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MANDATE FOR THE ILA COMMITTEE ON CONFLICT-OF-LAWS ISSUES IN INTERNATIONAL ARBITRATION

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A. Summary

1. This document sets out the mandate and envisaged work plan of the ILA committee on conflict-of-laws issues in international arbitration (the "***ILA Arbitration Conflict-of-Laws Committee***" or "***Committee***") as approved by the ILA Executive Council on 9 November 2024.

2. The ILA Arbitration Conflict-of-Laws Committee shall aim at fostering a harmonious approach to conflict of laws – or private international law, as it is often called –[1] at both the state level and in the context of international arbitral proceedings. This harmonisation will contribute to the development of international law, as the methodology, principles and rules sought to be developed will promote uniform decision-making in international arbitration, avoid conflicts between arbitral tribunals and state courts, and enhance legal certainty for parties. It will also facilitate the task of arbitrators and judges, and increase the efficiency of arbitration.

3. The ILA Arbitration Conflict-of-Laws Committee shall address conflict-of-laws issues in the entire field of international arbitration, covering questions of substance as well as procedure. While the Committee will focus on commercial arbitration, its work product will also be helpful for investment arbitration.

4. The ILA Arbitration Conflict-of-Laws Committee shall produce (1) a general methodology for conflict-of-laws issues surfacing in arbitration; (2) principles built on this methodology that can be followed and cited by arbitrators and judges; and finally, (3) draft treaties, draft model laws and other rules (including arbitration rules) that can be used as blueprints by international organisations, national legislators, and arbitral institutions.

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[1] This mandate uses the following terminology:

- "*Conflict of laws*" (having the same meaning as *private international law*, a term more commonly used in civil law jurisdictions) is the general term to describe the set of rules and principles used to determine which legal system and which jurisdiction's law is applicable in a legal dispute involving multiple jurisdictions;
- "*conflict-of-laws*" is the adjective used to describe matters related to the field of conflict of laws (eg. conflict-of-laws principles) and
- "*conflicts of laws*" is the plural form to refer to multiple instances.

While conflict of laws is an international notion in the sense that it deals with legal issues that cross national borders, it is also a national notion because each jurisdiction develops its own rules and principles on how to handle these international disputes. The Committee aims to raise this national notion to an international level to establish uniform principles and rules (treaties, model laws, arbitration rules; see mn 24 *et seqq* below).

B. Issue

5. Every international arbitrator faces the issue of determining the applicable law(s). Numerous rules purport to regulate the question and a plethora of academic studies purport to offer guidance. Despite this abundance of guidance, a uniform approach to determining this – often crucial – issue has evaded us to date. Further, case law of different jurisdictions is anything but uniform by adopting different views and tests when determining conflicts of laws. As a result, conflict-of-laws problems are often very complex, strongly disputed, and thorny to decide, although they are often only preliminary to the substance of the dispute.

6. Further, current literature on and practice in conflict-of-law issues face several significant challenges beyond the lack of a uniform solution:[2] (i) the field is highly fragmented, with different jurisdictions applying divergent principles and methodologies; (ii) there is a disconnect between theory and practice, as literature often focusses on abstract principles without fully addressing practical challenges faced by practitioners and vice versa; (iii) conflict-of-law issues are inherently interdisciplinary, but are often regarded in isolation, missing out on the broader context that could lead to more holistic solutions; (iv) many publications are biased toward the legal principles and practices of specific jurisdictions, which limits their global applicability and transferability to different legal systems.

7. At the outset, the very basis of the approach to conflict of laws in arbitration needs to be clarified. For instance, it is doubtful on which sources arbitrators should rely. Can, or must, arbitrators use the conflicts rules provided by the law at the seat of the arbitration (*lex arbitri*)?[3] If so, which ones – only those specifically designed for arbitration[4] or also the general rules of conflict of laws? Should other rules be considered, in particular those of the state of performance[5] or of the likely state of enforcement, to assure that the tribunal renders an enforceable award? Can institutional rules serve as guidance? Can arbitrators determine the applicable law directly (on the basis of - potentially even new - principles they deem relevant and adequate), or is it necessary to justify the choice of a particular law (on the basis of established principles including an explanation of why these are

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2 See eg. *Mayer*, The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator, Kluwer Arbitration Blog, 2011; *Czernich*, Determining of the Applicable Law in Arbitration Proceedings: Rome I Regulation vs National Conflict of Laws Rules, 2013; *Min*, Determining the Law Applicable to the Merits in International Arbitration, NYU Journal of International Law and Politics, 2022; *Cordero-Moss*, Why Arbitration Needs Conflict of Laws Rules, Kluwer Arbitration Blog, 2018; *Landbrecht,* Conflict of Laws and Arbitral Jurisdiction—A Structural and Comparative Analysis, Kluwer Arbitration Blog, 2021; *Collins*, Nullity, Invalidity, the Conflict of Laws and Articles II(3) and V(1)(A) of the New York Convention, Kluwer Arbitration Blog, 2021.

3 On this discussion see Born, Chapter 19: Choice of Substantive Law in International Arbitration, in Born, *International Commercial Arbitration* (3rd ed, Kluwer 2021, update 2024) §19.03[B].

4 See eg. Art 178 (2) Swiss Federal Act on Private International Law (PILA).

5 See eg. Article 9 (3) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Discussing this matter: Bermann, Mandatory rules of law in international arbitration, in Ferrari and Kröll, *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter 2010) pages 325–339 (332–334).

applicable in the specific case)?[6] The debate and uncertainty surrounding these fundamental issues explain why conflict-of-laws issues in arbitration are so complex.

8. At the same time, the determination of the applicable law is particularly relevant as it permeates all aspects of arbitration.[7] This includes the validity of the arbitration agreement and thus the basis of arbitration itself. The law governing the validity of the arbitration agreement is one of the most disputed issues in arbitration,[8] and also the subject of a recent UK reform proposal.[9] The problem extends even beyond the completion of arbitral proceedings, when the law applicable to *res judicata* effects of an arbitral award is to be determined.

9. Another issue of applicable law prevalent in arbitration is the question of the law governing arbitrability. States follow diverging policies regarding the types of disputes that can be arbitrated. This is another "make or break" question, as it decides whether the arbitral proceedings are capable of resolving the dispute, and whether the award will be recognised and enforced.

10. One approach is that states and arbitrators explicitly accept a specific conflicts rule, for instance with regard to the arbitral procedure, which is typically governed by the law of the seat unless a different law has been chosen.[10] Yet even in such seemingly clear cases, discrepancies emerge due to diverging characterisations, particularly with respect to whether an issue is characterised as procedural or substantive. The positions taken in this regard are influenced by different legal cultures, e.g. common law versus civil law. Illustrative examples in this regard are the determination of

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6 Born (n 1); Lew, Mistelis, and Kröll, Comparative International Commercial Arbitration (Kluwer 2003), pages 424–436; Zekos, Problems of Applicable Law in Commercial and Maritime Arbitration, *J. Int'l Arbitration* 1999, Volume 16, Issue 4, pages 173–183.

7 De Ly, Conflicts of law in international arbitration – an overview, in Ferrari and Kröll (n 2) pages 3–16 (4–5); Jhangiani, Conflicts of Law and International Commercial Arbitration – Can Conflict Be Avoided?, *BCDR International Arbitration Review* 2015, Volume 2, Issue 1, pages 99–116 (100); Lew Applicable Law in Commercial Arbitration, Int'l J. of Arbitration, Mediation and Dispute Management 1981, Volume 47, Issue 2, pages 92–98.

8 A very illustrative example in this regard is the "*Kabab-Ji vs Kout Food*" saga with diametrical perspectives of English and French courts on the law applicable to arbitration agreements; another example is the decision of the Austrian Supreme Court in case no. 3Ob153/18y determining a different applicable law to the arbitration agreement than the arbitral tribunal. In literature see Born, The Law Governing International Arbitration Agreements; An International Perspective, *Singapore Academy L. J.* 2014, Volume 26, pages 814–848; Born, Chapter 4: Choice of Law Governing International Arbitration Agreements, in Born (n 3); Graffi, The law applicable to the validity of the arbitration agreement: A practitioner's view, in Ferrari and Kröll (n 2); Plavec, The Law Applicable to the Interpretation of Arbitration Agreements Revisited, *University of Vienna L. Rev.* 2020, Volume 4, pages 82–127.

9 Law Commission, 'Review of the Arbitration Act 1996: Final report and Bill', 2023, Recommendation 19, p. 148, para 12.77 (recommending an amendment of the Arbitration Act 1996 to provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise).

10 See already the Geneva Protocol on Arbitration Clauses 1923, Art 2 ("*The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place*."); cf. also New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art V(1)(d) ("…*the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*").

damages[11] and (pre- and post-award) interest,[12] which are considered procedural in nature by some jurisdictions, whereas others qualify them as substantive issues.[13]

11. Further questions arise when it comes to specific aspects of the arbitral process. One example is document production, a common law concept which is alien to many civil law jurisdictions. Can privileges be invoked as an objection to providing documents, and which law should govern whether such privileges apply?[14] The manner in which tribunals address this is – absent clear rules – hard to predict and often inconsistent.

12. Another controversial issue is the limits of party autonomy when choosing the law applicable to the merits of the dispute. National legal systems subject the freedom to choose the applicable law to important limits in various areas, such as competition law, commercial agency,[15] corporate law, insolvency law, consumer law,[16] or labour law. To date, there is no consensus on how arbitrators should deal with these limitations.[17]

13. The conflicts problem comes to a head in the area of highly politicised norms. Examples are embargoes, capital controls, moratoria, or sanctions and counter-sanctions. Do international arbitrators have to follow such norms when they purport to impact the dispute? If so, which ones, and which law(s) determine what applies in a given set of circumstances?

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[11] See eg. sec 287 German Code of Civil Procedure and sec 273 Austrian Code of Civil Procedure permitting the judge to freely determine damages in certain cases. The International Institute for Conflict Preventino & Resolution has issued a Protocol on the Determination of Damages, seehttps://static.cpradr.org/docs/CPR-Protocol-on-Determination-of-Damages-in-Arbitration-fnl.pdf (accessed 3 September 2024). In literature see Derains and Kreindler, *Evaluation of Damages in International Arbitration* (Kluwer 2015).

[12] Pre-award interest is eg. considered procedural in nature in England, Singapore and most common law countries and substantive in nature in Korea and most civil law countries; see also *Han*/*Ray*, Allocating Pre-award Interest When a Procedural Delay is Beyond Parties' Control, *Kluwer Arbitration Blog*, September 2020. See Gotanda, Awarding Interest in International Arbitration, *Amer. J. Int'l Law* 1996, Volume 90, Issue 1, pages 40–63; Secomb, *Interest in International Arbitration* (Oxford University Press 2019).

[13] See eg. *Pauker*, Substance and procedure in international arbitration, *Arbitration International*, Volume 36, Issue 1, March 2020, pages 3–66.

[14] On this discussion see eg, Franck, International Arbitration and Attorney-Client Privilege — A Conflict of Laws Approach, Arizona State Law Journal 2019, Volume 51, pages 935–1001; Kuitkowski, The Law Applicable to Privilege Claims in International Arbitration, *J. Int'l Arbitration* 2015, Volume 31, Issue 1, pages 65–105; Stouten and Jansen, egal privilege issues: at the mercy of the arbitral tribunal, IBA 2021, https://www.ibanet.org/legal-privilege-arbitral-tribunal (accessed 3 September 2024). Recently, the IBA Arbitration Committee Task Force on Privilege in International Arbitration also published its Report on Uniform Guidelines on Privilege in International Arbitration, see https://www.ibanet.org/document?id=Report-on-Uniform-Guidelines-on-Privilege-in-International-Arbitration (accessed 3 September 2024).

[15] The Austrian Supreme Court has found an arbitration agreement subjecting an agency matter to New York law as violating public policy since New York law does not foresee mandatory statutory compensation claims attributed by the EU Commercial Agents Directive (case no. 5Ob72/16y).

[16] See eg Austrian Supreme Court case no. 6Ob43/13m.

[17] In literature see eg, Berman (n 2); Buxbaum, Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization, 18 *Amer. Rev. of Int'l Arb.* 2007, pages 21–36; Landolt, The application of public interest norms in international commercial arbitration, *Arbitration Int'l* 2023, Volume 39, Issue 4, pages 469–514; Rau, The Arbitrator and Mandatory Rules, 18 *Amer. Rev. of Int'l Arb.* 2007, pages 51–90; Shore, Applying Mandatory Rules of Law in International Commercial Arbitration, 18 *Amer. Rev. of Int'l Arb* 2007, pages 91.

C. Mandate

14. The initial mandate of the ILA Arbitration Conflict-of-Laws Committee is to study conflict-of-laws issues in international arbitration to address and clarify the problems that arise.

15. The ILA Arbitration Conflict-of-Laws Committee shall produce practically relevant outcomes contributing to the development of international law, on which courts and arbitrators can rely. The core outcome is intended to be conflict-of-laws principles for arbitration, providing high-level guidelines that can be cited to aid the resolution of specific cases.

16. However, such principles cannot be created without a sound basis. Therefore, we suggest to first develop a general methodology.

17. Neither such methodology nor the principles based thereon are legally binding. Therefore, we also envisage drafting rules that may be adopted as treaties, national laws or institutional arbitration rules where necessary and possible.

18. We thus propose to structure the Committee's work in three phases:

C.1. General Methodology

19. The general methodology will offer guidance on how arbitrators should generally approach conflict-of-laws issues. This phase lays the basis and directly shapes the principles which are to be developed in the second step.

20. The general methodology shall identify sources that can be used to solve conflicts of laws. In particular, it shall consider whether only a single source should be used, for instance the law at the seat of the arbitration, or whether a plurality of sources should be consulted. If the latter solution is chosen, conflicts between different sources must be dealt with. Possibly, this could be done by a hierarchy of different sources, e.g. between international conventions, state laws and institutional rules, or hard law and soft law.

21. The methodology should also address the question of characterisation. Conflicts rules frequently use broad notions, such as "procedure", "capacity", "contractual", "corporate", or "insolvency". How should arbitrators decide whether a certain legal issue falls into a particular category? In accordance with which concepts, terms and definitions? In this regard, a national, an international, or a transnational method could be supported. Which of these is followed is of decisive importance for the application of conflicts rules and hence for the determination of the governing law.

22. One of the methodological key questions is whether the choice by the parties is paramount and as such binding on the arbitrator, or whether there are exceptions. In particular, it will need to be clarified whether the validity of the parties' choice must be tested against a national law – and if so which one. Another issue is whether such a choice is subject to conditions and limitations, and from where these might be drawn.

23. A further question is how to deal with norms that are not part of the governing law, but may nevertheless be relevant, e.g. the laws of a third country where enforcement is sought, or the laws filling a lacuna, or soft laws such as the IBA Rules on the Taking of Evidence in International Arbitration. How should they be dealt with? The ILA Arbitration Conflict-of-Laws Committee will discuss whether these norms must or can be applied at all, or only under certain conditions. It will also discuss whether they are to be "applied" or only "taken into account" or "given effect" and what difference this makes.

C.2. Principles

24. Based on the methodology established in the first phase, principles for resolving conflicts of laws in international arbitration shall be developed in a second phase. These principles are intended to be sufficiently abstract and high-level such that they are conducive to consensus and can be easily followed in a wide range of areas. Yet they must also be sufficiently precise and granular so they can be relied upon in arbitral awards or state court decisions.

25. The principles should align requirements and rules in the public interest with the needs of arbitration. The idea is to accommodate, as far as possible, legitimate state interests and the efficiency of arbitration as a method of transnational dispute resolution. They should cover the issues that have been identified as the source of specific problems[18] as well as other issues identified by the members of the ILA Arbitration Conflict-of-Laws Committee. The Committee will develop a questionnaire to gather input on these issues before formulating such principles.

26. The principles shall be derived from both international law and state law as well as soft laws and arbitral practice.

27. Among those, international legal instruments will be of primary importance as these often contain explicit or implicit conflicts rules, which may be moulded into general principles.[19]

28. Next, conflicts rules of state laws will be compared, including both statutory provisions and court judgments. The starting point will be conflicts rules specific to arbitration, but general conflicts rules may play a role as well.

29. Then, soft laws, institutional rules and arbitral practice (particularly arbitral awards) will be examined as to the potential guidance they provide to arbitrators on the determination of the applicable law.

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[18] These include the law governing the following questions: (1) the validity of the arbitration agreement, (2) the question of arbitrability; (3) the role of the substantive/procedural dichotomy; (4) the characterisation of issues as procedural or substantive; (5) the significance, conditions and limits to party autonomy regarding the merits of the dispute; (6) the law applicable in the absence of a choice of law; (7) the impact of public policy or overriding mandatory rules of law. This list is not exhaustive.

[19] In particular the New York Convention, the European Convention on International Commercial Arbitration, the Geneva Protocol on Arbitration Clauses, the UNCITRAL Model Law on International Commercial Arbitration and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

30. The principles are intended to be short and concise. They shall be drafted in plain, easily understandable language, avoiding technical terms as much as possible. The wording shall be "jurisdiction neutral" in order to accommodate different backgrounds of courts and arbitrators.[20]

C.3. Rules (Treaties, Model Laws, Arbitration Rules)

31. While it is hoped that the principles will prove influential in international arbitration practice, they will be a soft law instrument. If the principles gain traction in particular jurisdictions, they could form the basis for legislative developments. Such developments could potentially manifest on the international level, e.g. through treaties, on the national level, e.g. by implementing model laws, or on the contractual level, in particular via arbitration rules. The added benefit of such "hard law" rules would be that they are binding on courts and arbitrators.

32. After the conclusion of the first two phases (methodology and principles), the ILA Arbitration Conflict-of-Laws Committee shall determine if and to what extent it shall develop draft rules.

33. The ILA Arbitration Conflict-of-Laws Committee will thereby focus on areas (1) in which political agreement can probably be achieved and (2) which are sufficiently important in practice to justify the effort of international law-making.

34. Depending on the results of the ILA Arbitration Conflict-of-Laws Committee's work, a new international text or an addition to an existing text addressing conflict-of-laws issues could be considered. For example, a short protocol on the law applicable to arbitration clauses could be an option. Another possibility would be an addition to Art 28(1) and (2) UNCITRAL Model Law.

35. One could also envisage uniform provisions on conflict of laws for institutional arbitration rules or ad-hoc arbitration rules. The advantage of this type of rules is that their adoption would not need a consensus by states but could still exert considerable influence in practice.

D. Work Plan

36. Following its approval by the ILA Executive Council on 9 November 2024, the ILA Arbitration Conflict-of-Laws Committee aims to complete the first two phases of its mandate within four years (i.e., by end of 2028). The following timeline is envisaged:

Year	**Achievement**
Early 2025	Webinar on the theme and mandate of the Committee
2025	Developing and distributing questionnaire, collecting responses and analysing data
2026	Developing general methodology

[20] As a model, one could take inspiration from the principles in the ILA Final Report on Res Judicata and Arbitration, which are regarded as highly useful and are frequently referred to by the arbitration community.

Year	Achievement
2027 - 2028	Developing principles
2029 - 2030	Developing rules (treaties, model laws, arbitration rules)

37. The Committee intends to hold meetings on a regular basis (i.e., at least twice per year), both online and in person. The Committee has envisaged to *inter alia* hold in person (hybrid) meetings on the occasions of the IBA Annual Conference in Toronto (2-7 November 2025), the Paris Arbitration Week in 2026, the 82nd ILA Biennial Conference in Vienna (17-21 August 2026) as well as the 83rd and 84th ILA Biennial Conferences.

38. In order to ensure flexibility and adaptability to potential (new) developments, this preliminary work plan may be subject to changes.

E. Committee Officers and Members

39. The chairs of the ILA Arbitration Conflict-of-Laws Committee are Nikolaus Pitkowitz (Austrian Branch, practitioner) and Wendy Lin (Singaporean Branch, practitioner). The co-rapporteurs are Mariel Dimsey (Hong Kong Branch, practitioner) and Matthias Lehmann (German Branch, academic).

40. The composition of the Committee officers ensures that all relevant perspectives, i.e., the academic, practical and institutional perspective, as well as the civil law and common law perspectives, are covered.

41. The co-chairs and co-rapporteurs expect the ILA Arbitration Conflict-of-Laws Committee to consist of 50 members from branches around the world, including academics and practitioners, thereby encompassing different regional and professional backgrounds.

42. The following contains biographies of the co-chairs and co-rapporteurs:

a) **Dr. Nikolaus PITKOWITZ** is founding partner and head of dispute resolution at Pitkowitz & Partners, a leading commercial law firm regularly ranked by GAR 100 among the world's leading arbitration firms. Nikolaus is also President of the Vienna International Arbitral Centre (VIAC), the premier international arbitration institution in Central and Eastern Europe. He is considered one of the leading Austrian arbitration practitioners, having acted as party counsel and arbitrator in over 140 international disputes, in a range from smaller to multibillion cases, located in Europe, the United States and Asia. Nikolaus frequently speaks, lectures and is author of over 50 publications. He is also co-editor of the Austrian Yearbook on International Arbitration, and co-organizer of the Vienna Arbitration Days. From 2011 until 2022, Nikolaus had been a member of the ILA International Commercial Arbitration Committee. Since 2013, Nikolaus has been Secretary and Treasurer of the ILA Austrian Branch.

b) **Wendy LIN** is the Deputy Head of WongPartnership's Commercial & Corporate Disputes Practice, and a Partner in the International Arbitration Practice. She has an active and leading practice spanning a wide array of high-value, multijurisdictional and complex commercial, fraud and asset recovery disputes before the Singapore Courts, as well as in arbitrations conducted

under various arbitral rules. As a reflection of her unique combined expertise in litigation, enforcement and arbitration work, she is involved in numerous landmark arbitration-related decisions from the Singapore Courts. Wendy is a member of the Singapore Academy of Law's Law Reform Committee, and previously served as the Co-Chair of the YSIAC Committee from 2019 to 2024.

c) **Dr. Mariel DIMSEY** is an international commercial and investment arbitration specialist and is Managing Partner of the CMS Hong Kong office. She is the immediate past Secretary-General of the Hong Kong International Arbitration Centre. Prior to her role at HKIAC, Mariel was previously also a Partner at CMS and Co-Head of CMS International Arbitration. She has almost 20 years' experience acting as adviser and advocate in numerous international arbitrations, including IP, construction/infrastructure, foreign investment, post-M&A, automotive, aircraft, supply chain, pharmaceutical, and sales and distribution disputes. She has particular expertise in disputes involving China and APAC, and acts in both common law and civil law disputes, having worked in Germany for a decade earlier in her career. She also sits regularly as arbitrator and has experience as arbitrator under the HKIAC, ICC, KCAB, and DIS Rules, and in ad hoc disputes. She is on the arbitrator panels of several institutions. She is admitted to practice law in Australia and Hong Kong. Mariel's native language is English and she has full professional fluency in German.

d) **Prof. Dr. Matthias LEHMANN** is a professor of Private Law, Private International and Comparative Law at the University of Vienna, as well as Professor of European and Comparative Business Law at Radboud University Nijmegen. His main interests lie in conflict of laws, comparative law, and dispute resolution, as well as banking and financial law. He has published widely on these matters in four languages. Matthias is regularly guest professor at various universities around the world. He has taught courses at the Hague Academy of International Law and participated in a European Commission's Expert Group on conflict of laws. Currently, he is an observer in a project of the Hague Conference on Private International Law (HCCH) and a member in various UNIDROIT Working Groups.

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