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# THE CURRENT EUROPEAN PERSPECTIVE ON THE EXEQUATUR OF U.S. PUNITIVE DAMAGES: OPENING THE GATE BUT KEEPING A GUARD

**Abstract:**
*Global trade and intercontinental tourism are on the rise in today's world. This, in turn, leads to more cross-border law suits. Inevitably, jurisdictions will be confronted with legal concepts that are unknown in the host forum. This contribution investigates whether, and to what extent, punitive damages judgments originating in the United States can be enforced against the assets of a defendant in a number of selected Member States of the EU. More specifically, the article explores the possibilities of enforcing American punitive damages judgments in five EU countries, namely Germany, Italy, Spain, France and England. This comparative analysis reveals that the case law in these selected countries is relatively divergent as to the stance adopted towards foreign punitive damages, resulting in different degrees of acceptance of this legal remedy.*

**Keywords:** European Union, punitive damages, United States

## INTRODUCTION

The world we live in today is one where the practical significance of national boundaries is slowly eroding. Due to improved modes of transportation, people are able to visit other continents with relative ease. Similarly, with the rise of global commerce businesses are expanding into other jurisdictions. Distances are no longer a hindrance to global mobility. It could be said that the world is becoming a "global village", not only on the level of electronic communication as once conceived by Professor Marshall McLuhan,[1] but also in terms of tourism and trade.

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[1] M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man*, Toronto University Press, Toronto: 1962, p. 31.

This increased globalisation is arguably resulting, or will result, in an increased number of law suits between Common Law and Civil Law parties. In such transnational litigation it is inevitable that a domestic jurisdiction will at some point be faced with a legal institution that is alien to the substantive law of the forum state. Punitive damages are, alongside with, e.g., contingency fees, discovery procedures, and class action lawsuits, such an institution.

Common Law countries like the United States, Australia, New Zealand, Canada and South Africa provide for punitive damages in their respective legal systems. These jurisdictions may be called "dualistic" in that they make both punitive and compensatory damages available to litigants. Continental Europe, on the other hand, is monistic in nature with respect to damages, since successful plaintiffs can only obtain compensatory damages and punitive damages are said to be non-existent. The concept of punitive damages is considered contrary to the fundamental separation of criminal and private (civil) law. Civil Law countries in the European Union are wary of punitive damages because they are administered in civil proceedings but pursue objectives which are traditionally the focus of criminal law. Punitive damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff.

With the effects of punitive damages increasingly being felt outside the jurisdictions where they are awarded,[2] and with punitive damages predicted to remain a significant feature of US litigation,[3] European countries cannot ignore this important phenomenon within American law.[4] This contribution therefore investigates whether, and if so to what extent, American judgments for punitive damages will be enforced in five selected EU Member States. This private international law perspective is interesting, as private international law forms a country's first line of defence against a remedy described as an "(undesired) peculiarity of American law"[5] or even as "the Trojan horse of the Americanisation of continental law" (own translation).[6] A nation's private international law attitude measures the country's level of tolerance or receptiveness towards a foreign concept unknown in its own legal system.

[2] G. Nater-Bass, *U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries*, Deutsch-Amerikanische Juristen-Vereinigung Newsletter (2003), p. 154.

[3] K. Browne, *Punitive Damages in the U.S.: A primer for insurance buyers and brokers*, Armonk, Swiss Re: 2011, p. 5, available at: http://www.thefederation.org/documents/06.Punitive_Damages_in_the_US-Browne.pdf (accessed 20 April 2016).

[4] T. Rouhette, *The Availability of Punitive Damages in Europe: Growing trend or nonexistent concept?*, 74(4) Defense Counsel Journal 320 (2007), p. 321.

[5] E. de Kezel, *The Protection and Enforcement of Private Interests by (the Recognition of US) Punitive Damages in Belgium*, in: L. Meurkens, E. Nordin (eds.), *The Power of Punitive Damages: Is Europe Missing Out?*, Intersentia, Cambridge-Antwerp-Portland: 2012, p. 235.

[6] Y. Lambert-Faivre, S. Porchy-Simon, *Droit du dommage corporel. Systèmes d'indemnisation*, Dalloz, Paris: 2009, no. 92 and 375; H. Honsell, *Amerikanische Rechtskultur*, in: P. Forstmoser, H.S. von der Crone, R.H. Weber, D. Zobl (eds.), *Festschrift für Roger Zäch zum 60. Geburtstag. Der Einfluss des europäischen Rechts auf die Schweiz*, Schulthess Verlag, Zürich: 1999, p. 39; F.-X. Licari, *La compatibilité de principe des punitive damages avec l'ordre public international. Une décision en trompe-l'œil de la Cour de cassation?*, 6 Recueil Dalloz 423 (2011), p. 427.

The choice for *American* punitive damages is prompted by three important considerations. First, European national court decisions on private international law deal extensively with American punitive damages. The United States produces the most punitive damages judgments and its awards[7] are in the highest amounts.[8] A second factor is the particular position of the United States in the field of private international law, which gives rise to some interesting issues. The United States (in contrast to Canada, New Zealand and Australia) is presently not a party to any bilateral treaty or multilateral international convention governing reciprocal recognition and enforcement of foreign judgments in Europe. As a consequence, parties seeking recognition of an American judgment containing a punitive damages award are subject to a patchwork of national laws governing the recognition of judgments. Lastly, the European Union's commerce is to a large extent focused on the United States. The USA is the leading country in the ranking of the European Union's most important trading partners.[9]

This contribution discusses the chances for enforcement of US punitive damages in five EU countries: Germany, Italy, Spain, France and England.[10] The selection of these five Member States is inspired by two considerations. First, over 60 % of the European Union's population lives on the territory of these five nations. Moreover, these countries represent the five largest economies of the European Union.[11] Secondly, in an area of law where the available case law is limited, Italy, Germany, France and Spain are particularly useful because the Supreme Courts of those countries have ruled on the issue of the enforceability of (American) punitive damages. Their approaches moreover represent the different poles of the spectrum. England is included because it is a Common Law country, and since English law provides for punitive damages,[12] it is revealing to see the position of its own private international law doctrine on foreign punitive damages.

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[7] In this contribution the term "award" will be not be used to refer to arbitral awards but rather to a portion of a court judgment. In particular, the terms "punitive award" and "award for punitive damages" refer to the heading of punitive damages within a foreign judgment.

[8] C.I. Nagy, *Recognition and enforcement of US judgments involving punitive damages in continental Europe*, 1 Nederlands Internationaal Privaatrecht 4 (2012).

[9] European Commission, Directorate-General for Trade, *European Union, Trade in Goods with USA*, 16 April 2014, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf (accessed 20 April 2016).

[10] European Union, *EU member countries* (4 November 2015), available at: http://europa.eu/about-eu/countries/member-countries/index_en.htm (accessed 20 April 2016). In our contribution England is used instead of the United Kingdom.

[11] The figures for the year 2013 are available on the website of the International Monetary Fund: International Monetary Fund, *World Economic and Financial Surveys – World Economic Outlook Database* (October 2013), available at: http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx (accessed 20 April 2016).

[12] *Rookes v. Barnard* [1964], 1 All E.R. 367, 410-11 (H.L.) (punitive damages can be awarded in three categories of cases: abuses of power by government officials, torts committed for profit, or express statutory authorisation).

In what follows, the concept of US punitive damages is first explained (part 1). Subsequently, the central mechanism at play when deciding on the enforcement of punitive damages – the (international) public policy exception – is elaborated in part 2. This paves the way for an analysis of how the traditional countries, Germany and Italy, have rejected requests for enforcement of US punitive damages (part 3). Their approach stands in contrast to the attitude found in Spain and France, which have embraced the concept of punitive damages and have shifted to checking the possible excessiveness of a punitive damages award (part 4). In England, so-called "multiple damages", i.e. punitive damages arrived at by multiplying the amount of compensatory damages, stand no chance of penetrating the English borders, but the situation is less clear as to other forms of punitive damages (part 5). The main findings of the contribution are then summarised in the final part of the article.

## 1. THE CONCEPT OF PUNITIVE DAMAGES IN THE US

Punitive damages are a typical and established feature of American law. In the United States, the Second Restatement of Torts and Black's Law Dictionary define punitive damages as: "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[13] The US Supreme Court views punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[14] The remedy can thus be described as an additional amount of money awarded to the victim of an unlawful act on top of the compensatory damages award. As opposed to the latter, punitive damages do not (primarily) compensate for the harm suffered. Instead, they pursue the aims of punishment of the perpetrator and the deterrence of potential wrongdoers. The functions of punishment and deterrence are traditionally associated with criminal law sanctions. It is, therefore, often argued that punitive damages pursue criminal law objectives rather than private law ones.[15] As a quasi-criminal institution, punitive damages are thus halfway between civil and criminal law and they call into question the boundary between these two spheres of law.[16]

Punitive damages are an important tool in the United States' societal model, which relies on private enforcement through tort litigation as a means to achieve public safety.

[13] Second Restatement of Torts § 908 (1979); B.A. Garner (ed.), *Black's Law Dictionary* (3rd ed.), West, St. Paul, Minnesota: 2006, p. 175.

[14] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), 350.

[15] L. Meurkens, *The Punitive Damages Debate in Continental Europe: Food for thought*, in: L. Meurkens, E. Nordin (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, Cambridge-Antwerp-Portland: 2012, p. 4.

[16] 22 Am. Jur. 2d Damages § 541; Rouhette, *supra* note 4, p. 320; Y. Adar, *Touring the Punitive Damages Forest: A Proposed Roadmap*, 2 Osservatorio del diritto civile e commerciale 275 (2012), p. 302.

In this sense they act as a reward to incentivise private plaintiffs to seek redress for their own violated interests, thereby contributing to the common good.[17] Punitive damages have always been a subject of political and academic debate.[18] They are a much-discussed matter, similar to issues such as gun control or abortion.[19] They are a controversial feature of US law which adds to defendants' perception of the American tort system as capricious, hostile and an avenue for "jackpot justice".[20] However, despite being considered an anomaly in the law of torts,[21] punitive damages are an accepted form of penal remedy in American civil law.[22] In *Luther v. Shaw*, for example, the Wisconsin Supreme Court stated that:

> [t]he law giving exemplary damages is an outgrowth of the English love of liberty regulated by law (…) [that] (…) restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law.[23]

Punitive damages most often arise under state tort law.[24] Each state of the US has a wide discretion with respect to the imposition of punitive damages. The federal system of the US has created considerable diversity among the 50 states as to the form and content of punitive damages.[25] The US Constitution, however, can and has put significant limitations on the divergences between states.[26] In addition to the various state laws, the federal level also provides in certain statutes for punitive damages. For instance, the Clayton Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) all provide for an award of

[17] J. Mallor, B.S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 Hastings Law Journal 1001 (1999), p. 1003; Meurkens, *supra* note 15, pp. 20-21; U. Magnus, *Punitive Damages and German Law*, in: Meurkens et al., *supra* note 5, p. 251; de Kezel, *supra* note 5, pp. 225-226.

[18] Meurkens, *supra* note 15, p. 22; Adar, *supra* note 16, pp. 301 and 347.

[19] M. Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1 Wisconsin Law Review 1 (1998), p. 14.

[20] V.E. Schwartz, M.A. Behrens, J.P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brooklyn Law Review 1003 (1999), p. 1004.

[21] C. Morris, *Punitive Damages in Tort Cases*, 44 Harvard Law Review 1173 (1931), p. 1176; L.L. Schlueter, *Punitive Damages – Volume 1*, LexisNexis, Newark, New Jersey: 2005, p. 79.

[22] R.L. Blatt, R.W. Hammesfahr, L.S. Nugent, *Punitive Damages: A State-by-State Guide to Law and Practice*, Thomson Reuters/West, Eagan, Minnesota: 2008, p. 40; D.G. Owen, *Products Liability Law*, Thomson/West, St. Paul, Minnesota: 2005, p. 1122.

[23] Wisconsin Supreme Court, *Luther v. Shaw*, 147 N.W. 18 (1914), 20.

[24] A.J. Sebok, *The U.S. Supreme Court's Theory of Common Law Punitive Damages*, in: Meurkens et al., *supra* note 5, p. 133.

[25] W. Schubert, *Simplifying Punitive Damages: Due Process and the Pursuit of Manageable Awards and Procedures in U.S. Courts*, 4 European Journal of Consumer Law 829 (2011), p. 832; A.J. Sebok, *Punitive Damages in the United States*, in: H. Koziol, V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, Springer, Vienna: 2009, p. 156.

[26] Sebok, *supra* note 25, p. 156.

treble damages (a form of multiple damages achieved by tripling the compensatory award).[27]

Punitive damages are generally accepted in 45 states of the United States.[28] In Connecticut punitive damages are only permitted to compensate the plaintiff for his legal expenses, less taxable costs.[29] Five states have restricted levels of acceptance, varying from prohibition to conditional acceptance. New Hampshire has abolished the remedy by statute,[30] and the Constitution of Nebraska bars punitive damages awards.[31] In the states of Louisiana (an island of Civil Law influenced by the surrounding ocean of Common Law[32]), Massachusetts and Washington a plaintiff cannot obtain punitive damages unless there is specific statutory authorization.[33] The availability of punitive damages is in principle restricted to tort actions.[34] In practice, however, American courts award punitive damages in a wide array of cases.[35] The plaintiff in a contractual dispute may receive punitive damages if the defendant's breach of contract constitutes an intentional tort as well.[36] The Second Restatement of Contracts states the principle clearly: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."[37] Insurance bad faith cases, for instance, can lead to an award of punitive damages if the insurer's breach of contract is so outrageous that it amounts to a breach of the duty of good faith and fair dealing which is implied in every insurance policy.[38]

Probably one of the most (in)famous punitive damages cases in the United States is that of *Stella Liebeck v. McDonald's*.[39] The plaintiff had been burned by hot coffee which she had purchased at a McDonald's fast food restaurant. She suffered third- and

[27] The punitive portion of the award will thus amount to twice the compensatory damages.

[28] Sebok, *supra* note 25, p. 155; Sebok, *supra* note 24, p. 134, fn 5.

[29] *Venturi v. Savit, Inc*., 191 Conn. 588, 592, 468 Atlantic Reporter, Second Series (A. 2d) 933, 935 (1983) (citing *Collens v. New Canaan Water Co.*, 155 Conn. 477, 489, 234 A.2d 825, 832 (1967)); *Kelsey v. Connecticut State Emp. Ass'n*, 179 Conn. 606, 427 A.2d 420 (1980).

[30] N.H. Rev. Stat. Ann. § 507:16 (1997).

[31] *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N. W. 2d 566, 574 (1989).

[32] B. Janke, F.-X. Licari, *Les conflits de lois en matière de dommages-intérêts punitifs. L'expérience de la Lousiane*, 85 Revue Lamy Droit des Affaires 132 (2013).

[33] *See e.g. Int'l Harvester Credit Corp. v. Seale*, 518 So.2d 1039, 1041 (La. 1988); *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589, 590–91 (Wash. 1996); *Fleshner v. Technical Communications Corp*., 575 N.E.2d 1107, 1112 (Mass. 1991).

[34] 22 Am. Jur. 2d Damages § 568, 569, 570; 25 C.J.S. Damages § 198, 199, 200.

[35] Schlueter, *supra* note 21, p. 399; 25 C.J.S. Damages § 199.

[36] W. Burnham, *Introduction to the Law and Legal System of the United States* (4th ed.), Thomson/West, St. Paul, Minnesota: 2006, p. 241.

[37] Second Restatement of Contracts, § 355 (1981).

[38] H.R. Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 University of San Francisco Law Review 613 (1979), p. 618; J.M. Barrett, *Contort: Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts – Its Existence and Desirability*, 60 Notre Dame Law Review 510 (1985), p. 510 and fn 2 with the references therein.

[39] *Liebeck v. McDonald's Restaurants, P.T.S., Inc*., 1995 WL 360309 (N.M. Dist. 1994).

fourth-degree burns (some all the way to the bone) in her pelvic region when she spilled the hot coffee on her lap. She initially spent eight days in hospital and her burns were so severe that she almost died. The victim demonstrated that McDonald's had previously settled claims of victims with similar injuries from hot coffee, and that the company had never changed its policy of selling coffee at that temperature. The jury awarded the plaintiff USD 2.7 million in punitive damages (in addition to USD 160,000 in compensation). However, the amount of punitive damages was later reduced to USD 480,000 (triple the compensatory damages) by the trial judge. This verdict was appealed, but before the appeal was decided the parties settled for an undisclosed and confidential amount.[40]

## 2. ENFORCEMENT OF PUNITIVE DAMAGES IN THE EU MEMBER STATES: (INTERNATIONAL) PUBLIC POLICY EXCEPTION

When an American court orders punitive damages against a defendant, such defendant must pay the amount due to the plaintiff. If the defendant/debtor does not pay, the judgment can be enforced against his assets. When the debtor has no or insufficient assets in the jurisdiction where the judgment was rendered, enforcement can take place in a state or country where the judgment-debtor has assets. If the creditor wishes to seize European assets of the debtor, he will have to request exequatur of the judgment in the country or countries where the debtor holds assets.

As has been noted, there is no treaty between the European Union and the United States with respect to the mutual recognition and enforcement of judgments. Neither have individual Member States concluded bilateral or multilateral conventions with the United States in this respect. Hence the recognition and enforcement of US decisions in the examined EU Member States is governed by the respective countries' national rules of private international law (understood as including civil procedure).

Compensatory damages awarded in the United States do not pose any special problems in terms of their enforcement in the European Union. Punitive damages granted by an American court are, however, a far more tricky issue given the divergent views on the exequatur of punitive damages between the different EU Member States. Traditionally, the Member States have exhibited an attitude of distrust and even antipathy towards punitive damages. However, judicial decisions in Spain and France indicate an increasing openness toward this controversial remedy.

The decision whether to grant or refuse enforcement of American awards of punitive damages boils down to a decision whether exequatur of the award would be compatible with the public policy of the requested forum. In all five selected Member

[40] For a collection of blog posts offering different unique insights into the case, *see* http://abnormaluse.com/?s=liebeck (accessed 20 April 2016). There is also a 2011 documentary film entitled Hot Coffee (directed by Susan Saladoff) which discusses the case.

States a finding that enforcement is contrary to the state's public policy constitutes grounds for refusal of such enforcement. All cases regarding the enforcement of US punitive damages in the EU Member States have been decided on the basis of these grounds, but with different outcomes.

At the outset it must be emphasised that the notion of public policy should be understood in the context of private international law. In private international law we deal with a more restricted form of public policy, namely *international* public policy.[41] A legal system is required to be more tolerant in cross-border matters than in purely domestic affairs.[42] Despite its name, "international" public policy is a purely national concept.[43] It contains the fundamental rules of domestic public policy that a legal system wants respected in international cases.[44] International cases thus trigger the more narrow concept of international public policy. This is the appropriate yardstick to be used when dealing with cases which are not purely domestic in nature.

It is under the umbrella of this (international) public policy exception that the enforceability of foreign punitive damages is assessed and the objections against punitive damages are formulated. This (international) public policy mechanism thus plays a pivotal role in the existing case law. Unfortunately, courts and scholars do not always distinguish between public policy and the narrower concept of (international) public policy. More often, they realise the existence of a division but, nevertheless, muddy the waters by employing the term public policy when referring to international public policy. This terminological confusion does not weaken the messages the national courts want to convey in their respective judgments.

## 3. THE HOSTILE ATTITUDE IN GERMANY AND ITALY

In the European Union several countries have rejected the enforcement of US punitive damages awards, based on the conservative view that such damages are, as a concept, a violation of the country's (international) public policy. These jurisdictions include Germany and Italy (see parts 3.1. and 3.2 below).

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[41] P. Mayer, V. Heuzé, *Droit international privé*, Montchrestien, Paris: 2004, p. 149, no. 205; A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge University Press, Cambridge: 2009, pp. 275-277; A. Mills, *The Dimensions of Public Policy in Private International Law*, 4(2) Journal of Private International Law 201 (2008), p. 213; P. Bernard, H. Salem, *Further Developments for Qualification of Foreign Judgments for Recognition and Enforcement in France: The test for punitive damage awards*, International Bar Association (April 2011), p. 18.

[42] B. Janke, F.-X. Licari, *Enforcing Punitive Damage Awards in France after Fountaine Pajot*, 60 The American Journal of Comparative Law 775 (2012), p. 792.

[43] J. Dollinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 Texas International Law Journal 167 (1982), p. 170.

[44] A.S. Sibon, *Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy*, available at: http://ssrn.com/abstract=2382817 (accessed 15 March 2016).

### 3.1. The German principled refusal

The 1992 judgment of the *Bundesgerichtshof* in the case of *John Doe v. Eckhard Schmitz* epitomises the traditional European position of disapproval with respect to US punitive damages. The German Supreme Court clearly formulated the idea that punitive damages are contrary to Germany's (international) public policy and should thus be prohibited from entering the German legal order via a foreign judgment. It did, however, leave the door open for enforcement of punitive damages to the extent that they pursue a compensatory function.

#### 3.1.1. The unenforceability of US punitive damages

The landmark case of *John Doe v. Eckhard Schmitz* originated in the state of California. The plaintiff was a fourteen-year-old boy, a California resident, who had been the victim of sexual abuse. The defendant also lived in Stockton, California and had been sentenced in California to prison time for sexual misconduct. The victim sought to recover damages from the perpetrator. Before the case was tried in the civil court, the defendant/perpetrator, who was both an American and German citizen, fled to Germany, where he owned property. He did not appear in the civil case and left no property to seize in California. The California Superior Court (County of San Joaquin) found in favour of the victim and deemed the appropriate compensatory damages to be USD 150,260 for past and future medical expenses and USD 200,000 for anxiety, pain and suffering. In addition to these compensatory damages, the perpetrator was ordered to pay USD 400,000 in punitive and exemplary damages. The California Court further ruled that 40% of the entire award represented the plaintiff's attorney's fees.[45] Owing to the defendant's lack of any assets in the US the victim had to enforce the judgment against the wrongdoer's assets in Germany. During these enforcement proceedings the question arose as to whether a decision containing a punitive award could be enforced on German territory.[46]

The *Bundesgerichtshof* deviated from the lower courts' rulings[47] by accepting the compensatory damages, but rejecting the punitive damages awarded by the California Superior Court. In addressing the fate of the punitive award, the German Supreme

[45] California Superior Court (County of San Joaquin) 24 April 1985, *John Doe v. Eckhard Schmitz*, no. 168-588, unpublished. The facts are to be found in the judgment of the *Bundesgerichtshof*: BGH 4 June 1992, *BGHZ* 118, p. 312, NJW 1992, p. 3096, *RIW* 1993, p. 132, *ZIP* 1992, p. 1256 (English translation of the relevant parts of the judgment by G. Wegen, J. Sherer, *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 International Legal Materials 1320 (1993), p. 1329); J. Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 Columbia Journal of Transnational Law 641 (1992), p. 644; S. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 George Washington International Law Review 173 (2009), p. 203.

[46] M. Tolani, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 Annual Survey of International & Comparative Law 185 (2011), p. 186.

[47] Landgericht Düsseldorf 12 April 1990, 13 O 456/89, unpublished; Oberlandesgericht Düsseldorf 28 May 1991, *RIW* 1991, p. 594.

Court stated that a foreign judgment awarding lump-sum punitive damages of a not inconsiderable amount in addition to the damages for material and immaterial losses generally cannot be enforced in Germany.[48] The judgment was thus declared enforceable for a total amount of USD 350,260.

The Court's ruling is of particular interest because of its thorough and extensive explanation as to why US punitive damages trigger the public policy exception found in Art. 328(1)4 of the *Zivilprozessordnung* (ZPO) i.e. the German Civil Code of Procedure. The Supreme Court asserted that the German private law system provides for compensation for damage suffered but does not intend an enrichment of the victim.[49] The *Bundesgerichtshof* held that the legal principle of awarding the victim damages for the sole purpose of reimbursing what he has lost to be a fundamental principle of German law.[50] Punishment and deterrence, the main objectives pursued by punitive damages, are aims of criminal law rather than of civil law. Punitive damages allow a plaintiff to act as a private public prosecutor. This interferes with the state's monopoly on penalisation. Furthermore, the defendant cannot rely on the special procedural guarantees provided for in criminal law.[51]

The *Bundesgerichtshof* did note the existence of a penal institution within German civil law. Contractual penalties provide for punishment under civil law.[52] This finding could have dismantled the civil/criminal distinction that the Court embraced and could have created an opening for punitive damages. However, contractual penalties originate from a legal agreement between parties. The German Supreme Court, therefore, found them to be irrelevant to the debate before it.[53]

Finally, the *Bundesgerichtshof* formulated the argument that the enforcement of the punitive damages award should be denied because its enforcement in Germany would put foreign creditors in a better position than domestic creditors. The former would be able to gain access to the assets of German debtors to a considerably greater extent than the latter, even if the latter had suffered more damage. The fact that foreign creditors can obtain punitive damages leads, according to the Court, to a lack of equal treatment.[54, 55]

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[48] BGH 4 June 1992, NJW 1992, pp. 3102 and 3104; V. Behr, *Punitive Damages in American and German Law: Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 Chicago–Kent Law Review 105 (2003), p. 158.

[49] W. Kühn, *Rico Claims in International Arbitration and their Recognition in Germany*, 11 Journal of International Arbitration 37 (1994), p. 44.

[50] V. Behr, *Punitive Damages in Germany*, 24 Journal of Law and Commerce (2005), p. 205.

[51] BGH 4 June 1992, NJW 1992, p. 3103; Tolani, *supra* note 46, p. 202; P.J. Nettesheim, H. Stahl, *Recent Development: Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award*, 28 Texas International Law Journal 415 (1993), p. 419; N. Jansen, L. Rademacher, *Punitive Damages in Germany*, in: Koziol & Wilcox, *supra* note 25, p. 76.

[52] Art. 340-341 BGB (German Civil Code).

[53] BGH 4 June 1992, NJW 1992, p. 3103.

[54] *Ibidem*, p. 3104.

[55] M. Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, in: Koziol & Wilcox, *supra* note 25, p. 246.

It thus seems that the *Bundesgerichtshof* attempted to protect German industry from US litigation.[56] The Court also highlighted the significant economic consequences on the insurance industry resulting from excessive punitive damages.[57]

We can turn the reasoning of the *Bundesgerichtshof* around and look at the policy-oriented argument from the point of view of an American competitor of the German judgment debtor. One can ask why the German debtor (who is active on the American territory) should be immune from liability for punitive damages incurred in the United States, whereas an American market competitor cannot escape this liability. Furthermore, the enforcement of American pain and suffering awards seems to be unproblematic in Germany, even if they are substantially larger than the amounts German courts would grant. The Court does not mention this scenario.[58]

The *Bundesgerichtshof* also noted that the application of the public policy clause requires a strong link between the facts of the case and the forum where enforcement is sought.[59] For the public policy exception to apply a connection between the case and the requested state is necessary. This connection is referred to as *Inlandsbeziehung* or *Inlandsbezug*. The weaker the connection, the less likely it is that the exception will apply and the more likely that enforcement will be granted.[60] If the connection to the forum country is low, that country has less interest in closely policing its public policy.[61] In *John Doe v. Eckhard Schmitz*, there was no close connection to Germany. The crime was committed in the US. The young victim was a US citizen. The perpetrator had dual citizenship but had moved to Germany only after his conviction. Under these circumstances one would reasonably expect the public policy exception to be more restrained. Hence the rejection of punitive damages despite the slight connection of the case to the forum state indicates a strong German antipathy towards this type of damages.[62]

Although the determination that the punitive damages award was incompatible with German public policy sealed the fate of the punitive award, the Supreme Court, nevertheless, took its analysis one step further. It looked at the punitive award to assess whether it would pass the proportionality test.[63] This principle gives German courts the responsibility to ensure that a damage award does not exceed the amount needed to compensate the injured party.[64] The Court expressed its disapproval of sums of money

[56] S. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 New York University Journal of International Law and Politics (2013), p. 998.

[57] BGH 4 June 1992, NJW 1992, 3104; Nettesheim & Stahl, *supra* note 51, p. 424.

[58] P. Hay, *The Recognition and Enforcement of American Money-Judgments in Germany: The 1992 Decision of the German Supreme Court*, 40 The American Journal of Comparative Law 729 (1992), pp. 746-747, fn 72.

[59] BGH 4 June 1992, BGHZ 118, p. 348.

[60] Requejo Isidro, *supra* note 55, pp. 245-246.

[61] Baumgartner, *supra* note 45, p. 205, fn 189.

[62] Nagy, *supra* note 8, p. 8.

[63] BGH 4 June 1992, NJW 1992, p. 3104.

[64] Nettesheim & Stahl, *supra* note 51, pp. 423-424.

imposed on top of the compensation for damages, an approach which would leave no room for any amount of punitive damages. However, the Court found that enforcement of the punitive damages award in the case before it would be excessive because the punitive damages awarded were higher in amount than the sum of all the compensatory damages.[65] This statement may be interpreted such that the *Bundesgerichtshof* views a 1:1 ratio between compensatory and punitive damages as the maximum allowed. In the case at hand this opinion was purely academic. However, the *Bundesgerichtshof*'s opinion on proportionality could prove to be vital if the compatibility of punitive damages with (German) international public policy can be demonstrated. If the compatibility of the concept of punitive damages with international public policy would be accepted, the excessiveness check is the only obstacle remaining before the judgment can be enforced.[66] This is the approach taken by the Spanish and French Supreme Courts (see *infra* part 4). The *Bundesgerichtshof*'s judgment gave no explicit indication as to the consequences of a finding of excessiveness for the enforcement of the non-excessive part of the punitive damages award, although it did mention that a court should not cut up the punitive award at its own unfettered discretion.[67]

### 3.1.2. Exception for the compensatory part of the punitive award

The *Bundesgerichtshof* construed one exception to the unenforceability of punitive damages.[68] It ruled that it would allow the enforcement of punitive damages if, and to the extent, that the punitive award serves a compensatory function. In the United States, punitive damages may occasionally serve as compensation for losses that are difficult to prove, for losses that are not covered by other types of damages, or as a means to deprive the defendant of the gains he or she acquired through his or her wrongful behaviour.[69] More importantly, the Court referred to legal costs which, under the US system, the prevailing party cannot, in principle, recoup from the losing party. It, however, refused to accept that one of the reasons for awarding punitive damages is invariably to shift the victorious party's legal costs onto the losing party.[70] The German Supreme Court, on the contrary, required that the foreign judgment clearly indicate the (partly) compensatory

[65] BGH 4 June 1992, NJW 1992, p. 3104.

[66] In its decision the *Bundesgerichtshof* rejected punitive damages of "a not inconsiderable amount". This is surprising because the amount should have been irrelevant to the German Supreme Court, given that the non-compensatory nature of the remedy alone was enough to refuse enforcement: Behr, *supra* note 48, p. 159. This might indicate an opening for punitive damages after all.

[67] BGH 4 June 1992, NJW 1992, p. 3104.

68 *Ibidem*, p. 3103.

[69] W. Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23(1) Berkeley Journal of International Law 175 (2005), pp. 196-197; Nater-Bass, *supra* note 2, p. 156; G. Wegen, J. Sherer, *Recognition and Enforcement of US Punitive Damages Judgments in Germany: A Recent Decision of the German Federal Court of Justice*, International Business Lawyer 485 (1993), p. 486; A.R. Fiebig, *The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments*, 22 Georgia Journal of International & Comparative Law 635 (1992), p. 649.

[70] BGH 4 June 1992, NJW 1992, p. 3103; Hay, *supra* note 58, p. 747.

purpose of any punitive award.[71] If the foreign court fails to do so, the German enforcing court cannot ascertain the motives behind the award, as this would run counter to the prohibition of *révision au fond* (i.e. a review of the merits of the judgment), laid down in section 723(1) ZPO. In the case at hand the *Bundesgerichtshof* did not find any reliable information in either the California judgment or in the transcript to support the argument that the punitive damages were intended to cover the legal costs incurred by the plaintiff. Although the American court had awarded 40% of the judgment to the plaintiff's lawyer, the German Supreme Court argued that, since the 40% related to the *entire* judgment it could not exclude the possibility that the sums paid as compensatory damages – which the *Bundesgerichtshof* appeared to find generous – already included an element addressing those costs.[72] The *Bundesgerichtshof*, therefore, did not deviate from its conclusion that the punitive award in its entirety should be rejected.[73]

### 3.2. Italy's complete unwillingness to enforce punitive damages

In Italy one can find a similar attitude of rejection and disdain for punitive damages as in Germany. The seminal case on the enforcement of US punitive damages concerned a judgment coming from the state of Alabama. In 1985, a fifteen-year-old boy was involved in a traffic accident in the city of Opelika. A car failed to give way and hit the boy's motorcycle, throwing him off the bike. The buckle of his helmet malfunctioned and his unprotected head struck the pavement, resulting in instant death. The boy's mother sued the driver, the American distributor of the helmet, as well as some additional defendants for the sum of USD 3 million before the District Court of Jefferson County in Alabama. Fimez SpA, the Italian manufacturer of the helmet, was later also brought into the proceedings. At trial all parties decided to settle for an undisclosed amount. Fimez SpA, however, had abandoned the case before this settlement agreement. In a judgment of 14 September 1994 the District Court of Jefferson County in Alabama held the defendant liable for the negligent design of the defective crash helmet.[74] The District Court awarded the victim's mother USD 1 million in damages, without further specification.[75]

When the case reached Italy's highest court in 2007, the *Corte di Cassazione* (the Italian Supreme Court) first explained that the classification of the USD 1 million damages depended on the facts of the individual case. This analysis is left to the Court of Appeal, whose factual finding cannot be reversed. The Court of Appeal of Venice had held that the foreign judgment lacked a rationale, making it impossible to understand

[71] Zekoll, *supra* note 45, p. 657.

[72] Nagy, *supra* note 8, p. 8.

[73] BGH 4 June 1992, NJW 1992, p. 3104.

[74] The District Court had already rendered the USD 1 million award in a non-final decision of 1 April 1991 (or 1 January 1991 - the Venice Court of Appeal's judgment mentions both dates throughout its text). The judgment of 14 September 1994 confirmed the previous order, declared it final, and added reasons for it.

[75] L. Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 Journal of Law and Commerce 245 (2005), p. 246.

the grounds on which the amount was awarded, the nature of the damages recovered, and the basis for the recovery of damages. It was, therefore, not able to establish and assess the criteria used by the Alabama Court to qualify the nature of the damages awarded and to quantify those damages. This led the Venice Court of Appeal to the conclusion that the damages awarded were punitive in nature, even though the US Court did not expressly qualify them as such.[76]

The Court of Appeal was probably not aware of the exact meaning of the Alabama wrongful death statute,[77] which applied in this case.[78] Historically, this rule has been interpreted to mean that the descendants or heirs are only allowed to recover punitive damages for wrongful death. Compensatory damages are not available. The Alabama Supreme Court, however, explained that the remedy serves multiple functions.[79] It provides a "mere solatium to the wounded feelings of surviving relations, [or] compensation for the [lost] earnings of the slain"[80] but it also aims "to prevent homicides"[81] by making the amount of damages dependent on "the gravity of the wrong done".[82, 83] It was, therefore, clear that the award rendered against Fimez SpA pursued both a compensatory objective as well as its sanctioning and deterrence purposes.[84] The Venice Court did not consider this and instead seems to have based the penal classification of the judgment on the amount awarded.[85] This judicial misconception, nevertheless, does not undermine the Venice Court's message as to the unacceptability of punitive damages. Besides, in light of the Alabama wrongful death statute, the American court would have probably classified the damages as punitive if it had decided to label the damages it awarded.

Although it could not have intervened even had it wished to, the Italian Supreme Court noted that the Venice Court of Appeal's finding of a violation of Italy's public policy seemed justified in this case. The Italian Supreme Court is only entitled to reverse matters of law, such as a different definition of public policy. However, it did not find fault with the interpretation of public policy rendered by the Venice Court.[86]

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[76] Court of Appeal Venice 15 October 2001, Rep Foro it 2003, Delibazione no. 29; Giur. It. II 2002, p. 1021; Ostoni, *supra* note 75, p. 249.

[77] Alabama Code § 6-5-410 (1975).

[78] F. Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, in: D. Fairgrieve, E. Lein (eds.), *Extraterritoriality and Collective Redress*, Oxford University Press, Oxford: 2012, p. 276.

[79] F. Quarta, *Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe*, Conference paper – "Extraterritoriality and Collective Redress", London 15 November 2010, Draft 19 November 2010, p. 7.

[80] *Savannah & Memphis Railroad v. Shearer*, 58 Ala. (1877), p. 680.

[81] *South & North Alabama Railroad v. Sullivan*, 59 Ala. (1877), p. 278.

[82] *Estes Health Care Ctrs Inc v. Bannerman*, 411 So2d (1982), p. 113.

[83] Quarta, *supra* note 79, pp. 6-7.

[84] Quarta, *supra* note 78, p. 276; Quarta, *supra* note 79, p. 7.

[85] Requejo Isidro, *supra* note 55, p. 248; Nagy, *supra* note 8, p. 7.

[86] Cass. Civ. 19 January 2007, no. 1183, *Rep Foro it* 2007 *v. Delibazione* no. 13 and *v. Danni Civili* no. 316; *Corr. Giur.,* 2007, 4, p. 497; F. Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, 31 Hastings International & Comparative Law Review 753 (2008), p. 757.

The Italian Supreme Court further disagreed with the contention that the US decision did not violate public policy because the Italian liability system contains several legal institutions, such as penalty clauses and moral damages, which pursue punitive objectives.

It held that penalty clauses are not punitive in nature and do not have a retributive aim. They serve to strengthen a contractual relationship and quantify damages in advance. The Supreme Court noted that the amount of the contractual penalty can be reduced if the judge finds an abuse of the parties' freedom of contract contrary to the principle of proportionality. It concluded that penalty clauses cannot be compared to punitive damages, despite the fact that the penalty is due without proof of the damage suffered or a strong correlation with the extent of the damage. Punitive damages, on the other hand, are an institution that is not only connected to the tortfeasor's conduct and not to the damage suffered, but is also unjustifiably disproportional to the harm actually incurred.[87]

The Court also rejected the suggested equivalence between punitive damages and moral damages. Moral damages reflect an actual loss suffered by the victim and recovery is based on that loss. Moral damages focus on the injured party, not on the wrongdoer. The primary objective of moral damages is compensation, whereas in the case of punitive damages there is no relation between the damages awarded and the harm incurred.[88]

According to the Italian Supreme Court, damages in private law are not connected to the idea of punishment or to the wrongdoer's misconduct. Instead, the damages are intended to restore the damage suffered by the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money. This is true for all types of civil damages, including moral damages, and they are not influenced by the victim's conditions and the wrongdoer's wealth, but require concrete and factual evidence of the loss suffered.[89] In other words, Italy's highest court made a clear distinction between compensatory and punitive damages, with absolutely no room for any overlap. Compensatory damages, including moral damages, focus on the victim, relate to his or her loss, and are intended to make him or her whole. Punitive damages, on the other hand, focus on the wrongdoer's behaviour, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.

In sum, the Italian Supreme Court dismissed the analogy between penalty clauses and moral damages and punitive damages, as had the German Supreme Court in *John Doe v. Eckhard Schmitz*. It confirmed the view of the Venice Court of Appeals that punitive damages are in violation of public policy and declined to enforce the Alabama USD 1 million award.[90] As a result, the plaintiff was left without any compensation.

[87] Cass. Civ. 19 January 2007, no. 1183, *Rep Foro it* 2007 *v. Delibazione* no. 13 and *v. Danni Civili* no. 316; *Corr. Giur.,* 2007, 4, p. 497.

[88] *Ibidem.*

[89] *Ibidem.*

[90] *Ibidem.*

Conversely, in view of the Court's reasoning there should be no doubt about the enforcement of compensatory damages. As long as the compensatory damages are clearly distinguished from the punitive damages, their enforcement should not pose any public policy concerns.[91]

The Italian Supreme Court later affirmed its position in a judgment of 8 February 2012.[92] In this case it was confronted with a judgment coming from the Middlesex Superior Court in Massachusetts, USA. That court had ordered an Italian company to pay USD 8 million to an employee who had suffered injuries in an accident at the premises of the Italian corporation's US subsidiary. The judgment did not mention punitive damages nor the criteria used to quantify the award. As in *Fimez*, the Italian courts were confronted with a global award without further specification or demarcation. The Court of Appeal of Turin declared the entire award enforceable because the judgment did not refer to punitive damages and the amount was reasonable and fair in light of the seriousness of the employee's injuries. The Supreme Court, however, overturned the Court of Appeal's decision. It yet again labelled the damages as punitive in nature despite the fact that the American judgment never discussed punitive damages. The Court reiterated that the Italian civil liability system is strictly compensatory and not punitive. The USD 8 million in damages awarded was thus found to be unenforceable on the basis of the public policy exception.[93]

## 4. MORE OPENNESS IN SPAIN AND FRANCE

In both Spain and France (parts 4.1 and 4.2 below), the tolerance towards US punitive damages seem to be much higher. The Supreme Courts of both nations have no objection to the concept *per se*. Instead of outright rejecting the institution itself, they focused on the amount of punitive damages awarded by the foreign (US) court. This more receptive stance increases the likelihood that the plaintiff will be able to enforce an American judgment containing punitive damages in its entirety against a defendant's assets in Spain or France.

### 4.1. Spanish Supreme Court embraces US punitive damages

In the case of *Miller Import Corp. v. Alabastres Alfredo, S.L.* of 13 November 2001, the Spanish Supreme Court (*Tribunal Supremo*) issued its fiat approving a request for

[91] Nagy, *supra* note 8, p. 7.

[92] Supreme Court, *Soc Ruffinatti v. Oyola-Rosado*, no. 1781/2012, 8 February 2012, *Danno resp* 2012, p. 609.

[93] LS Lexjus Sinacta, *Italian Supreme Court Confirms Stance On Punitive Damages* (21 December 2012), International Law Office, available at: http://www.intemationallawoffice.com; *Italian Supreme Court Affirms Position Against Punitive Damage Awards* (31 January 2013), available at: http://www.goldbergsegalla.com/publication/italian-supreme-court-affirms-position-against-punitive-damage-awards (both accessed on 20 April 2016); Quarta, *supra* note 78, p. 275, fn 32.

enforcement of a US judgment containing punitive damages.[94] At the time, requests for the enforcement of foreign judgments had to be brought directly before the civil division of the Spanish Supreme Court.[95] The American litigation concerned an alleged infringement of intellectual property rights. The plaintiffs, Miller Import Corp. (domiciled in the US) and Florence S.R.L. (domiciled in Italy) claimed that defendant, Alabastres Alfredo, S.L. (domiciled in Spain) had manufactured falsified labels of their registered trademark in Spain. The Federal District Court for the Southern District of Texas (Houston Hall) in Houston sided with the plaintiffs and awarded treble damages in a judgment of 21 August 1998.[96] The defendant contended before the Spanish Supreme Court that, *inter alia*, enforcement should be declined on the basis of the public policy exception.

In its decision on the request for enforcement the *Tribunal Supremo* held that the Texas award contained some damages that did not serve a compensatory objective but were more punitive, sanction-like and preventive in nature. The Court classified compensation for injuries as part of (Spanish) international public policy. However, it added that coercive, sanctioning mechanisms are not uncommon in various areas of Spanish substantive law, specifically contract law, and procedure. According to the Court, the presence of such punitive mechanisms in private law to compensate for the shortcomings of criminal law is consistent with the doctrine of minimum intervention in penal law. This doctrine is embedded in the Spanish legal system and requires the legislature to first counter unwanted conduct by employing less invasive remedial intervention, such as civil penalties. Criminal penalties should only be used as *ultimum remedium*.[97] Furthermore, it is often difficult to differentiate concepts of compensation. The Court referred to the example of moral damages to make this point clear. Moral damages fulfil a compensatory role (the reparation of moral damage) as well as a sanctioning function, and it is not easy to distinguish between the two.[98] Spanish law thus allows for a minimal degree of overlap between civil law (compensation) and criminal law (punishment).[99] This was an opposite view to that taken by the Italian Supreme Court in *Fimez* (see *supra* part 3.2). In making its public policy analysis, the Spanish Court added that courts should not lose sight of the connection between the matter and the

[94] Spanish Supreme Court, Exequatur no. 2039/1999, 13 November 2001, Aedipr 2003, p. 914.

[95] F. Ramos Romeu, *Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments,* 38(4) International Lawyer 945 (2004), p. 951; M. Requejo Isidro, *Punitive Damages: Europe Strikes Back?*, presentation delivered at the British Institute of International and Comparative Law, 2 November 2011, London; text on file with the author.

[96] Federal District Court for the Southern District of Texas (Houston Hall) of 21 August 1998, unpublished and archived. The judgment of the Spanish Supreme Court does not mention the amount of the treble damages.

[97] Quarta, *supra* note 79, p. 10.

[98] Nagy, *supra* note 8, p. 9.

[99] S.R. Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts: A Recent Case in the Supreme Court of Spain*, 24 Journal of Law and Commerce 225 (2004-2005), p. 229; Nagy, *supra* note 8, p. 9.

forum. This is of course a reference to the theory of *Inlandsbeziehung*, which regulates the strength of the public policy exception according to the case's proximity to the forum.[100] All these reasons led the Court to the conclusion that punitive damages as a concept do not violate public policy.[101]

The *Tribunal Supremo* went on to develop its reasoning further. The principle of proportionality was the second and final requirement of the public policy test which the award needed to meet before enforcement could be allowed. The Court took two elements into account when assessing the (potentially) excessive nature of the treble damages: (1) the predictability of the award; and (2) the nature of the interests protected.[102]

The Court first underlined the fact that the treble damages arose *ex lege*. The legal provisions providing sanctions for infringements of the intellectual property rights in question took into consideration the intentional character and gravity of the defendant's behaviour when allowing for a tripling of the amount of compensatory damages. This reliance on the statutory origin of the punitive damages in issue begs the question whether punitive damages developed by case law would be predictable enough for the Spanish Supreme Court.[103] In our opinion the absence of a statutory provision would not automatically rule out the enforcement of a punitive damages judgment.[104]

US punitive damages awards can reach very high amounts. A 2005 survey of trials in state courts in the United States' seventy-five most populous counties indicated that in 27% of cases in which punitive damages were awarded the amount granted exceeded USD 250,000. In 13% of the matters the award exceeded USD 1 million.[105] One wonders what could happen to punitive awards coming from states where punitive damages legislation does not provide for caps.[106] In most American states the only constraint on the amount of punitive damages comes from the courts, most notably from the US Supreme Court's case law regarding due process. The Spanish Supreme Court confirmed that the U.S courts are prudent in policing the proportionality of damages awarded.[107] Moreover, legality may lead to foreseeability, but it does not guarantee proportionality. Even a legislative intervention to fix the amount of punitive damages (whether by establishing a maximum, a minimum, or an appropriate range) does not

[100] M. Requejo Isidro, *Punitive Damages: How Do They Look Like When Seen From Abroad?*, in: Meurkens et al., *supra* note 5, pp. 326-327; Requejo Isidro, *supra* note 55, p. 247.

[101] Spanish Supreme Court, Exequatur no. 2039/1999, p. 914.; M. Otero Crespo, *Punitive Damages Under Spanish Law: A Subtle Recognition?*, in: Meurkens et al., *supra* note 5, p. 289; Requejo Isidro, *supra* note 55, pp. 247-248; Requejo Isidro, *supra* note 100, p. 326.

[102] Requejo Isidro, *supra* note 100, pp. 327-328.

[103] *Ibidem*, p. 328.

[104] Requejo Isidro, *supra* note 95.

[105] T.H. Cohen, L. Langton, *Civil Bench and Jury Trials in State Courts, 2005*, Bureau of Justice Statistics (28 October 2008), p. 6.

[106] Requejo Isidro, *supra* note 95.

[107] Spanish Supreme Court, Exequatur no. 2039/1999, p. 914; Jablonski, *supra* note 99, p. 229.

make the award proportional in all cases. Furthermore, the foreign country's idea of proportionality may vary from the Spanish legislature's estimation.[108]

As to the second aspect of the proportionality criterion, the Court argued that the safeguarding of intellectual property rights in a market economy is important. Moreover, the interest in offering protection to such rights is not strictly local but is shared universally by countries that harbour similar judicial, social, and economic values.[109] The common desire to protect the interests at stake justified the awarding of an amount double the amount of compensatory damages on top of the compensation granted.[110] The importance of the underlying *ratio legis* will thus determine the outcome of the proportionality analysis.[111] Other rights of high importance outside the field of intellectual property could, for instance, include: environmental protection, protection of human rights, freedom, legal certainty and dignity.[112]

Commentators seem to agree that the Court's acceptance of treble damages in this case does not mean that every punitive award will easily pass the public policy exception in Spain.[113] Jablonski argues that the judgment should be interpreted narrowly. It should be seen as inspired by the specific facts of the case (and not, therefore, as laying down a general rule[114]).[115] Requejo Isidro also expresses doubt as to whether punitive damages awards will be enforced in future cases in Spain. She underscores the fact that there is only a single decision. Under Art. 1.6 of the Spanish Civil Code, case law constitutes a source of law if the doctrine set is *repeatedly* upheld by the Supreme Court, which requires at least two judgments. She further argues that it was a coincidence that the applicable national jurisdictional rules at the time allowed the Supreme Court to rule on the case without any prior litigation at the lower levels.[116] In France, on the other hand, the *Fountaine Pajot* case travelled through the pyramidal court system to reach the Supreme Court (see 4.2 below).[117] In our opinion it does not matter how the Supreme Court came to rule on the case. Besides, as will be discussed in the next section, the verdict of the *Cour de cassation* deviated from the two lower French courts. Whatever the case may be, the enforcement of the *compensatory* damages of a foreign judgment containing punitive damages should never be obstructed by the international public policy exception.[118]

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[108] Requejo Isidro, *supra* note 95.

[109] Spanish Supreme Court, Exequatur no. 2039/1999, p. 914.

[110] Jablonski, *supra* note 99, p. 230.

[111] Requejo Isidro, *supra* note 100, p. 328.

[112] Requejo Isidro, *supra* note 95.

[113] Jablonski, *supra* note 99, pp. 227 and 230; Requejo Isidro, *supra* note 95; Ramos Romeu, *supra* note 95, p. 968.

[114] To the extent that the creation of rules is even possible for courts in Civil Law countries, given the absence of precedent.

[115] Jablonski, *supra* note 99, p. 230.

[116] Requejo Isidro, *supra* note 95.

[117] *Ibidem*.

[118] Ramos Romeu, *supra* note 95, p. 968.

### 4.2. Principled acceptance in France

The French Supreme Court (*Cour de Cassation*) indicated its willingness to accept foreign punitive damages awards in a judgment of 2010.[119] Peter Schlenzka and Julie Langhorne, a couple from California, had purchased a 56-foot Marquises catamaran from Rod Gibbons' Cruising Cats USA, an authorised dealer and agent for the French manufacturer, Fountaine Pajot S.A. The American buyers paid the sum of USD 826,009. When the boat was delivered to the couple, they believed the catamaran to be in excellent condition. However, unbeknownst to the buyers the vessel had suffered extensive damage in a storm in the port of La Rochelle, the place of its manufacturing. The seller had not disclosed this information to the buyers and had performed only superficial repairs. The structural problems were, however, not resolved and the California couple soon experienced issues with the catamaran.[120]

On 26 February 2003 the California Superior Court (Alameda County) ruled in favour of the plaintiffs and awarded them USD 1,391,650.12 in actual damages. It further held that Fountaine Pajot's conduct in relation to the sale amounted to fraud under California law. It determined that an amount of USD 1,460,000 in punitive damages would be appropriate to punish and deter the French company without resulting in its financial ruin. The California Superior Court also applied a statutory exception to the general American rule on attorneys' fees, which holds that each party shall bear their own costs, even if they are victorious in the law suit. On the basis of the federal Magnuson-Moss Warranty Act,[121] a prevailing consumer may recover reasonable legal costs. Schlenzka and Langhorne were thus awarded USD 402,084.33 in attorneys' fees, bringing the total amount to USD 3,253,734.45.[122]

The American couple subsequently had to enforce the judgment in France, as Fountaine Pajot was located there. The matter eventually reached France's Supreme Court, which for the first time had to take a stance on punitive damages. On 1 December 2010 it ruled: "le principe d'une condemnation à des dommages interest punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur." ("the principle of awarding punitive damages is not, in itself, contrary to public policy; although this is not the case when the amount awarded is disproportional to the loss suffered and to the contractual breach of the debtor") (own translation).[123] Thus according to the French Supreme Court, punitive damages are

[119] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, p. 423.

[120] The facts of the case are found in the judgment of the French district court of Rochefort: Tribunal de Grande Instance Rochefort, *Peter Schlenzka & Julie Langhorne v. S.A. Fountaine Pajot*, 12 November 2004, no. 03/01276, *unpublished decision.*

[121] 15 USC 2310(d)(2).

[122] California Superior Court, *Schlenzka v. Pajot*, case no. 837722-1, 26 February 2003; Janke & Licari, *supra* note 42, p. 782.

[123] *Schlenzka & Langhorne v. Fountaine Pajot S.A*, p. 423.

not in and of themselves contrary to (international) public policy. Foreign punitive damages can, therefore, in principle be enforced in France. This revolutionary ruling makes it clear that objections against the enforcement of punitive damages based on the argument that they violate the divide between criminal and private law should be dismissed.[124] This liberal, welcoming attitude on the part of France's Supreme Court appears at first sight to be very progressive.

However, the openness of the *Cour de Cassation* to punitive damages is by no means unbridled. The French Supreme Court attached an important caveat to the general rule it delineated. Punitive damages do violate international public policy when their amount is "disproportional to the damage suffered and the breach of the contractual obligations of the debtor" (own translation).[125] In other words, although the concept of punitive damages conforms to France's international public policy, the proportionality of the award is still a requirement of said policy.[126] The centre of the public policy analysis shifts from the incompatibility of the concept of punitive damages itself to an investigation of their amount.[127] The real obstacle for punitive damages under the (international) public policy test in France is no longer the dogma that they are not compensation, but rather the distinct issue of excessiveness. This corresponds to the attitude of the Spanish Supreme Court in *Miller Import Corp. v. Alabastres Alfredo, S.L.*

The Supreme Court's ruling in *Fountaine Pajot* did not offer concrete guidelines on how to determine whether a foreign punitive damages award is excessive. It merely provided that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor.[128] This lack of practical guidance leaves French judges, legal scholars and practitioners wondering at what point punitive damages become disproportional.[129] As the determination of the proportional nature of the award lies in the discretion of the lower courts, the absence of a bright-line standard creates uncertainty.[130]

The judgment of the *Cour de cassation* can be read in two different ways. On the one hand, one could assert that the French Supreme Court required a comparison between the amount of punitive damages and the amount of compensatory damages awarded (or in the words of the Court "the injury suffered" ("*préjudice subi*")). The *Cour de cassation* concluded in that regard that the punitive damages awarded too greatly exceeded the compensatory damages (the difference between them

[124] Licari, *supra* note 6, p. 425.
[125] *Schlenzka & Langhorne v. Fountaine Pajot S.A*, p. 423.
[126] Sibon, *supra* note 44.
[127] Janke & Licari, *supra* note 42, pp. 794-795.
[128] *Schlenzka & Langhorne v. Fountaine Pajot S.A*, p. 423.
[129] Bernard & Salem, *supra* note 41, p. 19; J. Juvénal, *Dommages-intérêts punitifs. Comment apprécier la conformité à l'ordre public international?*, 6 La Semaine Juridique Edition Générale (2011), p. 142.
[130] Sibon, *supra* note 44.

being USD 70,000).[131] One may also wonder whether the attorneys' fees should play a role in this mathematical exercise.[132] This first method of explaining the judgment leads to a 1:1 maximum ratio between punitive and compensatory damages, identical to the ceiling the German Supreme Court impliedly suggested 18 years earlier in *John Doe v. Eckhard Schmitz* (see *supra* part 3.1).[133] Such a 1:1 ratio stands in sharp contrast with the single digit rule (i.e. a maximum ratio of 9:1) established by the US Supreme Court when setting limits to punitive awards in the US.[134] Although the California Superior Court in the case at hand respected the US Supreme Court's delineation (the 9:1 ceiling), its exceeding of the 1:1 ratio, even though only by a few percentage points, proved fatal for the punitive award's chances of enforcement.[135]

On the other hand, one should bear in mind the *Cour de Cassation*'s reference in *Fountaine Pajot* to the defendant's breach of contract ("*des manquements aux obligations contractuelles du débiteur*").[136] The Court presumably was referring to the serious nature of the defendant's breach of contract.[137] The Supreme Court is in principle bound by the description of the facts laid out by the Court of Appeal. The dispute about the catamaran arose from a contract between the parties. The French Supreme Court, therefore, moulded the language of its judgment according to the contractual origin of the litigation. We can, however, extrapolate the *Cour de cassation*'s statement to torts as well. This is in fact necessary since most punitive damages in the US originate in tort cases. Punitive damages in contract cases are possible only if the behaviour constituting the breach of contract is also a tort for which punitive damages are available.[138] The notion "*des manquements aux obligations contractuelles du débiteur*" could perhaps be more generally read as the seriousness of the debtor's wrongful behaviour, the degree of culpability or blameworthiness of the fault.[139] The Court could actually have used this suggested terminology, notwithstanding the contractual origin of the litigation, because the punitive damages were probably more connected to Fountaine Pajot's fraudulent and deceitful conduct surrounding the breach of contract (i.e.

[131] *Schlenzka & Langhorne v. Fountaine Pajot S.A*, p. 423; N. Meyer Fabre, *Recognition and Enforcement of U.S. Judgments in France: Recent Developments*, The International Dispute Resolution News 6 (Spring 2012), p. 9.

[132] It could be argued that the amount awarded for attorneys' fees (*in casu* USD 402,084.33) should be added to the compensatory damages when calculating the ratio. Legal costs are in essence also a form of loss caused by the defendant. Of course, this scenario is quite exceptional because US litigants almost always bear their own costs, even if they win the case.

[133] N. Meyer Fabre, *Enforcement of U.S. Punitive Damages Award in France: First Ruling of The French Court Of Cassation in X. v. Fountaine Pajot, December 1, 2010*, 26(1) Mealey's International Arbitration Report 1 (January 2011), p. 4.

[134] *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 425 (2003).

[135] Janke & Licari, *supra* note 42, p. 801 and fn 113.

[136] Bernard & Salem, *supra* note 41, p. 19; Nagy, *supra* note 8, p. 9.

[137] Janke & Licari, *supra* note 42, p. 776.

[138] Second Restatement of Contracts, § 355 (1981).

[139] Meyer Fabre, *supra* note 133, p. 4; Nagy, *supra* note 8, p. 9.

tortuous actions) than to the actual breach itself (the non-conformity of the vessel to the contract).[140]

This second interpretation of the judgment requires the defendant's conduct to be taken into account when assessing the possible excessiveness of the foreign punitive damages awarded, along with the amount of compensatory damages given to the victim.[141] In our view, this could mean that the enforcement judge can modulate the 1:1 maximum ratio according to the reprehensibility of the defendant's conduct. This approach, however, encounters a fundamental problem: it seems to allow an incursion into the forbidden *révision au fond*.[142], [143]

Although the *Cour de cassation* touched upon the breach of contract as one of the two factors used to measure the proportionality of the punitive damages, it did not take the Fountaine Pajot's conduct into account.[144] It merely stated that the Court of Appeal could have rightfully concluded that the punitive award was manifestly disproportionate because the punitive damages greatly exceeded the purchase price and the cost of the repairs. To make matters worse for the American plaintiffs, they had not requested enforcement of only the compensatory damages in the event the punitive damages were deemed unacceptable. The *Cour de cassation*, therefore, had to reject the entire California judgment as it could not grant partial enforcement. This prohibition on *ultra petita* rulings thus left the US plaintiffs empty-handed.

## 5. THE MIXED OUTLOOK ON PUNITIVE DAMAGES IN ENGLAND

England distinguishes itself from the other countries examined in this contribution because English law itself provides for "exemplary damages", the English equivalent of "punitive damages" (part 5.1 below). Perhaps surprisingly, this fact does not mean that England is completely receptive to enforcing US punitive damages. Multiple damages cannot be enforced (part 5.2) and it is currently uncertain whether other forms of punitive damages will be accepted for enforcement purposes by English courts (part 5.3).

### 5.1. Availability of punitive damages in English substantive law

The roots of modern punitive damages can be found in England. The first statutory recognition of multiple damages took place in 1275. The relevant provision in the

[140] Meyer Fabre, *supra* note 131, p. 9, fn 25.
[141] Nagy, *supra* note 8, p. 9.
[142] Cass. Civ. 1st, 7 January 1964, Munzer, Bull., I, no. 15.
[143] Various authors note that the proportionality test reintroduces a *révision au fond*: Bernard & Salem, *supra* note 41, p. 19; Juvénal, *supra* note 129, p. 142; Janke & Licari, *supra* note 42, pp. 801-802.
[144] Meyer Fabre, *supra* note 133, p. 4.

Statute of Westminster read: "[t]respassers against religious persons shall yield double damages".[145] Between 1275 and 1763 Parliament enacted at least 64 other provisions for double, treble and quadruple damages.[146] In 1763, in the case of *Huckle v. Money*, exemplary damages[147] were first expressly recognised in England.[148]

In *Rookes v. Barnard* the House of Lords laid down three categories according to which punitive damages are available.[149] Lord Devlin first suggested that it may well be thought that exemplary damages confuse the civil and criminal functions of the law.[150] He, however, explained that: "[...] there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."[151]

The House of Lords, as per Lord Devlin, opined that oppressive, arbitrary or unconstitutional behaviours or actions by the servants of the government could warrant punitive damages. It was held that: "[...] the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service". Lord Devlin clarified that oppressive conduct by private persons or entities does not fall into this category.[152] Most cases under this category involve misconduct by police officers.[153]

The second category encompasses cases in which the defendant calculated his behaviour in order to make a profit which may exceed the compensation payable to the victim. Lord Devlin explained that the law should demonstrate that it cannot be broken with impunity, i.e. whenever a defendant calculates that the money generated from the wrongdoing will probably exceed the damages at risk. In essence, punitive damages under this category teach the wrongdoer that wrongful tort actions do not pay.[154] The most notable examples under this category are cases in which a landlord unlawfully evicts a tenant. Defamation cases form the second largest group of cases which could lead to punitive damages under this heading.[155]

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[145] Synopsis of Statute of Westminster I, 3 Edw., c. 1 (Eng.), quoted in: D.G. Owen, *Punitive Damages Overview Functions: Problems and Reform*, 39 Villanova Law Review 363 (1994), p. 368.

[146] R. Fowler, *Why Punitive Damages Should Be a Jury's Decision in Kansas: A Historical Perspective*, 52 Kansas Law Review 631 (2004), p. 636.

[147] The case can also be seen as the beginning of the English courts' use of the term "exemplary damages" for damages awarded above the level of compensation and with the purpose of deterring and punishing the defendant: J.B. Sales, K.B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 Vanderbilt Law Review 1117 (1984), pp. 1119-1120.

[148] *Huckle v. Money*, 95 English Reports, King's Bench (Eng. Rep.) 768 (K.B. 1763).

[149] *Rookes v. Barnard*, pp. 37-38.

[150] *Ibidem*, p. 34.

[151] *Ibidem*, p. 37.

[152] *Ibidem*.

[153] V. Wilcox, *Punitive Damages in England*, in: Koziol & Wilcox, *supra* note 25, p. 11.

[154] *Rookes v. Barnard*, pp. 37-38.

[155] Wilcox, *supra* note 153, p. 12; T. Ingman, *The English Legal Process* (13th ed.), Oxford University Press, Oxford: 2010, p. 326.

In addition to the two common law categories, Lord Devlin constructed a third category, i.e. punitive damages expressly provided for by statute.[156]

## 5.2. Absolute prohibition to enforce multiple damages

The Protection of Trading Interest Act (PTIA) is a statute from 1980 which prohibits the enforcement of multiple damages in England. PTIA attempts to thwart the exercise of US extraterritorial jurisdiction over foreign citizens.[157] The United States has always emphasised the need for and legality of enforcing its antitrust laws against parties that lack a connection to the US territory, but whose actions nevertheless have an effect in the US. The British government, on the other hand, has believed that these antitrust laws should only apply to the promulgating nation's own territory or citizens.[158] This disagreement could not be solved by diplomatic means, and legal warfare ensued.[159]

As part thereof, the British government enacted PTIA, which provides that a judgment of an overseas country cannot be registered and no court in the UK may entertain proceedings at common law for the recovery of any sum payable under such a judgment, if that judgment grants multiple damages (sections 5.1 and 5.2). The rule incorporates the belief that the treble damages which are recoverable under US antitrust law are penal in nature and should not be available to private plaintiffs acting as private attorneys general.[160] Section 5 aims to neutralise the treble damages incentive for private parties in US legislation, because it forces private litigants to weigh the benefits and costs of such an action given their unenforceability in the UK.[161] Although intended to apply to multiple damages (treble damages) arising out of antitrust litigation, a literal reading of the Act prohibits the enforcement of any type of multiple damages, irrespective of the underlying cause of action.[162]

Section 5 of PTIA not only prevents the enforcement of the additional damages but deems the basic compensatory element of a multiple damages award unenforceable as well. This follows from a textual interpretation of the Act, and the scholars Dicey and Morris support this literal reading of the Act, arguing that that: "[j]udgments caught by section 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor".[163] Judge Parker (and Lord Diplock later agreed on his point[164]) remarked in the case of *British Airways*

[156] *Rookes v. Barnard*, p. 38.

[157] T.J. Kahn, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2(2) Northwestern Journal of International Law & Business 476 (1980), p. 479.

[158] Kahn, *supra* note 157, p. 514.

[159] J. Fawcett, J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th ed.), Oxford University Press, Oxford: 2008, p. 561.

[160] Kahn, *supra* note 157, p. 489.

[161] *Ibidem*, p. 510, 513 and 515.

[162] *Ibidem*, p. 510.

[163] L. Collins (ed.), *Dicey & Morris on the Conflict of Laws* (13th ed.), Sweet and Maxwell, London: 2000, p. 566.

[164] *British Airways v. Laker Airways* [1985] AC 58, p. 89.

*v. Laker Airways* that section 5 of PTIA is aimed at judgments in antitrust matters and affects the whole award, not just the multiple damages part of it.[165, 166]

### 5.3. Are other forms of punitive damages enforceable?

Punitive damages which are not created by a multiplication of the compensatory damages are outside the scope of PTIA, and thus a different regime is applied to them. It is well settled in England that an English court will not lend its assistance to the enforcement of a foreign penal law.[167] An imposition of a penalty constitutes an exercise by a State of its sovereign power. Such an act of sovereignty cannot have any effect in the territory of another nation.[168] English courts will, therefore, refuse to enforce a foreign judgment when it is given in respect of a fine or penalty. However, a sum payable to a private individual is not a fine or penalty.[169] The crucial criterion for determining whether a foreign measure is a penalty thus appears to be the receiver of the sums. If the money goes to a foreign state, the sum has to be classified as penal (and unenforceable).

This formalistic approach was confirmed in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*,[170] the only case incidentally dealing with the issue of the enforceability of punitive damages. A French company had sold clothing to English merchants, but after delivery the buyers failed to pay the agreed price. The seller brought its payment claim before the Commercial Court of Lille. In addition, it sought a further 10.000 francs as "*résistance abusive*",[171] a type of damages awarded in France when a defendant has unjustifiably opposed the plaintiff's claim. Since the defendants did not appear in court, the Commercial Court of Lille issued a default judgment for the plaintiffs for the amount claimed, interest and costs. Enforcement of the judgment in England was at the time governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933, which regulated enforcement for judgments originating in countries with which the UK had a mutual recognition treaty. The defendants attempted to prevent the enforcement of the 10,000 francs (awarded as a result of the unreasonable refusal by the defendants to pay a plain claim) in England on the grounds that the French judgment imposed a penalty. Under section 1(2)(b) of the Act, sums payable in respect of a penalty were excluded from enforcement. The defendants further relied on section 4(1)(a)(v), which stated that enforcement should be denied when it would violate the public policy of the requested state. As to the nature of the sum for the "*abusive résistance*", all three judges in the Court of Appeal agreed that the amount for the un-

[165] *British Airways v. Laker Airways* [1984] QB 142, p. 161.

[166] E. Kellman, *Enforcement of Judgments and Blocking Statutes: Lewis v. Eliades*, 53 International & Comparative Law Quarterly 1025 (2004), p. 1028.

[167] *See e.g. Folliott v. Ogden* [1790] 3 Term Rep, p. 726; *Huntington v. Attrill* [1893] AC, 150, *Raulin v. Fisher* [1911] 2 KB, p. 93.

[168] Fawcett & Carruthers, *supra* note 159, p. 126.

[169] M. Polonsky, *Particular Issues Affecting the Recognition and Enforcement of U.S. Judgments*, 19 International Law Practicum 156 (2006).

[170] *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] Q.B., p. 279.

[171] Art. 1153 of French Civil Code.

reasonable withholding of sums under a valid claim was compensatory, not penal in nature, and therefore enforceable in England. Lord Denning saw the sum as compensation for losses not covered by an award of interest, such as loss of business caused by want of cash flow, or for costs of the proceedings not covered by the court's order for costs. He, however, expanded *obiter dictum* upon the issue and summarised the defendants' argument as sustaining that the 10,000 francs were punitive or exemplary damages which amounted to a penalty and were therefore unenforceable under section 1(2)(b) of the 1933 Act.[172] He repeated the conventional idea that a fine or other penalty only referred to sums payable to the state by way of punishment, and that a sum payable to a private individual was not a fine or penalty.[173]

Lord Denning's statements *in dicta* relating to punitive damages provide insight given the hybrid nature of punitive damages. Punitive damages seek to punish the wrongdoer for reprehensible conduct. However, they are not payable to the treasury but to the victim of the blameworthy behaviour. Lord Denning's remarks seem to explicitly support the view that, despite their inherent criminal nature, for enforcement purposes in England punitive damages can avoid the penal label if they are awarded to a private person instead of to a state.[174] Lord Denning further ruled that English public policy does not oppose the enforcement of a claim for punitive damages, because they are "still considered to be in conformity with the public policy in the United States and many of the great countries of the Commonwealth."[175] He thereby indicated that punitive damages do not pose a problem under England's (international) public policy either.[176] However, the *obiter dictum* character of his elaboration should be emphasised, leading to the conclusion that, at the very least, the enforceability of punitive damages in England has not yet been definitively settled.

## CONCLUSIONS

Despite being under constant criticism, punitive damages have a strong foothold on the other side of the ocean. As the extra-compensatory function of punitive damages has no equivalent institution or official existence in the European Union, the remedy is one of the characteristics of the American legal system which exemplifies the "*Atlantic divide*"[177] between Civil Law and Common Law jurisdictions. The only major exception to the express rejection of punitive damages in the European Union can be found

[172] The other judges in the case, Goff L.J. and Shaw L.J., did not refer to the notion "punitive damages".
[173] *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] Q.B., pp. 299-300.
[174] Collins, *supra* note 163, p. 476.
[175] *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*, p. 300.
[176] The Supreme Court of Australia (Full Court) and the British Columbia Court of Appeal reached the same conclusion: *Benefit Strategies Group Inc v. Prider* [2005] SASC, p. 194 and *Old North State Brewing Co v. Newlands Services Inc.* [1999] 4 WWR, p. 573.
[177] de Kezel, *supra* note 5, p. 214.

in England, the nation of their modern birthplace,[178] which provides for an acknowledgment of "exemplary damages" in limited circumstances.[179]

Given the absence of international treaties on the subject, the domestic law of each Member State determines the enforceability of American punitive damages awards. In general, the outcome of a request for enforcement of a US punitive award depends on how the Member State construes its own (international) public policy exception. Our analysis shows that several countries within the European Union have adopted divergent stances on the issue.

The Supreme Courts in Italy and Germany have rejected punitive damages awards in enforcement proceedings, arguing that the concept itself violates international public policy. In 1992, in the case of *John Doe v. Eckhard Schmitz*, the *Bundesgerichtshof* stated that US punitive damages awards cannot be enforced in the German territory. The German Supreme Court referred to various arguments underlying this decision. It underlined the compensatory function of German private law and noted that enrichment of the plaintiff is prohibited. The German Supreme Court further held that punishment and deterrence are objectives that belong to the realm of criminal law. Punitive damages interfere with the state's monopoly on penalisation because a private person acts as a public prosecutor. In addition, in such civil cases the defendant cannot rely on the fundamental guarantees that are available to him in criminal law proceedings. The *Bundesgerichtshof* also rejected the parallel between penalty clauses and punitive damages.

In 2007, in *Glebosky v. Fimez* the Italian *Corte di Cassazione* refused to accept that Italian private law contains any punitive considerations. It also found that penalty clauses and moral damages are not comparable to punitive damages. Five years later it reiterated this position by stating that the Italian civil liability rules pursue only compensatory, and not punitive, aims.

The odds of recovering a US punitive damages award in Italy or Germany are, therefore, close to zero. In Germany, however, the compensatory part of a punitive damages award will be granted enforcement provided this compensatory portion is clearly indicated in the American judgment. The Italian Supreme Court did not contemplate this option.

France and Spain, on the other hand, have accepted the compatibility of punitive damages with their international public policy. The Spanish *Tribunal Supremo* was the first European Supreme Court to allow the enforcement of punitive damages, in the case of *Miller v. Alabastres* in 2001. It acknowledged the existence of punitive elements in Spanish private law. The presence of these punitive mechanisms demonstrates that Spanish civil law sometimes concerns itself with punishment in addition to compensation. Punitive damages as a legal concept could not be viewed as a violation of Spain's

[178] J.Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Columbia Journal of Transnational Law 391 (2004), p. 398.

[179] *Rookes v. Barnard*, pp. 37-38.

international public policy. About a decade later the French Supreme Court in *Schlenka & Langhorne v. Fountaine Pajot* reached the same conclusion.

Both the Spanish and the French Supreme Courts subsequently shifted their attention to an investigation of the amount awarded by the foreign court. Although punitive damages as such are digestible to the Spanish and French Civil Law stomachs,[180] e*xcessive* punitive damages are problematic in light of their international public policy exceptions. In France, the *Cour de cassation* seems to have limited its tolerance of punitive damages to an amount equal to the compensatory damages granted, although it is unclear to what extent the blameworthiness of the defendant's conduct can be taken into account. In Spain the level of acceptance is much higher, as the *Tribunal Supremo* allowed the enforcement of an American treble damages judgment. It put forward two criteria to assess the excessiveness of the award: (1) the predictability of the award; and (2) the nature of the interests protected. How Spanish and French (lower) courts will shape the excessiveness assessment in future cases remains to be seen and is difficult to predict.

England offers a mixed outlook on the enforcement of a third state's punitive damages award. Multiple damages, a subcategory of punitive damages, are statutorily barred by PTIA. In addition, the presence of a multiple element taints the entire award, rendering the compensatory part unenforceable as well. Whether other forms of punitive damages can survive the English courts' scrutiny seems to be uncertain. Foreign fines or penalties are not enforceable in England. However, Lord Denning's *obiter dictum* in *S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* argued that punitive damages cannot be equated to a fine or a penalty if they awarded not to a state but to a private actor. Furthermore, according to Lord Denning, English public policy does not oppose punitive damages awards. Further case law is, however, needed to confirm whether this welcoming attitude will become law.

[180] Nagy, *supra* note 8, p. 7.