framework, making the know-how accessible to other professional service firms as well. Because of the lack of concepts and because of the lack of transparency in these issues of international legal structure it is timely to deal with this issue as well. The author argues that it is wise and prudent for international law firms of a global dimension to deal with this issue systematically, taking into account the analogous results of the findings of the Big Five. The author further argues that the counselling law firms involved in designing international legal structures should generalize their know-how and make it accessible to the legal and scientific community.

The text is partially based on the description of the Big Five firms and the largest global law firms of their legal structure and their answers to a questionnaire. The participating firms were Andersen Worldwide SC, KPMG, Ernst & Young, PricewaterhouseCoopers of the group of Big Five and Baker McKenzie, Linklaters & Alliance, Clifford Chance, Allen & Overy, Freshfields, Skadden Arps, White &

Case, Shearman & Sterling, Latham & Watkins and Cleary Gottlieb from the group of global international law firms, which is the majority of the international law firms from the chart 'who's global' from The Economist of 25 February 2000. The questionnaire contained the following questions:

- Have you consciously structured the law firm from a legal point of view?
- Does the fact that you are an international law firm have an influence as to how you have structured the law firm legally?
- Are you using a corporate or a contractual basis for the legal structure?
- What are the primary considerations in choosing the structure, liability?
- Tax?
- Governance?
- Professional regulations?
- Are you of the opinion that the efforts of the Big Five to structure their international legal network professionally will have an influence on the international law firms' efforts to adapt and change their structures? (question to international law firms)
- Are you as a Big Five firm influenced by international law firms? (question to international legal networks of the Big Five)
- Do you see any need in the near future to change and adapt the structure of your law firm in view of those developments and in view of the future internationalization of the firm?
- Who within the firm is dealing with the issue of legal structure?
- Have you ever had outside advice concerning matters of the legal structure?
- Why do you think has the issue of legal structure of Professional Service Firms and in particular of International Law Firms not been dealt with to a large extent neither in practice nor in theory?
- And – of course – Special Remarks?[6]

With the exception of one Big Five firm and two international law firms, all of the firms replied to the questionnaire and wrote the description of their legal structure.

The text deals with the issue of creation of the international legal structure of

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[6] The author is very grateful for the following contributions and the answering of a questionnaire: Andersen Legal, by Professor Dr Peter Athanas, Head International Taxes Switzerland, Arthur Andersen AG, Zurich; KLegal International Association, by Dr J. Baer, Senior Partner KPMG Switzerland; Ernst & Young, by Dr Urs Widmer, CEO ATAG Ernst & Young Switzerland; PricewaterhouseCoopers, by Ann McDougal, Office of the General Counsel, New York; Baker & McKenzie, by Professor Dr Wulf Döser, Partner Baker & McKenzie/Döser Amereller Frankfurt; Clifford Chance, by Edward Sadler, London; Allen & Overy, by Anthony J. Herbert, London; Freshfields, by Ian Terry, Managing Partner, London; Skadden Arps Slate Meagher & Flom LLP, by Bruce M. Buck, London; Shearman & Sterling, by John J. Madden, Managing Partner New York; Cleary Gottlieb Steen & Hamilton, by Peter Karasz, Managing Partner, New York; CMS Hasche Sigle Eschenlohr Peltzer and CMS, by Professor Dr Alexander Riesenkampff, Frankfurt; Hengeler Mueller Weitzel Wirtz, by Dr Hendrik Haag, Frankfurt.

international law firms based upon the experience of the Big Five in the area of auditing and consulting, *primarily from a methodological standpoint using the following grid* (A), *facts and trends in legal structures of international service firms* (B), legally relevant features and trends and their impact on the legal structure of international service firms (C), key qualities of a legal structure of international professional service firms (D), the legal issues of the creation of the legal structure of international professional service firms (E) and the role of law and lawyers in the creation of the legal structure of international professional service firms (F). The text can be characterized as an essay. In view of the present lack of consistent and coherent theoretical tools, we base our observations on specific experiences from consulting and from interdisciplinary seminars held at the University of St. Gallen.

This descriptive approach based on observations and experience in our view is intellectually a more honest and legitimate way to reflect the present stage of development of general knowledge on these issues of legal structuring. The essay, moreover, is to be situated on the methodological and exploring side. The text 'spots the issue', the specific content of the analogy to be determined in further research and writing. The still governing principle of territoriality brings about the simultaneous applicability of a multitude of national legal systems on the legal structure of an International Law Firm. This is the prevailing reason to situate the remarks on a methodical meta level. Because of the lack of published and otherwise accessible know-how on the legal structure of Professional Service Firms the text hardly contains any footnotes. We have developed a basic approach and a basic observation with respect to the function of the international legal structure of international service firms in the introductory overview of the book 'Professional Service Firms'. The use of the working hypothesis of the relevance of the analogy to the knowledge and concepts of the Big Five to international law firms, has a didactic purpose and is intended to speed up the 'spotting' and 'addressing' of the issues by the international law firms by a dialectical approach. The text limits itself to the international legal structures of the 'biggest law firms' who at the same time are global law firms operating under a 'one firm concept' or an 'as if one firm concept'.[7] The analogous professional experience of the Big Five is used as a mere example and suggestion.[8] The know-

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[7] There are other strategies of law firms to deal with the internationalization of the legal profession. It will be necessary to analyze those forms of co-operation from a legal perspective as well; see *infra* Section H 'Looking Ahead'.

[8] As part of the inclusion of international law firms into the class of international professional service firms, G. Müller-Stewens and the author attempt to argue the same working hypothesis on the management method side on the 'organizational structure of international law firms as international professional service firms'. We try to apply the same criteria as developed for professional service firms in the book Professional Service Firms in general. It is tempting to analyze the 'characteristics of the market' for professional services as used in the book Professional Service Firms such as 'growth of market' and 'change in needs of customers' and 'constellations on the supply side' to

how on the design of international legal structures merits attention in all areas of Professional Service Firms because they all per se have international legal structures. The knowledge developed here merits further generalization and integration into the general body of knowledge on International Professional Service Firms.

B. The Issue of the Design of the International Legal Structure of International Law Firms Compared to the Auditing and Business Consulting Organization and the International Legal Networks of the Big Five – Hypothesis of Analyses and Method Applied[9]

(1) Every international professional service firm has a legal structure. Unlike the organizational and management structure, the legal structure of international professional service firms essentially concerns the legally binding and if

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international law firms as well. The same can be done with respect to the function of 'leverage', 'ownership' and the 'one-firm-culture'. The same may be endeavoured in the analogy concerning the 'management and the organizational structure'. Finally, the aspects of 'value generation' of a professional service firm such as 'generation of service' ('acquisition', 'staffing' and 'sourcing', 'operations' and 'delivery', 'termination') and 'range of services', the 'professionals', ('recruiting', 'training', 'reviewing', 'remuneration', 'promotion', 'retention' and 'retirement') as well as 'systems and procedures', 'research and development', 'knowledge management', 'technology', 'project management') can successfully be applied to international law firms as well. Such analysis is likely to contain much more commonalties than differences as one would expect.

9 There is little literature available on the topic in German concerning '*Kautelarjurisprudenz*', the somewhat disparaging term used for the teaching of legal business planning and formation, see for instance G. Langenfeld, *Vertragsgestaltung: Methode – Verfahren – Vertragstypen* (2nd edn, München, 1997); E. Rehbinder, *Vertragsgestaltung* (2nd edn, 1993); E. Höhn and R.H. Weber, *Planung und Gestaltung von Rechtsgeschäften* (Zurich, 1986) all of them with bibliographies. These publications do not really address international circumstances, and are more oriented towards two-party contractual relationships and not towards corporate structures. At least on the continent of Europe there is a lack of conceptualization of the planning and structuring of legal transactions. The international dimension of these legal activities, which are core activities in the 'international practice of law', is thus unconceptualized either. The 'decision'-oriented legal education has not been adequately supplemented by an 'action' or 'creation'-oriented legal education. The original legal discipline of *Kautelarjurisprudenz* (discipline on the making of contacts) has not developed into a full blown theory of legal creation. See Jens Drolshammer, 'Ein didaktisches Experiment an der Universität St. Gallen und ein Plädoyer für eine transaktionale Lehrmethode im modernen Wirtschaftsrecht' in *Solothurner Festgabe zum Schweizerischen Juristentag 1998* (Solothurn, 1998) pp. 381–411.

necessary legally enforceable definition of the rights and obligations of the members participating in the structure and the treatment of the intangible property rights which are needed to achieve the business goals of the professional service firms. The avoidance or limitation of liability risks is an equally important dimension of the international legal structure. This planning and structuring task must take place with regard to the compulsory provisions of public law embodied in a great many primarily national legal systems which are applicable to the creation, organization and operation of international professional service firms according to the rules on conflict of laws of the relevant legal systems. When the legal constitution of an international professional service firm is determined, it must therefore be remembered that today the key legal areas (such as contract, company, antitrust, professional supervisory, intellectual property and tax law) are still for the most part determined at national level, regardless of the degree of globalization of the organization and its economic activities. Obviously the national legal systems do not yet correspond to the needs of Professional Service Firms created by globalization of the economy, even tough this inadequacy varies from one legal system to another. In this context, it is particularly important for the arrangements made to be enforceable and controllable in practice. This means that they must be structured in such a way that different routine forms of daily conduct be developed which might, under certain circumstances, make the given legal regulatory mechanism superfluous and inapplicable. Following the respective principle of 'substance over form' applied in various legal orders, various legal structures and factual behaviours might create risks and legal consequences which are undesirable and must specifically be prevented. Therefore, the planning of an international legal structure is an integrative task whose purpose is to achieve corporate legal certainty in a wide range of concrete circumstances that may be encountered in the future life of a professional service firm. The function of the legal experts in this interdisciplinary process involving a division of work is confined – a fact that is often overlooked – to the identification and assessment of legal risks or the possibility of legal enforceability for the benefit of the persons responsible for corporate decision-making. It is not the lawyers but the decision-makers who decide in the last instance as to which risks and which legal uncertainties are acceptable in the framework of the legal planning and structuring of the international professional service firm.

In addition to the function of optimization of the certainty of legal relations and minimization of risks, the process of legal planning and structuring itself has important functions in the design of the international legal structure. In general, it transpires that in the context of the integral planning of an international professional service firm, important issues and solutions which are relevant to decision-making are only brought out into the open by the legal experts involved in the planning of the legal structure for the benefit of the decision-makers. The question of the legal constitution of

an international professional service firm is therefore essentially also a matter of the design of the dynamic process to safeguard attainment of the business goals, having regard to legal considerations in which aspects of substance and procedure will be specifically linked.

(2) The creation, existence and operation of a professional service firm depend in large measure, in our view at least at the time of its creation, on the quality of the planning and structuring of its legal constitution and the subsequent legal management of the organization over an extended period of time. Any analysis of international professional service firms therefore necessarily must take an interdisciplinary look at the management and legal dimension of the structure of such firms. That dimension, especially in the case of international professional service firms, has been the subject of even less study today than the management aspect. As mentioned above, the changes in demand structure as a result of globalization are also bringing about demands for substantial adaptations to the legal structure of professional service firms. Greater emphasis is therefore being placed, in particular, on issues of legal structuring, especially if these adaptations are affected by acquisitions or mergers or by far-reaching internal restructuring operations. This can be seen in the area of the original Big Six (Arthur Andersen, Coopers & Lybrand, Deloitte Touche, Ernst & Young, KPMG and Price Waterhouse) since they are increasingly engaging in global operations and thereby looking for adequate international legal structures. This need is currently giving rise to the creation of a new generation of professional service firms. For example, the term 'breakaway firm', used to designate the motivation of Pricewaterhouse-Coopers in 1997, is intended to symbolize the start of an innovative and qualitatively different operation. All these structures until recently included the business areas of audit, tax, management consulting and, increasingly, legal services.

Manifestly, there was a clear need and/or willingness to act 'as if one firm' in relation to third parties with 'seamless service' and a 'uniform quality standard' at a global level; but even within the individual professional service firms different opinions prevail as to the management principles. Both centralized 'top-down' and geographically decentralized 'bottom-up' approaches are taken. There is, however, general agreement that professional service firms must nowadays be manageable in a similar manner to corporate groups, i.e., central intervention must be possible depending on the needs of the moment. The name and trade marks are increasingly being placed in the service of these visions as a means of creating and maintaining identity. In this context, significant tensions arise between do-ability and legality. Tensions also arise because – given the size of the Anglo-American member companies in the majority of international professional service firms – these processes are as a general rule heavily influenced and conditioned by the latter, a fact which is also reflected in their attitudes towards the issue of

creating legal structures.[10] The above mentioned plans for divestiture of the Big Five, for instance, will certainly lead to further needs of new legal structures in the near future.

(3) As part of the general analogy suggested in the introduction, we assume as a working hypothesis that it is unlikely that an in-depth analysis will show a material difference between international law firms and other professional service firms with respect to the issue of legal structure. This to an extent that such a comparative analysis would seem to be besides the point to start with. We would like to go one step further to pretend and assume that it is time to fructify and mobilize any professional knowledge in the field of international professional service firms on the issue of international legal structure, that is of the Big Five in particular, for the analysis of the legal structure of international law firms. The fact that direct actual and potential competitors have come to the conclusion that the legal structure is an issue of strategic dimension, should be noted. The Big Five, after clarifying the international legal structure of the audit and consulting organization, have introduced (or are about to introduce) new legal structures for their international legal networks as well. We therefore propose to embark on a voyage along this analogy and to attempt to explore the issue of the legal structure of international law by using the experience of the Big Five in creating international legal structures in the area of auditing, consulting and legal organizations. We would like to describe the present state of international legal structures of the Big Five, to find out the background of the issue, the legally relevant features and trends determining the issue and to develop options and alternatives of legal structures of international law firms by using the know-how of the Big Five by analogy, wherever suitable and feasible. We limit ourselves at this stage to argue the need for repositioning the issue of international legal structures for those international law firms which are organized on the basis of a 'one firm concept' and which strive to operate on the global legal markets as an entrepreneurial entity. We are constantly reminded in that context that we are sailing uncharted seas, since most of our concepts of legal structures for multinational service firms have been developed for multinational industrial firms.[11] We moreover should not forget – and this is particular to the analysis of the legal as opposed to the organizational

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[10] Ernst Stiefel and James R. Maxernes, 'Why are US-lawyers not Learning from Comparative Law?' in Nedim Peter Vogt (ed.), *The International Practice of Law, Liber Amicorum für Thomas Bär und Robert Karrer* (Basel and Frankfurt a.Main and The Hague/London/Boston, 1997) pp. 213–236; see also John Henry Merryman, 'The Loneliness of the Comparative Lawyer and other Essays' in *Foreign and Comparative Law* (The Hague/London/Boston, 1999) in particular the four essays in Part IV, 'What do Comparative Lawyers Do?'.

[11] The slow growth of the body of scientific knowledge on professional service firms from a management and even more so from a legal perspective is described in Günter Müller-Stewens, Jochen Kriegmeier and Jens Drolshammer, *Professional Service Firms* (1999) p. 17 et seq.; see James L. Heskett, *Managing in the Service Economy* (Harvard Business School

structure of the international law firm – that these complex legal structures have to be devised in a phase in which the principal of territoriality of legal systems still prevails. That is, we are faced with a complex process of comparative law, finding the most suitable national legal system and at the same time taking into account a multitude of additional national legal systems applicable at the same time to the legal structure based upon the applicability of the respective system of conflict of laws.

C. Facts and Trends in Legal Structures of International Service Firms

I. The Legal Structure of the Big Five and Their Legal Networks – Present and Future

For purposes of exemplification and visualization we start with an overview on the present legal structures of the Big Five. The description is based on the answers to a questionnaire sent to the professional service firms dealt with on publicly accessible facts, from commercial registers, the international economic press and special publications on the international practice of law'.[12] We moreover identify as evidence of the present dynamic evolution the imminent changes of these enterprises announced in 1998, 1999 and 2000, which will likely lead to further changes of the international legal structures in the near future as well. The descriptions, which are

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Press, Boston, 1986); James L. Heskett and Leonard A. Schlesinger, *Out in Front, Building High Capability Service Organizations* (Harvard Business School Press, Boston, 1997); James L. Heskett, W. Earl Sasser Jr and Leonard A. Schlesinger, *The Service Profit Chain* (New York, 1997); David H. Maister, *Managing the Professional Service Firm* (New York, 1993); David H. Maister, *True Professionalism, The Courage to Care About your People, your Clients and your Career* (New York, 1997), Stephen Mayson, *Making Sense of Law firms, Strategy, Structure and Ownership* (London, 1997); Mark C. Scott, *The Intellect Industry, Profiting and Learning from Professional Service Firms* (New York, 1998). Swiss publications in this field e.g., are rare and suffer from the fact that due to the predominance of the English language in this field, they are not taken note of in their German form; see e.g., Günter Müller-Stewens, Jens Drolshammer and Jochen Kriegmeier, *Professional Service Firms* (Frankfurt, 1999).

[12] See the following US American and English Journals: *International Journal of the Legal Profession; Lawyer International; The Legal Business Briefing on International and Emerging Markets; Legal Business; The American Lawyer; European Corporate Lawyer; European Counsel; Commercial Lawyer, London; International Legal Practitioner, International Bar Association, London; International Business Lawyer*. See for instance J. McCahery and S. Picciotto, 'Creative Lawyering and the Dynamics of Business Regulation, S. 238 ff' in Y. Dézalay and D. Sugerman (eds), *Professional Competition and Professional Power, Lawyers, Accountants and the Social Construction of Markets* (London and New York, 1995).

general and basic, have been taken from texts provided by the contributing Big Five, without alterations.

1. Andersen Worldwide SC

(a) Andersen Worldwide SC is a co-operative association under Swiss law. Members of the co-operative are the international partners in their capacity of natural persons. The business entities, which are separated for business and legal purposes on a country by country basis into an Arthur Andersen and an Andersen Consulting company, are linked to the co-operative by a series of parallel and largely identical vertical Interfirm Agreements. The dynamics of the present evolution are evidenced by the fact that the stability of Andersen Worldwide SC is being questioned by the Andersen Consulting firms in an arbitration proceeding.

(b) The Andersen Legal network of law firms operates as integrated practices, sharing expertise, resources and technology. It is more than an alliance of law firms that simply refers work to each other. The lawyers of Andersen Legal are specialists in specific areas of law, linked by a common operating philosophy and business objectives.

The law firms are, in general, partnerships of lawyers in each jurisdiction. Standard Partnership Agreements are set up and adapted to local legislation. The law firms themselves are connected to Andersen Legal CV through a standard Co-operating Firm Agreement. Andersen Legal CV is a Dutch limited partnership that co-ordinates the international network of law firms associated with Andersen Worldwide SC. All of the partners of Andersen Legal CV are lawyers. All of the firms which have Co-operating Firm Agreements with Andersen Legal CV are, and will in the future be, law firms regulated by their respective bars and law societies.

Andersen Legal CV does not itself practice law in any jurisdiction – it functions solely as a co-ordinating body for the network, like the European Economic Interest Groupings and other vehicles used in other international legal networks. Its role consists first and foremost, of co-ordination of education, drafting common standards for quality and quality control as well as co-ordinating the economic co-operation among the law firms. These functions are summarized in the Co-operating Firm Agreement. Andersen Legal CV may perform some of its functions by subcontracting with one or more of the participating law firms of the international network or with Andersen Worldwide SC which, in turn, may call upon its Member Firms.

The Co-operating Firm Agreement is based on the general concept that local legislation and regulations are given precedence over the contents of the regulations of the Co-operating Agreement and such legal legislation or regulations.

2. Deloitte Touche Tohmatsu International

Deloitte Touche Tohmatsu International is an association under Swiss law with domicile in Zurich. In preparation for a possible disassociation or separation of the international consulting business, the Deloitte Touche Consulting Group, another Swiss association with domicile in Basle, has been founded. On the question whether Deloitte Touche Tohmatsu International operates its legal services as a separate business line, nothing can be found in the public records consulted. Deloitte Touche declined to answer the questionnaire.

3. KPMG

(a) KPMG since its inception has been an association under Swiss law with its registered office in Zurich. The choice of this particular constitution was unique and innovative for the service industry at the time. KPMG has remained committed to federative and decentralized management principles ('one firm' in its work for customers, federative structure and operative implementation). However, for some years there has been a perceptibly growing tendency towards legal and structural strengthening of the 'one firm' at KPMG too (e.g., commitment to uniform and exclusive use of the 'KPMG' brand name in dealings with the market; decision-making powers for an international lead partner/key account manager which displaces all national, federative structures). Following the cancellation of the proposed merger between KPMG and Ernst & Young in 1998, KPMG published restructuring plans. KPMG is planning to strengthen top down management in order to bind the members of the association more closely to the association as such and significantly increase the central management capacities. All partners shall be members of the Swiss Verein and the operations of the country practices shall be centrally managed through Consortial Agreements. The American – and subsequently also the European and Asian – consultancy business is planned to be placed on an independent footing by the inclusion of third party shareholders via an IPO.

(b) Legal services are offered by KPMG in the various countries through various forms. The form is usually a function of the professional body or other restraints on legal practices in each jurisdiction. The forms include multidisciplinary practices and alliances with law firms.

In order to achieve a better integration among the legal services practices and to foster mutual support and co-operation, a Swiss Verein 'Legal International Association (the Association) was created at the beginning of 2000. The Association is legally independent from KPMG International (also an association under Swiss law) or the member firms of KPMG International. Membership to the Association is restricted to individual lawyers or law firms, which in their home jurisdiction are admitted to the relevant bar or law society and/or regulated by the local laws and regulations applicable to law firms. The legal form of a Swiss Verein has been chosen

because this structure has proven to be adequate and efficient for an international professional service firm.

The Association itself does not conduct any business in a commercial manner but has *inter alia* the object of creating a strong international organization, co-ordinating and supporting legal services of the highest quality through its members, facilitating and maintaining high and uniform standards of work and conduct by the members.

The governance structure of the Association comprises the General Meeting, the Board of Directors, the Chairman and the Chief Executive Officer. The rights and duties of the members are laid down in the statutes of the Association as well as in a membership agreement between the Association and the member.

4. Ernst & Young

(a) Ernst & Young ever since its creation through the merger of Arthur Young and Ernst & Whinney, has been a federation whose structure and organization are regulated by a basic memorandum of association in company, limited by guarantee organized under the law of the Cayman Islands. The main features of this arrangement are well-developed central decision-making competencies and management capacities in the areas of strategic planning and implementation, business development, technology infrastructure, knowledge management and key account management. Ernst & Young is currently reviewing the structure described above. Its intention is to move one step further towards the goal of 'one firm world-wide' through the additional strengthening of the central management competence, central management capacities and financial resources, a global system to introduce 'shared economic interest', associated with a global MIS, finance shared services, and the commitment of the member companies to global branding. The optimum global legal structure for this purpose is also being assessed in this context. The emphasis is on a corporate legal form founded on separate and economically independent member companies, which are affiliated to and via this corporation but not directly among themselves. Consideration is being given to the formation of additional independent units to take part in global joint initiatives (ventures with third parties, co-sourcing companies, etc). The same applies to ownership of rights in the name Ernst & Young and the corresponding logos.

(b) Legal Services are for Ernst & Young International (EYI) a business area of strategic importance. The EYI legal network operates as a combination of both types of practices, independent law firms as well as legal services practices as an integrated part of the local national EY firms. The lawyers of EY Law are specialists in specific areas of law, such as corporate, commercial, banking, labour, IP, etc, linked through a multilateral Cooperation Agreement (CA). The CA rules various topics of common interest of its members such as business strategies, common initiatives, risk management, quality control, conflict of interests, sharing of knowledge and

resources, referred work and IT. An Implementation Committee is in charge with the implementation, monitoring and administration of the CA. It reports to the EY Law Practice Steering Group ensuring the alignment of the implementation of the CA with the EYI Global Law Strategy and Balanced Scorecards.

It is the goal of EY Law to strengthen the international co-operation between its members through the forming of a more corporate governance and structure and at the same time further enhance the independence of its lawyers with respect to their local national firms. In any case, CA and any future scheme ruling the co-operation of the members of EY Law and its relationship with their local national EY firms is and will be based under the general principle that local legislation and professional regulations are preceding over any agreement or other legal structure of EYI.

5. *PricewaterhouseCoopers*

(a) PricewaterhouseCoopers (PwC) has chosen a two-tier organizational form built upon the independent member companies which are largely organized on a country basis. They are economically separate and linked together in a star-shaped global structure in a corporate legal form for the global structure. In this legal form, no legal company law based relationships exist between the member companies. The member companies are the successor firms to the merged national companies of Coopers & Lybrand, a Verein governed by Swiss law domiciled in Zurich, and Price Waterhouse, the two premerger international legal structures; in some cases, these cover all the business areas such as audit, tax, management consulting and legal in a single business while in others important services, such as management consulting, are outsourced. The target was for as many of the predecessor companies as possible to join the new global network; this was to ensure co-ordinated management and 'shared economic interests' among them and also to centralize the name of PwC and the associated trade marks and logos. The international arrangements concern governance. On the basis of membership, in a corporate governance entity, the provision of services for the benefit of member company by service entities and the centralization of the name in a central name entity, together with licensing of the name to the member companies. Governance is the responsibility of a UK private company limited by guarantee whose members are the merged national professional companies.

(b) Landwell is the network of independent law firms associated with (PwC). The centrepiece of this structure, Landwell Genossenschaft, is a newly-organized central membership organization structured as a Swiss co-operative (the *Genossenschaft*). The Genossenschaft co-ordinates the law firm network, manages cost-sharing arrangements, licenses the network name and oversees the relationship with the PwC professional services network.

The Genossenschaft's members are:

(1) law firms whose partners or shareholders are all bar or law society-regulated lawyers; and
(2) individual lawyers, all of whom are bar or law society-regulated lawyers.

The Genossenschaft will establish quality control standards across the law firm network, subject, of course, to any higher standards that may be required by local law or regulation. It will also oversee the co-operation among the member law firms to provide a coordinated cross-border service, and will organize international training. In addition, the Genossenschaft will provide a mechanism through which the law firms can make joint investments – for example, in the establishment of legal practices in emerging markets. The Genossenschaft will also oversee the relationship between Landwell and PwC, and ensure that this relationship is carried out in a manner that facilitates the provision of high-quality joint services by the two networks to interested clients, while preserving core legal values, including independence, attorney-client privilege, confidentiality, avoidance of conflicts of interest and appropriate disclosure to clients. Landwell's relationship with PwC is non-exclusive, and law firms in the Landwell network continuously work with non-PwC professional services firms. However, the relationship with PwC permits Landwell to draw upon the resources of the PwC professional services firms (for example, in areas like mergers and acquisitions, capital markets, insolvency, e-business and employee benefits) and to provide a comprehensive and efficient service that complies with applicable bar and law society regulations.

The primary governing body of the Genossenschaft is the General Meeting of its members. The General Meeting elects the Chairman of the Genossenschaft and the Board, as well as the Administrative Council. The Chairman, who must be a regulated lawyer, is the Chief Executive of the Genossenschaft. The first chairman is Gérard Nicolaÿ, a French avocat who is a partner in Landwell & Associés, the French member law firm. The Board, all of whose members must be regulated lawyers, exercises the principal oversight role in the Genossenschaft on behalf of the General Meeting. Certain actions by the Genossenschaft specifically require Board approval, but the Board's oversight mandate extends beyond those actions. The Administrative Council of the Genossenschaft, comprised of three members, including the Chairman and two Swiss regulated lawyers, is required by Swiss law to ensure the Genossenschaft's compliance with Swiss legal requirements and toperform certain other specified functions.

The law firms have designed the Landwell network with a view to the special needs of clients operating in a competitive global environment. Landwell will safeguard core legal values while permitting clients to benefit from the efficiencies of multinational and multidisciplinary co-operation.

II. Conclusions From the Answers to the Questionnaire

(a) *All of the Big Five as auditing and consulting organizations have implemented an international legal structure for the global organization, Arthur Andersen*

having been the first to do so. Arthur Andersen Worldwide and PricewaterhouseCoopers have opted for a legal structure allowing for 'one firm' and 'top down management'. All of the Big Five are presently organized in a corporate structure as opposed to a contractual structure. Deloitte Touche and Andersen Worldwide have split off or provided for a possibility of disassociation of the consulting division in a separate, related but independent legal structure, either linked by corporate or contractual means to the international legal structure of the audit organizations. Most of the Big Five use central service entities as legal entities distinct from the global structure. Some of the Big Five plan to concentrate certain assets, in particular know-how and IT – see announcement of KPMG – in separate legal entities. Two of the presently existing global legal structures are incorporated in England, three in Switzerland. All those corporate vehicles are membership-based – as opposed to capital-based – legal forms. Arthur Andersen is the only example in which the partners as individuals have a constitutional legal position in the global legal structure as members in the co-operative Andersen Worldwide SC. With the exception of Andersen Worldwide SC, the Big Five's international legal structures are comprised of only one legal entity at the core, Arthur Andersen using a double structure in which the operative national companies are not members of the global legal entity of Andersen Worldwide SC as such, but are linked to that entity by an identical vertical agreement. In all of the global structures, the protection of names and trademarks today has a high priority, the names and trademarks being centralized, with regard to Arthur Andersen and PricewaterhouseCoopers even in a special legal vehicle, distinct from the global entity.

(b) *All of the Big Five have an international legal network besides the lawyers employed in traditional business areas such as international tax planning, etc. All of the Big Five have announced that legal services is a business area of strategic importance, in which they have or plan to grow rapidly and aggressively*. All of the Big Five are or will be involved in finding an adequate legal structure allowing them to realize the respective strategic business plans, taking into account the particular needs following an internationalization of the legal services. All of the Big Five appear to use the existence and organizational sophistication developed in the creation of the international structure of the audit and management consulting organizations for the creation of the international legal structure of their international legal networks. With the exception of Arthur Andersen and PricewaterhouseCoopers, all of the presently existing legal structures according to the questionnaire are still contract and not corporation-based, with KPMG planning to move into a corporate form in the near future. In all the instances it seems to be the obvious intent to use to the utmost extent possible the same business and legal concepts used in the planning and structuring of their audit and consulting organization. In those instances in which the audit and consulting organization has been brought up to date

allowing for instance to pursue a 'top down' and 'one firm philosophy', the international legal network has been brought up to date in the aftermath as well, first by Arthur Andersen, then by PricewaterhouseCoopers.

A rough analysis and various interviews have shown that the present structure of the legal networks of the Big Five, by virtue of which local law firms of the international network of law firms are simply associated with the local companies and, in cases where this is permitted, joined to the local national companies with a limited sharing of economic interest, is nowadays in general considered to be incompatible with the declared strategy of strong growth of legal services. In particular, the present international legal structures are generally incompatible with a modern management concept of global service lines. Professional regulations have so far prevented closer co-operation through co-operation agreements with national entities in various jurisdictions. All of the Big Five – Arthur Andersen and Andersen Legal, Pricewaterhouse-Coopers and Landwell most distinctly – seem to keep their international legal networks to a considerable extent separate from their global legal structure of audit and consulting, usually contractual relationships assuring some type of co-ordination with the global legal structure obviously being reserved. According to the answers to the questionnaire, the corporate structure shall prevail in the future. Arthur Andersen and PricewaterhouseCoopers expressly favour a corporate over a contractual solution. Both organizations have chosen a jurisdiction different from the one of incorporation of the audit and consulting global legal structure; PricewaterhouseCoopers for instance chose England for the auditing and consulting organization and Switzerland for the legal services organization and Arthur Andersen Worldwide SC Switzerland for the consulting and auditing organization and the Netherlands for the legal services organization. Both have chosen civil law jurisdictions on the continent of Europe for the incorporation of their international legal networks. Liability issues apparently have not been as important as in the structuring of the global audit and consulting organization, tax considerations seem to have been of similar importance, regulatory considerations have raised considerable additional difficulties compared to the audit and consulting structure, regulatory and governance considerations according to the questionnaire being the most important factor influencing the choice of the legal structure. *From the answers to the questionnaire it is interesting to note that the Big Five are looking more to the international law firms as to expertise and relevance for their own operation and legal structure than the international law firms seem to look to the Big Five. This is the case despite the fact that the Big Five are – from a global perspective – obviously more sophisticated than the international legal networks in creating their international legal structure.*

III. The Legal Structure of the Largest International Law Firms – Present and Future

The majority of the contributing international law firms have been chosen from the graphic chart 'the biggest and the best' and 'who's global' reproduced in The

Economist of 26 February 2000. The selection is limited to international law firms with global ambition pursued in an integrated manner, based upon a 'one firm concept'. The answers to the questionnaire are referred to and reflected in the summary at the end of this section. As mentioned before, the texts strictly conform to the texts provided by the International Law Firms to the author.

1. Baker & McKenzie

Baker & McKenzie is organized as an Illinois partnership with close to 600 individual partners and approximately 2,000 associates, all of them duly admitted at least in the jurisdiction where they practice.

In a law firm generally devoted to the principle of subsidiarity, the partners constitute the supreme and dominant body, deciding by equal vote in annual meetings and by written ballot on amendments to the Articles of Partnership, the election and expulsion of partners, the establishment and closure of offices, the formation and funding of global practice groups and other fundamental issues brought before them by management or any individual partner. From among their numbers, they elect the chairman of the firm to a 3–5 year term and, upon nomination by the partners in the office, from each office one member, mostly the managing partner, of the Policy Committee, and additional members for each 15 partners residing in an office in excess of 15. The Policy Committee resolves on the annual budget of the firm, elects its auditors, discusses and decides on policy matters and elects the seven members of the Executive Committee and the up to ten members each of various other sub-committees, such as the Financial Committee, professional Development Committee and the Professional Responsibility and Practice Committee, for differing terms of at least three years. The Executive Committee, presided by the Chairman, conducts the day-to-day management of the firm.

The partners in the four regions (Asia Pacific, Europe Middle East, Latin American and North America) decide in annual meetings and by written ballot on their respective regional budgets, regional practice groups, and regional policy matters, and elect the members of the Regional Council in which each office in the region is represented, again preferably by its managing partner. It co-ordinates activities in the region. The partners in each Office in turn determine its budget and its policy matters including its practice groups, elect its managing partner and management committee for its day-to-day management and resolve on partnership nominations.

Profits after covering of local, regional and global expenses are allocated to each partner according to a formula forming part of the Articles of Partnership whose main factors are the partner's collections, contributions to the attraction of clients, and seniority as a partner, as well as the office's general profitability. It is open to variations which the partners in an office or in a practice group may agree with respect to their aggregate profit participations.

2. Linklaters & Alliance

Linklaters & Alliance was created by a contractual arrangement between Five premier independent European Law firms, later jointed by an Italian firm. The agreement is governed by Dutch law. It is established for a fixed period until 2017 with a possibility for a Constituent Firm to give notice of resignation at three pre-agreed dates for only very serious pre-defined reasons. After 2017 Linklaters & Alliance shall continue for an indefinite period.

The effective date of Linklaters & Alliance was 1 November 1998. The six member firms are:

- De Bandt, van Hecke, Lagae & Loesch, a firm established as a Belgium Co-operative;
- De Brauw Blackstone Westbroek NV, a firm established as a Dutch company;
- Gianni Origoni & Partners, an Italian Partnership;
- Lagerlöf & Leman Advokatbyra, a firm established as a Swedish company;
- Linklaters, a UK partnership;
- Oppenhoff & Rädler, a German Partnership.

All partners are partners from one of the six Constituent firms.

The use of the brand name Linklaters & Alliance is regulated within the contractual agreement between the firms.

There is an International Board where each Constituent firm is represented and who meet on a quarterly basis. The Managing Partners are *de facto* members of the Board. Each member should act in the best interest of Linklaters & Alliance and is entitled to one vote. The Board's main task is to define and approve the strategy of Linklaters & Alliance, including extension or mergers.

The Executive Committee is composed of the CEO, the two joint Chairmen, the Secretary General and four Practice Groups Heads. It meets on a monthly basis and deals with day-to-day management.

On the financial side, the cost of the Linklaters & Alliance Central Executive team, of the Central marketing and other initiatives is shared by the firms according to a cost sharing key. There is however also the sharing of some financial interest between the constituent firms and the form of pooling of a percentage of their turnovers.

There are two joint offices in Warsaw and Prague, where the Constituent firms have a controlling interest through two Dutch BV's specifically structured for each operation. The Joint office in Brussels, where most of the EU expertise of the firms has been centralized, is structured as Belgium Société Civile, which is a profit centre. In New York and London there are cost sharing agreements to rule the relationships between the firms located within the same premises.

3. Clifford Chance

Clifford Chance practices in the major financial and commercial centres of Europe, the US, and Asia, and does so through branches of the world-wide partnership, separate partnerships and corporate entities.

The detailed legal structure of the firm is complex, but is designed to meet the following requirements: the firm satisfies all regulatory requirements applicable in whatever jurisdictions it practices; clients are serviced globally on a 'single firm' basis, regardless of which office or offices are instructed; all partners world-wide share in a single 'pool' of profits on the same lockstep basis; the firm is governed and managed as a single firm; limited liability for partners is available where such protection is possible; flexibility is maintained for fiscal purposes.

The world-wide partnership of the firm is Clifford Chance Limited Liability Partnership which is a New York law partnership registered in New York with limited liability. All partners (with a limited number of exceptions required for regulatory reasons) are partners in this partnership, the terms of which govern all major partnership matters, including profit-sharing, profit distribution and financial matters; governance and management; appointment and retirement of partners; and the operation of all partnerships and other entities which comprise the firm. Separate partnerships are maintained for the firm's practice in the Americas (Clifford Chance Rogers & Wells LLP), Germany (Clifford Chance Pünder), and Hong Kong (Clifford Chance – this partnership is a general (i.e., unlimited) partnership). In certain other jurisdictions, the firm practices through corporate entities which are held by the world-wide partnership.

The firm is governed and managed on three levels: key matters (including the appointment of partners, significant changes to the partnership agreement, elections to the Board and to executive positions) are reserved to all partners who have equal voting rights; the general governance of the firm is the responsibility of the Board, which ensures the accountability of the firm's Executive Group to partners; the Executive Group (under the leadership of the Chief Executive) has the responsibility for developing and implementing the firm's business strategy.

4. Allen & Overy

Allen & Overy is an unincorporated partnership under English law. As a matter of English law, a partnership itself has no legal personality. It exists by way of contractual agreement between the partners. The partners have unlimited liability in respect of the firm's obligations.

There are 268 partners (including some who, for non-UK tax reasons, are not technically partners but are treated as such); by May 16, 2000 this number is expected to increase to over 300. There are three classes of partner: There are local partners. These are some of the partners in non-UK offices (the others there being either one share or full partners, as to which see below). Local partners are, in effect, salaried partners with no guarantee of full partnership (though a number have in fact become full partners). Most of the local partners are nationals of the jurisdiction where their office is located. The essence of local partnership is that the person concerned is given partner status wile in the office concerned but will not necessarily have such status if relocated elsewhere. Secondly, there are one share partners. Each one share partner holds one profit share and under the terms of our partnership

Agreement that one profit share gives the individual the right to a salary plus a bonus equivalent to that proportion of the firm's profits represented by the one share. Thirdly, there are full partners. Full partners share profits on the basis of a lock-step system.

The power to make all decisions is entrusted to a partnership Board, except for certain specific matters reserved to a partnership vote. These reserved matters include the dissolution of the firm, admission and removal of partners and the election of elected members of the Board.

The partnership Board consists of the Senior Partner, elected by partnership vote, who acts as chairman of the Board, the Managing Partner, also elected by partnership vote, five members elected by partnership vote as 'independent directors' and up to four members appointed by the Senior partner, the managing Partner and the independent directors, with the Senior partner having a casting vote.

The Board delegated day-to-day management functions (but not responsibility) to an executive committee consisting of the Senior Partner, the Managing Partner and others (who need not be partners) appointed by the Board.

5. *Freshfields*

Freshfields is an international law firm with a network of 23 offices in Europe, Asia and the US. They provide a comprehensive world-wide service to national and multinational corporations, financial institutions and governments. They currently have approximately 280 partners and a total of 1600 fee-earners throughout the network. The firm recently merged with Deringer Tessin Herrmann & Sedemund and Bruckhaus Westrick, Skjemann, two leading German firms, giving clients the benefit of an established and successful practice in Germany. The other recent European initiatives include the opening of an office in Amsterdam. US law is another key part of their legal service to their clients around the world, particularly in areas such as securities and project financing. They have over 100 US-qualified lawyers spread throughout the network, and offices in New York and Washington DC. Through their seven Asian offices, they practice international law and, where permitted, local law.

The current legal structure of Freshfields has been developed with a view to achieving maximum tax efficiency for the individual partners in each of the offices, and for the multinational partnership based in London. The structure has also been affected by various professional and regulatory considerations. Freshfields is the top entity in the structure owning a number of branch offices and interests in local entities. Freshfields is a partnership formed in England under the Partnership Act 1890 and is accepted as a multinational partnership by the Law Society. The rules applicable in each of the jurisdictions they operate tend to vary and the structure they adopt in respect of each varies likewise. In the US, for example, their operations are carried out through a limited liability partnership incorporated in the State of New York. This partnership has a branch office in Washington, DC.

Issues of major importance to the firm are decided by the partners in a Partners' Meeting. Such decisions include the admission of partners, mergers with other firms, and any amendments to the terms of partnership. The Partnership Council, chaired by the Senior Partner, is the top policy body of the firm, receiving initiatives from its standing sub-committees in addition to formulating its own initiatives. It has power to decide all matters not reserved to the partnership and delegates authority for day to day decision-making to the Senior Partner, the Chief Executive, the Managing Partner, the Managing Partner Asia and the Chief Operating Officer. It is responsible for strategy and also for monitoring the firm's performance including the quality of its practice and achievement of its aims and goals. The Partnership Council meets at least once every quarter and has a membership consisting of the Senior Partner and fourteen other partners and a further two non-executives. The sub-committees of the Partnership Council include the Finance Committee, the Practice Committee and the IT Strategy Committee.

The Senior Partner has ultimate responsibility to the partnership for the firm's management, direction and continued success. The Chief Executive takes the lead on day to day management of the firm, with the assistance of the Managing Partner, the Managing Partner Asia and of the Chief Operating Officer.

6. Skadden Arps

Skadden Arps Slate Meagher & Flom LLP (Skadden Arps) is a limited liability partnership organized under the laws of the State of New York. It operates as a single world wide partnership except in jurisdictions, such as the State of Illinois, US, where the local law does not so permit. In such jurisdictions, a separate legal entity operates as an affiliate of the main limited liability partnership.

Skadden Arps is led by a managing partner. The main policy making body of the firm is the Policy Committee. It is comprised of partners reflecting the various constituencies within the firm, including the geographic location of the firm's office, the various practice areas of the firm, and age groups. The Policy Committee meets several times per month to consider policy matters applicable to the firm as a whole.

The international offices of the firm are organized as two separate loosely-knit groups, Skadden Arps Europe and Skadden Arps Asia. These are not separate legal entities. The intention is for the partners in each of these two groupings to complement each others skills and efforts (in marketing, practice areas, attorney utilization, etc) in a manner which achieves the best efficiency and optimum performance. So, for example, a partner based in London is the partner in charge of all of the firm's operations in Europe and he co-ordinates the activities of all the European offices of the firm.

7. White & Case

White & Case did not answer the questionnaire.

8. Shearman & Sterling

Shearman & Sterling is a New York general partnership with offices or branches in significant financial and commercial centres of the world. All partners, wherever located, are partners in the general partnership. Certain jurisdictions may require additional organizations such as the multinational partnership in London. Under New York partnership law, all partners have the right to bind the partnership. However, the firm's partnership agreement provides for a governing structure which gives certain powers and responsibilities as among partners to:

(i) the Policy Committee of the firm (the Policy Committee being comprised of seven partners of the firms of which six are elected by the partners generally and one is designated by the Senior Partner);
(ii) the Senior Partner who is the firm's Chief Executive elected by the partners and is a member of the Policy Committee; and
(iii) the Executive Group (which includes the Senior Partner and such others as may be designated by the Senior Partner).

9. Latham & Watkins

Latham & Watkins is structured as a general partnership under the laws of the state of California. It also has a multinational partnership which is a general partner in the California partnership. The partnership is subject to a partnership agreement which grants broad authority to an elected Executive Committee of five partners to act for the partnership in many areas, with specifically enumerated acts requiring a vote of all partners, such as admission of new partners, removal of partners, opening a new office or amending the partnership agreement.

The Executive Committee through its Chair and Managing Partner appoints a variety of committees to handle the various administrative, professional development, and business issues of the firm. These committees include an Associates Committee, Recruiting Committee, Finance Committee, Training and Career Development Committee, Audit Committee, Pro Bono Committee, Ethics Committee and Equal Employment Opportunity Committee.

10. Cleary Gottlieb Steen & Hamilton

Cleary, Gottlieb, Steen & Hamilton is an international law firm with over 600 lawyers, practicing from offices in nine cities in eight countries. The offices are located in New York, Washington, DC, Paris, Brussels, London, Frankfurt, Rome, Hong Kong and Tokyo. In addition, the Firm maintains a presence in Moscow.

The Firm's practice is both global and local. The Firm's lawyers are of many different nationalities and are authorized to practice in many jurisdictions. Indeed, the Firm gives advice as to both local law and international practice in almost all of its offices.

The legal structure of the Firm is intended to permit the Firm and its lawyers to satisfy all local requirements, as well as to comply with applicable tax rules. The Firm is constituted as a single general partnership organized under New York law. All partners, wherever located, are members of the New York partnership. In addition, to permit the Firm to comply with regulatory requirements, some offices of the Firm operate under the structure of a multinational partnership established under English law, while some offices are registered as separate entities.

IV. Conclusions From the Answers to the Questionnaire

Based upon the questionnaire, a first analysis of the answers merits the following observations on the legal structure of the international law firms identified. All of the law firms stated that they consciously structure their firm from a legal point of view and that the fact of them being an international law firm has an influence on the specific legal structure chosen. They are basically not looking at or evaluating structuring efforts of the Big Five. It is fair to say that probably only Baker & McKenzie, the pioneer among the international law firms with a global ambition, has dealt with the issue of the legal structure from the specific perspective of the international nature of the law firm as 'one firm' from the time of its formation; for many years it has had as its main purpose the creation of an international network of law firms designed to practice as 'one firm'. Since we limit ourselves in our context to the analysis of law firms operating internationally in an integrated manner, we probably would look to Coudert Brothers and more recently White & Case with a comparable ambition amongst the group of law firms embracing a concept of a truly international law firm operating as 'one firm', starting at an early post-war stage. Cleary Gottlieb, with a long standing tradition of selective internationality limited to key jurisdictions, might well be qualified as the most international of the originally predominantly American law firms operating on a global scale. All of the other international law firms looked at have a distinctive one-city origin, predominantly New York or London, and seem to have internationalized from that centre by using the legal form originally developed for their domestic operations, global ambition not being a decisive factor influencing the legal structure of the international law firm until now. The degree of internationality of the partner population of those law firms is gradually increasing in the US based firms to 5–20 per cent, in England based firms to 25–60 per cent. The internationality of the operation of a law firm as such seems to lead to a tailor-made legal structure taking care of that internationality. As regards the history of the internationalization of the law firms observed, the majority have grown international (and global in particular) fairly recently and, although increasingly rapidly, in general by internal growth, the exceptions being Linklaters & Alliance and Clifford Chance. Unlike the history of the coming into existence of the majority of the Big Five, there was less external growth through sizable mergers, which in itself would necessitate finding an international legal structure for the merged law firm, and which would – if the merger is effected to improve the

degree of internationality of the law firm in itself constitutes an additional reason to take into account this new internationality, by designing an adequate legal structure for the new international organization. Because of certain planned transatlantic mergers, because of the critical size reached by some international law firms, and because of the rapid formation of integrated legal networks of the Big Five using new and specific forms of international legal structures, we think that – contrary to the majority of replies to the questionnaire – this might rapidly change in the near future. Clifford Chance Limited Liability Partnership, which is a New York law partnership, might be the front-runner for the next generation of international structures of law firms.

At this moment of time, no international law firm observed uses a truly and purely corporate form for the global structure. Corporate identity protection through names and trademark seems to be widespread, although in general not concentrated in one legal entity. The use of service companies on an international level is only known to a limited extent by international law firms. It is fair to say that international law firms, contrary to the Big Five in the auditing and consulting area, have not been compelled to structure as liability-driven so far, tax motives still being relatively more important, the issue of 'shared economic interest' having arisen recently though as well, and governance issues having arisen to a considerable extent only after the law firms have reached a critical size and have been transformed into an international business operation by using management concepts comparable to integrated industrial and service firms operating internationally as groups. There is a consensus that regulatory aspects have an important influence on the legal structuring, but the US originating international law firms seemingly less worried. It is finally fair to say that those international law firms have been less tempted to opt for a governance and management structure 'top down' and to subject the firm as a whole to a far reaching 'one firm concept', thereby for the time being not making use of these two important management drivers for structural reform operating in the area of the Big Five. The answers to the questionnaire further confirm that international law firms still favour contract based structures as better guarantors to maintain the so-called 'partnership principle' and do not substantially look at and emulate the structuring activities of the Big Five. The answers moreover confirm that structuring issues are almost exclusively handled in-house by special committees of partners and not by outside consultants. This is contrary to the obvious use of outside management consultants for the business and organizational aspects. The international law firms are of the opinion that the lack of state of the art knowledge on legal structures is mainly due to the fact that the phenomenon of rapid internationalization is a recent one. Some of the law firms in their answers to the questionnaire, suspected that they might have to review the issue of legal structure in the near future; the most established international law firms deny that though. At the same time we have to keep in mind the narrow focus of this text limited to very large global law firms operating as 'one firm'. There are other strategic alternatives to cope with globalization, even in those high end markets of legal services on which the described integrated

international law firms are active. The example[13] of the 'best friends' concept of leading law firms, such as Hengeler Mueller Weitzel Wirtz, Slaughter and May and Davis Polk, lead to an almost non-existent legal dimension of the specific type of international co-operation, not to mention the many other business concepts coming 'into existence' to cope with the effects of globalization. An interesting example of a concept in which full integration of the participating law firms is

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[13] Hengeler Mueller Weitzel Wirtz (HMWW) is constituted as a *Gesellschaft bürgerlichen Rechts*. Besides this legal form, attorneys in Germany may organize themselves in the form of a capital based company *(Gesellschaft mit beschränkter Haftung* or *Aktiengesellschaft)* as well as a special form of *Patnerschaftsgesellschaft*. The advantages of a corporate form (limited liability, possibility of funding pensions) are by far offset with the disadvantages associated with it (*Versteuerung geleisteter und noch nicht abgerechneter Arbeiten, Sollversteuerungsprinzip bei der Umsatzsteuer)*. The newly introduced *Partnerschaftsgesellschaft,* which from a tax point of view is treated as a *Gesellschaft bürgerlichen Rechts,* has been introduced to facilitate limitations of liability for liberal professions. This goal though is not fully attained, since – besides the *Partnerschaftsgesellschaft* – the partners discharging mandates remain personally liable. Partners of HMWW therefore have decided against changing the firm into a *Partnerschaftsgesellschaft*.

Members of a *Gesellschaft bürgerlichen Rechts* are under a personal unlimited liability. The internal organization is hardly regulated in the *Bürgerliches Gesetzbuch* (BGB). HMWW therefore uses an elaborate partnership agreement which above all contains more specific provisions on the finance and on the distribution of profits.

HMWW maintains seven offices in five countries. The partners of HMWW are partners in the *Gesellschaft des bürgerlichen Rechts* irrespective of their places of work. Besides the general partners meeting, HMWW has two management levels: the Management Committee *(Verwaltungsausschuss)* consisting of two persons and an Enlarged Management Committee consisting of five additional persons. With the exception of the powers reserved to the general partners meeting, the Management Committee has full power to conduct the affairs of the law firm. Traditionally, one member of the management committee each comes from the Dusseldorf and the Frankfurt office. The enlarged management committee mainly serves as a sounding board for the members of the Management Committee.

Besides that, there are special committees, confirmed by the general partners meeting (recruiting, employment, IT, etc).

HMWW internationally co-operates with Slaughter and May, London, and with respect to a series of products with Davis Polk and Wardwell, New York, based upon a special relationship. The joint work on a mandate is in the centre of the co-operation. At the level of the respective practice teams, project teams are formed, which regularly work together and the members of which know each other well. At methods it is possible to form on short notice necessary resources for a mandate on the international level as well.

Both of the law firms on a bilateral basis have formed steering committees, which coordinate and control the practice groups. The steering committees deal as well with the co-ordination of external relationships of each of the law firms in the framework of a best friends' relationship with leading law firms in other European countries.

HMWW and its partner law firms are convinced that they can offer through this 'integrated team approach' a service of equal quality offered by the globally active law firms. According to the experience of HMWW it is irrelevant for a client if the attorneys working at a mandate efficiently and without friction belong to the same law firm.

designed to be realized on a step by step basis, is CMS Hasche Sigle Eschenlohr Peltzer.[14]

D. Legally Relevant Features and Trends and Their Impact on the Legal Structure of the Big Five as International Service Firms

I. Professional Service Firms in General – The Legal Structure of the Audit and Consulting Organization of the Big Five as Examples

Of the characteristics and trends observed,[15] we found that among others the following issues have a specific impact on the legal structuring and operation for the structure of an international professional service firm and deserve to be highlighted. These are empirical observations from consulting experiences, which need to be

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[14] CMS Hasche Sigle Eschenlohr Peltzer is a German general partnership with offices in most major cities in Germany and in Brussels. The first step into partnership is the junior partnership, which is salary- and performance-based, generally followed by full partnership. The partnership agreement provided in addition to the General Partners Meeting a Partnership Committee *(Partnerausschuss)* which consists of representatives of the more important branch offices within Germany, the Managing Partner and the Senior Partner. Both of them are elected by the General Partners' Meeting. During his term of office, the Managing Partner is released from substantive legal work and devotes his entire time to the management of the firm whereas the Senior Partner heads the Vernal Partners' Meeting and represents the firm towards the outside world. In addition to these institutions on a national level, a local managing partner is appointed at each major location of the firm.

The firm is part of CMS. CMS is a major transnational legal services organization presently consisting of law firms in the UK, Holland/Belgium, Germany, Austria and Switzerland. CMS wishes to expand on a medium term basis into France, Italy and Spain. Presently, it combines some 1,300 lawyers in the countries mentioned above. It is contemplated that the member firms use CMS which is organized as a European Economic Interest Grouping as a vehicle to develop in the foreseeable future into a single European law firm on a fully integrated basis.

CMS's internal structure provides for a Council which consists of two representatives of each member firm, an executive Committee which consists of one or two representatives of each member firm and an Executive partner who is appointed by the Executive Committee and is responsible for the administration and further development of CMS on a full-time basis. Altogether CMS has established 13 practice area groups dealing with such areas as corporate, real estate, utilities, technology, banking, competition etc.

[15] Christian Belz, *Managementszenarien 2005*, Special Edition (Thexis, St. Gallen, 1998) refers to the speculative nature of trends and points out that: 'Many economic and societal trends can be reliably forecasted. But we still under-estimate, generally, how we can concretely overcome these changes and how we will experience them as participants. For this reason participants and those effected are constantly surprised even though the themes were known'.

further described and analyzed in greater depth.[16] They primarily have been observed in the area of the Big Five as audit and consulting organizations. They would have to be adequately adapted for professional service firms in other service areas. In this particular context and in connection with the working hypothesis of treating international law firms as professional service firms, the following characteristics and trends serve as a basis for comparison with the characteristics and trends observed in the area of international law firms.

Audit and consulting organizations:

- combine in a single operation several business areas, such as auditing, consulting and tax and legal which differ in substance and in terms from the underlying legal conditions (all of the Big Five companies);
- act 'as if one firm' in relation to their employees and partners internally and to the market externally (in particular Arthur Andersen and Pricewaterhouse-Coopers);
- assume some of the corporate risks of their customers and so extend the corporate assistance function of consultancy (e.g., outsourcing, Andersen Consulting);
- governance is increasingly coming to resemble that of an international group which keeps open a substantial number of management options (in particular Arthur Andersen and since recently PricewaterhouseCoopers);
- corporate identity, put across by trademarks and trade names, is assuming growing importance (in all of the Big Five companies);
- are increasingly being structured beyond the local and regional context at global level in centrally organized business areas (e.g., Arthur Andersen and PricewaterhouseCoopers);
- in the context of governance, the importance of central management is growing, i.e., top down management (Arthur Andersen, PricewaterhouseCoopers, Deloitte Touche);
- via a system of centrally administered compensatory payments ('shared economic interest') on a limited scale, they seek some minimum income for partners in the context of the safeguarding of network quality; nevertheless, the profits earned by the national companies will as far as possible accrue to the professionals working in those companies as partner income (e.g., Arthur Andersen, PricewaterhouseCoopers);
- the global structure is increasingly moving on from an integrated co-ordination of corporate assistance functions to the creation of enterprises with a complete

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[16] Our traditional concepts of legal structuring have been developed in the area of industrial firms. It is conceivable that the key issues or the weight of these issues may be different for service firms and that the respective answers and solutions might differ as well. This is a necessary and plausible further hypothesis of analysis at the outset of the legal analysis of these issues. This also is a reasonable hypothesis of analyses regarding international law firms and international legal networks of the Big Five.

range of functions (e.g., Arthur Andersen, PricewaterhouseCoopers, Ernst & Young);

- are virtually integrated on the basis of internal networking as virtual companies and from that angle constitute a single business (all of the Big Five);
- ownership in the form of capital shareholdings by the professionals – subject to the legal coverage of the increased needs for financing which have arisen of late – plays only a subordinate role. There are few assets and they are essentially in the nature of intellectual property. The corporate goodwill value is not achieved at any particular point in time but either passed on under a generation contract to the next partner generation without payment or else rolled over to unfunded pensions or current profit-sharing schemes;
- have a declared economic purpose;
- in these professional service firms the consultants as natural persons are the professionals; proprietors and professionals are the same; the companies belong to their managerial personnel;
- their business areas of auditing, tax (in part) and legal are governed by binding professional rules;
- the principle of self-management still predominates;
- the importance of information technology is increasing greatly;
- knowledge and knowledge management play an increasingly central role;
- the investment and hence financing requirement is growing strongly in selected areas;
- back offices are being increasingly centralized;
- performance components are being increasingly unified and subjected to central quality control;
- because of the different earning power and size of national companies they require, if the organization is based on membership of the national companies, decision-making procedures in which votes are cast by a weighted voting method;
- to preserve stability, the organizations are increasingly placing legal obstacles in the way of the departure of their members and imposing legal difficulties on the termination of the partnership or employee relationship by competition prohibition clauses;
- are multicultural in various aspects;
- these professional service firms are increasingly 'Anglo-Saxon', i.e., largely under American control, from the legal angle in regard to their internationalization;
- the partnership principle is being modified and increasingly called into question by the corporation principle;
- in the context of their legal constitution, and unlike the case of stock market listed limited companies, they have a fundamental need for internal control within the business. This does not require sound corporate governance from the outside but, on the contrary, adequate partner governance from the inside.

The most important of these features substantially influencing or determining the legal structure of an audit and consulting organization as professional service firm

will reappear below, identifying the principal legal issues and the main areas of law involved in the planning and structuring of such international legal structures.[17]

II. Relevance to the International Legal Structure of International Law Firms?

In this section, we would like to ask ourselves if the same characteristics and trends do also exist in the area of the organization of the legal networks of the Big Five and of the international law firms as professional service firms, and if yes to what extent. We further would like to ask ourselves if those characteristics and trends also have an impact on the legal structure of these global organizations, and if yes to what extent. In this context, we would like to explore if the fact that the legal networks of the Big Five are to be legally structured as part of a global organization comprising auditing and consulting services within the same group will have a specific impact on the legal structuring of those international networks. We further try to find out what the differences of both types of international law firms are from audit and consulting firms. Again, these empirical observations, which are based on consulting and teaching experience as well as on the answers to the questionnaire and interviews, need to be analyzed and explained in greater depth elsewhere.[18] Based upon the working hypothesis, we follow the same order of observations as above for the area of the audit and business consulting organization of the Big Five, and we add some special observations made at the most recent Homburger Forum 2000.[19] We do not further dwell on specific differences between international legal networks of the Big Five and International Law firms of independent attorneys leaving the specific issues of legal networks, which are part or linked with a multidisciplinary practice (MDP) for further analysis.[20] There are of course substantial differences between these two

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[17] See *infra* Section D:III.

[18] See J. Drolshammer, 'Recht und Management – Auf der Gralssuche nach den Schnittstellen zwischen 'lawyer' und 'manager' – Irritationen und Anregungen auch zum Forschen' in *Meilensteine des Managements, Band IX* (forthcoming in 2001).

[19] Homburger Rechtsanwälte invites every other year 30 to 40 managing partners from leading European law firms to discuss topics of common interests with experts. In January 2000, the topic was 'Cross Border Mergers of Law Firms – a Problem or a Solution?', in January 1998 the topic was 'The Law Firm in Cyberspace'.

[20] See e.g., Arndt Raupach, 'Globalisierung Full Service-Concept und Multi-Disciplinary Practices auf dem Beratungsmarkt, Anwaltssozietäten auf dem Weg zur Internationalisierung, internationale Wirtschaftsprüfungsgesellschaften auf dem Weg zum Global Legal-Service' in *Der Fachanwalt für Steuerrecht im Rechtswesen* (Festschrift) pp. 13–49. On the legal issues concerning Multidisciplinary Practices see 'Preserving the Core Values of the American Legal Profession, The Place of Multidisciplinary Practice in the Law Governing Lawyers' Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation (Albany, New York, April 2000); on the recommendations of the New York Bar Association on MDP see Sidney M. Cone III, 'The Future Debate on Multidisciplinary Practice in the United States' Article 12 ante.

types of international legal organizations, which have specific effects on the issue of international legal structure as well.

Legal Services Organizations generally possess the following characteristics:

- they generally only comprise one business area, legal services;
- they usually do not yet act 'as if one firm' in relation to their employees and partners internally and to the market externally, although some of them try to implement a 'one firm strategy';
- they in general do restrict themselves to legal services and do not assume any entrepreneurial risk beyond a consultancy function;
- they in general attempt to implement governance structures which are not modeled after international groups, although the trend is clearly in that direction;
- they also put a growing emphasis on corporate identity by the use of tradenames and trademarks;
- they are not yet organized on a global level in central business units, certain products being exempted;
- in the context of governance the importance of central management is also increasing, although at this moment 'top down management' is not yet vigorously pursued;
- systems of centrally administered compensatory payments ('shared economic interest') attempting to achieve minimum incomes for partners in the context of safeguarding network quality is less in the foreground because of a greater homogeneity of partner earning power due to greater selectivity of choice of geographic markets and because of the prevailing lock-step formula;
- the global structure of international law firms is more likely to stay in the area of co-ordination of corporate assistance functions and not moving as fast into the area of full integration into one entrepreneurial full-function as in the service areas of the Big Five;
- they are likely to be equally integrated as virtual companies by means of information technology;
- ownership in the form of capital shareholdings plays a subordinated role;
- they own few assets, which are basically in the nature of intellectual property;
- the corporate goodwill is not realized at any particular point in time but either passed on under a generation contract to the next partner generation without payment or else rolled-over to unfunded pensions or current profit-sharing schemes;
- international law firms clearly have an economic purpose;
- in international law firms as professional service firms, the legal consultants as natural persons are the professionals; proprietors and professionals are identical;
- the business area of law is heavily regulated in various respects;
- the principle of self-management still largely prevails;
- the importance of information technology is also increasing greatly;
- knowledge-management plays an increasingly central role;

- the investment and hence financing requirements are growing, but not as fast as in audit and consulting;
- back offices are also gradually more centralized, but not as far-reaching than in the audit and consulting field;
- performance requirements are increasingly centralized as well and subjected to a central quality control;
- they are increasingly multicultural;
- they are largely of Anglo-Saxon origin;
- the partnership principle will be more vigorously defended than in the audit and consulting organization;
- there will also be a need for weighted voting procedures;
- there will also be a growing need to place legal obstacles in the way of departure of local firms and of partners;
- there is no obvious need for a corporate governance type of control.

Beyond these consulting and teaching based observations above we add a few which have been mentioned at the most recent Homburger Forum Cross Border Mergers of Law Firms – a Problem or a Solution?:

- international law firms are distinct from other international professional service firms;
- the market for legal services is not as concentrated;
- the product offered by law firms is different; part of the difference comes from the use of different languages based upon the application of different national legal systems;
- international law firms are slower and more selective in globalizing;
- the building of international law firms is rather 'bottom-up' and rarely 'top-down' yet;
- international law firms are more difficult to manage than other international professional service firms;
- the gratification sought after in international law firms is still long-term and not instant;
- international law firms are not as capital-intensive as some of the other international professional service firms;
- international law firms, contrary to industrial firms, do not argue their internationalization by taking advantage of low cost environments;
- international law firms are not as client-driven in their internationalization;
- the internationalization of international law firms has to be viewed as a process which is developing in stages which take a lot of time; international law firms are young.

III. Preliminary Conclusions for the Design of International Legal Structures

These remarks are not experience-based observations, but are rather assessments

of likeliness of the relevance of certain factors in a *future* structuring exercise.

It is not obvious that there is a need to focus particularly on the legal structure since the phenomena of the international law firm is a recent one. The working hypothesis in international law firms still is – almost exclusively – that the relatively bigger importance of the 'partnership principle' as compared to Big Five organizations is more likely to lead to the choice of 'contractual structures' than 'corporate structures'. The 'partnership principle' moreover is likely to lead to an international legal structure, in which the professionals as individuals will have a formal legal position. The as yet underdeveloped management sophistication only recently brought into focus the specific issues of 'governance' under the aspect of the international legal structure. It is an obvious resistance to have corporation-like management structures driven by a principle of 'top-down management' in international law firms, although the intrinsic limitations of contractual legal structures to central management is likely to attract particular attention from the management of international law firms.

With respect to company law issues, because of a higher degree of loyalty and a lower degree of horizontal mobility, it is likely that the issue of far-reaching exit-payments will not be as acute as in auditing firms. The still deep entrenchment of the 'partnership principle' and a comparatively lower perception of the liability risks associated with the international practice of law is likely to give a lesser priority to liability-avoidance in the planning of an international legal structure. The multiplicity of regulatory schemes and international co-operation and management centralization adverse regulations will seriously affect the planning of international legal structures of international law firms. The weighted vote necessity will be less difficult to solve since the voting base in contractual structures are individuals and in general principals of 'one man one vote' are applied. To bring about and to protect 'partnership identity' in the meaning of 'corporate identity', by means of name and trademark protection, is likely to be of high priority in the creation of an international legal structure of an international law firm as well. Although the financial requirements are increasing within an international law firm, they are unlikely to have a determining effect on the creation of an international legal structure, the raising costs of information technology being an unknown factor. The preponderance of a 'lock-step principle' of remuneration is likely to raise less tax issues than the 'shared economic interest schemes' discussed within the Big Five. Since so far, exceptions reserved, international law firms have not grown substantially through large-scale mergers, the issue of creating a legal structure is likely to be brought forward rather by strategic foresight in the regular planning process than at the occasion of a merger transaction. The still relatively high degree of internal cohesion, which allegedly seems to be based on non-legal factors, is likely to give the contribution of the legal dimension of the international law firm a less prominent function than in other professional service firms. It is in our view likely though that the increasing professionalization and imminent reach of critical sizes of international law firms will bring the issue of the creation of an international legal structure on more and more agendas of the players interviewed. In view of the fact

that despite the answers to the questionnaire all of the international law firms argue that they have consciously designed the international structure and that they have taken into account the internationality of the law firm, it is fair to say that the experience-based observations under I. have actually been observed. The international law firms in our opinion – with the exception of Clifford Chance – have not moved into the next generation of sophistication of international legal structures yet.

E. Key Qualities of a Legal Structure of International Professional Service Firms

In this section we address the question as to the key qualities of an international legal structure from:

(1) a legal; and
(2) from a business point of view.

In (I) we deal with fundamental legal qualities which have to be conveyed by law to an organization operating as international professional service firm under aspects of legal capacity in various respects, under aspects of international recognition and under aspects of binding and enforceable nature of the legal relationships. In (II) we deal with fundamental business qualities of the international professional service firm such as the legality and do-ability of business goals specific to the particular international professional service firm. In (III) we deal with the criteria for a comparative law search for the do-ability and legality of specific prerequisites in a given national system of law.

I. Professional Service Firms in General – Key Qualities of an International Legal Structure – Basis for a Comparative Law Search for a Governing Law or Governing Jurisdiction

1. Key qualities of an international legal structure from a legal point of view

Regardless of the planned content of the specific legal structure and regardless of the comparative law analysis leading to the choice of a particular national legal system, the question arises as to which fundamental requirements are to be satisfied in principle by the legal structure of an international professional service firm. Our considerations have been developed based upon specific planning and structuring processes, and are situated on a meta-level. As a general rule, these fundamental requirements also serve as basis for the decision on the profile of criteria which must be taken into account in planning the comparative law search for a suitable legal form in a specific national legal system under 3. The raising of these fundamental

questions is necessary because of the novelty of the issue of structuring an international service organization, as opposed to industrial organizations, from a legal point of view, and the lack of state of the art-knowledge on these issues. They are to be considered as part of the tool kit of sophisticated legal planning and structuring of corporate lawyering, since they address issues of the basic qualities of the legal structure of an international professional service firm and of the legal validity and enforceability of the ' legal architecture'.

- the organization must be manageable in the sense of its entrepreneurial intent;
- the organization should be permanent, but open to modification;
- the organization should largely for reasons of liability as far as possible not give natural persons as individual professionals a direct legal status within the organization; nationally the organization should operate on the individual markets through local companies;
- regardless of the existence of the natural persons acting as professionals and the legal persons in the shape of the national companies, the organization should exist in its own right and be able to survive these other natural persons;
- the organization should have a status in corporation law – although this is contested – and have limited liability;
- the organization should be allowed to have assets and own intellectual property rights;
- the organization should be able to enter into contracts with third parties;
- the applicability and content of the substantive law which determines legal relations between the members and the organization or within the organization as such should be predictable, legally binding and enforceable;
- under the aspect of conflicts of law, the organization should be 'recognized' under the key legal systems in which the international professional service firms operate;
- in the legal system in which the organization is incorporated and in conformity with the rules of conflict of law, a choice of law should be permissible in respect of all contractual relationships entered into by the organization or its members;
- the legal system of incorporation should have an acknowledged and modern regime in commercial and procedural law and not be litigious or litigation prone;
- the legal system under which the business is incorporated should be a signatory of the key multilateral treaties on intellectual property law;
- the legal system under which incorporation takes place should permit arbitration on legal disputes within the organization and between the organization and third parties and enjoy an acknowledged reputation as a place of arbitration;
- the legal system under which the incorporation takes place should recognize partnerships or companies as corporations with a legal personality in which all the corporate goals of the professional service firm can essentially be pursued in a single legal form.

2. *Criteria for a comparative law search for the do-ability and legality of the international legal structure under a specific governing law*

These questions raised in connection with a desirable international legal structure of a professional service firm cannot be answered unless a specific national legal system is determined. Consulting experience has shown that nowadays, for audit and consulting organizations in general, a basic decision in favour of a corporate as opposed to a contractual structure is advisable and effectively chosen; thereafter, a comparative legal study is usually made to determine the national legal system as basis of incorporation of the global structure.

Beyond the answers to the basic questions raised above, this comparative search in general has to answer a number of more specific questions as to the available legal forms in the national legal systems of incorporation of the global structure such as:

- does the corporate legal form have the fundamental legal and taxation characteristics required by the entrepreneurial intent?
- does the corporate legal form have the necessary powers to exercise the entrepreneurial tasks in that legal form?
- to what extent does the legal form in corporation law convey freedom to determine all aspects of its own internal organization?
- how is governance exercised in a corporate legal form and, in particular, are decisions binding on members?
- to what extent and by what method is an exit premium permitted and enforceable in the corporate legal form?
- does the particular legal form involve complex disclosure obligations?
- what legal security as to validity and enforceability is provided by the applicable provisions of substantive law governing the corporate legal form of incorporation?

This comparative search, moreover, has to take into account beyond purely legal aspects other aspects such as style, cultural interoperability and compatibility, political acceptance of the targeted jurisdiction as well as specific aspects of planning and structuring international service organizations at this particular point in time and in this particular service area. This step in the planning and structuring work usually takes place in an international field of tension which is largely dominated by Anglo-Saxon law and lawyers. The Anglo-Saxon principle of 'substance over form' in various specific areas of planning and structuring (i.e., liability) has considerable – sometimes negative – influence on a more European and civil law-based structural and institutional approach to the issue of international legal structure. Moreover, the rapid changes of the business organizations require constant far-reaching changes or constant adaptations of the international legal structure. The design of the legal structuring of such international professional service firms moreover necessitates, in many respects, a dynamic concept of legal structures. For example, the basic management decisions often do not yet exist with the necessary clarity for legal structuring and first have to be defined by interaction in the planning and structuring

process. For this dynamic structuring process, moreover, a new comparative law based understanding is required. The main reasons are, in fact, that the basic legality and the basic stability of these international legal structures will only be brought about by taking into consideration a multiplicity of simultaneously applicable national and sometimes international legal systems. Moreover, the in-house and outside counsels involved in the legal planning and structuring process in that context usually come from very diverse and different legal cultures among which the Anglo-American – because of the economic strength of the participating companies – has a dominant effect with regard to the determination of an adequate international legal structure as well.

II. Relevance to the Legal Structure of International Law Firms?

As pointed out above, regardless of the planned content of the specific legal structure and regardless of the comparative law analysis leading to the choice of a particular national legal order, the question arises as to which fundamental requirements are to be satisfied in principle by the legal structure of an international professional service firm. *Since the remarks in this article on key qualities of a legal structures of international professional service firms are general and in particular methodological in nature, they are basically applicable to the planning of international legal structure of international law firms as well.* The fundamental questions raised are part of a sophisticated legal planning and structuring of corporate lawyering, since they address issues of the basic qualities of the legal structure of an international professional service firm and the legal validity and enforceability of its 'legal architecture'. It is self-understood, that the relative weight of these qualities identified will have to be adapted to the area of international law firms. One of the major issues in that respect will be to answer basic questions, rather for an anticipated 'contract-based' legal form than for a 'corporation-based' legal form as above, provided that in the next generation the creation of international legal structures of law firms will not, as the last generation of international legal structures in the areas of auditing and management consulting organizations, be 'corporation-based'. The answers to the questionnaire are rather timid in that respect. Despite the fact that corporate legal forms are by and large still excluded by regulatory schemes for law firms operating directly in the market in most jurisdictions, it cannot be excluded that the overall international legal structure be hosted in a corporate vehicle like a Swiss Verein or a Swiss Co-operative.

With regard to the criteria for a comparative law search for the do-ability and legality of the international legal structure, for a specific governing law or governing jurisdiction, the basic lead questions cited above are of general and methodological nature as well, and are therefore analogously applicable to a comparative law search in view of creating an international legal structure for an international law firm. It is a matter of professional outlook and judgment, as to what function and what position an international law firm should contribute to the tasks of the international legal structure as such and to the task of its formation. It is in our view likely that the

degree of sophistication will increase and will come closer to the degree of sophistication used by the Big Five with respect to their auditing and consulting organizations. From a professional point of view, the possible differentiation is more likely to be a differentiation in substance with respect to the key legal dimensions of the international legal structure of an international law firm. The specific differences of international law firms will have to be adequately taken into account at that stage of legal planning and structuring.[21]

F. Key Legal Issues of the Design of the Legal Structure of International Professional Service Firms

In this section we deal with the key legal issues of the creation of the legal structure of international professional service firms. We again use the international legal structure of audit and consulting organizations of the Big Five as examples. We address key areas of the legal determination of the international structure observed in the most recent generation of professional service firms. This part has to be read in conjunction with Section F:II *post* 'Issues of Legal Structure by Areas of Law'. This should help to apply an integrated view necessitating a careful balancing of the

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[21] See Section F:III; if we supplement the fundamental profile above, which is predominantly legal in nature, by a profile which is predominantly management goal-oriented, we are likely to find specific differences between the legal networks of the Big Five firms and international law firms. From a business standpoint, a legal structure of an international legal network within the global structure of a Big Five organization should ideally: be owned by and managed as a part of the global structure; practice globally under the name of the global structure; afford all law firms associated full membership status in the organization of the global structure; allow all law firm partners to be full participants in the shared economic interests among the partners of the global structure world-wide; be capable of offering a full scope of legal services to all clients of the global Structure, including SEC registrant audit clients; be capable of operating globally, including in the US; comply in all respects with local regulatory requirements; operate in a tax efficient manner and; not create undue legal liability risk.

In the current regulatory and political climate, however, legal practices closely associated with multidisciplinary professional service firms are subject to various restrictions in the pursuit of an ideal solution. It is obvious that the international law firms do not have to solve the problem arising of being owned by and managed as a part of or related to the global structure as well as the issue of 'offering legal services to all clients, including SEC registrant audit clients'. These are presently key legal and management issues in the global legal structure of the audit and consulting organization as well as the international networks of the Big Five. This text limits itself to the identification of the relevance of the experiences of the search for international legal structures of the audit and consulting organizations of the Big Five to international law firms comprised of independent attorneys-at-law practicing in international law firms.

different legal standpoints associated with the various types of interests by the legal specialists in the various areas of law concerned.

I. Key Legal Issues of International Legal Structures of Professional Service Firms in General – the Legal Structure of Audit and Consulting Organizations of the Big Five as Example

In the following part, we consider issue-related key areas of the legal determination of the structure which concern fundamental planning and structuring and to some extent also affect problem areas in different legal sectors in the traditional classification. These issues generally became apparent at the point where questions of fundamental legal admissibility and related feasibility arose in relation to the implementation of the business intentions of the parties and the corporate vision of the international professional service firm. In the context of the heightened importance of the planning and structuring process, it became apparent that the process-related organization of the planning work, the choice of the planning method and the determination of the sequence of clarifications must itself be regarded as an issue, quite apart from matters of content, which partly determine the nature and quality of the solutions arrived at.[22] We limit ourselves to the exemplary description of the key issues of the most prominent legal structures in various areas of the auditing and consulting organization of the Big Five of the immediate past. We further focus our observations on the later examination of the relevance of these issues for the international legal service of international law firms. The remarks therefore have as a purpose to spot these fundamental issues as such, and not deal with them in detail.

1. A key issue is the basic question as to whether the legal structure is to be based on a contractual or a corporate foundation

As the experience of the Big Five has shown, both routes may be successfully pursued. Once the decision had finally been taken in favour of a corporate constitution, a study in comparative law as to the vehicles that might be used has usually been made. This comparative study had to answer a number of essential questions as key issues. The decisive factors in the choice of a corporate form with a

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[22] Connected with an orientation towards a 'proceduralization' is an orientation towards factually determined issues as problem-related fundamental focuses that have to be topically organized according to their total context and which cannot, or cannot easily, be classified under traditional legal fields. See J. Drolshammer, 'Ein didaktisches Experiment an der Universität St. Gallen und ein Plädoyer für eine transaktionale Lehrmethode im modernen Wirtschaftsrecht' in *Solothurner Festgabe zum Schweizerischen Juristentag 1998* (Solothurn, 1998). The method of structuring and controlling such a process of planning and formation could be put into concrete terms analogous to such methods developed in management sciences by 'project management'.

membership character were ultimately matters of liability and flexibility. From the liability angle, it appeared advantageous to choose an organizational form which did not affect the legal and economic independence of the member companies and only required them to adopt certain co-ordinated forms of behaviour as members of the group on a voluntary basis. It is particularly important that the clear adoption of a particular corporate form with its typical rights and obligations precludes the existence of any other legal form. In a so-called 'protected relationship', there is no 'partnership' from a purely theoretical point of view. This basic principle means that membership in a corporate organization, such as the UK private company or a Swiss association or co-operative, involves rights and obligations which do not, however, as such create any joint and several liability between the members, since the member is only in a direct legal relationship with the corporate entity and not with the other members of that corporate entity. On the other hand, a contractual organization is essentially open to interpretation by third parties and therefore entails the risk that third parties may be able to construct contractual contents such as mutual liabilities that are not wanted by the original parties. The flexibility of organizations established in corporate form is also greater, as majority decisions can be taken without endangering the existence of the corporation while in contractual solutions, the principle of consensus applies.[23] It is further accepted that the intra-corporate organization is better adapted to reflect desired models of 'governance' typical in these new generations of organizations.

2. *A key issue is the clarification of the question as to whether there are corporate forms of law at all in which the intentions of the management and the declared entrepreneurial vision can be legally pursued*[24]

Account naturally has to be taken of the fact that, in virtue of the territoriality principle, the corporate legal form to be chosen can only be determined by reference to a specific national legal system. The basis for legitimization of the legal constitution of the global structure, which consists in membership and not in ownership of a capital share, therefore raises various questions, especially from the standpoint of the intended permanence and nevertheless necessary flexibility, e.g., how and on what scale would there be structuring possibilities to alleviate the provisions for leaving a corporate legal form based on membership which is generally defined by mandatory provisions of company law? And could there be any assurance that weighted voting would legally be possible in the context of governance at the meetings of members? Another question is how, in a group

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[23] The ability to change the legal relationship between a multiplicity of persons, which is contractual in nature by a majority decision is dogmatically difficult to argue.

[24] In the realm of the legal structure of multinational service firms, the legally defined limits between wanting to, being able to and being legally allowed to should be distinguished.

consisting of a great many companies which is itself only about to become an enterprise in its own right, can one avoid residual risks of nullity in those jurisdictions which limit certain suitable corporate forms to organizations pursuing non-economic goals? Or how can the relationship of the top management and the members be shaped in accordance with the underlying vision, so that there is no infringement of binding national company law and, above all, of the professional rules embodied in the legal systems of the state of incorporation of the member companies?

3. A key issue is how, while avoiding a profit pool[25] between the participants which is critical for tax, professional and liability law considerations, a 'joint economic interest' could nevertheless be created between the participants which is considered to be indispensable to the success of the organization from the management point of view

This goal may be achieved by various corporate legal models. Divestment and creation of legal independence for various infrastructural areas of the member companies are conceivable, followed by their merger into a new legal entity, in which the member companies or partners would have shareholdings. This new legal entity would then have provided services at arm's length' criteria to the member companies and the resulting profits would have been distributed between the member companies/partners according to criteria that remain to be determined. Another possibility would be to adopt a corporate form of organization for the group of member companies typified by mutual assistance, such as a Swiss co-operative, including perhaps financial compensatory payments but without creating a profit pool. This issue usually is the most difficult to address and to square, since a profit pool usually is critical under tax, professional and liability law considerations, while the introduction of an element of 'joint economic interest' between the participants seems to be indispensable for the success of the organization from a business point of view.

4. A key issue of the organization of a legal structure of an international professional service firm is the organization of the planning and structuring process

It is one of the main consulting experiences, that the multifaceted proceduralization of the planning and structuring task observed has to be particularly analyzed, described and integrated as a key issue of the structuring of a global professional service firm in an overall view, if the function of law and of lawyers in such projects is regarded as evidence of the 'living law', important and necessary for the successful

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[25] 'Shared economic interest' is the generally used and legally non-prejudicial expression for this key area in partnership-structured international service firms.

structuring endeavour. To illustrate and emphasize this, we cite certain observations concerning the formation of the organizational and legal structures of Ernst & Young/KPMG and Price Waterhouse/Coopers & Lybrand, which were discussed in international economic journals and in recent publications dealing with the 'international practice of law' as well as in the mentioned courses and seminars at the University of St. Gallen.[26]

The planning and structuring process as a project was mainly influenced by the restrictions of the 'time' factor. The structuring phase was additionally characterized by the constant need to make good gaps in the corporate and entrepreneurial consensus. The planning work in those two instances was further held up by the merger notification proceedings in several jurisdictions, which took up a great deal of time and required the deployment of considerable legal expertise until one month before the effective date. The problems apparently could only be solved by the in-house and outside counsels acting on the basis of previous planning experiences in the original international legal structures, while civil law considerations came to the fore on key matters. Interdisciplinary work apparently was necessary in various areas, in particular in the merger control procedures with specialized economists and communication consultants. The in-house and outside counsels also had to contend with many imponderables and inherent instabilities of such mergers. Heavy demands were moreover placed on the work of the in-house counsels because the achievement of a consensus within the organization on the international legal structure and the national companies was central to the acceptance and implementation of the merger. Another factor, apparently, was of course that as the projects went ahead, appointments in the new global organization to be formed as part of a merger were made which specifically affected the in-house functions in the new organization. The structuring work took place to some extent under pressure from the media. The competing Big Five played an active part in the process. The process of definition of the international legal structure resulted in the identification and articulation of several issues relevant to decisions on which no corporate conclusion had yet been reached, or a great deal of clarification remained to be effected. Ultimately, it was important that the interests articulated in the different legal areas often led to goal conflicts which made conscious decisions on the relative weight of the different legal standpoints essential. These reasons among others were apparently responsible for calling off the planned merger of KPMG and Ernst & Young.

II. Issues of Legal Structure by Areas of Law

In this section, we give an overview intended to permit a general understanding of the legal problems which arose in consulting and teaching experience in specific legal

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[26] See contributions of Dr Baer (KPMG), Dr Widmer (Ernst & Young), Professor Dr Fluri and Dr Weibel (PricewaterhouseCoopers) in the book *Professional Service Firms* and remarks made at the seminars.

areas during the efforts to plan an international legal structure of the audit and consulting organizations of the Big Five. The distinction of an issue, and an area of law-related view, at face redundant, helps to base the international legal structure on a goal-oriented overall view. As mentioned before, the interests articulated in the different legal areas by various groups within the organization often led to conflicts of goals; thus this general overall view made necessary conscious decisions on the relative importance of the different legal standpoints, articulated by the specialists of the various areas of law on a given issue. In addition, compulsory legal provisions in all kinds of legal areas set limits on the international legal structure which had to be taken into account. We confine ourselves below to the identification of the principal legal problems, and for reasons of space, only reproduce the outcomes of this legal analysis. This text again limits itself to the identification of the experiences in the area of finding an international legal structure for audit and consulting organizations of the Big Five relevant for international law firms of independent attorneys-at-law.

1. Company law

Given the many issues under company law which arise, some from consulting and teaching experience raise particularly difficult issues which will be mentioned in conclusion. The specific form of co-operation between different legal persons in a plurality of persons forming part of the global structure raised difficult problems, having regard to the foreseeable transition from a plurality of businesses to a single business and to certain legal systems in respect of the legal admissibility of 'economic purposes' for 'membership-based organizations'. The conversion of the association under corporate law from a co-ordinating function in respect of corporate auxiliary functions into a fully-fledged corporate organization which implies the transition from a 'non-economic' to an 'economic purpose' raised in *extremis,* e.g., in the case of a Swiss association, the risk of the structure being declared null and void under civil law. In addition, the legal experts found that it was extremely difficult to arrive at a legal form under company law in which a flexibly organizable voting possibility with weighted votes can be achieved based upon the relative turnover of the national companies. The design of obstacles to the departure from membership-based organizations in a manner permitted under compulsory company law in such a way that a binding entitlement to leave, which generally exists under civil law systems, is not infringed. The difficult problems of barriers under company law to an influence on independence and decision-making freedom of the national companies as members of the corporation should be repeated here.

2. Professional regulations

As a basic principle, professional regulations are intended to protect and ensure the quality of the regulated professional services, and not to impair the latter. However, the fact is that professional regulations generally lag behind current developments and only adapt to the economic needs of the area protected by them after the event.

One example is the need for legal consultancy to be offered not just by individual attorneys and partnerships but also by legal persons with limited liability. Provision for this has only recently been made in Germany for instance. Professional law does to a limited degree acknowledge crossborder involvement of comparable professions, but account is not yet taken of the economic realities within big professional service firms which work on a global and multidisciplinary basis. In the medium to long term, it can therefore be assumed that the professional regulations will follow economic needs and adjust to them. Nevertheless, professional regulations must be observed in their current version and create the framework for possible forms of organization of the professional service firm. The point of preference of all professional regulations is the preservation of independent exercise of the profession and prevention of control by third parties. That is why, as a general rule, applicable statutory provisions exclude the participation of third parties in the success of the business (e.g., prohibition of shareholding, profit sharing, issue of party loans, etc). Professional rights in principle are also embedded in the national legal systems and therefore tend to prevent international professional linkups.[27]

As already indicated, the 'independence' of the exercise of the profession, together with professional qualifications, is one of the key requirements for professionals to work in regulated areas. Professional law is essentially national, so that there are natural tensions between the management needs of an international organization and the professional needs and requirements – including factors under company law – viewed from a perspective of national law. Nevertheless, in the context of the legally feasible and possible structures, company law based legal structures had to be found to permit overall control of the global organization. This was achieved by the creation of a relatively complex multidimensional matrix which gives equal weighting to the interests of the product groups, the industries served, the participating national companies, the internal services, the staff and risk control. This, in practice, is likely to result in a relatively strong influence of the international officers on their national counterparts, although there will be no legal possibility of giving instructions as that would in general be incompatible with the requirements of 'independence' prescribed by 'professional law'. On the other hand, it must be legal for the members of the organization to agree on joint criteria for assessing the performance of their professionals, for instance. The achievement of international planning targets of all kinds usually plays an important role in professional service firms of this type. But here, too, failure by the national companies to comply with these criteria generally cannot be sanctioned as the sovereignty over remuneration in general cannot be delegated under professional law. This is a key problem in the organization of global professional service firms. For professional law, and to some extent also company law reasons, the national units have to preserve their

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[27] In the area of legal services, and specifically attorney services see Sidney M. Cone III, *International Trade in Legal Services, Regulation of Lawyers and Firms in Global Practice* (Boston, New York, Toronto, London, 1996).

independence and decision-making sovereignty. That is why, in general, it is impossible to take sanctions to punish infringements of international criteria. However, such members may be excluded from the organization, but the consequences of that exclusion cannot be in the nature of a punishment. It is possible that liability may be agreed on certain prejudice caused to the organization through the loss of one of its member companies.

3. Liability law

Starting originally in the US, in recent years the number and scope of cases of liability claims, which create a threat to the company's survival in the auditing sector, have increased strongly. In addition, there is an unsatisfactory situation from the point of view of the professional service firm, as in some parts of the world any limitation of liability is prohibited by law. In the context of the feasible limits therefore, all major professional service firms protect themselves by buying suitable insurance cover and by making suitable organizational arrangements in relation to their legal structure. Apart from problems of professional, company and tax law, this is one of the major obstacles to the creation of global partnerships which best meet the desired purpose of serving companies from a single source, ensuring world-wide uniform quality standards. In this context, it is decisively important that liability transfer from one national member of the organization to another be prevented, as would be possible in an international partnership. The protection mechanisms for natural persons are also to be mentioned here. In countries in which the regulated professions can only be exercised in the form of partnerships of natural persons, these mechanisms are only available to a limited degree (limited liability partnerships). In the countries in which the profession can be exercised by legal persons with limited liability, this mechanism is regularly used.

The management's intention usually is to offer a service on the market which would satisfy the highest professional standards on a uniform world-wide basis, so keeping administrative costs in the relationship with the customer as low as possible, i.e., offering this seamless service from a single source. The international professional service firms do not wish to escape liability for possible poor service, but wish to offer effective insurance cover for such cases. It was also clearly the case that liability extending across member companies must be excluded and use made of all possible national limitations of liability either through structures under national company law or through individual contracts with customers.

Work on international legal structures has shown that handling of the risks situation under liability law is a central legal structuring factor, even if the corresponding legal risk situations are sometimes assessed differently from the corporate and managerial viewpoint. The manageability of these issues is usually made more difficult by the fact that in the light of complex considerations of competence and conflicting legal provisions, a great many applicable legal systems always had to be taken into account and under many of these legal systems the principle of 'substance over form' plays an important role. Nevertheless, the legal

view prevails that the deliberate handling of these risks is inevitable, both at the level of the structural design and at that of preventive behavioural measures to avoid risks in the specific and day-to-day exercise of the profession. The major structural tools of liability law based planning and operating an international legal structure are the choice of a limited liability corporate vehicle, the exclusion of the individual partners from a constituent legal position in the structure, the incorporation of the members of the international legal structure, the placing of the name and trademarks into a separate legal vehicle of a corporate nature, the introduction of preventive measures to control behaviour, as well as the introduction of a captive insurance scheme.

4. Tax law

In structuring an international professional service firm from a legal perspective a major role is naturally played by tax matters. In general, three main problem areas from consulting and teaching experience had to be solved:

(1) tax deductibility of crossborder payment flows between member companies;
(2) protection of member companies outside the US against possible tax assessment by the US revenue authorities;
(3) tax questions concerning names and trademarks.

The body of regulatory provisions in general provides for payments between member firms to be made according to arm's length' criteria only, so making them tax deductible. This principle also applies to payments to member companies which are unable to remunerate their partners and staff on normal market terms on their own as they are still being established, although such payments are necessary to secure the quality of the network. In simplified terms, the member company in the US has an interest in its principal with interests in Bangladesh receiving the same service quality there, as it would in the US. It may therefore incur expenditure in Bangladesh to enable the member company based there to provide suitably qualified services.

Professional service firms in the US do enjoy – under certain conditions – tax privileges accompanied by significant interest advantages. Under these conditions, the essential requirement is that these professional service firms must be owned by active professionals and are not allowed to pursue any commercial activities. These tax privileges would be endangered by an association with other member firms which exercise professional activities or have proprietors who do not belong to the profession. In addition, in cases where the US revenue authorities take the view that such associations exist, they might tax member firms, which are not resident in the US, including their foreign partners. For precautionary reasons, therefore, the non-American member companies also satisfy the requirements necessary to qualify for tax benefits for the US company or do prevent an association with the US firm.

The set ups often stipulate that the name, service marks and other trademarks are centralized in a particular legal body and then licensed back to the member companies of the international network without payment of royalties. Because of the

often unclear situation in respect of the existence and location of trademarks within the organizations and the possibly high values carried by these trademarks, a centralization of the marks valid under the law of contract is often the goal; but one has to watch carefully possible negative consequences of the transfer of value by reason of the centralization. This, in general, is the aim for tax reasons via a combination of centralization in the law of contract with licensing back free from license royalties. In that sense, the centralization of intellectual property rights has often not been chosen for tax reasons but to generate license-back flows optimized for tax purposes which could have been used as sources of revenue to finance activities throughout the network and relevant to the network.

5. Name and trademark law

The new generation of international professional service firms in the Big Five is typified by a management structure similar to that of a 'group', the 'as if one firm' image on the market, and a strong corporate identity is regularly brought about by name and trademark planning. The declared protective strategy is to centralize ownership and control of the name and the related trademarks and logo. In the framework of legal and tax considerations, the uniformization of the rights and obligations of the network companies must be optimized, with stronger protection of intellectual property rights, trademark management on a global basis and assurance of optimum protection of the trademarks as assets in relation to claims of third parties. To implement this strategy, it is often recommended that all the intellectual property rights be centralized with a single legal person. This would initially have the function of preserving the rights in the name and centralizing global management of all the intellectual property rights in this name, including the related marks and logos on a global basis, licensing the names and trademarks of all the network firms, monitoring their use and in future including all the intellectual property rights of network firms in the management system and keeping all significant new intellectual property rights.

6. Antitrust law – merger control

The lawyers involved in developing a legal structure nowadays regularly have to examine first the merger control provisions applicable simultaneously in different jurisdictions, if the growth is achieved by way of mergers. The case law of the well-documented mergers of PricewaterhouseCoopers, Ernst & Young and KPMG are good examples. The handling of these issues in the particular instance apparently were complicated by the fact that immediately after the publication of the PricewaterhouseCoopers merger, Ernst & Young and KPMG also notified their intention of merging. In view of the degree of the oligopolization of various service markets even from an international perspective, this was a key issue. Because of the geographically comparable degree of globalization and practical simultaneity (even if the notification strategies differed in the two cases), a great many merger control

searches had to be conducted simultaneously in order to determine the future effects of two corporate mergers on the identical future market structures of the same relevant markets. A substantive consideration of the risk potential, which formed part of the merger control procedure, also had to contend with the inherent instability of these international networks. In addition, all this had to be done under the influence of the active participation of the remaining competitors among the Big Five in the proceedings and under the strong influence of all kinds of different public opinions. These specific features of the PricewaterhouseCoopers' merger were reinforced by the different time scales of the proceedings under all the different jurisdictions, and the inadequacy or absence of contacts and co-ordination between the merger control authorities involved. From the point of view of project management of the global legal structure, the resources had to be suitably allocated to the involved in-house and outside consultants. In addition, intensive inter-disciplinary co-operation was necessary with specialized economists and communication advisors. That is why the planning and design of the legal structure under the conditions for completion of the merger had to take place in parallel with the different merger control procedures. The different merger control procedures began in November and ended in early June. The capacity problems in project management associated with this simultaneity of the legal considerations created a heavy workload. The influence of the factor of time on the planning of a global legal structure is most obvious in the area of merger control.

As an example of the justification of admissibility of the Price Waterhouse/Coopers & Lybrand transaction under merger control law, mention may be made of the arguments put forward in the media release by the Competition Commission in Switzerland which corresponded largely to those used by the GD IV in the EU and the Justice Department in the US.[28] The question if from a perspective of efficient

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[28] See the Swiss Competition Commission's statement dated 20 April 1998 concerning the planned merger of Revisuisse Price Waterhouse/STG-Coopers & Lybrand and the EU Commission's decision dated 20 May 1998 (Case No. IV/M. 1016-Price Waterhouse/Coopers & Lybrand); see for instance the Swiss Competition Commission:

> 'Green light from the Competition Commission
> After detailed scrutiny of the merger project, the Competition Commission has decided not to raise any objections to the merger of Revisuisse Price Waterhouse and STG-Coopers & Lybrand.
>
> The Competition Commission had originally feared that the merger might lead to a dominant position on the markets for the auditing of banks, insurance companies and major corporations and therefore decided to make a detailed investigation of the merger project. However, the investigations showed that conditions of normal competition will still prevail on these markets even after the merger. The new company created by the merger will be confronted with serious and powerful competitors in the shape of ATAG Ernst & Young, KPMG and also Arthur Andersen and Deloitte & Touche. This will prevent sole domination of the market by the partners in the merger.
>
> In the view of the Competition Commission, there is likewise no risk that the merger will encourage coordinated behaviour on the part of all the major audit companies and

knowledge management of legal planning the preparations of the various merger control proceedings should be situated in a phase before the announcement of a binding merger agreement and the question if because of the similarities of the simultaneously applicable national and supranational merger control systems the preparation of the various proceedings can be co-ordinated or even unified are only mentioned here.

III. Relevance to the Legal Structure of International Law Firms?

Assessing in a summary form the relevance of the key legal issues and the issues of legal structures by areas of law of international structures of professional service firms, we refer to the description of the relevance for the legal structure of international law firms, of the legally relevant features and trends and their impact on the legal structure of the Big Five and on the description of the relevance of the legal structure of law firms and of the key qualities of a legal structure of international professional service firms above. With these conclusions in mind, we describe the relevance of the key legal issues for the design of the legal structure of international law firms.

The questionnaire and interviews have shown that the issues, as regards the choice between 'corporate-' and 'contract-based' international legal structures, at this moment of time generally are viewed differently by international law firms. The majority stays within and wants to stay within a 'contract-based' legal framework. The legally not defined concept of the so-called 'partnership principle' still seems to exercise a great deal of influence. Therefore, contrary to the international legal structures of the audit and consulting organizations of the Big Five, there are always the professionals as individuals who have the constituent legal position in the international legal structure and not the business unit, who exercise their profession on the local market. Certainly this is to be seen in connection with the fact that, in general, regulatory schemes do not allow law firms to incorporate their legal practices in a given national jurisdiction. The stronghold of the 'partnership

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cont.

therefore create a situation of collective domination of the market. The heterogeneity of the audit services and the lack of transparency of the market make any such concerted practices by market participants impossible. In addition, the audit companies earn the bulk of their fee income on these markets from just a few customers. The latent threat of the customers to take their business elsewhere if the audit companies do not adopt a competitive approach therefore has a disciplining effect – especially as these big companies also use the services of the audit companies in other areas (tax consultancy, computer consultancy etc). The Competition Commission accordingly reached the conclusion that the merger of Revisuisse Price Waterhouse and STG-Coopers & Lybrand will neither create nor strengthen a position of market dominance.

Berne, 20 April 1998
The Competition Commission
Secretariat'

principle' also has to be seen in connection with the declared perception of a lesser importance of the liability issue as a driver for the international legal structure. The basic conceptual limitations of longterm contractual structures and of the legal impossibility in general to change complex multilateral contractual relationships by majority decision, do not seem to have disquieted lawyers planning international structures of international law firms based upon contracts so far.[29] This in turn might have to do with the fact that accelerated global ambition and institutionalization of the international law firms bringing about a new need for stability and continuity so far have not been a salient issue at the early stage of formation of globalized legal organizations. Although business goals in general can be reached in international law firms by a 'contractual' as well as a 'corporate' legal form, it seems to be prudent to plan further integrated structures of international law firms in 'corporate' forms as well. The recent example of Clifford Chance could be the start of a new generation of those organizations. It will be interesting to see how Freshfields will deal with the issue after the merger with Bruckhaus, and how Linklaters and Alliance will design its legal structure after further integrating the various offices. Management structures of international laws firms so far have not been analyzed from a management point of view in detail. According to the answers to the questionnaire and the interviews, they are considered to be less far-reaching and less sophisticated than in audit and consulting organizations. Moreover, pressing new needs have not made 'governance' the key driver militating for a 'corporate legal form' of the international legal structure. From the history of the 'one firm concept in professional service firms' which are managed 'top-down', needs in the direction of a corporation-like type of management within the area of international law firms are likely to increase though.

If one would accept at least for planning purposes a working hypothesis of a 'corporate structure' of a future international law firm, the key issues of the clarification of the question as to whether there are corporate forms of law at all in which the intentions of the management and the declared entrepreneurial vision can be legally pursued, is similar. As to the key issue how, while avoiding a profit pool between the participants which is critical for tax, professional and liability law considerations, a 'joint economic interest' could nevertheless be created between the participants, which is considered to be indispensable from the management point of view to the success of the organization will become more important in the area of law firms. The key issue of the organization of the planning and structuring process is of comparable importance in our opinion in the area of international law firms. In that context, one has to remark though, that the planning and structuring needs in that area so far have not risen in connection with far-reaching mergers which have

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[29] These thoughts concur with the final remarks in Dr. Nowak's presentation concerning the legal structure of Coopers & Lybrand International and the planned merger of PricewaterhouseCoopers in the Ph.D. Candidates Seminar in the summersemester 1998 at the University at St. Gallen.

necessitated a very complex overall structuring and planning process. It is more likely that in the area of international law firms the future planning and structuring process will be part of a general strategic management of an international law firm, which will be brought about by less sudden and less dramatic instances. It is obvious that this has changed in view of the most recent mergers, such as Freshfields Bruckhaus Deringer.

All the remarks above and the following remarks as to the relevance for international law firms of issues of legal structure by areas of law, are not *ex post* experience-based judgments of the past, but are *ex ante* assessments of potential issues in the future. Therefore, they are common sense-based assumptions. With regard to the area of company law, the issues raised as potential nullity in connection with the apparent economic purpose of the international structure, the issues of termination payment, weighted voting and company law-based 'independence' from intra-group interference, create less of a planning need in the area of international law firms and are therefore less acute. With respect to the area of law of professional regulations, it is obvious that the multiplicity and diversity of regulatory schemes in the area of 'international legal practice' is far greater than in the area of audit organizations. Due to the limitations of internationalization and integration, those regulatory schemes have to be analyzed in detail elsewhere. So far they have not in themselves been questioned by the degree of internationalization and integration of international law firms as such. This might change though. On the other hand, because of the nature of international law firms as 'one-disciplinary-practices', the effects of other regulators limiting 'multidisciplinary practices' will be far less felt,[30] as long as international law firms do not develop ambitions to transform their one-

[30] In the current regulatory and political climate, international legal practices closely associated with multidisciplinary professional service firms are subject to various restrictions in the pursuit of an ideal solution. These restrictions are particular to the international professional service organizations in the area of law, if those service organizations are associated with an audit and a consulting organization of a Big Five company. Among these restrictions are in particular: Securities and audit regulations of several jurisdictions limit the services which a law firm associates with an audit firm can perform for the audit firms' clients; Bar regulations broadly require that law firms be 'independent', which affects practice management issues (the role of persons other than locally-admitted lawyer partners in managing the practice), funding issues (undue reliance on economic support and borrowings from non-lawyers, specially through local audit firms) and referral arrangements; Bar regulations generally prohibit income or fee sharing by lawyers and non-lawyers or, in some cases, even with lawyers from other jurisdictions (see pending litigation by the Dutch Bar against the Price Waterhouse and the Arthur Andersen law firms); Bar regulations generally do not permit lawyers and non-lawyers to practice together in partnerships; Bar regulations require lawyers to preserve confidentiality and attorney-client privilege, and from sharing client secrets with non-lawyers; Bar regulations may also preclude a law firm from practicing under a name other than that of an active or former partner in the firms practice or of a predecessor firm; in general, no structure can be envisaged if it involves a risk of the legal services network being treated as a single partnership for legal or for tax purposes.

disciplinary into multidisciplinary practices themselves. In the groups of regulators of international legal services, there have not been developments in the direction of a lead regulator, or of an alliance of important regulators co-ordinating their regulatory activities in their regulations of international law firms. It is clear though that the growing needs for centralization of management and the growing needs for profit sharing are likely to bring about higher levels of interference by regulators, particularly if the trend in the direction of integrated international law firms is accelerating.

With regard to the area of liability law, the questionnaire and the interviews have shown an increased awareness but still not a top priority of a planning and structuring process of international law firms. It is obvious that the 'one firm-concept' under the 'holding out-principle' has not been brought into a similar shooting line as in the area of the auditing organizations. None of the international law firms, therefore, argued that liability considerations as outlined are the key drivers for the planning and structuring of international legal structures of law firms.

With regard to the area of name and trademark law, the protection of 'partnership identity' by means of name and trademark protection is likely to be of just as high priority in the creation of an international legal structure of an international law firm. Depending on the discipline in name and trademark housekeeping in the past, several

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cont.

First analysis and various interviews have shown that the present structure of the legal networks of the Big Five by virtue of which local law firms of the international network of law firms are simply associated with the local companies and, in cases where this is permitted, joined to the local national companies with a limited sharing of economic interest, is nowadays considered to be incompatible with the declared strategy of strong growth of legal services. In particular, the present international legal structures in general are incompatible with a modern management concept of global service lines. Professional regulations have so far prevented closer co-operation through co-operation agreements with national entities in various jurisdictions. There obviously are ideal or desirable solutions as to how the legal structure of the international legal networks should be linked to the global legal structure of the audit and the consulting organization. With regard to the present status of the professional regulatory regulations in the different jurisdictions and the general climate with respect to the law activities of professional service firms, it may be assumed though that the ideal or desirable solution cannot be achieved in the foreseeable future. The main reasons are that the professional regulations generally contain a far-reaching stipulation of independence, a prohibition of profit sharing between lawyers and non-lawyers and partly also between lawyers operating in different jurisdictions. With a view to the creation of the internal organization of a global structure complying with the overall visions of the Big Five in the area of governance, the issues of the one man one vote principle, the principle of equal treatment, proposed exit premiums and the statutory requirements of nationality for a majority of board members all apparently generally prove soluble in the legal form of a co-operative under Swiss law. The SEC Rules on 'independence' appear to have a considerable effect in the presently planned 'unbundling' of the various business lines of the Big Five in the area of legal services as well, that is that the fate of the legal business line in multidisciplinary practices is still open to debate as well.

issues arising with the centralization of name and trademark can arise within international law firms as well. With regard to the area of antitrust law, it is obvious, that in view of the market shares of the global players operating in the market and in view of the reduced likelihood that growth will be effected by external growth through large-scale mergers – it is unlikely to be a legal issue in the planning and structuring of international structures of law firms in the near future.

It is self-understood that a sophisticated analysis of the relevance of the structuring experience of the Big Five in the areas of audit and consulting organizations will have to take into account not only purely legal aspects but aspects such as style, cultural interoperability and compatibility as well as political acceptance in a more in-depth fashion. It is likely that on the level of structuring a global international law firm, a contest between Anglo-Saxon-based and civil law-based alternatives of international legal structures will arise as well. It could well be that, because of the largely London and New York based internationalizations of the majority of the major players, this will be a moot issue. From the planning experience at least in the area of the Big Five, it can be stated that an Anglo-Saxon commercial domination of the internationalization of an international professional service firm does not in itself justify a sole reliance on Anglo-American legal concepts of planning and structuring, the international legal structure of such international business organizations.

G. The Role of Law and Lawyers in the Design of the Legal Structure of International Professional Service Firms – Relevant to the Legal Structure of International Law Firms?

The analysis of this text obviously by the nature of its object has to go beyond the identification of the above mentioned key legal issues (see Section G:I *post)* and the issues by areas of law (see Section G:II post). This is already evidenced by the inclusion of the organization of the planning and structuring process as a key legal issue (see Section G:II:4 *post)* and is a consequence of a new role of lawyers and of law in this planning and structuring task as important elements of legal services in a multijurisdictional globalized world. Therefore this part addresses the role of law and lawyers in the creation of the international legal structure of professional service firms. It deals, among others, with the serving role of law and the lawyer vis-à-vis the entrepreneurs and business goals, the perception of the relevance of law and lawyers in designing the international legal structure, and the relevant importance of law and lawyers in safeguarding the attainment of the goals of the international professional service firm. The observations, among others, again are made based on experiences as consultant and as teacher in the special seminars at the University of St. Gallen. In view of the function of this overview and the limited space, we do not elaborate on the background of the observations.

I. Professional Service Firms in General – the International Legal Structure of Audit and Consulting Organizations of the Big Five as Example

The following observations were made and results on the role of law and of lawyers were gained:

- the function and requirements of the legal constitution of the international organization are – sometimes even by their in-house legal representatives – underestimated by the professional service firms;
- the legal function does not as a general rule take priority in designing the organization of the international professional service firm, but it does become more important when structuring questions arise in the context of external corporate growth or decisive internal restructuring operations; however, it always remains secondary to the entrepreneurial vision;
- the issues of legal structure and their function is often forgotten by the members of the professional service firms once the structure is worked out and put into effect;
- as a general rule, professional service firms do not have an adequate internal instrument for legal planning and structuring with the necessary depth and width in the context of mergers and in times of great change;
- at present there is no independent state of the art knowledge about the legal structuring of multinational service firms;
- there is no national corporate vehicle which could adequately satisfy all the needs of the legal structuring of multinational service firms;
- the corporate legal basis in law is generally preferred to a contractual legal basis by a multinational service firms;
- the corporate goal of 'one firm' or 'as if one firm' and 'top down management' can only be achieved to a limited or incomplete degree in membership-based organizations; in a capital based organization, the corporate goal of partnership can only be achieved to a limited or incomplete extent in a capital-based organization;
- regulatory limitations on business activities of professional service firms cannot in the long run deter internationalization of service activities in the area concerned, although they might have a serious influence on the international structure in particular for multidisciplinary service firms;
- there is no compelling reason for granting a direct legal status to natural persons in the legal form in which the global structure is constituted, provided that regulatory law does not require and a business entity of professionals may not be constituted as a corporate body;
- as professional service firms generally lack ownership or capital at present as a legal basis of legitimization, multinational service companies are – compared to capital-based industrial firms – limited in their openness to change, inherently unstable and more difficult to manage; this is likely to change in the area of the non-regulated service lines of multidisciplinary practices once the requirement

of 'independence' has forced a structural unbundling or even sale of the non-regulated business lines;

- the non-legal incentives to stay (access to knowledge management, participation in the better future) are more important for the stability of a multinational service company than the legal disincentives to leave (exit premiums etc);
- there is no point in structuring a 'one firm' with 'top down management' under company law unless the characteristics such as the name and trademarks are also centralized;
- liability law influences the legal structuring of a multinational service company and currently has a dominant influence on the legal constitution;
- a system of shared economic interest in the form of profit sharing is not permissible for reasons of liability and tax law; cost sharing at arm's length' principles is therefore the only feasible solution today;
- it may be regarded as a shortcoming, from the angle of the state authorities, that as a general rule no supervisory regulations exist for multinational service companies, with the exception of the audit and legal services' areas, while at the same time the publicity obligations in the chosen legal forms are limited; this might change in the near future in the auditing part of multidisciplinary practices, once a parallelization of the impact of regulators, based upon an alliance of core regulators, increases.

Studies and work in connection with the majority of the projects on the legal structure of international professional service firms clearly revealed that, against the background of current legislation in the area of company, tax and professional law, the business objectives of a global service company with a structure similar to that of a group cannot be fully implemented. Here, the criteria of 'independence' under professional law are particularly important for regulated activities of the kind pursued by auditors, attorneys and to some extent also tax consultants, and which are typified by a national concept of the exercise of the particular profession. In this context mention must also be made of liability risks, which may endanger the very survival of professional service providers and are necessarily increased still further by global forms of organization. On the basis of the current legislation, organizational solutions adopted today for world-wide professional service firms are based on compromises within the limits of feasibility. This implies greater co-ordination, more shared costs and investments, but no control of the kind that might be created through ownership ties within a group. The national units must remain independent in the core processes. Their degree of success in satisfying the global requirements will depend on the quality of their voluntary co-ordination.

II. Relevant to the International Legal Structure of International Law Firms?

To talk about the role of law and lawyers with respect to the design of an international legal structure itself would be a topic of an essay. The author has

wondered sometimes how within the Big Five, with their business consultancy expertise, the project of creating a new international legal structure has been tackled from the project management side. With respect to law and legal structure of an international law firm, the lawyer's issue might be comparable to the issues of medical doctors dealing with their own health. In the answers to the questionnaire all law firms participating have stated that they consciously structured the international organization from a legal point of view, that they specifically take into account the internationality of the organization of the law firm and that they do not benchmark their efforts to the Big Five in finding new international legal structures. Since most of the law firms answered in the negative, if they think that they will have to approach the issue of international legal structure in the near future from a more fundamental perspective, one gets the impression that the issue is perceived as still fairly unimportant. There might be different reasons, one of them being, in the eyes of international law firms, that they are about to reach the same size that led the Big Five to move into a next generation of international legal structures. Another one being that in a 'partnership principle-based' organization, the relative weight of the legal structure as factor of stability, cohesion and continuity is viewed as less important than in a more 'corporate principle-based' organization in the area of the Big Five.

Looking forward and making a judgment as to the future, the author came to the conclusion that the functions and requirements of the legal constitution of the international organization are with a few exceptions underestimated by international law firms to date. Since the planning and structuring of an international legal structure in the area of international legal law firms has not been triggered by big mergers, restructurings and divestitures so far, the issue has not really gotten off the ground. As in the Big Five, it is likely that the issues certainly remain secondary to the entrepreneurial vision of an international law firm. Despite the fact that usually the individuals are in a legal position in the international legal structure themselves, we get the impression that the lawyers in international law firms on the whole are not conscious of and know little about the legal nature of the international structure of their own law firm. Therefore, as evidenced in the questionnaire, if at all, the issue of the international legal structure is generally dealt with in-house, and not by a specialized instrument for legal planning and structuring with the necessary depth and strength, as observed in other international professional service or international industrial firms. If at all, it seems to be the task of their top management, if one exists, or of a partner's committee. There is a lot to learn for international law firms from observing the planning of international legal structures in the Big Five though. Most of the legal issues brought about by the basic dichotomy between 'contract-based' or 'corporation-based' international legal structures can be used fruitfully in the area of international law firms as well. An analysis of the legal implications of the organizational goal of 'one firm' or 'as if one firm' or 'top-down management' in the organizations of the Big Five are very relevant in view of the growing entrepreneurial ambition of international law firms. The same holds true for the experiences of centralization of corporate identity related assets such as 'name' and 'trademarks'.

The growing professional sophistication in international law firms will likely lead to deeper analysis of the liability issue as possible driver for an international legal structure, since the issue of risks and liabilities involved are not fundamentally different. It is not unlikely that law firms up until now involved in finding a new international legal structure in existing Big Five auditing and consulting organizations will be retained by law firms as well and in that context make use of their experience developed in mandates for the Big Five. Further it is not unlikely, that general and tailor-made 'state of the art' knowledge will be developed with regard to aspects of international legal structures for the whole service industry, thereby raising information, transparency and rationality in dealing with the issue of international law firms as well. It can be assumed that the ever-growing media attention to lawyers and law firms will create direct and indirect pressure for a professionalized approach to the issue. In that context, one should not forget that several international business consultants, after having advised Big Five firms, now consult international law firms with respect to their business organization and strategy. This increase of professionalization in turn is likely to have a spill-over effect and raise the level of professionalization in dealing with the issue of international legal structures as well.

Comparable to other service organizations, international law firms are likely to be faced with modern phenomena of the information society, such as growing 'virtualization' of the international organization of the international practice of law, which has direct and indirect impacts on the international legal structure as well.

H. Looking Ahead

This article has argued that the creation of the international legal structures of the Big Five, in the area of audit and consulting organizations as well as in the area of international legal networks, merit careful attention, despite the fact that the majority of the international law firms replying to the questionnaire stated that they are not looking to the Big Five's plans to find an adequate legal structure. They are of the opinion that they will not have to look for a new international legal structure despite the fact that the majority of the law firms stated that they consciously structured their law firm from a legal point of view and the fact that they have become an international law firm had a decisive influence as to how they structured their law firm legally.

Since the Big Five have structured or are about to structure their international legal network by making use of their planning and structuring sophistication with respect to the international legal structure, this seems to be the case despite the fact that business-wise international law firms are to a large extent more sophisticated than the legal networks of the Big Five. It is tempting to argue, that there is a lack of knowledge and a lack of integrating the dimension of the international legal

structure as a strategic factor in the general strategic planning and operation of an international law firm.

There is of course more than one business strategy to cope with globalization in the area of the international practice of law. The various options have different consequences with respect to the type and the importance of the international legal structure. Further analyses will have to deal with the concepts such as 'best friends' concept of Hengeler Mueller Weitzel Wirtz, Slaughter & May and Davis Polk, in which there is hardly any formalization of the legal side of the business relationship chosen to cope with globalization. The same holds true with respect to the sophisticated types of strategic options to cope with globalization such as the one mentioned by CMS Hasche Sigle Eschenlohr Peltzer and BBLP Beiten Burkhardt Mittl & Wegener, Meyer Lustenberger, Moquet Borde & Associé and Pavia e Ansaldo. We argue that integrated international law firms will in the future be more important – indeed this is the topic of this journal – and that the creation of an international legal structure will be more important as well and will be integrated in the general strategic planning and structuring of an international law firm as such. We assume that this will even be the case for lesser integrated forms of international co-operations as above, since the fundamental issue is the question of the adequate legal form and structure in which the international practice of law is being conducted.

We have attempted to use an 'analogy' to explore the issue. In view of the present lack of consistence and coherent theoretical tools, we took the liberty to base our observations on specific experiences from consulting and from interdisciplinary seminars held at a university. We are of the opinion that this descriptive approach, based on observation and experience, is in our view intellectually more honest, and is a legitimate way to reflect the present stage of general knowledge on these issues of legal structuring. The text of this article therefore is situated more on the methodological and exploring side. The text basically 'spots the issue'; the specific content of the analogy to be determined in further research and writing. The text therefore admittedly stays at the surface. Concluding, we argue that there is a need for the development of a state-of-the-art knowledge on questions of international legal structures of professional service firms, which are transparent and accessible to all international professional service firms interested and concerned. The author argues that because of the lack of concepts and because of the lack of transparency in those issues, it is even more timely to deal with the issue as such. The author therefore argues that the issue of the design of an international legal structure of an international law firm is a strategic issue of the future and that this future has already begun. We argue that it is wise and prudent for international law firms of a global dimension to deal with this issue systematically with regard to the analogous results of the Big Five.

Based on initial observations in this text, there is a lack of instruments to approach the new and partially different character of the planning and structuring of a legal structure of an international professional service firm. It seems likely that in this area a customized state-of-the-art knowledge, which constantly changes and develops further on the time axis, will arise and allow soundly based statements of a

more valid kind to be made. These questions must be thematized, differentiated according to international professional service firms in different economic areas, and then integrated into an area of corporate 'business as usual' of the general operation of an international law firm. A full sharing of knowledge, even among competitors, may expedite the wide dissemination of professional knowledge and promote the responsible transfer of knowledge to professional service firms in other economic areas. It can be construed and perceived as strategic behaviour to take an active part in the consolidation of this state-of-the-art knowledge by 'sailing in the winds'. Given the general climate and conditionalities – because of the time-lag in developing conceptual frameworks – it might even be professionally sound and wise that the professional service firms themselves foster the increase and the dissemination and the communication about such know-how themselves.

The more fundamental issue beneath this 'scratching of the surface' is the lack of conceptualization of the respective value and function of the legal point of view in the context of corporate management activity as such. In our perspective, it is a key problem of management culture in the current phase of globalization of these international professional service firms. The continued lack of theoretical conceptualizations of the management and legal dimension of professional service firms can only be changed, if new and more integrated, interdisciplinary and international approaches are institutionalized at the level of law and business schools, and thus contribute to the development of the state-of-the-art knowledge in teaching as well as in research. In that context, the function of the lawyer and the function of law in managing an international professional service firm in general and integrating an international legal structure has to be fundamentally changed to start with.

The task raised by the legal dimension of the issue is the reexamination, repositioning and possible enlargement of theoretical legal constructions. Just as the comparative law analysis has shown that under the aspect of do-ability and legality of the use of certain national corporate structures, there are inadequacies and grey zones within the use of the most flexible and most accepted legal forms such as the Swiss law based associations ('*Verein*') and co-operations ('*Genossensehaft*'), there will be similar unanalyzed areas of the theory of legal organizations on the next level of abstraction. This exploration and extension of corporate law theory, or this meta-level of organizational law, will merit particular attention in the area of the conceptualization of the legal structure of professional service firms as well. Henry Hansman's book *The Ownership of Enterprise* (1996)[31] might serve as guide. Henry Hansman analyzed various forms of enterprises from a generalized perspective. He uses an enlarged conceptual framework in which he is able to describe producer-owned enterprises, customer-owned enterprises, and non-profit and mutual

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[31] Henry Hansman, *The Ownership of Enterprise* (The Belknap Press of Harvard University Press, Cambridge, Mass., London, 1996); the author wishes to thank Rainier Kraakman for valuable insights into aspects of organization law.

enterprises under the central aspect of ownership of enterprises. It is this type of theoretical endeavour and prejudice-driven endeavour which is likely to be fruitful and necessary to integrate the phenomena of modern day professional service firms into the framework of presently positive law.[32]

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[32] For a sampling of the kinds of legal problems faced by these international lawyers see the various articles *The International Lawyer; Freundesgabe für Wulf Döser* (Baden-Baden, 1999); *Wege zur Globalisierung des Rechts, Festschrift für Rolf A. Schütze* (München, 1999); see also *Recht und Internationalisierung, St. Galler Festschrift zum Schweizerischenrecht und Internationalisierny Juristentag* (to be published in fall 2000) at the occasion of this year's Annual Conference of the Swiss Lawyers Association. The influence of globalization on the profession of these international lawyers is addressed in Nedim Peter Vogt et al (eds), *The International Practice of Law, Liber Amicorum for Thomas Bär and Robert Karrer* (Basel and Frankfurt a.Main and The Hague/London/Boston, 1997); in the table of contents one finds among others texts like Peter Böckli, 'Osmosis of Anglo-Saxon Concepts in Swiss Business Law' p. 9, Klaus Böhlhoff, 'The International Practice of Law: Globalization or Regionalization' p. 31, Willem J.L. Calkoen, 'Internationalisation of the Legal Profession' p. 53, Philippe Nouel, 'The International Practice of Law' p. 183, Andrew Soundy, 'UK Aspects of International Legal Praxis' p. 207, Peter D. Trooboff, 'Maintaining Professionalism in International Legal Practice – Challenges for the Future' p. 237, Detlev Vagts, 'Bär and Karrer: Connecting Two Legal Systems' p. 247. See e.g., Neue Züricher Zeitung Fokus, May 1999 devoted entirely to 'Globalisierung' in business, economic and cultural affairs; G. Boxberger and H. Klimenta, *Die 10 Globalisierungslügen* (Munich, 1998), with additional references to literature on the merits of globalization/the terror of the economy/the globalization trap/the myth of the world market; Hartmut Berg (ed.), *Globalisierung der Wirtschaft: Ursachen – Formen – Konsequenzen, Schriften des Vereins für Socialpolitik,* Vol. 263 (Berlin, 1999); C. Christian von Weizsäcker, *Logik der Globalisierung* (Göttingen, 1999); *Jürgen Habermas, Die Postnationale Konstellation* (Frankfurt a.Main 1998), pp. 65 et seq.; Ulrich Beck (ed.), *Politik der Globalisierung* (Frankfurt a.Main, 1998); Ulrich Beck (ed.), *Was ist Globalisierung?* (Frankfurt a.Main, 1997); *Daniel Thürer,* 'Globalisierung der Wirtschaft: Herausforderung zur "Konstitutionalisierung" von Macht und Globalisierung von Verantwortlichkeit Unterwegs zur "Citizen Corporation"?' (2000) 119:I *ZSR* pp. 107 et seq.; in englischer Sprache see e.g., Thomas Friedman, *The Lexus and the Olive Branch* (New York, 1999); David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations, Politics, Economics, Culture* (Stanford, 1999); Anthony Giddens, *Runaway World, How Globalization is Reshaping our Lives* (New York, 2000).