

Harmonizing Law in an Era of Globalization

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Trade, Development, and Social Justice

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Harmonizing Law in an Era of Globalization

Convergence, Divergence, and Resistance

Larry Catá Backer

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Essays in Honor of Sylvia Ostry

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Convergence, Divergence, and Resistance

edited by
Larry Catá Backer

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This book is dedicated to the people who masterfully taught me the most subtle points of harmonization, convergence, divergence and resistance: Donna, Nicholas, Arianna and Lucinda.

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Green Hall
1535 West 15th Street
Lawrence, KS 66045-7577
U.S.A.
Tel. (785) 864-4550
Fax. (785) 864-5054

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Preface

Globalization and harmonization are important buzzwords in law, economics, politics and public policy. Like any buzzword, both terms tend to take on specific meanings to suit the purposes of those who use them.

Fifty years ago, globalization could have been understood to mean the emerging Marxist-Leninist world order. Many believed that humanity was inevitably progressing away from capitalism and autonomous nation-states to a global community based on principles of Marxism which would serve as the common language of political and social organization in the world. Five hundred years ago, and in certain parts of the contemporary world, many believed that globalization would come in the form of the inevitable earthly triumph of one or another singular, true and universal religious system. This form of globalization would produce a common language of social, political, and economic organization based on a common normative structure provided by the structural and behavioral framework of the dominating religion.

Today, in much of the world, globalization is commonly conceived of as the emerging system of private interactions structured, for the most part, through economic relationships. Within this framework, the value of particular expressions of social and political action is to be judged on the basis of the way in which each might contribute to the optimization of free, transparent and fair markets. For this purpose, for example, democratic political systems might be thought ‘better’ than other systems. Likewise, ‘free market’ economic norms might be judged better at optimizing private market functioning than systems based on ‘command economy’ principles. This form of globalization, like the others described above, is believed to transcend the more limited autonomous self-contained political, economic, social and religious communities. The nation-state, in particular, is meant to serve as a cog in the great wheel of global markets, devoting its law-making power to enhancing the transparency, fairness and efficiency of those markets.

One can see, then, that globalization can be understood as both a descriptive and a normative concept. At its most general, globalization is the term used to describe the communication, interaction, migration, and intercourse between autonomous communities. At its most specific, globalization is the term used to describe particular forms of interaction prevalent in any particular historical epoch. As a normative concept, globalization is the name that is given to a particular ideology of transnational interactions among and between members of different political communities.

Harmonization is sometimes used as a synonym for globalization. But harmonization is something quite different. Harmonization is a consequential concept. It suggests a course—or the method—for any of the many forms of globalization, rather than the normative basis of globalization itself. If globalization is the objective—the substance—of universalism, then harmonization focuses on the means of attaining those substantive ends. At its most basic, harmonization suggests the search for com-

monalities. This may mean little more than finding a common language through which autonomous communities may communicate. The spread of English as a ‘global’ language is a good example of this form of harmonization as communication. Standardization of products—from light bulbs, to time, to weights and measures—is another good example of harmonization.

But harmonization usually suggests a search for common behavior rules. Harmonization as integration can take many forms, from voluntary and non-coercive, to mandatory and specific. Much modern integration is implemented through law making—as political communities today tend to hold most of the power to coerce behavior from their members. In the United States, the creation of an idealized form of corporate governance, the Model Business Corporation Act, by a non-governmental organization, the American Bar Association, has served as an influential model for state law and, as a consequence, as an important vehicle for the harmonization of corporate law on a voluntary and non-coercive basis. In the European Union (the “E.U.”), the adoption of framework legislation—called “directives” in the E.U. treaty system are particularly important. Directives are laws directed to the Member States of the European Union that obligate each of the Member States to amend its own domestic law to achieve the objectives specified in the directive. Where the directive is specific, transposition of the directive to domestic law may require adoption of the directive verbatim; otherwise, Member States may have substantial flexibility. But legal harmonization is not necessarily dependant on governmental action. Adoption of common contractual terms within an industry also has been as effective in integrating practice on a global basis. For example, common terms and understandings used in letters of credit were developed through agreement by the major banks that controlled the majority of those transactions and are now enforced by contract.

For all of their power, neither globalization, as a set of influential conduct norms, nor harmonization, as a collection of methodologies of integration, have ever been able to assert dominance over all individuals and all communities. As a historical matter, every form of globalization, and every attempt to integrate behavior within a single set of norms, has met resistance. World history does not reveal a time in which everyone has embraced one single set of norms. While technology has made it more likely that some form of universal system could be implemented, technology has yet to find a way to bend the will of individuals or communities to affirmatively embrace any set of behavior norms either would rather reject.

Not every autonomous community encountering any given framework for globalization would invariably choose to embrace those universal behavior norms, irrespective of the manner in which the community is confronted by that framework. Not every autonomous community reacts positively to inducements to modify rules and law to implement (or induce) greater integration with global standards. Such inducements can as easily be interpreted as attempts to shift the power to govern from within a political community to groups outside of, and not subject to the control of, the members of the political community now subject to its rule making power.

For nation-states recently emerging from out of systems of colonial control, the parallels may be too striking to ignore without difficulty. For example, Cuba under the leadership of Fidel Castro from 1959 into this century has refused to conform to the economic behavior model developed through global economic institutions like the International Monetary Fund and the World Bank. The Cuban leadership grounded this refusal on a rejection of the normative basis of those rules. In any case, the Cuban state apparatus has refused to surrender its power to determine its own economic course to another entity. The difficulty

may blind nation-states to differences between colonial systems of control and participation in global networks of private relationships bounded by common rules of behavior. Of course, resisting nation-states may have other motives as well. Thus, the Cuban leadership might have chosen to resist internalizing the narrative framework of economic globalization based on liberalized trade regimes as a matter of political choice. They have sought to act as agents of a competing system of globalization—a Marxist-Leninist global order.

Institutional religion today also plays a role, as both a facilitator of and source of resistance to, the dominant ideology of transnational interactions understood as globalization as well as to the means embraced to attain globalization's aims. Where a particular institutional religion achieves hegemony within a political community, the normative framework of that religion can serve as a competing ideology of globalization. In this sense, religion might act as a source of resistance to other globalization systems. Where particular institutional religions are actors within a political community, each can seek to influence the form in which globalization is understood or implemented. For example, the institutional Catholic Church has played a very active role in seeking to expand a "social justice" framework for economic globalization. On the other hand, the normative framework of institutional religion can play a decisive role in harmonizing practices among cultures. Institutional Islam, for example, might serve a critical role in naturalizing global commercial norms into majority Muslim states by providing a system of translation and transposition into the traditional normative and legal frameworks of those states.

In the absence of consensus on the value of harmonization, the appropriate goals of convergence, or basis on which either is to be effected, the world community simultaneously experiences both acute resistance to one or another form of convergence and strong efforts to erect ever more effective frameworks for convergence. The essays in this book highlight the ways in which legal systems interact with others, and the reasons those interactions are important in an increasingly global social order. The initial essays focus more generally on theoretical issues in legal harmonization—that is, they focus on the nature and character of communication between legal systems and their effects. The essays that follow are intended to illustrate the many ways in which communication between legal systems have been producing very real, if very different, effects across the world. These essays range over a wide variety of issues relating to harmonization.

All of the essays touch on communication—the great fundamental problem of harmonization. Communication, in a variety of forms, presents problems that loom large even in the context of the development of what appear to be universal norms. The essays suggest the ways communicative difficulties can affect harmonization and serve as an organizing principle of resistance. Each essay thus serves as an illustration of the many paths taken by harmonization in the context of the current norm system of globalization. The essays show that globalization can produce powerful incentives to harmonize law, either voluntarily or coercively. But they also demonstrate that globalization produces great inducements to divergence and resistance.

The materials are divided in six parts. Part I consists of an introductory essay that provides a general framework for understanding issues of harmonization, convergence and resistance. This essay provides a foundation for approaching issues of harmonization in context of globalization. It suggests that harmonization is particularly powerful in the context of global economic activity, and that the focus on economic activity has particularly powerful effects on reshaping the divisions between public and private spheres of regulation. Corporations, bridging public and private spheres of activity, serve as a powerful illustration of harmonization within the normative framework provided by global-

ization. It ends with a consideration of the other essays in the collection in the context of the framework developed for understanding globalization and harmonization.

The essays that follow are arranged in broad thematic sections that each focus on different aspects of harmonization, its limitations, and the nature of opposition to harmonization projects. The essays each shed light on an aspect of the dynamic and sometimes elusive character of harmonization in the many particular areas of regulation in which it seems to apply.

Part II—*Introducing Issues of Horizontal and Vertical Harmonization: Convergence and Divergence in Global Human Rights Regimes*—includes two essays that consider convergence and divergence of norms in the increasingly unified global ordering of norms protecting individual and communal rights. The emerging unified systems of human rights well evidence both the general problems of harmonization among nation-states, and the specific problems of harmonizing rules of individual rights. One essay suggests the ways in which the harmonization of international human rights law fosters personal distinctions and protects individual diversity within a framework of respect for the rights of others. The other looks to Africa to explore the intersection between national sovereignty and emerging international systems of behavior control, where states attempt to conform the rules for Truth and Reconciliation Commissions to the emerging standards under the treaty establishing the International Criminal Court.

Part III—*Convergence and Integration in Federal and Quasi-Federal Systems*—introduces another important and difficult aspect of harmonization. The two essays in this section consider convergence and integration in governance systems arranged vertically—federal and quasi-federal systems. One essay focuses specifically on the difficulties of harmonization among the three distinct governmental and court systems of the United States—federal, state, and tribal. It explores the current body of rules defining the place of the tribal courts in the federal system and the resulting pressures on tribal courts to look and act the same as state and federal courts. The other essay focuses on the functioning of framework legislation, directives, in the European Union. This essay looks at the extent to which directives issued by the European Community institutions, as harmonization instruments, may give rise to obligations against individuals.

Part IV—*Convergence and Divergence in Public and Private International Legal Regimes*—consists of explorations into issues arising from the integration or harmonization implementation “on the ground.” These four essays explore convergence and divergence among roughly co-equal governance systems. These issues of horizontal harmonization, that is, of harmonization among communities of equals, are particularly important in the fields of public international law and the regulation of private economic activity. One essay analyzes the transnational dispute resolution system being developed by the members of the Southern Cone Common Market—Brazil, Argentina, Uruguay and Paraguay. It contrasts the two fundamentally different views of the form that integration ought to following the region, one based on the primacy of the member states and the other based on the creation of autonomous institutions at the supranational level. It then suggests some of the ways in which the current system may still bring some progress to regional integration. A second essay explores the development of a unitary set of norms for conceptualizing culture and the ownership of the artifacts produced by culture where states attempt to protect cultural artifacts from international markets for cultural treasures. A third essay examines several little known cases from the European Union in the area of competition law, and traces the convergence of national law around a particular antitrust norm: the abuse of a dominant position result-

ing from the refusal to supply spare parts. The author argues that E.U. law on this point differs significantly from the position of U.S. law, and warns against convergence at the international level around this particular antitrust “principle.” A fourth essay also examines governmental efforts to regulate the amalgamation of economic power in the United States and the European Union.

Part V—*Communication and the Boundaries of Harmonization*—wrestles with issues of limitation and divergence. Two essays focus on the limitations of harmonization projects, especially as it concerns horizontal harmonization. One essay examines the issue of communication in the context of harmonization and serves to demonstrate both the power of harmonization and its difficulties. It suggests the difficulties of integration even among systems sharing a similar set of basic norms. The lessons of this essay have broad application, as well, to the problems illustrated in the essays that follow. The other essay considers the difficulties of harmonization even within systems that might embrace integration. The essay illustrates how the particular method of rule making in common law countries, and England in particular, tend to make uniformity, or even conformity to single standards, difficult. Methods of communicating law can thus have a profound effect on shape of integration.

Part VI—*Beyond the Boundaries of Harmonization: Cycles of Convergence and Resistance*—considers divergence and resistance to globalization and its attendant incentives to harmonization. The first essay introduces the reader to an aspect of Islam’s encounter with globalization. It examines the ways in which nation-states with Muslim majority populations attempt to interact with each other and with non-Muslim states without losing what they might consider to be the essence of their national or religious character. This interaction occurs in the context of attempts at horizontal harmonization, where convergence is not the goal, and where integration is impossible, but where something more than mere communication between systems is necessary. There is also a strong element of resistance in the context of Islam’s encounter with non-Muslim and secular systems of norm making. The second essay focuses on the interrelationship among globalization, harmonization, and resistance within the European Union. It suggests that harmonization is best understood as a dynamic process in an ongoing contest among and within autonomous political and economic communities seeking to preserve their distinctive characteristics while creating means for facilitating interaction between them.

Together, the essays suggest the ambitions and limitations of globalization as a norm system. They also serve to illustrate the complexities of harmonization as a methodology of convergence. At a fundamental level, all of the essays touch on issues of control and on the relationship between law and the state. Today it is possible to construct binding legal systems without the mediation of states or even recourse to state power. This is threatening to the old order, which senses a diminution of its power as its monopoly over lawmaking is split up among other actors. And rightly so: the essays point to the several avenues by which it may be increasingly realistic to understand law and legal systems as rules distinguishable from the political state. The ramifications of this single change will remake power relationships well into this new century.

The materials in this book are designed to reach a broad audience. There are materials here of interest to those beginning their study of harmonization as well as to specialists in law and politics. The materials are meant to be accessible to all readers. There has been an attempt to avoid jargon or language peculiar to the initiates of an academic field of study. The subject matter is meant to cover a broad area as well. There is a focus on legal systems, to be sure, from the most successful national and transnational sys-

tems of harmonization—the United States and the European Union—to those of Latin America and the Middle East. But the materials also consider globalization in the context of indigenous peoples' rights, culture, and religion.

Because most of the contributors are lawyers, there is a special emphasis on the issue of harmonization within the context of law. As a consequence, the materials are particularly appropriate for law students enrolled in Comparative or International Law courses, or in seminar courses in either field of law, with a more detailed framework within which to consider the complexities of the legal implications of globalization. The materials could also be useful in courses on Trade Law. The goals of the materials are to provide students with the analytical foundation for understanding issues of harmonization, and with contextual applications of these analytical foundations. The focus is not merely on the familiar—that is on issues affecting the United States and Europe. The materials also are meant to introduce students to the ways in which legal harmonization is approached in often ignored areas of the world—places like Latin America, Africa and the *dar al Islam* (that is, what some might understand as the “abode of Islam” or the “Muslim nation” and generally understood as including those states with majority Muslim populations).

The materials can also be profitably used in undergraduate political science courses. The essays are especially useful for adding context to courses on national political systems or for courses on international political systems or globalism and political theory. While the essays are related, each can be assigned independently of the others. Advanced courses in the sociology of law, or Islamic Law, might also find some of the materials useful.

Lastly, the materials in the book also can serve as a set of basic readings in advanced seminar, research or paper oriented courses covering the field of legal harmonization. The initial essays can be used to provide the reader with a conceptual and analytical framework for examining legal harmonization. The other contributions provide contextual examination of the most significant issues in the field. Together, the contributions provide a diverse examination of theory and context rich enough to support a stand alone advanced course.

My hope is that the study of some or all of the issues raised in these materials will provide students, as well as other readers, with a broader perspective on globalization and harmonization. Globalization is not a single and invariable set of norms, but instead represents a tendency to seek to universalize behavioral norms that have taken a variety of forms over the last several millennia. The current form of globalization, based on private economic transactions, political democracy, and basic rules limiting the power of governments and others over individuals—human rights—is neither unique nor necessarily transcendent. Whether this form of globalization has any lasting power remains to be seen.

Like globalization, harmonization does not take on a single form, nor is it an inevitable consequence of globalization. Harmonization is how we understand the processes invoked to integrate rules of behavior. These materials provide the basis for understanding the limited number of patterns for developing these processes. The push for integration appears natural enough—two or more communities seeking to interact need a common language of communication, perhaps common practices or common systems of rules. Integration in this context requires rules, and rules require law making of some kind. Legal harmonization thus forms the basis of the materials provided in this volume. Each contribution adds a layer to the understanding of the benefits and

limitations of legal harmonization and an appreciation for differences in governance in a world that is so focused on standardizing globalization.

I will close this preface with thanks to all who have helped this project along. Pennsylvania State University has been gracious with its support of this project. The editors at Carolina Academic Press have been exceedingly patient. My colleagues at the Coalition for Peace & Ethics performed yeoman service as sounding boards for much of the material that I authored. I want to extend particular thanks to the students enrolled in my courses in Comparative Corporate Law and Comparative Constitutional Law. They willingly served as test subjects for the material. Their collective feedback and insights proved invaluable. I extend special thanks to my student research assistants at Pennsylvania State University: Jill Hammill, Chris Moffitt, Frank J. Lacquaniti, Katie Maxwell, Barzilai Axelrod, and Pedro Hernandez.

It is sometimes easy to fall into jargon and obscurity when dealing with the complexities of globalization and integration. It is also easy to indulge fads and popularly embraced analytical perspectives. But all of the contributors to this work have striven to make the materials accessible to as wide an audience as possible, and all have sought to avoid faddism of any sort.

Larry Catá Backer
State College, Pennsylvania
April 20, 2007

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The Contributors

Emily Atwood received her LL.M. in Child Law from Loyola University of Chicago. She has published work in the area of harmonization and is currently working on issues of the protection of children. Ms. Atwood served as Law Clerk to Hon. Howard H. Kestin, P.J.A.D. of the Superior Court of New Jersey, Appellate Division. She currently works with private global advocacy and human rights groups based in Chicago, Illinois.

Larry Catá Backer is Professor of Law at Pennsylvania State University, Dickinson School of Law. He previously served as Executive Director of the Comparative and International Law Center and Professor of Law at the University of Tulsa College of Law. Professor Backer has written on issues of international and comparative law, as well as on the constitutional law of the European Union and has provided testimony to the U.K. House of Commons on the European Constitutional Treaty. He has written a case-book: *Comparative Corporate Law: U.S., European Union, China and Japan* (2002). He is a member of the American Law Institute, the European Corporate Governance Institute, and a founding director of the Coalition for Peace and Ethics, a non-profit organization promoting appropriate behavior among public, private, economic and religious institutions.

Welber Barral is Professor of International Economic Law at the Universidade Federal de Santa Catarina Centro de Ciências Jurídicas and has been a Visiting Professorial Fellow at the Georgetown University Law Center. He has also served as a visiting professor at the Universidad de Valencia (Spain), at Vytautas Magnus Universitas (Lithuania), and at Penn State Dickinson School of Law. He is also on the roster of panelists for MERCOSUR and for WTO. Professor Barral has written widely on international trade issues and is a leading expert on the effects of the WTO on developing states. He has written several books on issues of international trade and development, the latest of which is *Tribunais Internacionais: Mecanismos contemporaneos de solução de controvérsias* (2004).

Gunnar Beck is a lecturer in E.U. law and legal theory at the School of Oriental African Studies in the University of London, and a legal adviser to the European Scrutiny Committee at the House of Commons. He was formerly a part-time lecturer in E.U. law at the London School of Economics, where he still teaches occasionally. He is a qualified barrister with full rights of audience in the higher English courts and holds a doctorate in political philosophy from the University of Oxford, which he completed under the supervision of the late Professor Sir Isaiah Berlin. He previously taught political and moral philosophy at Oxford and worked for the E.U. and Competition department of the law firm Herbert Smith.

Bruce Carolan is Head of the School of Social Sciences and Legal Studies of the Dublin Institute of Technology, where he teaches and researches on European Union and WTO law and the law of Competition. He is a past president of the Irish Associa-

tion of Law Teachers. He also is a Fellow of the Center for Comparative and International Law of the University of Tulsa School of Law, and has been a visiting professor at the University of Florida Warrington College of Business and Stetson University College of Law. He has taught the Law of the European Union, Competition Law, Trade Law and International Business Transactions in Ireland, the U.S., the U.K., Argentina, Belgium and Geneva.

Vivian Grosswald Curran is Professor of Law at the University of Pittsburgh. She is a member of the American Law Institute, an associate member of the International Academy of Comparative Law, and during 2004–06 served as the United States member of the Claims Committee of Austria's General Settlement Fund relating to Nazi-era property expropriations. She has served as Secretary of the American Society of Comparative Law; chair of the AALS section on comparative law; and book review editor of the *American Journal of Comparative Law*. She is the author of *Learning French through the Law: a French/English Comparative Treatment of Terms in a Legal Context* (1996); *Comparative Law: An Introduction* (2002); and is the translator from the German of Bernhard Grossfeld, *Core Questions of Comparative Law* (2005). She is a past director of the Univ. of Pittsburgh's LL.M. program and founded and directs its Languages for Lawyers program. She has lectured and taught in the area of comparative law and theory in the United States, Germany, France and the Netherlands.

Beth Farmer is Professor of Law at Pennsylvania State University, Dickinson School of Law. She is a former state antitrust law enforcement attorney, is actively engaged in researching and writing about the application of antitrust and trade regulation law within the federal system of the United States and within the international community. She is the chair of the American Association of Law School's (AALS) section of Antitrust Law & Economic Regulation. Professor Farmer serves as a member of the advisory board of the American Antitrust Institute; as chair of the AALS Liaison Committee of the ABA Antitrust Section; and as chair of the Professional Education Committee of the ABA Administrative Law & Regulatory Practice Section. Professor Farmer's teaching and research interests also include criminal law, with emphasis both on white-collar crime and on the impact of the criminal justice system on women.

Seema Lal is in private practice in New York. She received her LL.M. in Intellectual Property from the Cardozo University School of Law, and her J.D. from Pennsylvania State University. She is currently in private practice in New York and has worked extensively in the publishing industry and does research in the intellectual property field.

Jo M. Pasqualucci is Professor of Law at the University of South Dakota. She earned an S.J.D. in International and Comparative Law from the George Washington University Law School, and she has worked with the Secretariat of the Inter-American Court of Human Rights while on a Fulbright in Costa Rica. Her book, *The Practice and Procedure of the Inter-American Court of Human Rights*, was published in 2003 by Cambridge University Press. She has also published several law journal articles on international human rights law.

Christopher Stuart is an attorney employed by the United States Government. He currently works on issues pertaining to Islamic jurisprudence and war crimes. He received his J.D. with a Certificate in International, Comparative and Foreign Law from Pennsylvania State University Dickinson School of Law. The opinions expressed in his article are his own.

Melissa L. Tatum is nationally known for her work in jurisdiction and procedure (particularly with respect to tribal courts) and is developing a national reputation in the field of group rights. She served on a joint federal/state/tribal working group on cross-

jurisdictional enforcement of protection orders and co-authored a model tribal code for enforcement of foreign protection orders. Professor Tatum speaks regularly at conferences across the country on the topic of tribal jurisdiction, and has served as a faculty member at the National Tribal Judicial Center. She has served as a judge on the Southwest Intertribal Court of Appeals and developed a system for indexing and publishing the tribal court opinions of the Muscogee (Creek) Nation. She has served as a Co-Director of the Native American Law Center at the University of Tulsa, where she has also served as Director of the LL.M. Program in American Indian and Indigenous Law.

Takis Tridimas, LL.B. (Athens), LL.M, Ph.D. (Cantab); Sir John Lubbock Professor of Banking Law and Head of the International Financial Law Unit of the Centre for Commercial Law Studies, Queen Mary, University of London. Professor Tridimas is a Barrister of the Middle Temple and Advocate, Bar of Athens. He is Professor at the College of Europe, Bruges. He was senior legal adviser to the E.U. Presidency (2003) and Chairman of the Committee set up by the E.U. Council of Ministers to draft the Treaty of Accession 2003 by which ten new Member States joined the EU. His research interests include all aspects of E.U. law, including securities regulation, financial services law, company law, internal market, constitutional and administrative law, and the law of remedies, internal market and comparative law. He has published extensively in the fields of financial services and E.U. law. His publications include: Tridimas and Nebbia (eds.): *E.U. Law for the 21st Century: Rethinking the New Legal Order*, Hart Publishing, Volumes I & II, 2004; Tridimas: *The General Principles of E..C Law*, Oxford University Press, 1999; He is the co-editor of the *Yearbook of European Law*, a member of the Editorial Board of *The Company Lawyer*, and a member of the Advisory Board of the *European Financial Services Law Review*.

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