# Out now: Punitive Damages and Private International Law: State of the Art and Future Developments

*Written by Zeno Crespi Reghizzi, Associate Professor of International Law at the University of Milan*

The recognition of punitive damages represents a controversial issue in Europe. For many years, due to their conflict with fundamental principles of the *lex fori*, punitive damages have been found to be in breach of public policy by some European national courts. This has prevented the recognition and enforcement of foreign judgments awarding them, or (more rarely) the application of a foreign law providing for these damages.

More recently, the negative attitude of European courts vis-à-vis punitive damages has been replaced, at least in some States, by a more open approach. The latest example is offered by a *revirement* of the Italian Supreme Court case law as per its judgment no 16601 of 5 July 2017.

This book – edited by Stefania Bariatti, Luigi Fumagalli, and Zeno Crespi Reghizzi and published by Wolters Kluwer-CEDAM – intends to explore the relationship between punitive damages and European private international law from different angles. After introducing the topic from a comparative law perspective, the chapters of this book examine, in particular, the purpose and operation of public policy as applied to punitive damages, the solutions adopted by the case law of various European States, the treatment of punitive damages in international commercial arbitration, and the emerging trends in EU and ECHR law.

The contributions have been prepared by leading legal scholars from different jurisdictions and are based on papers presented at a conference that took place on 11 May 2018 at the Department of Italian and Supranational Public Law of the State University of Milan, with the support of the SIDI Interest Group on Private International Law and the “Rivista di diritto internazionale privato e processuale”.

# 8th Journal of Private International Law Conference 2019 in Munich

*Written by Christiane von Bary, Ludwig-Maximilians-University Munich*

The 8th edition of the biannual Journal of Private International Law Conference took place at the Ludwig-Maximilians-Universität in Munich from 12-14 September 2019, organized by Professor Anatol Dutta in cooperation with the editors of the journal, Professor Paul Beaumont and Professor Jonathan Harris.

The call for papers by the organisers resulted in a record number of applications and thus papers presented. More than 190 participants registered for the conference and delivered 114 papers over the course of the three days in Munich. With participants coming from around 50 jurisdictions ranging from Australia to Venezuela, all speakers had a truly international audience and were able to benefit from questions, insights and remarks by a very diverse group of private international law scholars. The diversity of the participants and speakers not only covered a wide variety of geographical backgrounds but also every stage of the academic career from doctoral candidate to senior professor. Due to the unexpectedly high interest in the conference, sadly some people who were interested could not attend due to space constraints – even despite a video transmission of the plenary session.

On Thursday and Saturday, a total of 28 parallel sessions took place. Blocks of seven alternative sessions happened at the same time and participants where free to choose according to their interests. This was a challenge not only for the participants who were spoilt for choice but also from an organisational perspective. In each session, up to four speakers presented their papers on related topics. There were several panels on topics related to jurisdiction, judgments or family law but also on subjects like child abduction, judicial

cooperation, arbitration, technology or CSR. The presentations were all followed by lively and fruitful discussions each chaired by an expert in the relevant field. The animated debate often continued in the cafeteria and the sunny courtyard during the coffee breaks. Two speakers who were unable to attend in person even had the chance to participate via video call and answered questions remotely.

The plenary sessions on Friday allowed for a larger audience for four panels. Particularly interesting and thought provoking was the session on "Women and Private International Law" with Professors Roxana Banu, Mary Keyes, Horatia Muir Watt, Yuko Nishitani and Marta Pertegás Sender. Their contributions focussed on gender issues in private international law and provided a broad variety of perspectives in an area that has – so far – been largely neglected by the private international law community. The very existence of this community was addressed by Professor Ralf Michaels and Dr. Veronica Ruiz Abou-Nigm who spoke about what the heart of the endeavour of private international law is. During the days in Munich, which were not only filled by intellectual debate but also by colleagues and friends (re)connecting, the existence of an international community of private international law felt very much real.

The conference website (https://jprivintl2019.de/) will remain active and offers an overview of all papers as well as abstracts from many speakers. Finally, it was revealed that the next Journal of Private International Law Conference will take place in Singapore in 2021, organised by Professor Adeline Chong, which will be the first time the private international law community gathers in Asia.

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# Conflict of Laws Section of the American Association of Law Schools (AALS) Panel on Jan. 4,

# 2020 in Washington, DC

On January 4, 2020, the Conflict of Laws Section of the American Association of Law Schools (AALS) will host a panel at the AALS Annual Meeting in Washington, DC.  Registration is available here.

Sessions Information
January 4, 2020

10:30 am – 12:15 pm

Room: Maryland Suite B
Floor: Lobby Level
Hotel: Washington Marriott Wardman Park Hotel

**Description**: The biggest development in conflict of laws in the last 100 years is the move to party autonomy. The panel will discuss issues relating to the interpretation and enforcement of choice-of-law clauses, forum selection clauses, and arbitration clauses. It will also discuss the reasons why parties may choose to arbitrate or litigate future disputes at the time of contracting.

**Speakers**

Moderator: John F. Coyle, University of North Carolina School of Law

Speaker: Pamela Bookman, Fordham Law School

Speaker: Christopher R. Drahozal, University of Kansas School of Law

Speaker: Laura E. Little, Temple University, James E. Beasley School of Law

Speaker: Julian Nyarko, Stanford Law School

# Singapore Convention on Mediation

Forty-six countries have signed up to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") today. The signatory countries included Singapore, China, India, South Korea and the USA. The Convention, which was adopted by the UN General Assembly in December 2018, facilitates the cross-border enforcement of international commercial settlement agreements reached through mediation. It complements existing international dispute resolution enforcement frameworks in arbitration (the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and litigation (the Hague Convention on Choice of Court Agreements and the recently concluded Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters). Article 1(3) of the Singapore Convention carves out settlement agreements which may fall within the scope of these other instruments to avoid an overlap. The Convention does not prescribe the mode of enforcement, but leaves it to each Contracting State to do so "in accordance with its rules of procedure and under the conditions laid down in this Convention" (Article 3(1)). Formal requirements to evidence the settlement agreement are specified although the competent authority in the state of enforcement is also granted flexibility to accept any other evidence acceptable to it (Article 4). The settlement agreement may only be refused enforcement under one of the grounds listed in Article 5. These grounds include the incapacity of a party to the settlement agreement, the settlement agreement is null and void under its applicable law and breaches of mediation standards. Only two reservations are permitted: one relating to settlement agreements to which a government entity is a party and the other relating to opt-in agreements whereby the Convention applies only to the extent that the parties to the settlement agreement have agreed to the application of the Convention (Article 8).

While mediation currently commands a much smaller slice of the international dispute resolution mode pie compared to arbitration or litigation, some countries are making concerted efforts to promote mediation. To that end, the Singapore Convention will assist to increase mediation's popularity among litigants in

international commercial disputes.

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# Arbitrating Corporate Law Disputes: A Comparative Analysis of Turkish, Swiss and German Law

*Written by Cem Veziroglu*

*Cem Veziroglu, doctoral candidate at the University of Istanbul and research assistant at Koc University Law School has provided us with an abstract of his paper forthcoming in the European Company and Financial Law Review.*

**Arbitrating Corporate Law Disputes: A Comparative Analysis of Turkish, Swiss and German Law**

The resolution of corporate law disputes by arbitration rather than litigation in national courts has been frequently favoured due to several advantages of arbitration, as well as the risks related to the lack of judicial independence, particularly in emerging markets. While the availability of arbitration appears to be a major factor influencing investment decisions, and there is a strong commercial interest in arbitrating corporate law disputes, the issue is unsurprisingly debated in respect of certain characteristics of the joint stock company as a legal entity. Hence the issue comprises a series of legal challenges related to both corporate law and arbitration law.

In a paper forthcoming in the European Company and Financial Law Review, I tackle *the arbitrability of corporate law disputes* and *the validity of arbitration clauses stipulated in the articles of association* ("AoA") of joint stock companies. The study compares Turkish law with that of Germany and Switzerland and in particular tries to shed light on the current position of Turkish law with respect to

(i) arbitrability of corporate law disputes, such as validity of general assembly resolutions and requests for corporate dissolution, (ii) validity and binding nature of an arbitration clause provided in the AoA. The paper also suggests practicable legislative recommendations as well as a model arbitration clause.

**Arbitrability of Corporate Law Disputes**

Under Turkish law corporate law disputes are, in principle, considered to be arbitrable, whereas disputes concerning the *validity of general assembly resolutions* and *corporate dissolution* are still heavily debated. I argue that both types of disputes are arbitrable, albeit judicial dissolution requests accommodate practical hurdles due to the magnitude of remedial power granted to judges by law. Moreover, I suggest that arbitral awards should be granted an *erga omnes* effect (the effects exceeding the parties to the dispute), as long as the interested third parties are provided with the necessary procedural protection. These procedural mechanisms may include the pending and consolidation of all actions filed before the arbitral tribunal and collective – or impartial – selection of arbitrators in multy-party arbitral proceedings.

It seems that the case law has thus far followed the distinction adopted by the orthodox doctrine in general terms; namely disputes concerning the validity of general assembly resolutions and corporate dissolution are deemed inarbitrable. However, considering the ever-growing pro-arbitration tendency in Turkey –in parallel with many other jurisdictions– it would not be surprising if a more flexible approach is eventually adopted in case law as well.

**Place of the Arbitration Clause: Articles of Association or Shareholders Agreement?**

It is necessary to provide an arbitration clause in the AoA of the company, rather than a shareholders' agreement ("SHA"), in order to (**i**) prevent contradicting judgments handed down in parallel proceedings, (**ii**) be able to request claims peculiar to corporate law and (**iii**) ensure the binding effect *vis-à-vis* the company, board members and new shareholders as well as the current shareholders.

**Validity of an Arbitration Clause Provided in the AoA**

There is no rule under Turkish corporate law that restricts contractual freedom within the AoA of privately held joint stock companies that has the effect of

restraining arbitration clauses. An arbitration clause can, therefore, be validly provided either in the original AoA or by way of an amendment thereof by way of a unanimous vote. However, the binding effect of the arbitration clause in question depends on its legal nature, namely, 'corporative' or 'formal' (contractual).

Addressing this issue, the paper proposes to adopt a two-step test and concludes that if an arbitration clause stipulated in the AoA is deemed corporative in nature, the company, the board members, the new shareholders, and the current shareholders are bound by such an arbitration clause. In the event that the arbitration clause in question is deemed to be a formal provision, it may still remain effective only among the parties as a purely contractual term.

**Policy Recommendations**

The arbitrability of corporate law disputes, the validity of arbitration clauses stipulated in the AoAs and the procedural standards to protect third parties' interests should be clarified by an explicit legal provision. In fact, Article 697n of the Swiss Draft Code of Obligations dated 23 November 2016[1] and Italian Legislative Decree of 17 January 2003 No. 5 Articles 34-37 may offer motivating examples in this respect.

According to German Federal Court's decision in 2009[2], an arbitration clause in the AoA is valid, provided that the protections and the opportunity of shareholders to participate in the proceedings comparable to those in national court proceedings are respected. Therefore Turkish courts should examine the arbitration clause in question in terms of the protection provided to shareholders, rather than applying an outright ban on such clauses in the AoA.

The leading arbitration institutions should draft and publish rules for corporate law disputes as annexes to their existing rules of arbitration. These should consider the issues peculiar to corporate law disputes. Hence, they should provide such mechanisms as the pending and consolidation of actions filed before the arbitral tribunal; collective -or impartial- selection of arbitrators so as to provide the minimum legal procedural protection granted to shareholders. A comprehensive example is the German Arbitration Institution's 'DIS-Supplementary Rules for Corporate Law Disputes 09'[3].

With a view to facilitating the incorporation of applicable and valid arbitration

clauses into the AoA, a model arbitration clause for corporate law disputes should be published by leading arbitration institutions. Such a model clause may be inspired by the draft model clause found in the paper referenced above.

[1] https://www.admin.ch/opc/fr/federal-gazette/2017/625.pdf.

[2] BGH, 6 April 2009, II ZR 255/08, BGHZ 180, 221.

[3] The said rules can be found at: http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15.

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# Call for participants: Second Meeting of the Young EU Private International Law Research Network

This spring, the first meeting of the newly established Young EU Private International Law Research Network was held at the University of Würzburg (please find more information about this event here). The first research project and meeting in Würzburg dealt with the "Recognition/Acceptance of Legal Situations" in the EU.

The cooperation involving the young generation of private international lawyers is intended to be continued with annual conferences. The next meeting of the network will take place at **ELTE Eötvös Loránd University,Budapest** on 20 March 2020. The conference will focus on **overriding mandatory provisions**with particular regard to national legislation and court practice outside the scope of application of the EU private international law regulations. The provisions of the EU private international law regulations, and in particular the Rome I and II Regulations, on overriding mandatory provisions and the

related case law received considerable attention among commentators. However, less attention has been devoted to the treatment of overriding mandatory provisions in the law of the Member States outside the scope of application of the EU private international law regulations. The areas concerned may include property law, family law, company law, etc. A comprehensive comparative study is missing in this field. In order to map the similarities and differences of the approaches of the private international law of the Member States, national reports will be prepared. Based on these national reports, a general report will be produced.

The conference will consist of a morning session where overriding mandatory rules will be discussed in a general way (e.g., the appearance of overriding mandatory provisions in property law, family law, arbitration, their interconnection with human rights, etc.) and an afternoon workshop where participants will discuss the outcome of the national reports and the conclusions of the general report.

If you are interested in the research project or the activity of the Young EU Private International Law Research Network, please do not hesitate to contact us (youngeupil@gmail.com).

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# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2019: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

*S.A. Kruisinga*: **Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges**

A new trend is emerging in continental Europe: several states have taken the

initiative to establish a new commercial court which will use English as the language of the proceedings. Other states have provided that the English language may be used in civil proceedings before the existing national courts. Several questions arise in this context. Will such a new international (chamber of the) court only be competent to hear international disputes, or only a specific type of dispute? Will there be a possibility for appeal? Will extra costs be involved compared to regular civil proceedings? Which provisions of the law of procedure will the court be required to follow? These questions will be answered in relation to developments in the Netherlands, Belgium, France and Germany. For example, in Belgium, a draft bill, which is now being discussed in Parliament, provides for the establishment of a new court that is still to be established: the Brussels International Business Court. In the Netherlands, as of 1 January 2019, the Netherlands Commercial Court has been established, which will allow to conduct civil proceedings in the English language.

*K. de la Durantaye*: **Same same but different? Conflict rules for same sex-marriages in Germany and the EU**

Conflict rules for same-sex marriages are as hotly disputed as the legal treatment of such marriages in general. The German rules on the topic contain multiple inconsistencies. This is true even after the latest amendments to the relevant statute (EGBGB) entered into force in January 2019. Things become even more problematic when the German rules are seen in conjunction with Rome III as well as the two EU Regulations on matrimonial property regimes and on property consequences of registered partnerships, both of which are applicable since January 29, 2019. Some instruments do treat same-sex marriages as marriages, others – notably the EGBGB – do not. Curiously, this leads to a preferential treatment vis-à-vis opposite-sex marriages. The EU Regulation on matrimonial property regimes does not define the term marriage and provides for participating member states to do so. At the same time, the ECJ extends its jurisdiction on recognition of personal statuses to marriages. Given all these developments, one might want to scrutinize the existing conflict rules for marriages as provided for in the EGBGB.

*T. Lutzi*: **Little Ado About Nothing: The Bank Account as the Place of the Damage?**

The Court of Justice has rendered yet another decision on the place of the damage

in the context of prospectus liability. In addition to the question of international jurisdiction, it also concerned the question of local competence under Art. 5 No. 3 Brussels I (now Art. 7 No. 2 Brussels Ia) in a case where the claimant held multiple bank accounts in the same member state. The Court confirms that under certain circumstances, the courts of the member state in which these banks have their seat may have international jurisdiction, but avoids specifying which bank account designates the precise place of the damage. Accordingly, the decision adds rather little to the emerging framework regarding the localization of financial loss.

*P.-A. Brand*: **International jurisdiction for set-offs – Procedural prohibition of set-off and rights of retention in domestic litigation where the jurisdiction of a foreign court has been agreed for the claims of the Defendant**

The question whether or not a contractual jurisdiction clause entails an agreement of the parties to restrict the ability to declare a set-off in court proceedings to the forum prorogatum has been repeatedly dealt with by German courts. In a recent judgement – commented on below – the Oberlandesgericht München in a case between a German plaintiff and an Austrian defendant has held that the German courts may well have international jurisdiction under Article 26 of the Brussels Ia-Regulation also for the set-off declared by the defendant, even if the underlying contract from which the claim to be set-off derived contained a jurisdiction clause for the benefit of the Austrian courts. However, the Oberlandesgericht München has taken the view that the jurisdiction clause for the benefit of the Austrian courts would have to be interpreted to the effect that it also contains an agreement of the parties not to declare such set-off in proceedings pending before the courts of another jurisdiction. That agreement would, hence, render the set-off declared in the German proceedings as impermissible. The judgment seems to ignore the effects of entering into appearance according to Article 26 of the Brussels Ia-Regulation. That provision must be interpreted to the effect that by not contesting jurisdiction despite a contractual jurisdiction clause for the claim to be set-off, any effects of the jurisdiction clause have been repealed.

*P. Ostendorf*: **(Conflict of laws-related) stumbling blocks to damage claims against German companies based on human rights violations of their foreign suppliers**

In an eagerly awaited verdict, the Regional Court Dortmund has recently dismissed damage claims for pain and suffering against the German textile discounter KiK Textilien und Non-Food GmbH („KiK“) arising out of a devastating fire in the textile factory of one of KiK’s suppliers in Pakistan causing 259 fatalities. Given that the claims in dispute were in the opinion of the court already time-barred, the decision deals only briefly with substantial legal questions of liability though the latter were upfront hotly debated both in the media as well as amongst legal scholars. In contrast, many conflict-of-laws problems arising in this setting were explicitly addressed by the court. In summary, the judgment further stresses the fact that liability of domestic companies for human rights violations committed by their foreign subsidiaries or independent suppliers is – on the basis of the existing framework of both Private International as well as substantive law – rather difficult to establish.

*M. Thon*: **Overriding Mandatory Provisions in Private International Law – The Israel Boycott Legislation of Arab States and its Application by German Courts**

The application of foreign overriding mandatory provisions is one of the most discussed topics in private international law. Article 9 (3) Rome I- Regulation allows the application of such provisions under very restrictive conditions and confers a discretionary power to the court. The Oberlandesgericht Frankfurt a.M. had to decide on a case where an Israeli passenger sought to be transported from Frankfurt a.M. to Bangkok by Kuwait Airways, with a stop over in Kuwait City. The Court had to address the question whether to apply such an overriding mandatory provision in the form of Kuwait’s Israel-Boycott Act or not. It denied that because it considered the provision to be “unacceptable”. However, the Court was not precluded from giving effect to the foreign provision as a matter of fact, while applying German law to the contract. Since the air transport contract had to be performed partly in Kuwait, the Court considered the performance to be impossible pursuant to § 275 BGB. The judgement of the Court received enormous media coverage and was widely criticized for promoting discrimination against Jews.

*C.F. Nordmeier*: **The inclusion of immoveable property in the European Certificate of Succession: acquisition resulting from the death and the scope of Art. 68 lit. l) and m) Regulation (EU) 650/2012**

The European Certificate of Succession (ECS) has arrived in legal practice. The present article discusses three decisions of the Higher Regional Court of Nuremberg dealing with the identification of individual estate objects in the Certificate. If a transfer of title is not effected by succession, the purpose of the ECS, which is to simplify the winding up of the estate, cannot be immediately applied. Therefore, the acquisition of such a legal title in accordance with the opinion of the OLG Nuremberg is not to be included in the Certificate. In the list foreseen by Art. 68 lit. l and m Regulation 650/2012, contrary to the opinion of the Higher Regional Court of Nuremberg, it is not only possible to include items that are assigned to the claimant „directly" by means of a dividing order, legal usufruct or legacy that creates a direct right in the succession. Above all, the purpose of the ECS to simplify the processing of the estate of the deceased is a central argument against such a restriction. Moreover, it is not intended in the wording of the provision and cannot constructively be justified in the case of a sole inheritance under German succession law.

*J. Landbrecht*: **Will the Hague Choice of Court Convention Pose a Threat to Commercial Arbitration?**

Ermgassen & Co Ltd v Sixcap Financials Pte Ltd [2018] SGHCR 8 is the first judicial decision worldwide regarding the Hague Choice of Court Convention. The court demonstrates a pro-enforcement and pro-Convention stance. If other Contracting States adopt a similar approach, it is likely that the Convention regime will establish itself as a serious competitor to commercial arbitration.

*F. Berner*: **Inducing the breach of choice of court agreements and "the place where the damage occurred"**

Where does the relevant damage occur under Article 7 (2) of the Brussels I recast Regulation (Article 5 (3) of the Brussels I Regulation), when a third party induces a contracting party to ignore a choice of law agreement and to sue in a place different from the forum prorogatum? The UK Supreme Court held that under Article 5 (3) of the Brussels I Regulation, the place where the damage occurs is not the forum prorogatum, but is where the other contracting party had to defend the claim. This case note agrees, but argues that the situation is now different under the Brussels I recast Regulation because of changes made to strengthen choice of court agreements. Thus, under the recast Regulation, the place where the damage occurs is now the place of the forum prorogatum. Besides the main

question, the decision deals implicitly with the admissibility for claims of damages for breach of choice of law agreements and injunctions that are not antisuit injunctions. The decision also raises questions about the impact of settlement agreements on international jurisdiction.

*D. Otto*: **No enforcement of specific performance award against foreign state**

Sovereign immunity is often raised as a defence either in enforcement proceedings or in suits against foreign states. The decision of the U.S. District Court for the District of Columbia deals with a rarely discussed issue, whether an arbitration award ordering a foreign state to perform sovereign acts can be enforced under the New York Convention. The U.S. court held that in general a foreign state cannot claim immunity against enforcement of a Convention award, however that a U.S. court cannot order specific performance (in this case the granting of a public permit) against a foreign state as this would compel a foreign state to perform a sovereign act. Likewise, enforcement of an interest or penalty payment award has to be denied for sovereign immunity reasons if the payment does not constitute a remedy for damages suffered but is of a nature so as to compel a foreign state to perform a sovereign act. Whilst some countries consider sovereign immunity to be even wider, the decision is in line with the view in many other countries.

*A. Anthimos*: **No application of Brussels I Regulation for a Notice of the National Association of Statutory Health Insurance Physicians**

The Greek court refused to declare a Notice of the National Association of Statutory Health Insurance Physicians in Rhineland-Palatinate enforceable. The Greek judge considered that the above order is of an administrative nature; therefore, it falls out of the scope of application of the Brussels I Regulation.

*C. Jessel-Holst*: **Private international law reform in Croatia**

This contribution provides an overview over the Private International Law Act of the Republic of Croatia of 2017, which applies from January 29, 2019. The Act contains conflict-of-law rules as well as rules on procedure. In comparison to the previous Act on Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters which had been taken over after independence from former Yugoslavia in 1991, nearly everything is new. Full EU-harmonization was a key

purpose of the reform. The 2019 Act also refers to a number of Hague Conventions. Habitual residence has been introduced as a main connecting factor. Renvoi is as a rule excluded. Many issues are addressed for the first time. For the recognition of foreign judgments, the reciprocity requirement has been abandoned.

### *G. Ring/L. Olsen-Ring:* New Danish rules of Private International Law applying to Matrimonial Property Matters

The old Danish Law on the Legal Effects of Marriage, dating back to the year 1925, has been replaced by a new Law on Economic Relations Between Spouses, which was passed on May 30, 2017. The Law on Economic Relations Between Spouses entered into force on January 1, 2018. There is no general statutory codification of private international law in Denmark. The Law on Economic Relations Between Spouses, however, introduces statutory rules on private international law relating to the matrimonial property regime. The Danish legislature was inspired by the EU Matrimonial Property Regulation, but also developed its own approach. The EU Matrimonial Property Regulation is not applied in Denmark, as Denmark does not take part in the supranational cooperation (specifically the enhanced cooperation) in the field of justice and home affairs, and no parallel agreement has been concluded in international law between the European Union and Denmark. The rules set out in the Danish Law on Economic Relations Between Spouses are based on the principle of closest connection. The main connecting factor is the habitual residence of both spouses at the time when their marriage was concluded or the first country in which they both simultaneously had their habitual residence after conclusion of the marriage. The couple is granted a number of choice-of-law options. In case both spouses have had their habitual residence in Denmark within the last five years, Danish law automatically applies.

# The Future of International Dispute Settlement, June 27th, Sydney

The International Law Association and New South Wales Young Lawyers association are hosting a half-day conference next week. It will cover a range of topical issues of international law in the settlement of international disputes, including international commercial arbitration. A copy of the programme is available here. Interested attendees may register via this link.

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# Recent private international law titles offering common law perspectives

*Private International Law in Australia*
The 4th edition of this leading book authored by Professors Reid Mortensen, Richard Garnett and Mary Keyes has been published with Lexis Nexis and is available for purchase as a paperback or an eBook here. Significant recent developments in the private international law of Australia, including legislative reforms and important case law, are examined in this edition. In addition to a detailed analysis of the principles applicable to jurisdiction, choice of law and the recognition and enforcement of foreign judgments, the authors give dedicated attention to international arbitration, family law and company law. This edition also features a brand-new chapter on the choice of law rules applicable to equitable claims and trusts. This book will be a valuable addition to the library of anyone with an interest in the private international law principles applicable in common law jurisdictions, particularly in Australia.

*Commercial Issues in Private International Law: A Common Law Perspective*

This collection, edited by Mr Michael Douglas and Professors Vivienne Bath, Mary Keyes and Andrew Dickinson, has just been published in Hart Publishing's series, *Studies in Private International Law*. It is the culmination of the successful and enjoyable conference held at the University of Sydney in February of last year. The authors include judges, scholars and practitioners from Australia, New Zealand, Singapore and the United Kingdom. Their chapters deal with a range of contemporary topics, including rules for service out of the jurisdiction; case management stays; rules governing the recognition and enforcement of foreign judgments and their relationship with jurisdiction; arbitration; (overriding) mandatory rules; proof of foreign law and party autonomy, among others. The Honourable William MC Gummow, a retired justice of Australia's highest court, remarks in the foreword that "Legal advisers, advocates, judges, scholars and students will find in these pages much to engage them and stimulate further thought.". The book is available for purchase as a hardback or an eBook here.

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# Singapore Court of Appeal Affirms Party Autonomy in Choice of Court Agreements

*Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Professor of Law at Singapore Management University, has kindly provided the following report*:

"The Singapore Court of Appeal has recently affirmed the significance of giving effect to party autonomy in the enforcement of choice of court agreements under the common law in three important decisions handed down in quick succession, on different aspects of the matter: the legal effect of exclusive choice of court agreements, the interpretation and effect of non-exclusive choice of court agreements, and the effect of exclusive choice of court agreements on anti-suit injunctions.

In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*

[2018] SGCA 65, proceedings were commenced in Singapore in respect of an alleged breach of a commercial sale contract containing an exclusive choice of English court agreement. The agreement was dated before the Hague Convention on Choice of Court Agreements took effect in English law, so the Convention was not engaged. Like many other common law countries, the Singapore courts would give effect to the agreement unless strong cause can be demonstrated by the party seeking to breach the agreement. A complication arose because there had been four previous decisions of the Court of Appeal in the shipping context where proceedings had been allowed to continue in Singapore in the face of an exclusive choice of foreign court agreement because the court had found that the defence was devoid of merits. The claimant's argument that based on these decisions the Singapore court should hear the case because there was no valid defence to its claim succeeded before the High Court.

Sitting as a coram of five on the basis of the significance of the issue, the Court of Appeal unanimously reversed the decision. It decided that the merits of the case were not a relevant consideration at the stage where the court was determining whether to exercise its jurisdiction, and departed from its previous decisions to the extent that they stood to the contrary. While affirming the continuing validity of the strong cause test, the court placed considerable emphasis on the element of contractual enforcement. Thus, factors that were reasonably foreseeable at the time of contracting would generally carry little or no weight. In particular, the court recast one of the traditional factors in the strong cause test, "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages", as an inquiry into whether the party seeking to enforce the choice of court agreement was acting abusively in the context of cross-border litigation. In the view of the court, the genuine desire for trial in the contractual forum has been adequately expressed in the choice of court agreement itself, and it is legitimate to seek the procedural advantages in the contractual forum. The court considered that strong cause would generally need to be established by either proof that the party seeking trial in the contractual forum was acting in an abusive manner (which is said to be a very high threshold), or that the party evading the contractual forum will be denied justice in that forum (ignoring the foreseeable factors), for example if war had broken out in that jurisdiction.

The court left open the question whether the same approach would be taken if the choice of court agreement had not been freely negotiated, taking cognisance of

situations, especially in the shipping context, where contracting parties may find themselves bound by clauses the contents of which they have had no prior notice. The court expressed the tentative view that as a matter of consistency, the same approach should be adopted.

In *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, the Court of Appeal was faced with an unusual clause: "This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China." The High Court found the choice of law agreement to be meaningless as a purported floating choice of law, and that the choice of court agreement was invalid as it could not be severed from the choice of law agreement. The court then applied the natural forum test and declined to exercise jurisdiction on the basis that China was the clearly more appropriate forum for the dispute. On appeal, the Court of Appeal agreed with the finding that the choice of law agreement was invalid, but held that the choice of court agreement could be severed from the choice of law agreement.

In a prior decision, the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, had considered a non-exclusive choice of court clause to be relevant at the very least as a factor in the natural forum test, and that the weight to be accorded to the factor depended on the circumstances of each case. It also considered that there was another possible approach to such clauses based on contractual enforcement principles, which it did not fully endorse as the parties had not raised arguments based on contractual intentions.

In *Shanghai Turbo*, the Court of Appeal had to face this issue squarely, and affirmed that if there is a contractual promise in the non-exclusive choice of court clause, the party seeking to breach the agreement had to demonstrate strong cause why it should be allowed to do so. The court went on to hold that, generally, where Singapore contract law is applicable, the "most commercially sensible and reasonable" construction of an agreement to submit, albeit non-exclusively, to a court is that the parties have agreed not to object to the exercise of jurisdiction by the chosen court. This inference does not depend on there being an independent basis for the chosen court to assume jurisdiction (eg, by way of choice of law agreement), or on the number of courts named in the clause. Conversely, there is generally no inference that the parties have agreed that the chosen court is the most appropriate forum to hear the case.

Thus, practically, where there is a non-exclusive choice of Singapore court clause, in general the Singapore will hear the case unless strong cause (the same test elucidated in *Vinmar*) is demonstrated by the party objecting to the exercise of jurisdiction by the Singapore court, but where there is a non-exclusive choice of foreign court clause, this is merely a factor in the natural forum test, as the party seeking trial in Singapore is not in breach of any agreement. On the facts, the court held that jurisdiction should be exercised because the defendant could not demonstrate strong cause.

It is to be noted these are canons of construction under Singapore law. Under Singapore private international law, the choice of court agreement is governed by the law that governs the main contract unless the parties have indicated otherwise. However, Singapore law will apply in default of proof of foreign law. Moreover, canons of construction may be displaced by evidence of contrary intention. The court left open the question – expressing no tentative view – whether the same approach would be taken for contracts which are not freely negotiated. However, as this is a question of interpretation, the context of negotiation could be a relevant indication of the true meaning of contractual terms.

The third case is on arbitration, but the Court of Appeal also made comments relevant to choice of court agreements. In *Sun Travels & Tours Pvt Ltd v Hilton International (Maldives) Pvt Ltd* [2019] SGCA 10, an injunction was sought to prevent reliance on a foreign judgment obtained in proceedings commenced in breach of an arbitration agreement. The court correctly identified the remedy sought as an anti-enforcement injunction, but nevertheless also discussed the anti-suit injunction because the case was argued on the basis that the injunction sought followed from an entitlement to an anti-suit injunction. The court clarified that an anti-suit injunction would generally be granted to enforce a choice of court agreement unless strong cause is demonstrated why it should be denied, and that there is no need to demonstrate vexatious or oppressive conduct independently. Thus, the law in this area is the mirror image of *Vinmar*. This case is particularly significant for Singapore because statements in the previous Court of Appeal decision in *John Reginald Stott Kirkham v Trane US Inc* [2009] SGCA 32 could be read as suggesting that the breach of contract is merely one factor to consider in determining whether the conduct of foreign proceedings abroad was vexatious.

These common law developments are highly significant in bringing greater consistency with developments elsewhere where party autonomy has come to assume tremendous significance. One is the Hague Convention on Choice of Court Agreements which took effect in Singapore law on 1 October 2016. Two critical aspects of this Convention are that a choice of the court of a Contracting State is deemed to be exclusive unless there are express provisions to the contrary, and that the chosen court should assume jurisdiction unless the choice of court clause is invalid. The second is the Singapore International Commercial Court (SICC) established in 2015. Where there is a choice (whether exclusive or not) of SICC clause, the SICC will assume jurisdiction unless the case is not an appropriate one having regard to the court's character as an international commercial court. In addition, under the Rules of Court, a choice of the Singapore High Court made on or after 1 October 2016 is presumed to include the SICC unless expressly indicated otherwise. In both situations, the common law is not relevant, and to that extent, the practical effects of *Vinmar* and *Shanghai Turbo* will be limited. However, the extent to which anti-suit injunctions will be consistent with the Hague Convention on Choice of Court Agreements remains an open question, and it is certainly an area for watch for further developments."

A more detailed discussion of the cases mentioned above can be found at: https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2019.pdf