

**A NORMATIVE FRAMEWORK FOR THE ENFORCEMENT OF
U.S. PUNITIVE DAMAGES IN THE EUROPEAN UNION:
TRANSFORMING THE TRADITIONAL ‘;NO PASARÁN!’**

Cedric Vanleenhove*

INTRODUCTION.....	348
I. ENFORCEMENT OF U.S. PUNITIVE DAMAGES IN GERMANY, ITALY, SPAIN, AND FRANCE: <i>STATUS QUAESTIONIS</i>	350
A. Central Mechanism: International Public Policy Exception.....	351
B. Traditional Hostility in Germany and Italy.....	353
1. Principled German Refusal of U.S. Punitive Damages	353
2. Italy’s Principled Refusal of U.S. Punitive Awards	358
C. More Welcoming Attitudes Toward American Punitive Damages in Spain and France	361
1. Spanish Supreme Court Embraces U.S. Punitive Damages	362
2. Principled Acceptance of U.S. Punitive Damages in France.....	365
II. EVALUATION OF THE EXISTING STANCES ON U.S. PUNITIVE DAMAGES.....	369
A. Transformation to Principled Acceptance	369
B. Examples of Punitive Elements in European Private Law Systems.....	371
1. Surcharge of Benefits in Spanish Social Security Law	371
2. Double License Fee in German Copyright Law	372
3. Covert “Punitive Damages” Awarded as Moral Damages in France	373
4. Penalty Clauses Can Contain Punitive Damages	376
III. SUGGESTED GUIDELINES FOR EUROPEAN COURTS.....	377
A. Prohibition of Révision au Fond.....	378
B. Enforcement Is the Rule, Refusal the Exception	380

* Dr. Cedric Vanleenhove is Post-Doctoral Researcher at the Transnational Law Center of Ghent University in Belgium. He is also Lecturer-in-Charge for a course in the first year of the Bachelor of Law at Ghent University. He holds an LL.M. in Commercial Law from Cambridge University (Evan Lewis-Thomas Scholar of Sidney Sussex College) and was a Visiting Fellow at Oxford University as well as a Visiting Researcher at Harvard Law School.

C. Compensatory Damages Should Always Be Granted Enforcement	381
D. The Compensatory Portion of the Punitive Damages Should Be Enforced.....	383
E. U.S. Punitive Damages Above a 9:1 Ratio Are, in Principle, Suspect	388
F. A 1:1 Ratio Might Be the Appropriate Limit	389
G. The Weaker the Case's Connection to the Forum, the More Tolerance Should Be Shown.....	393
H. The Nature of the Interests Involved	397
I. Reducing the Punitive Award to the Tolerable Level Is Permissible	398
CONCLUSION	401

INTRODUCTION

In continental Europe, American punitive damages have been described as an *undesired peculiarity of American law*¹ or even as *the Trojan Horse of the Americanisation of continental law*.² As opposed to the dualistic American legal system, which allows for punitive damages on top of compensatory damages, continental Europe is monistic in nature because successful plaintiffs can only obtain compensatory damages.³ In the continental European countries, punitive damages are said to be non-existent and the concept of punitive damages is considered contrary to the fundamental separation of criminal and private law.⁴ These Civil Law nations in the European Union (EU) are wary of punitive damages because

1. Evelien de Kezel, *The Protection and Enforcement of Private Interests by (the Recognition of US) Punitive Damages in Belgium: Limits and Opportunities*, in *THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT?* 235 (Lotte Meurkens & Emily Nordin eds., 2012).

2. YVONNE LAMBERT-FAIVRE & STÉPHANIE PORCHY-SIMON, *DROIT DU DOMMAGE CORPOREL – SYSTÈMES D'INDEMNISATION* 171 (6th ed. 2009); *see also* Heinrich Honsell, *Amerikanische Rechtskultur [American Legal Culture]*, in *FESTSCHRIFT FÜR PROFESSOR ROGER ZACH ZUM 60. GEBURTSTAG* 39, 45–49 (Peter Forstmoser et al. eds., 1999); François-Xavier Licari, *La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil fe la Cour de Cassation?*, 6 *RACUEIL DALLOZ* 423, 427 (2011).

3. Amaury S. Sibon, *Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy* (Apr. 1, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2382817>.

4. Helmut Koziol, *Punitive Damages – A European Perspective*, 68 *LA. L. REV.* 741, 748, 755–56 (2008).

they are awarded in civil proceedings but pursue objectives that are traditionally the focus of criminal law.⁵ Also, punitive damages are an anathema to the principle of strict compensation and result in unjust enrichment of the plaintiff.⁶

Today's world is a *global village*,⁷ characterized by an increase of intercontinental tourism and cross-border trade. The practical significance of national boundaries is slowly diminishing and distances are no longer a hindrance to global mobility. Due to improved modes of transportation, people are able to visit other continents with relative ease; the rise of global commerce causes businesses to expand into other jurisdictions. With increased globalization, more lawsuits will likely arise between Common Law and Civil Law parties. As punitive damages are predicted to remain a significant feature of U.S. litigation,⁸ EU countries will inevitably face punitive damages, which is a legal institution alien to the substantive law of the forum.⁹

The U.S. is the EU's most important trading partner. Therefore, it is vital to investigate whether and to what extent the EU will enforce American judgments for punitive damages.¹⁰ This article examines four important EU Member States in terms of population¹¹ and economy:¹² Germany, Italy, Spain, and France. In this area of law, the available case law is sparse. These nations are interesting because their respective supreme courts have ruled on the enforceability of American judgments containing punitive damages. Comparative analysis reveals that the case law in these selected countries is relatively divergent on enforcing U.S.

5. *Id.* at 751.

6. *Id.* at 751–52.

7. MARSHALL McLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 31 (1962).

8. KAREN BROWNE, *SWISS REINSURANCE CO., PUNITIVE DAMAGES IN THE U.S.: A PRIMER FOR INSURANCE BUYERS AND BROKERS* 5 (John Novaria ed., 2011), http://www.thefederation.org/documents/06.Punitive_Damages_in_the_US-Browne.pdf.

9. Gabrielle Nater-Bass, *U.S. - Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries*, 28 *DAJV NEWSLETTER*, Apr. 2003, at 154.

10. *Report of the Directorate-General for Trade on the European Union Trade in Goods with the USA*, at 2–3 (June 21, 2016), http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf.

11. EU MEMBER COUNTRIES, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Dec. 10, 2016).

12. *World Economic and Financial Surveys*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx> (last visited Dec. 10, 2016).

punitive damages. Each Supreme Court displays varying degrees of openness towards this legal remedy.¹³

Subsequently, the current situation is evaluated and it is argued that a principled refusal of the enforcement of U.S. punitive damages is untenable because rejecting the concept of punitive damages is inconsistent with the private laws of the selected Member States. Instead, European courts should resort to an excessiveness analysis of the incoming punitive damages.¹⁴

Lastly, the article sets out a number of guidelines courts can fall back on to apply this suggested excessiveness test when confronted with a request to enforce an American judgment containing punitive damages. Scholars have not yet created such a normative framework. The concrete guiding principles offered are derived from the dominating American rules on punitive damages and the existing case law on the enforcement of punitive damages in the EU.¹⁵

I. ENFORCEMENT OF U.S. PUNITIVE DAMAGES IN GERMANY, ITALY, SPAIN, AND FRANCE: *STATUS QUAESTIONIS*

First, the pivotal mechanism of *international public policy* is discussed. The international public policy exception plays a crucial role in the enforcement process because courts use it to deny *exequatur* to punitive damages awards.¹⁶ Then, the German and Italian Supreme Court judgments regarding the enforcement of punitive damages are scrutinized. These Supreme Courts have demonstrated a negative stance toward enforcing American punitive damages.¹⁷ Conversely, Spanish and French Supreme Court judgments provide for a much more tolerant attitude toward such damages, even though the openness is by no means unbridled.¹⁸

13. See *infra* Part I (discussing the various countries' Supreme Court decisions).

14. See *infra* Part II (evaluating the EU countries' stance on enforcing American punitive damages).

15. See *infra* Part III (suggesting a framework for EU countries when faced with enforcing American punitive damages).

16. See *infra* Part I.A (discussing the international public policy exception).

17. See *infra* Part I.B (discussing German and Italian courts' treatment of American punitive damages).

18. See *infra* Part I.C (discussing Spanish and French courts' tolerance of American punitive damages).

A. Central Mechanism: International Public Policy Exception

If an American court decides to award punitive damages to the plaintiff, the defendant is obliged to pay this sum to the plaintiff. If the debtor refuses to pay, the judgment will be enforced against his assets.¹⁹ When the judgment-debtor has no or insufficient assets in the jurisdiction where the judgment was rendered, the creditor will need to enforce the judgment in the country where assets are available.²⁰ If the creditor wishes to seize the European assets of the debtor, he will have to request exequatur of the U.S. judgment in the country or countries where the debtor holds these assets.²¹

Currently, the EU and the U.S. have no treaty arranging for the mutual recognition and enforcement of judgments.²² Also, individual Member States have not concluded bilateral or multilateral conventions with the U.S.²³ Therefore, U.S. decisions in the examined EU Member States are recognized and enforced according to the respective countries' national rules on private international law.²⁴

Generally, the compensatory damages awarded in the U.S. will not be difficult to enforce in the EU. However, the punitive damages granted by a United States court are far more complicated and controversial given the divergent views on the exequatur of punitive damages within the European Union. Traditionally, the European Member States have exhibited an attitude of distrust and antipathy towards punitive damages.²⁵ More recently, Spain's and France's courts indicate an increased openness for this contentious remedy.²⁶

19. Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641, 642 (1992).

20. *Id.*

21. See, e.g., Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 199 (2005) (describing how U.S. judgments may be enforced against assets).

22. Zekoll, *supra* note 19, at 642.

23. *Id.*

24. de Kezel, *supra* note 1, at 234.

25. Marta Requejo Isidro, *Punitive Damages: How Do They Look Like When Seen from Abroad?*, in THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT? 311 (Lotte Meurkens & Emily Nordin eds., 2012) [hereinafter Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*].

26. *Id.* at 326–27.

In determining whether to grant enforcement to American awards of punitive damages, courts examine whether exequatur of the award would be compatible with the public policy of the requested forum.²⁷ All four selected EU Member States deny enforcement where the result would be contrary to public policy.²⁸ All EU judgments on the enforcement of U.S. punitive damages centered on this ground of refusal but all resulted in different outcomes.²⁹

The notion of public policy should be understood as *international* public policy. Private international law deals with a more restricted public policy.³⁰ This derivative is a narrower scope of domestic public policy, incorporating only the most fundamental values of the forum. A legal system needs to be more tolerant in cross-border matters than in purely domestic affairs.³¹ However, despite its name, international public policy is a purely national concept.³² It contains those fundamental rules of internal public policy that a legal system wants respected in international cases, too.³³ International cases trigger the narrower concept of international public policy.

The enforceability of foreign punitive damages is assessed and objections against punitive damages are formulated under the realm of this international public policy exception. Thus, the international public policy mechanism plays a fundamental role in case law. Unfortunately, courts and scholars do not always distinguish between public policy and the

27. de Kezel, *supra* note 1, at 234.

28. See, e.g., Zekoll, *supra* note 19, at 642 (“If the laws of the domestic forum are considered incompatible, enforcement of the judgment is generally denied as a matter of public policy.”).

29. See, e.g., Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 326–27 (discussing the varying conclusions in Spain and France regarding compatibility of foreign judgments with public policy).

30. PIERRE MAYER & VINCENT HEUZÉ, *DROIT INTERNATIONAL PRIVÉ* 149 (2004); ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW – JUSTICE PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 275–77 (2009); Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 *J. PRIV. INT’L L.* 201, 213 (2008); Patrick Bernard & Hiba Salem, *Further Developments for Qualification of Foreign Judgments for Recognition and Enforcement in France: the Test for Punitive Damage Awards*, *INT’L LITIG. NEWSLETTER*, Apr. 2011, at 18.

31. Benjamin Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France After Fountaine Pajot*, 60 *AM. J. COMP. L.* 775, 792 (2012).

32. Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 *TEX. INT’L L. J.* 167, 170 (1982).

33. Sibon, *supra* note 3.

narrower concept of international public policy.³⁴ More often, they realize the existence of a division but still employ the term public policy when referring to international public policy. However, the terminological jumble does not affect the different stances taken by courts in their judgments.

B. Traditional Hostility in Germany and Italy

In the EU, several countries have rejected the enforcement of U.S. punitive damages based on the conservative view that such damages are a violation of international public policy. Among these jurisdictions we find Germany³⁵ and Italy.³⁶

1. Principled German Refusal of U.S. Punitive Damages

The 1992 judgment of the German Supreme Court, the *Bundesgerichtshof*, in the landmark case *John Doe v. Eckhard Schmitz*, is the epitome of the traditional European, disapproving position towards U.S. punitive damages. A California judgment had awarded the underage victim of sexual abuse compensatory and punitive damages.³⁷ When the culprit fled to Germany, leaving no assets behind in California, the judgment had to be enforced in Germany.³⁸ When the matter reached the German Supreme Court, it recognized the compensatory damages awarded to the plaintiff but rejected the punitive damages, both granted by the American court.³⁹

The German Supreme Court concluded that punitive damages are contrary to international public policy and should thus be prohibited from

34. *Id.*

35. See *infra* Part I.B.1 (discussing Germany's refusal to enforce U.S. punitive damages).

36. See *infra* Part I.B.2 (discussing Italy's refusal to enforce U.S. punitive damages).

37. California Superior Court (County of San Joaquin) April 24, 1985, *John Doe v. Eckhard Schmitz*, no. 168-588, unpublished. See Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 312 (¶ 2) (Ger.), for the facts of the judgment. See Gerhard Wegen & James Sherer, *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 INT'L LEGAL MATERIALS 1320, 1329 (1993), for an English translation of the relevant parts of the judgment. See also Zekoll, *supra* note 19, at 644 (1992) (discussing the treatment of U.S. punitive damages in Germany); Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare In Europe?*, 40 GEO. WASH. INT'L REV. 173, 203 (2008) [hereinafter Baumgartner, *U.S. Judgments in Europe*].

38. Baumgartner, *U.S. Judgments in Europe*, *supra* note 37, at 203–04.

39. *Id.* at 204.

entering the German legal order.⁴⁰ The Court held 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.⁴¹ The Court asserted that German private law provides compensation for actual damages, but it does not intend to enrich the victim.⁴² Further, the Court concluded that awarding the victim damages with the sole purpose of reimbursing what he has lost is a “fundamental principle of German law.”⁴³ On the other hand, the main objectives of punitive damages are punishment and deterrence, which are aims of criminal law rather than of civil law.⁴⁴ Punitive damages allow a plaintiff to act as a private-public prosecutor, which interferes with the state’s monopoly on penalization. Furthermore, the defendant cannot rely on the special procedural guarantees provided in criminal law.⁴⁵

The German Supreme Court spoke to the existence of a penal institution within German civil law. In civil law, contractual penalties provide for punishment.⁴⁶ However, the Court did not let the concept of a contractual penalty distort its clear distinction between civil law and criminal law. The Court emphasized that contractual penalties stem from a legal agreement between parties. For that reason, the German Supreme Court found them to be irrelevant.⁴⁷

40. *Id.* at 205.

41. 118 BGHZ 312 (¶ 52) (Ger.); Volker Behr, *Punitive Damages in American and German Law — Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI. KENT. L. REV. 105, 158 (2003) [hereinafter Behr, *Punitive Damages in American and German Law*].

42. Wolfgang Kühn, *Rico Claims in International Arbitration and their Recognition in Germany*, 11 J. INT’L ARB. 37, 44–45 (1994).

43. Volker Behr, *Myth and Reality of Punitive Damages in Germany*, 24 J.L. & COM. 197, 205 (2005) [hereinafter Behr, *Myth and Reality of Punitive Damages in Germany*].

44. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–15 (Matthew Bender ed., 7th ed. 2015).

45. 118 BGHZ 312 (¶ 61) (Ger.); Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANN. SURV. INT’L & COMP. L. 185, 202 (2011); Patrick J. Nettesheim & Henning Stahl, *Recent Development – Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award*, 28 TEX. INT’L L.J. 416, 419 (1993); Nils Jansen & Lukas Rademacher, *Punitive Damages in Germany*, in 25 TORT AND INSURANCE LAW, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 75, 75–76 (Helmut Koziol & Vanessa Wilcox eds., 2009).

46. BÜRGERLICHEN GESETZBUCHES [BGB] [CIVIL CODE] §§ 340, 341, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1230 (Ger.).

47. 118 BGHZ 312 (¶ 61–62) (Ger.).

Finally, the German Supreme Court argued that enforcement of the punitive damages award should be denied because enforcement in Germany would put foreign creditors in a better position than domestic creditors.⁴⁸ Foreign creditors would gain more access to the assets of German debtors than domestic creditors, even if the latter had suffered more damages. According to the court, foreign creditors' ability to obtain punitive damages leads to a lack of equal treatment.⁴⁹ Thus, the Court attempted to shield the German industry from U.S. litigation.⁵⁰ The Court also highlighted the significant economic consequences on the insurance industry resulting from excessive punitive damages.⁵¹

After finding American punitive damages to be a violation of public policy, thereby sealing the fate of the punitive award, the German Supreme Court decided to continue its analysis. The Court looked at the punitive award to assess whether it would pass the proportionality test.⁵² This principle gives German courts the responsibility to ensure that a damage award does not exceed the amount needed to compensate the injured party.⁵³ The Court expressed its disapproval of sums of money imposed on top of the compensation for damages.⁵⁴ This approach would leave no room for any amount of punitive damages. The Court found that enforcement of the punitive damages would be excessive because the punitive damages were more than the sum of all the compensatory damages.⁵⁵ Presumably, the Court viewed a 1:1 ratio between compensatory and punitive damages as the maximum. This opinion was purely academic for the case of John Doe, whose punitive damages were already refused. However, the Court's digression on proportionality can prove to be vital if the compatibility of punitive damages with German international public

48. *Id.* ¶ 78.

49. *Id.*; see also Marta Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, in 25 TORT LAW AND INSURANCE, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 237, 246 (Helmut Koziol & Vanessa Wilcox eds., 2009) [hereinafter Requejo Isidro, *Punitive Damages from a Private International Law Perspective*] ("In 1992, the BGH added that punitive damages should not be recognised or enforced because of the disproportional nature of awards and lack of equal treatment of creditors.").

50. Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. REV. 965, 998 (2013).

51. 118 BGHZ 312 (¶ 77) (Ger.); Nettessheim & Stahl, *supra* note 45, at 424.

52. 118 BGHZ 312 (¶ 63) (Ger.).

53. Nettessheim & Stahl, *supra* note 45, at 423–24.

54. 118 BGHZ 312 (¶ 59) (Ger.).

55. 118 BGHZ 312 (¶ 76) (Ger.).

policy can be demonstrated.⁵⁶ In that case, the excessiveness check is the only obstacle remaining before the judgment can be enforced.⁵⁷ Both the Spanish and the French Supreme Court have taken this approach.⁵⁸

The German Supreme Court construed one exception to the unenforceability of punitive damages.⁵⁹ The Court allowed enforcement of punitive damages, if, and to the extent, that the punitive award serves a compensatory function.⁶⁰ In the U.S., punitive damages 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.⁶¹ Hence, punitive damages are used to force wrongdoers to reimburse the victim for all losses suffered by removing all obstacles preventing the recovery of full compensation.⁶²

More importantly, the Court referred to legal costs that the prevailing party in principle cannot recoup from the losing party in the U.S.⁶³ The American rule on distribution of costs forms perhaps the most important legal impediment to full recovery of the plaintiff.⁶⁴ In almost every Western democratic country, the winning party can recover the attorneys' fees from

56. See *infra* Part I.B.2 (discussing Italy's refusal to enforce a U.S punitive damages award).

57. In its decision, the *Bundesgerichtshof* rejected punitive damages of a "not inconsiderable amount." 118 BGHZ 312 (¶ 73) (Ger.). 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, *Punitive Damages in American and German Law*, *supra* note 41, at 158–59. It might indicate an opening for punitive damages after all.

58. See *infra* Parts I.C.1 and I.C.2 (examining France's and Spain's acceptance of punitive damages).

59. 118 BGHZ 312 (¶¶ 63, 80) (Ger.).

60. *Id.*

61. Wurmnest, *supra* note 21, at 196–97; Nater-Bass, *supra* note 9, at 156; Gerhard Wegen & James Sherer, *Recognition and Enforcement of US Punitive Damages Judgments in Germany – A Recent Decision of the German Federal Court of Justice*, 21 INT'L BUS. LAW. 485, 486 (1993); Andre R. Fiebig, *The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments*, 22 GA. J. INT'L & COMP. L. 635, 649 (1992).

62. David G. Owen, *Punitive Damages as Restitution*, in THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT? 120–21 (Lotte Meurkens & Emily Nordin eds., 2012); Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 802 (2010); Lotte Meurkens, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT? 9 (Lotte Meurkens & Emily Nordin eds., 2012).

63. 118 BGHZ 312 (¶ 30) (Ger.).

64. Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327 (2013).

the losing side, but the American rules do not allow such transfer of costs.⁶⁵ Punitive damages can be used to—whether openly or covertly—circumvent this prohibition.⁶⁶ For example, Connecticut allows punitive damages in an amount equal to the plaintiff’s “expenses of litigation.”⁶⁷

In contrast, the German Supreme Court refused to accept that one of the reasons for awarding punitive damages is invariably the shifting of the victorious party’s legal costs onto the losing party.⁶⁸ The Court demanded that the foreign judgment clearly indicate the (partly) compensatory purpose of the punitive award.⁶⁹ If the American court has failed to signal this compensatory objective in its decision, the German enforcing court cannot ascertain the motives behind the award, as this would run counter to the prohibition of *révision au fond*, a review of the merits of the judgment, laid down in the *Zivilprozessordnung*, the German Code of Civil Procedure.⁷⁰ Here, the German Supreme Court did not find any reliable information in the California judgment or in the transcript to support the argument that the punitive damages were intended to cover the plaintiff’s legal costs.⁷¹ Although the American court had awarded 40% of the judgment to the plaintiff’s lawyer, the German Supreme Court argued that because 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 Therefore, the court concluded that the punitive award should be rejected in its entirety.⁷³

65. *Id.*

66. François-Xavier Licari, *Prendre les Punitive Damages au sérieux: critiques sur un refus d'accorder l'exequatur à une décision californienne ayant alloué des dommages intérêts punitifs* [Taking Punitive Damages Seriously: Why a French Court Did Not Recognize an American Decision Awarding Punitive Damages and Why it Should Have], 137 J. DU DROIT INT'L 1230, 1255 (2010) [hereinafter Licari, *Taking Punitive Damages Seriously*].

67. See *Collens v. New Canaan Water Co.*, 234 A.2d 825, 831–32 (Conn. 1967).

68. 118 BGHZ 312 (¶ 47) (Ger.); Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 747 n.72 (1992) [hereinafter Hay, *German Recognition of American Money-Judgments*].

69. Zekoll, *supra* note 19, at 657.

70. 118 BGHZ 312 (¶ 68) (Ger.).

71. *Id.* ¶ 49.

72. Csongor István Nagy, *Recognition and Enforcement of U.S. Judgments Involving Punitive Damages in Continental Europe*, NiPR, Feb. 2012, at 8.

73. 118 BGHZ 312 (¶ 52) (Ger.).

2. Italy's Principled Refusal of U.S. Punitive Awards

Similarly, Italy has an attitude of rejection and disdain for awards of punitive damages coming from the U.S. In Italy, the seminal case on the enforcement of U.S. punitive damages concerned a judgment from Alabama. In 1985, a 15 year-old boy got involved in a traffic accident in Opelika.⁷⁴ The boy died when the buckle of his helmet malfunctioned, and his unprotected head hit the pavement.⁷⁵ On September 14, 1994, the District Court of Jefferson County, Alabama held the Italian manufacturer Fimez S.P.A. liable for the negligent design of the defective crash helmet.⁷⁶ The district court awarded the victim's mother \$1 million in damages without further specification.⁷⁷ Because the manufacturer held no assets in the U.S., the judgment had to be enforced in Italy.

When the case finally reached the Italian Supreme Court, the *Corte di Cassazione*, in 2007, the Court first explained that the classification of the \$1 million damage award depended on the facts of the situation.⁷⁸ This analysis is left to the Venice Court of Appeal, whose factual finding cannot be reversed. The Venice Court of Appeal held that the foreign judgment lacked a rationale on how the amount was awarded, the nature of the damages recovered, and the basis for the recovery of damages.⁷⁹ Therefore, the Venice Court of Appeal could not establish and assess the criteria used by the Alabama court to qualify the nature of the damages awarded and to quantify those damages.⁸⁰ The Venice Court of Appeal concluded that the damages awarded were punitive in nature, even though the Alabama court did not expressly qualify them as such.⁸¹

The Venice Court of Appeal was probably not aware of the exact meaning of the Alabama wrongful death statute,⁸² which applied in this

74. Lucia Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 252 (2005).

75. *Id.* at 252.

76. *Id.* at 252 (recognizing the District Court had already rendered the \$1 million award in a non-final decision of April 1, 1991 or January 1, 1991. The Venice Court of Appeal's judgment mentions both dates throughout its text. The judgment of September 14, 1994 confirmed the previous order, declared it final, and added reasons for it).

77. *Id.*

78. *Id.* (citing Cass., sez. tre., 19 gennaio 2007, n. 1183, Foro it., 2007, I (It.)).

79. *Id.*

80. *Id.*

81. Ostoni, *supra* note 74, at 249.

82. ALA. CODE § 6-5-410 (1975).

case.⁸³ Historically, this rule has allowed the descendants or heirs to recover punitive damages for wrongful death; compensatory damages are not available. However, the Alabama Supreme Court explained that the remedy serves multiple functions.⁸⁴ The remedy provides more than a “mere solatium to the wounded feelings of surviving relations, []or compensation for the [lost] earnings of the slain,”⁸⁵ as it also aims “to prevent homicides”⁸⁶ by making the amount of damages dependent on “the gravity of the wrong done.”⁸⁷ Therefore, the award rendered against the Italian manufacturer pursued a compensatory objective in addition to the sanctioning and deterring purposes.⁸⁸ The Venice Court of Appeal did not consider this, but instead seems to have based the penal classification of the Alabama judgment on the amount awarded.⁸⁹ This judicial misconception, nevertheless, does not undermine the Venice Court of Appeal’s position that punitive damages are unacceptable. Besides, in light of the Alabama wrongful death statute, the American court would have probably labeled the damages as punitive.

The Italian Supreme Court also held that the Alabama decision violated public policy because the Italian liability system contains several legal instruments that pursue punitive objectives, such as penalty clauses and moral damages.⁹⁰

The Italian Supreme Court first ruled that penalty clauses are not punitive in nature and do not have a retributive aim. These clauses serve to strengthen contractual relationships and quantify damages in advance. The 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. Therefore, the Court concluded that penalty

83. Francesco Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 276 (Duncan Fairgrieve & Eva Lein eds., 2012) [hereinafter Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*].

84. Francesco Quarta, *Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe* 7 (Nov. 19, 2010) (on file with author) [hereinafter Quarta, *Judicial Recognition in Europe*].

85. S. & N. Ala. R.R. Co. v. Sullivan, 59 Ala. 272, 278 (1877) (emphasis removed).

86. *Id.*

87. *Estes Health Care Ctr. v. Bannerman*, 411 So.2d 109, 112–13 (Ala. 1982) (emphasis added); see also Quarta, *Judicial Recognition in Europe*, supra note 84, at 6.

88. Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, supra note 83, at 276; Quarta, *Judicial Recognition in Europe*, supra note 84, at 10.

89. Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, supra note 49, at 248; Nagy, supra note 72, at 7.

90. Baumgartner, *U.S. Judgments in Europe*, supra note 37.

clauses cannot be compared to punitive damages, despite the penalty being due regardless of proof of the damage suffered and the extent of the damage. Punitive damages 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.⁹¹

The Italian Supreme Court also refused to equate punitive damages and moral damages.⁹² Moral damages reflect a loss suffered by the victim, and recovery is based on that loss.⁹³ Moral damages focus on the injured party, not on the wrongdoer.⁹⁴ Compensation is the primary objective of moral damages, whereas in the case of punitive damages there is no relation between the damages awarded and the harm incurred.⁹⁵

According to the Italian Supreme Court, damages in private law are not connected to the idea of punishment or to the wrongdoer's misconduct.⁹⁶ These damages are intended to compensate the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money.⁹⁷ This is true for all types of civil damages, including moral damages, which are not influenced by the victim's conditions or the wrongdoer's wealth, but require concrete and factual evidence of the loss suffered.⁹⁸ In other words, Italy's highest court built a strong dogmatic wall between compensatory and punitive damages, with absolutely no room for overlap. Compensatory damages, such as moral damages, focus on the victim, relate to his or her loss, and intend to make him or her whole.⁹⁹ On the other hand, punitive damages center on the wrongdoer's behavior, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.¹⁰⁰

In sum, the Italian Supreme Court declined to analogize punitive damages to penalty clauses and moral damages, just like the German Supreme Court in *John Doe v. Eckhard Schmitz*.¹⁰¹ It confirmed the Venice

91. BÜRGERLICHEN GESETZBUCHES [BGB] [CIVIL CODE] §§ 340, 341, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1230 (Ger.).

92. Ostoni, *supra* note 74, at 250.

93. Cass., sez. tre., 19 gennaio 2007, n. 1183, Foro it. 2007, I, 1460 (It.).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

Court of Appeal's view that punitive damages violate international public policy and declined to enforce the Alabama court's \$1 million award.¹⁰² As a result, the plaintiff could not seize the assets of the defendant in order to obtain any of the money awarded to her.¹⁰³

On February 8, 2012, the Italian Supreme Court affirmed its deprecatory position.¹⁰⁴ The Massachusetts Middlesex Superior Court ordered an Italian company to pay \$8 million to an employee who had suffered injuries in an accident at the Italian corporation's U.S. subsidiary.¹⁰⁵ The judgment, again, was a global award without further specification or demarcation.¹⁰⁶ The court reiterated that the Italian civil liability system is strictly compensatory and not punitive.¹⁰⁷ The \$8 million in damages awarded was thus declared unenforceable on the basis of the public policy exception.¹⁰⁸

C. More Welcoming Attitudes Toward American Punitive Damages in Spain and France

Both Spain¹⁰⁹ and France¹¹⁰ have adopted a more receptive and tolerant stance towards U.S. punitive damages. The Supreme Courts of both nations have no objection to the concept itself. Instead of outright rejecting punitive damages, the courts focus on the amount of punitive damages awarded by the foreign court.

102. *Id.*

103. *Id.*

104. Cass., 8 febbraio 2012, n. 1781/2012, Foro it. 2012, I, 1449 (It.).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*; LS Lexjus Sinacta, *Italian Supreme Court Confirms Stance On Punitive Damages*, INT'L LAW OFFICE (Oct. 23, 2012), <http://www.internationallawoffice.com/Newsletters/Litigation/Italy/LS-Lexjus-Sinacta/Supreme-Court-confirms-stance-on-punitive-damages?redir=1>; *Italian Supreme Court Affirms Position Against Punitive Damage Awards*, GOLDBERG SEGALLA (Jan. 31, 2013), <http://www.goldbergsegalla.com/publication/italian-supreme-court-affirms-position-against-punitive-damage-awards>; Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, *supra* note 83, at 275 n.32.

109. *See infra* Part I.C.1 (discussing Spain's enforcement of U.S. punitive damages).

110. *See infra* Part I.C.2 (discussing France's enforcement of U.S. punitive damages).

1. Spanish Supreme Court Embraces U.S. Punitive Damages

In the case of *Miller Import Corp. v. Alabastres Alfredo, S.L.*, of November 13, 2001, the Spanish Supreme Court (*Tribunal Supremo*) decided to enforce a U.S. judgment for treble damages (i.e., punitive damages arrived at by trebling the compensatory damages).¹¹¹ At the time, requests for enforcement of foreign judgments had to be brought directly before the civil division of the Spanish Supreme Court.¹¹² The American litigation concerned an alleged infringement of intellectual property rights.¹¹³ The plaintiffs, Miller Import Corp. (domiciled in the U.S.) and Florence S.R.L. (domiciled in Italy), claimed that defendant Alabastres Alfredo, S.L. (domiciled in Spain) had manufactured falsified labels of a registered trademark in Spain.¹¹⁴ The Federal District Court for the Southern District of Texas (Houston Hall) in Houston sided with the plaintiffs and awarded treble damages.¹¹⁵ Before the Spanish Supreme Court, the defendant asserted that enforcement should be declined on the basis of the international public policy exception.¹¹⁶

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.¹¹⁷ The Court categorized compensation for injuries as part of (Spanish) international public policy.¹¹⁸ However, it added that coercive, sanctioning mechanisms are not uncommon in the areas of (Spanish) substantive law, specifically contract law and procedure.¹¹⁹ According to the Court, the presence of such punitive mechanisms in private law to compensate the shortcomings of criminal law is consistent with the doctrine of minimum intervention in penal law.¹²⁰ This doctrine requires the legislature to first counter unwanted conduct by

111. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

112. Francisco Ramos Romeu, *Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments*, 38 INT'L LAW. 945, 951 (2004).

113. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

employing less invasive remedial intervention, such as civil penalties. Criminal penalties should only be used as *ultimum remedium*.¹²¹

Furthermore, it is often difficult to differentiate concepts of compensation. The example of moral damages to which the Court refers makes 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.¹²² Spanish law thus does allow a minimal overlap between civil law (compensation) and criminal law (punishment).¹²³ The Italian Supreme Court in *Fimez* took the opposite view.¹²⁴ In making their public policy analysis, the Spanish Supreme Court finally added that courts should not lose sight of the connection between the matter and the Spanish forum.¹²⁵ This is 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.¹²⁶ This led the Court to the revolutionary conclusion that punitive damages as a concept do not oppose public policy.¹²⁷

The Spanish Supreme Court then developed its reasoning further. The principle of proportionality, or in other words an excessiveness assessment, was the second and final yardstick the award needed to overcome under the public policy test before the Court could enforce the judgment.¹²⁸ The Court used two elements to determine the (potentially) excessive nature of the treble damages: (1) the predictability of the punitive award, and (2) the nature of the interests protected.¹²⁹ The Texas judgment passed the

121. Quarta, *Judicial Recognition in Europe*, *supra* note 84, at 10.

122. Nagy, *supra* note 72, at 9.

123. Scott R. Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts—a Recent Case in the Supreme Court of Spain*, 24 J.L. & COM. 225, 229 (2005); Nagy, *supra* note 72, at 9.

124. *See supra* Part I.B.2 (discussing Italy's principled refusal of a U.S. punitive award).

125. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

126. Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 326–27.

127. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain); Marta Otero Crespo, *Punitive Damages Under Spanish Law: A Subtle Recognition?*, in *THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT?* 289 (Lotte Meurkens & Emily Nordin eds., 2012); Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 326.

128. Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 328.

129. *Id.* at 327–28.

excessiveness test and could subsequently be enforced against the assets of the Spanish defendant.¹³⁰

The Court first underlined the fact that the treble damages arose *ex lege*.¹³¹ The legal provisions sanctioning infringements of the intellectual property rights at hand took the intentional character and the gravity of the defendant's behaviour into consideration and foresaw a tripling of the amount of compensatory damages.¹³² As a point of criticism, it should be remarked that legality leads to foreseeability but it does not guarantee proportionality. The Court's reliance on the statutory origin of the punitive damages leads to the question of whether punitive damages developed by case law would be predictable enough for the Spanish Supreme Court.¹³³ Likely, the absence of a written provision would not automatically rule out the enforcement of the judgment.¹³⁴

It is unclear what would happen to punitive awards coming from states without legislative caps on punitive damages.¹³⁵ In those states, the only restraint on the amount of punitive damages comes from courts, most notably the U.S. Supreme Court's case law on due process.¹³⁶ The Spanish Supreme Court confirmed that the U.S. courts are prudent in policing the proportionality of damages awarded.¹³⁷ However, the legislature's intervention to fix the amount of the punitive damages, whether by establishing a maximum, a minimum, or an appropriate range, does not make the award proportional in all cases. Furthermore, the foreign country's idea of proportionality may vary from the Spanish legislature's estimation.¹³⁸

As to the second prong of the excessiveness test, the Court argued that safeguarding intellectual property rights in a market economy is important.¹³⁹ Moreover, this benefit from protecting such rights is not

130. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

131. *Id.*

132. *Id.*

133. Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 328.

134. Marta Requejo Isidro, Presentation at the British Institute of International and Comparative Law: Punitive Damages – Europe Strikes Back? 6 (Nov. 2, 2011) (transcript on file with author) [hereinafter Requejo Isidro, Presentation].

135. *Id.*

136. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

137. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain); Jablonski, *supra* note 123, at 229.

138. Requejo Isidro, Presentation, *supra* note 134, at 6.

139. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

strictly local, but is shared universally by nations with similar underlying judicial, social, and economic values.¹⁴⁰ The common desire to protect the interests at stake justified awarding twice the amount of compensatory damages on top of the compensation granted.¹⁴¹ The importance of the underlying *ratio legis* will thus determine the outcome of the proportionality analysis.¹⁴² Other rights of high importance outside the field of intellectual property could, for instance, be: environmental protection, protection of human rights, freedom, legal certainty, and dignity.¹⁴³

2. Principled Acceptance of U.S. Punitive Damages in France

In 2010, the French Supreme Court, *Cour de Cassation*, also indicated its willingness to enforce U.S. punitive damages awards.¹⁴⁴ In *Schlenzka v. Fontaine Pajot*, a California couple purchased a 56-foot Marquises catamaran from a French manufacturer, Fontaine Pajot.¹⁴⁵ When the boat was delivered to the couple, they believed it to be in excellent condition.¹⁴⁶ 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.¹⁴⁷ The seller had not disclosed this information and had performed superficial repairs.¹⁴⁸ The structural problems were, however, not resolved and the California couple soon experienced issues with the catamaran.¹⁴⁹

The California Superior Court awarded the plaintiffs \$3,253,734.45 in actual damages.¹⁵⁰ The court further determined that an amount of \$1,460,000 in punitive damages would be appropriate to punish and

140. *Id.*

141. Jablonski, *supra* note 123, at 230.

142. Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 328.

143. *Id.*; Requejo Isidro, Presentation, *supra* note 134, at 4.

144. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

145. See, e.g., Matthew Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT'L COMP. L. 389, 390 (2013) (discussing the *Schlenzka v. Fontaine Pajot* case).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 390 n.2.

deter the French company without causing financial ruin.¹⁵¹ Also, the court permitted an exception to the American rule on attorney's fees; the general rule was that each party should bear their own costs, even if they won the lawsuit.¹⁵² Under the Magnuson-Moss Warranty Act,¹⁵³ a prevailing consumer may recover reasonable legal costs. Schlenzka and Langhorne were awarded \$402,084.33 in attorney's fees.¹⁵⁴

The American couple subsequently had to enforce the judgment in France where Fontaine Pajot was located. The case eventually reached France's Supreme Court, which was the Court's first time taking a stance on punitive damages. The Court ruled that: "... *le principe d'une condamnation à des dommages intérêts 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 . . .*" Translation: "... the principle of an award of punitive damages is not in itself, contrary to public policy, it is otherwise where the allocated amount is disproportionate to the harm and shortcomings [of] the contractual obligations of the debtor . . ." ¹⁵⁵ According to the French Supreme Court, punitive damages are in themselves not contrary to international public policy. This position is reminiscent of the Spanish Supreme Court's receptive attitude in *Miller v. Alabastres*.¹⁵⁶ American punitive damages can, therefore, in principle be enforced in France. The 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.¹⁵⁷ This liberal, welcoming attitude of France's Supreme Court is very progressive, but does not mean that the openness to punitive damages is unbridled.

The French Supreme Court attached a crucial caveat to the general rule. The court held that punitive damages do violate international public policy when their amount is "disproportionate to the harm and

151. Janke & Licari, *supra* note 31, at 782.

152. *Id.*

153. Magnuson-Moss Warranty Act, 15 U.S.C § 2310(d)(2) (2016).

154. Janke & Licari, *supra* note 31, at 782.

155. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

156. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

157. Licari, *supra* note 2, at 425.

shortcomings [of] the contractual obligations of the debtor”¹⁵⁸ In other words, although the concept of punitive damages conforms to international public policy, damages should still be proportional.¹⁵⁹ The international public policy analysis shifts from the incompatibility of the concept of punitive damages itself to an investigation of their amount.¹⁶⁰ The real obstacle for punitive damages under the international public policy test is no longer the compensation dogma, but rather the distinct issue of excessiveness. This corresponds to the Spanish Supreme Court’s decision in *Miller v. Alabastres*.¹⁶¹

The French Supreme Court’s ruling in *Fontaine Pajot* did not contain concrete guidelines on how to determine whether a foreign punitive award is excessive. The Court merely found that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor.¹⁶² The judgment of the Court can be interpreted in two different ways. First, one could argue that the French Supreme Court compares the amount of punitive damages and the amount of compensatory damages awarded (the injury suffered). The Court concluded in that regard that the punitive damages largely exceeded the compensatory damages because the difference was \$70,000.¹⁶³ This could be read as laying down a 1:1 maximum ratio between punitive and compensatory damages, identical to the ceiling the German Supreme Court adopted 18 years earlier in *John Doe v. Eckhard Schmitz*.¹⁶⁴ Such a 1:1 boundary stands in sharp contrast with the single digit rule, a maximum ratio of 9:1, established by the

158. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

159. Sibon, *supra* note 3.

160. Janke & Licari, *supra* note 31, at 794–95.

161. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

162. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

163. *Id.*; Nathalie Meyer Fabre, *Recognition and Enforcement of U.S. Judgments in France—Recent Developments*, INT’L DISP. RESOL. NEWS, Spring 2012, at 9 [hereinafter Meyer Fabre, *U.S. Judgments*]. It could be argued that the amount awarded for attorney’s fees (*in casu* \$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 U.S. litigants almost always bear their own costs, even if they win the case.

164. Nathalie Meyer Fabre, *Enforcement Of U.S. Punitive Damages Award in France First Ruling Of The French Court Of Cassation In X. v. Fontaine Pajot, December 1, 2010*, 26 MEALEY’S INT’L ARBITRATION REP. 1, 4 (2011) [hereinafter Meyer Fabre, *U.S. Punitive Damages*]. See also *supra* Part I.B.1 (discussing Germany’s refusal of U.S. punitive damages).

U.S. Supreme Court when setting limits to punitive awards in the U.S.¹⁶⁵ Although the California Superior Court respected the U.S. Supreme Court's 9:1 ceiling, exceeding the 1:1 limit by only a handful of percentage points proved fatal for the punitive award's chances of enforcement in France.¹⁶⁶

Second, one should not forget the *Cour de Cassation's* reference to the defendant's breach of contract.¹⁶⁷ The Court presumably referred to the seriousness of the defendant's breach of contract.¹⁶⁸ In *Fontaine Pajot*, the dispute about the catamaran arose from a contract between the parties. Thus, the Court molded the language of its judgment according to the contractual origin of the litigation. The notion "*des manquements aux obligations contractuelles du débiteur*" could perhaps more generally be read as the seriousness of the debtor's wrongful behavior, the degree of culpability, or the blameworthiness of the fault.¹⁶⁹ 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 Fontaine Pajot's fraudulent and deceitful conduct surrounding the breach of contract than to the actual breach itself, which was the non-conformity of the vessel.¹⁷⁰

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, next to the amount of compensatory damages given to the victim.¹⁷¹ This could mean that the enforcement judge can modulate the 1:1 maximum ratio according to reprehensibility of the defendant's conduct. This approach, however, encounters a fundamental problem: it seems to allow a revival of the forbidden¹⁷² *révision au fond*, a review on the merits of the incoming judgment.¹⁷³

165. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

166. Janke & Licari, *supra* note 31, at 801. n.113.

167. The Court said "*des manquements aux obligations contractuelles du débiteur . . .*" Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.); Bernard & Salem, *supra* note 30, at 19; Nagy, *supra* note 72, at 9.

168. Janke & Licari, *supra* note 31, at 776.

169. Meyer Fabre, *U.S. Punitive Damages*, *supra* note 164, at 4; Nagy, *supra* note 72, at 9.

170. Meyer Fabre, *U.S. Judgments*, *supra* note 163, at 9 n.25.

171. Nagy, *supra* note 72, at 9.

172. Cass., sez. un., 7 gennaio 1964, n. 15, Foro it. 1964, I (It.).

173. Various authors note that the proportionality test reintroduces a *révision au fond*. See, e.g., Bernard & Salem, *supra* note 30, at 19 (noting that reviewing foreign punitive awards on proportionality could be bordering on the unauthorized revision of the decision on the merits); Jennifer Juvéal,

Although the French Supreme Court touched upon the breach of contract to measure the proportionality of the punitive damages, it did not take Fountaine Pajot's conduct into account.¹⁷⁴ It merely stated that the French Court of Appeal could have rightfully concluded that the punitive award was manifestly disproportionate because the punitive damages largely exceeded the purchase price and the cost of the repairs.

II. EVALUATION OF THE EXISTING STANCES ON U.S. PUNITIVE DAMAGES

The previous part concludes that the four Member States' courts examined the international public policy exception when deciding on the enforceability of American punitive damages awards. Like any type of private law judgment, a U.S. punitive damages award should not violate international public policy in order to be enforced. Both the German and the Italian Supreme Courts have taken a very hostile stance towards foreign punitive damages by finding that the concept itself is contrary to international public policy (the first prong of the international public policy exception). On the other hand, the French and Spanish Supreme Courts have moved away from this argument and find that punitive damages must only be rejected if their amount is excessive or disproportional, which is the second prong of the international public policy exception. This article argues that EU countries should take the latter approach when enforcing U.S. punitive damages awards.

A. Transformation to Principled Acceptance

European courts should not view U.S. punitive damages as, in themselves, contrary to international public policy.¹⁷⁵ International public policy is an evolutionary and fluid concept. As Justice Burrows stated in 1824, on the topic of public policy, "it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead

Domages-Intérêts Punitifs: Comment Apprécier la Conformité à L'ordre Public International?, 6 LA SEMAINE JURIDIQUE EDITION GÉNÉRALE 140, 142 (2011) (observing that a proportionality check in light of the conduct of the absent party in the enforcement proceedings places the judge in a position close to that of the judge who heard the substance of the case); Janke & Licari, *supra* note 31, at 801–02 (“[A] review of the [international public policy] is, inevitably, a *révision au fond* of a special and limited nature.”).

174. Meyer Fabre, *U.S. Punitive Damages*, *supra* note 164, at 4.

175. Nater-Bass, *supra* note 9, at 160.

you from the sound law.”¹⁷⁶ Using the same analogy, the European courts have ridden the horse in the wrong direction with regard to punitive damages. The traditional interpretation of international public policy, as rejecting the concept of punitive damages, no longer holds true. The outright rejection of punitive damages as a concept is not so fundamental as to merit international public policy protection.

The Member States’ courts should not refuse the enforcement of U.S. punitive damages because their own legal systems contain private law instruments that are akin to punitive damages or pursue identical or similar goals. In such a context, it is unacceptable to employ the international public policy exception to reject foreign punitive damages in private international law cases. American punitive damages should only be analyzed under the excessiveness prong of the international public policy test.¹⁷⁷ This proportionality analysis or excessiveness check could be viewed as a second phase of the international public policy test.

The legal systems of France, Spain, Italy, and Germany contain private law instruments, which resemble punitive damages or pursue the same goals.¹⁷⁸ The presence of these punitive and/or preventive elements becomes apparent when subjecting the private law of these countries to careful scrutiny. Therefore, internal legal coherence demands the acceptance of U.S. punitive damages at the enforcement stage. When a legal system itself contains punitive-like remedies in private law, it cannot declare punitive damages unenforceable by using the international public policy shield.¹⁷⁹ Member States would be guilty of legal hypocrisy if they were to reject U.S. punitive damages as violating international public policy, while at the same time acknowledging or condoning similar instruments in their substantive law.¹⁸⁰

176. Richardson v. Mellish [1824] 130 Eng. Rep. 294, 303.

177. Licari, *Taking Punitive Damages Seriously*, *supra* note 66, at 1262.

178. England, the birthplace of modern punitive damages, even acknowledges full-blown punitive damages in three limited circumstances: abuses of power by government officials, torts committed for profit, or express statutory authorization. *Rookes v. Barnard* [1964] AC 1129 (HL) 37 (reversing the UK Court of Appeal and holding that punitive damages can only apply in those three situations).

179. Behr, *Punitive Damages in American and German Law*, *supra* note 41, at 153; Tolani, *supra* note 45, at 207; Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, *supra* note 83, at 275.

180. Jessica Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 MINN. J. INT’L L. 55, 56, 77–78 (2010); Nagy, *supra* note 72, at 11.

The next section provides a few notable examples to elaborate “punitive traces,” which can be legal institutions, tendencies in the case law, and statutory provisions, among others. This article will not provide an exhaustive list of these punitive traces. There is no official marker to measure whether the content of the international public policy of a nation has changed. Therefore, we do not know how many punitive instruments in private law are needed before abandoning the international public policy objection against punitive damages. However, punitive elements in these private law systems provide a strong indication that the international public policy outlook on U.S. punitive damages is changing.

B. Examples of Punitive Elements in European Private Law Systems

1. Surcharge of Benefits in Spanish Social Security Law

The Spanish General Act on Social Security¹⁸¹ offers a clear example of a punitive provision within private law.¹⁸² The Act deals *inter alia* with the legal consequences of a labor accident or an occupational disease caused by the employer’s fault.¹⁸³ When the harm to the worker was caused by faulty equipment, in a workplace without obligatory safety devices or where safety and hygiene measures were not observed, the state will increase the benefits paid to the employee by 30 to 50% depending on the seriousness of the employer’s wrongdoing.¹⁸⁴ Further, the Act states that under these circumstances the employer is liable for the surcharge and cannot insure himself against this liability.¹⁸⁵ Also, the additional amount is independent from and compatible with other liability.¹⁸⁶

Therefore, the victim of a labor accident or an occupational disease is entitled to receive increased financial benefits when his condition can be attributed to the employer. This financial burden is imposed by the Spanish Department of Employment and borne by the employer. The exact percentage, between 30 and 50%, depends on the gravity of the employer’s wrong. This criterion reflects the tortfeasor-oriented approach of punitive

181. General Act on Social Security art. 123 (B.O.E. 1994, 1) (Spain).

182. Manuel Luque Parra et al., *Workplace Injuries and Tort Liability*, INDRET, Apr. 2001, at 10; Otero Crespo, *supra* note 127, at 294–95.

183. General Act on Social Security art. 123 (B.O.E. 1994, 1) (Spain).

184. *Id.*

185. *Id.*

186. *Id.*

damages and contradicts the idea of compensatory damages, which are strictly related to the victim's loss. Furthermore, the instrument of the surcharge appears to have a punitive as well as a deterrent objective. The Act punishes the employer for allowing the damaging event to take place and contributes to the prevention of such accidents by seeking the employer's compliance with his duties in the future.¹⁸⁷ The punitive and deterrent nature of the administrative sanction has been explicitly confirmed by the Spanish Supreme Court.¹⁸⁸

Other characteristics of the employer's surcharge are also reminiscent of punitive damages. First, like punitive damages in the U.S., the amount is payable to the victim, not to the state.¹⁸⁹ Second, the liability under the Act does not eliminate any criminal, or other, liability the employer might incur.¹⁹⁰ Similarly in America, a wrongdoer can face criminal prosecution and still be ordered to pay punitive damages with regard to the same conduct.¹⁹¹ In *BMW v. Gore*, the U.S. Supreme Court ruled that the civil court should take the possible criminal sanctions into account in order to avoid excessive punitive awards.¹⁹²

2. Double License Fee in German Copyright Law

The double license fee for the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA) is also among the measures that are not purely compensatory in nature.¹⁹³ GEMA

187. Otero Crespo, *supra* note 127, at 294.

188. S.T.S., Apr. 23, 2009 (R.J. No. 4140) (Spain).

189. Split recovery schemes, whereby a portion of the punitive award flows to the state, are of course an exception to this general principle. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (2016) (requiring 50% of a punitive damages award be deposited into the state's general fund).

190. General Law on Social Security art. 168.3 (B.O.E. 2016, 36) (Spain).

191. *Hudson v. United States*, 522 U.S. 93, 98 (1997).

192. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–76 (1995).

193. PETER MÜLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT 126–32 (2000); M. HELLWIG ET AL., SONDERGUTACHTEN DER MONOPOLSKOMMISSION GEMÄß, DAS ALLGEMEINE WETTBEWERBSRECHT IN DER SIEBTEN GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN GWB-NOVELLE, 79 (2004), http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/KartellG/monopolkomm.pdf. *But see* Ulrich Magnus, *Punitive Damages and German Law*, in *THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT?* 254 (Lotte Meurkens & Emily Nordin eds., 2012) (asserting that the double license fee is hardly a real punitive sanction but instead a standardized extended amount of compensation); Jansen & Rademacher, *supra* note 45, at 83 (arguing that a punitive interpretation would be misguided).

is a collecting society and a performance rights organization that collects copyright fees for its members. It protects the rights of lyricists, composers, and music publishers in Germany.¹⁹⁴ If GEMA discovers an infringement of the intellectual property rights held by one of its members, it charges a double license fee to the infringing party.¹⁹⁵ The idea behind this double license fee is to compensate GEMA's operating and monitoring costs.¹⁹⁶ This practice has been accepted by the *Bundesgerichtshof*, which found that without this sanctioning mechanism there would be no incentive for infringers to follow the rules.¹⁹⁷ Interestingly, GEMA is the only association allowed to use this remedy for copyright violations.¹⁹⁸

This double fee contains both punitive and deterring elements. The additional damages could be explained as compensation for GEMA's efforts to protect the right holder against the violation of the infringer. However, courts do not normally compensate for detection costs.¹⁹⁹ Moreover, in some instances, the double license fee will result in the infringer bearing a proportion of the general expenses incurred by GEMA that goes beyond the costs made in his individual case. When making the tortfeasor liable for damage he has not caused, sanctioning considerations are laid bare.

3. Covert "Punitive Damages" Awarded as Moral Damages in France

Moral damages offer a breeding ground for punitive damages. These damages cannot be quantified monetarily in an objective manner because it is difficult to place a monetary value on pain and suffering. Therefore,

194. *Über die Stiftung [About the Foundation]*, GEMA <https://www.gema.de/die-gema/gema-stiftung/ueber-die-stiftung/> (last visited Dec. 12, 2016).

195. See, e.g., Magnus, *supra* note 193, at 254 (explaining that the double license fee compensates both "organisational efforts" and "costs of investigation").

196. Jansen & Rademacher, *supra* note 45, at 82–83.

197. Bundesgerichtshof [BGH] [Federal Court of Justice] June 24, 1955, 17 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 376 (¶ 23) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 10, 1972, 59 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 285 (¶ 17) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 15, 1994, 128 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 1 (¶ 84) (Ger.); Gerhard Wagner, *The Protection of Personality Rights Against Invasions by Mass Media in Germany*, in *PERSÖNLICHKEITSSCHUTZ GEGENÜBER MASSEN MEDIEN – THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA* 137, 174 (Helmut Koziol & Alexander Warzilek eds., 2005).

198. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 22, 1986, 96 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 37 (¶¶ 1, 32) (Ger.).

199. Magnus, *supra* note 193, at 254.

judges have the discretion to assess these types of damages. This enables them to consider factors other than the extent of the harm suffered by the victim. Accordingly, parts of moral damages are *de facto* punitive damages.

In France, Patrice Jourdain expresses this idea as well.²⁰⁰ He notes that French courts sometimes do not calculate damages by using only the harm suffered by the plaintiff.²⁰¹ These courts take additional factors into account, such as the nature of the wrongdoer's behavior. If a French court finds that the wrongdoer deliberately violates the victim's rights, they punish the tortfeasor by inflating the moral damages.²⁰² The difference between the moral damages actually awarded and what the moral damages would have been if the judge had not deemed expansion of the moral damages necessary is punitive in nature. These additional damages come close to punitive damages as they are measured by the reprehensibility of the defendant's actions.

French courts enjoy a wide discretion to evaluate and set the damages in the cases before them.²⁰³ In that regard they escape the control of the French Supreme Court. The Supreme Court only quashes a decision, if it finds that the lower court has not adhered to the principle of *réparation intégrale*: full reparation.²⁰⁴ French judges are not obligated to explain how they reached the amount of damages awarded. They can resort to stating that the harm suffered will be compensated by the damages granted, without any further justification or elaboration. The Supreme Court intervenes only in rare cases where the lower court explained how it awarded damages and indicated that it took factors other than the harm into account.²⁰⁵

The *réparation intégrale* rule makes it hard to prove the existence of these hidden punitive damages within moral damages. The full reparation

200. Patrice Jourdain, *Rapport introductif*, Les Petites Affiches 3, no. 7 (2002).

201. *Id.*

202. *Id.* The information report of the First Legislative Chamber Law Commission on the reform of French civil liability, the so-called *Bêteille & Anziani Report*, refers to the statements made by Carval, who identifies the same practice in Italian and German civil courts. ALAIN ANZIANI & LAURENT BÊTEILLE, RAPPORT D'INFORMATION RECOMMANDATION N° 5 – TRADUIRE, DANS LE CODE CIVIL, L'ACQUIS JURISPRUDENTIEL DU DROIT DE LA RESPONSABILITÉ CIVILE EN SÉLECTIONNANT LES SOLUTIONS QU'IL CONVIENT DE CONSACRER (2009), <http://www.senat.fr/rap/r08-558/r085581.pdf>.

203. Jourdain, *supra* note 200.

204. *Id.*

205. Jean-Sébastien Borghetti, *Punitive Damages in France*, in 25 PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 55, 62 (Helmut Koziol & Vanessa Wilcox eds., 2009).

standard demands an assessment *in concreto* of the harm suffered.²⁰⁶ Courts should always look at the facts of the case and should not fall back on so-called *barèmes*, pre-determined, standardized scales of damages, to set the appropriate level of damages. The official admittance of *barèmes* would confirm the existence and measure the size of punitive damages within moral damages. A simple comparison between the *barème* and the amount of moral damages in the judgment would uncover the judge's punitive intentions.²⁰⁷

It is very likely that judges use the *barèmes* unofficially. However, they will not admit to this in their decision out of fear of having their judgment reversed. We are, therefore, left in the dark as to which of the *barèmes* the court has used, if it has used any at all, and are unable to make a comparison to the actual amount awarded. The prohibition on the use of these *barèmes* thus obstructs all inquiry into the presence of punitive elements in moral damage awards.²⁰⁸

However, there are other methods to show that courts use moral damages to punish the defendant. For example, a French scholar, Martine Bourrié-Quenillet, studied a number of French cases in which relatives of a deceased person received moral damages.²⁰⁹ The results of the analysis revealed a difference in the *quantum* of moral damages depending on whether the death was the defendant's fault or not.²¹⁰ Bourrié-Quenillet found that the average award for moral damages was higher when the defendant was sued on the basis of fault liability than on the basis of strict liability.²¹¹ Admittedly, Bourrié-Quenillet examined only a small sample of decisions: 536 judgments from the Courts of Appeal of Nîmes, Montpellier, Rennes, and Paris.²¹² The cases involved 1,765 family members in total.²¹³ Despite the relatively limited scale, the work points to hidden punitive considerations in moral damages.

206. Jourdain, *supra* note 200.

207. Borghetti, *supra* note 205, at 63.

208. *Id.*

209. Borghetti, *supra* note 205, at 63 (citing Martine Bourrié-Quenillet, *L'indemnisation des proches d'une victime décédée accidentellement: Étude d'informatique judiciaire* (1983) (unpublished thesis, Montpellier 1) 97–100).

210. *Id.*

211. *Id.*

212. *Id.*

213. Martine Bourrié-Quenillet, *A propos d'une étude sur l'indemnisation des proches d'une victime décédée accidentellement (Analyse quantitative de la jurisprudence des Cours d'appel de Nîmes, Montpellier, Rennes et Paris)*, 45 JCP-G 1985, 3212.

4. Penalty Clauses Can Contain Punitive Damages

The contractual penalty is another form of private punishment. Various legal systems in the EU allow parties to insert a penalty clause into their contract. For example, in Germany, Section 339 of the Civil Code (*Bürgerliches Gesetzbuch*) confirms the validity of such a clause. A penalty clause leads to the party failing to perform his obligation or failing to do it properly having to pay an amount of money as penalty to the other party. The clause is intended to encourage performance or, in other words, to deter the party from breaching the contract.²¹⁴ The party requesting payment of the penalty does not have to prove any real damage. The indirect penal effect of the clause is thus obvious.²¹⁵

The German Civil Code does leave an opening for the penalty to be reduced. If the payable penalty is disproportionately high, the judge may reduce it to a reasonable amount.²¹⁶ Even in that case, however, there is still a real possibility that the reduced amount will exceed the actual damage suffered. As such, the other party will receive more than the amount of the damages incurred.²¹⁷ Moreover, Section 348 of the German Commercial Code prohibits reduction of the penalty clause between merchants.²¹⁸

In France, penalty clauses, *clauses pénales*, also exist in private law.²¹⁹ The judge has the power to reduce the agreed upon amount if he finds the sum to be manifestly excessive.²²⁰ However, courts do not allow awards to the other party amounting to less than the damages actually suffered.²²¹ This means that the judge could moderate the penalty clause to a level above the damages incurred. The lower limit of the amount of actual damages thus opens the possibility for extra-compensatory damages to be awarded.

214. Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 DEF. COUNS. J. 320, 324 (2007).

215. Tolani, *supra* note 45, at 199; Magnus, *supra* note 193, at 253; Meyer Fabre, *U.S. Judgments*, *supra* note 163, at 9.

216. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 343, translation at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1230 (Ger.).

217. Borghetti, *supra* note 205, at 57.

218. HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 348, translation at http://www.gesetze-im-internet.de/hgb/_348.html (Ger.).

219. CODE CIVIL [C. CIV.] [CIVIL CODE] art.1226 (Fr.).

220. *Id.* art. 1152.

221. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 24, 1978, Bull. civ. I, No. 280 (Fr.).

The Court of Appeal of Venice argued in *Fimez* that penalty clauses are not comparable to punitive damages because they are not awarded by a court, but are set in advance by the parties in their contract.²²² The Italian Supreme Court confirmed the Court of Appeal's ruling on this point.²²³ The German Supreme Court in *John Doe v. Eckhard Schmitz* also declined to accept similarity between penalty clauses and punitive damages because contractual penalties arise from the parties' agreement.²²⁴ This reasoning cannot be followed. It is irrelevant that the penal mechanism of the penalty clause originates from the will of the parties. Italian private law, along with other private law systems of the Civil Law countries,²²⁵ facilitates the punishment of the breaching party. This finding supports the theory that European legal systems to a certain extent make room for penal considerations in private law relationships.

III. SUGGESTED GUIDELINES FOR EUROPEAN COURTS

Having stripped the objections against the very concept of punitive damages from their international public policy status, the question becomes whether this means that U.S. punitive damages should be able to freely penetrate the borders of "Fortress Europe." The answer is that there is still another aspect that acts as a safety valve: the punitive damages award should not be excessive. This proportionality check is the second prong of the international public policy test. This section will formulate guidelines on how to apply this excessiveness test.

We will attempt to put forward a set of guidelines that European judges might find useful when assessing the enforceability of U.S. punitive awards. Courts should not refuse the concept of punitive damages, but should resort to an excessiveness review of the punitive damages granted by the American court.²²⁶

This section will establish guiding principles to determine at which point punitive damages become excessive.²²⁷ These guidelines are derived

222. Ostoni, *supra* note 74, at 250.

223. Cass., sez. tre., 19 gennaio 2007, n. 1183 (It.).

224. 118 BGHZ 312 (¶ 62) (Ger.).

225. The only country not yet mentioned is Spain. Spanish law recognizes the contractual penalty. There is no provision regarding the reduction of excessive penalty clauses. CÓDIGO CIVIL [Civil Code] art. 1154 (Spain).

226. *See supra* Part II (evaluating the existing stances on U.S. punitive damages).

227. *See infra* Parts III.A–H (suggesting guidelines for European countries).

from the lessons drawn from U.S. Supreme Court case law as well as from the knowledge acquired through the few cases concerning the enforcement of punitive damages in the EU. Once the acceptable amount has been found, the question becomes what should happen to the punitive award; in particular, whether the prohibition on *révision au fond* imposes an all-or-nothing approach to punitive damages, or whether the enforcing court can reduce this head of damages to an acceptable amount in light of international public policy.²²⁸

The overall aim is to offer European courts some guidance on how to approach U.S. punitive damages. At the moment, there is no uniformity in the stances taken in the various Member States because enforcement depends on national law and the national courts' view on international public policy. It should be noted from the outset that it is extremely difficult to create absolute rules that apply in every single case. Judicial discretion will always be part of any excessiveness test. The observations we bring forward will hopefully assist courts when making their determination and thus become best practices. The guidelines should create a more receptive and uniform attitude towards this type of foreign damages.

A. Prohibition of *Révision au Fond*

Any discussion of the guiding principles should begin with the prohibition of *révision au fond*.²²⁹ This prohibition of a review on the merits is an overarching issue to consider when dealing with the enforcement of foreign judgments. It forbids European courts from opening a completely new investigation of the case and retrying the merits underlying a foreign judgment. Requested jurisdictions should not examine whether the foreign judgment was erroneous in law or in fact. Courts are also not permitted to undertake a review of the private international law analysis performed by the foreign court. The obligation or possibility for the requested court to conduct a *révision au fond* reflects a deep mistrust towards the foreign jurisdiction. The review of the foreign judgment for its legal, substantive or conflicts, correctness is no longer

228. See *infra* Part III.I (discussing the permissibility of the reduction of the punitive award).

229. Gilles Cuniberti, *The Liberalization of the French Law of Foreign Judgments*, 56 INT'L & COMP. L.Q. 931, 932 (2007).

part of the judgment-enforcement practice in most legal systems.²³⁰ For the enforcement of judgments originating in the EU, the Brussels *Ibis* Regulation also rules out any review of the substance of the judgment.²³¹

The international public policy exception does not examine the dispute itself but rather the foreign judgment that adjudicated the dispute. There is a fine line between the appropriate review of a foreign decision for its compliance with the international public policy of the forum and an inappropriate *révision au fond*.²³² In fact, no bright line separates the permissible public policy review from the undesirable *révision au fond*.²³³ In the context of an *ordre public* review, there is ultimately always a *révision au fond*. However, such review does not examine the substantive legality of the judgment but merely determines whether the international public policy has been violated.²³⁴

The proscription against *révision au fond* prevents certain possible criteria from being included in the excessiveness test for punitive damages. For instance, enforcing the American punitive damages to the extent they could have been awarded in the country of the requested court is not the answer to the excessiveness issue.²³⁵ This method authorizes the requested court to reopen the damages determination made by the originating court, thereby using principles applicable in the requested forum.²³⁶ This amounts to a clear *révision au fond*. Moreover, the fact that the requested court through exequatur allows for the awarding of a higher amount than what

230. Peter Hay, *On Comity, Reciprocity and Public Policy in U.S. and German Judgments Recognition Practice*, in PRIVATE LAW IN THE INTERNATIONAL ARENA: FROM NATIONAL CONFLICT RULES TOWARDS HARMONIZATION AND UNIFICATION 243 (Jürgen Basedow et al. eds., 2000) [hereinafter Hay, *On Comity*].

231. Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 52–56, 2012 O.J. (L 351) 1.

232. Hay, *On Comity*, *supra* note 230, at 244; Peter Hay, *Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation*, EUR. L.F., 2007, at 150.

233. Hay, *On Comity*, *supra* note 230, at 245.

234. Rolf Stürmer, *Anerkennungsrechtlicher und europäischer Ordre Public als Schranke der Vollstreckbarerklärung – der Bundesgerichtshof und die Staatlichkeit in der Europäischen Union*, in 50 JAHRE BUNDESGERICHTSHOF 688–89 (Claus Wilhelm Canaris et al. eds., 2000).

235. Other objections include: the fact that, apart from in England, punitive damages are not awarded in the EU, and the difficulty to ascertain the amount of punitive-like damages (if any) that would have been granted by domestic courts in a particular case.

236. Ronald Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181, 194 (2005).

would have been available under the law of the forum cannot form a valid basis for refusal of enforcement. Of course, there is nothing stopping the court from covertly assimilating the amount of acceptable foreign punitive damages to what it believes the plaintiff would have been able to recover under punitive-like sanctions in the forum. However, this approach cannot have a place as a formal criterion within the excessiveness analysis. It is undesirable to find a violation of international public policy as soon as the amount granted by the foreign court exceeds the result of applying the domestic standards of the enforcing court.²³⁷ Similarly, a discovery of the wealth of the defendant²³⁸ would also run counter to the principle outlawing *révision au fond*.

Keeping the prohibition of *révision au fond* in mind can help formulate the following guidelines.

B. Enforcement Is the Rule, Refusal the Exception

Courts dealing with a request for enforcement of a judgment should remind themselves of the comity of nations. This refers to the rules of international etiquette,²³⁹ which entail respecting each other's laws, judgments, and institutions. In private international law, the doctrine of comity is the legal principle that dictates that jurisdictions recognize and give effect to judicial decisions rendered in other jurisdictions, unless doing so would offend its international public policy.²⁴⁰ The U.S. relies more on this doctrine than Europe.²⁴¹ Its status as a legal principle in Europe is uncertain; however, the idea behind comity is useful to point European courts to the exceptional nature of a refusal to enforce a foreign judgment.

Violation of international public policy forms a justification for a refusal to recognize and enforce the foreign judgment.²⁴² However, this safety valve mechanism should only operate in the most

237. Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 322.

238. Martin Bernet & Nicolas C. Ulmer, *Recognition and Enforcement in Switzerland of the US Judgments Containing an Award of Punitive Damages*, 22 INT'L BUS. LAW. 272, 274 (1994).

239. William Edward Hall, A TREATISE ON INTERNATIONAL LAW 14 n.1 (A. Pearce Higgins ed., 7th ed. 1917).

240. John Kuhn Bleimaier, *The Doctrine of Comity in Private International Law*, 24 CATH. LAW. 327, 327 (1979).

241. *Id.* at 327–28.

242. *Id.* at 328.

compelling circumstances.²⁴³ Frequent refusals of enforcement on the basis of international public policy would contribute to the development of anarchy in international affairs.²⁴⁴ The escape clause should be reserved for extreme cases.²⁴⁵ When deciding on the enforceability of an American punitive damages award, courts in the EU should lean towards acceptance rather than rejection. The traditional maxim of *in dubio pro recognitione* supports this suggested attitude.²⁴⁶

C. Compensatory Damages Should Always Be Granted Enforcement

As to American punitive damages judgments specifically, it should first of all be emphasised that the enforcement of the compensatory damages granted to the prevailing party is unproblematic.²⁴⁷ Compensation of the victim forms the foundational objective of civil liability systems in Europe.²⁴⁸ The compensatory damages awarded are not in jeopardy by the presence of punitive damages in the judgment. However, the judgment must clearly single out the compensatory damages because the prohibition of *révision au fond* forbids a court to reduce the global amount of unspecified damages a foreign court has awarded.²⁴⁹

Even if the compensatory damages are very high in comparison to the compensation standards of the requested forum, they should be accepted for enforcement. In *John Doe v. Eckhard Schmitz*, the German Supreme Court followed this principle by accepting that the damages for pain and suffering

243. *Id.* at 330–31.

244. *Id.* at 331.

245. *See, e.g.,* Zekoll, *supra* note 19, at 646 (explaining that the refusal to recognize foreign judgments should only be used in extreme cases); Behr, *Myth and Reality of Punitive Damages in Germany*, *supra* note 43, at 204 (suggesting invoking the escape clause only in extreme cases where fundamental values of the German legal system or elementary objectives of its state policy are at issue); Tolani, *supra* note 45, at 201 (acknowledging that “a foreign judgment should only be denied in extreme cases”); Hartwin Bungert, *Enforcing U.S. Excessive and Punitive Damages Awards in Germany*, 27 INT’L LAW. 1075, 1079 (1993) (permitting German courts to refuse foreign judgments “merely in extreme cases”).

246. Nagy, *supra* note 72, at 10.

247. Olivier Cachard, *Le Contrôle Juridictionnel des Jugements Étrangers Ordonnant des Punitive Damages*, RLDA, Sept. 2013, at 137, 140.

248. *See generally* WALTER VAN GERVEN ET AL., TORTS: SCOPE OF PROTECTION 5–10 (1999) (discussing various European civil codes). *See also* CEES VAN DAM, EUROPEAN TORT LAW (2006), for a general discussion of the principles of tort law in Europe.

249. Meyer Fabre, *U.S. Judgments*, *supra* note 163, at 9; Meyer Fabre, *U.S. Punitive Damages*, *supra* note 164, at 4.

could be enforced even though their amount was very high in comparison to German standards.²⁵⁰ In England, section 5 of the Protection of Trading Interests Act 1980 (PTIA) prevents the enforcement of foreign multiple damages, punitive damages arrived at by multiplying the amount of compensatory damages.²⁵¹ A literal reading of the provision leads to the conclusion that the compensatory element of the multiple damages is unenforceable as well. Dicey and Morris support this textual interpretation: “[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.”²⁵² Lord Diplock agreed²⁵³ with Judge Parker’s observation in *British Airways Board 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.²⁵⁴ Provisions such as section 5 of PTIA detract from the *sanctity* of compensatory damages and should thus be abolished.

Plaintiffs should take note of national procedural rules prohibiting *ultra petita* rulings. Such rules forbid a court from awarding a party that which has not been claimed. Parties seeking enforcement of an American punitive damages judgment in the EU should not solely request the enforcement of the entire judgment. They are advised not to put all their eggs in one basket but to also request enforcement of the compensatory damages only. That way the possible unenforceability of the punitive damages does not affect the enforceability of the uncontroversial compensatory damages. If plaintiffs do not provide alternatives to the enforcing court, they might find themselves in the same situation as plaintiffs Schlenzka and Langhorne in the French case *Fontaine Pajot*. As part of their litigation strategy,²⁵⁵ the American plaintiffs had not requested enforcement of only the compensatory damages in case the punitive damages were deemed

250. 118 BGHZ 312 (¶ 83) (Ger.).

251. Protection of Trading Interests Act 1980, c. 11, § 5 (Eng.).

252. DICEY & MORRIS ON THE CONFLICT OF LAWS 566 (Lawrence Collins ed., 13th ed. 2000).

253. *British Airways Bd. v. Laker Airways Ltd.* [1985] 1 AC 58 (HL) 89 (appeal taken from the UK Court of Appeal).

254. *British Airways Bd. v. Laker Airways Ltd.* [1984] 1 QB 142 at 161 (Eng.). See also Elaine Kellman, *Enforcement of Judgments and Blocking Statutes: Lewis v Eliades*, 53 INT’L & COMP. L.Q. 1025, 1027–28 (2004) (discussing Judge Parker’s observation in the Court of Appeal judgment for *British Airways Board v. Laker Airways*).

255. Informal contact with the lawyers handling the case revealed that the lack of request for partial enforcement was the result of a tactical choice. They opted not to submit subsidiary requests in order not to weaken the main request of enforcement of the entire American judgment.

unacceptable. Therefore, the French Supreme Court could not rule *ultra petita* and had to reject the whole California judgment, leaving the couple empty-handed.

D. The Compensatory Portion of the Punitive Damages Should Be Enforced

Requested courts in the EU should keep in mind the compensatory function that some punitive awards (partly) pursue. As pointed out *supra*, compensation can indeed be one of the possible reasons an American court grants punitive damages.²⁵⁶ The compensatory objective of punitive damages should not pose any problem under international public policy because compensating the victim forms the cornerstone upon which private laws in the EU are based.²⁵⁷ Opponents of enforcing punitive damages in European legal systems often invoke the argument that such damages violate the solely compensatory intentions of private law.²⁵⁸ This argument loses any power it might hold when the punitive damages awarded in the U.S. are in part meant to compensate the plaintiff. Enforcing that part of an award, therefore, is not problematic under the public policy test. This additional, compensatory function of punitive damages does not bridge the gap between the European monistic, compensatory system of damages and the American dualistic system. It could, however, narrow the gap to a degree such that a monistic system at least in part accepts punitive damages awards.²⁵⁹

In *John Doe v. Eckhard Schmitz*, the German Supreme Court mentioned the possibility of enforcing the compensatory portion of a punitive award.²⁶⁰ The California Superior Court had awarded the plaintiff \$350,260 in compensatory damages and \$400,000 in punitive damages.²⁶¹ It attributed 40% of the entire award to the victim's lawyer.²⁶² Here, the German Supreme Court decided that it would allow the enforcement of punitive damages if and to the extent that the punitive award serves a

256. See *supra* Part I.B.1 (discussing a German Supreme Court decision which refers to the possible reasons for which an American court could grant punitive damages).

257. See *supra* Part II (demonstrating that there are deviations from this principle. However, despite these deviations, compensation remains the basic rule).

258. Behr, *Punitive Damages in American and German Law*, *supra* note 41, at 107.

259. *Id.* at 122.

260. 118 BGHZ 312 (¶ 80) (Ger.)

261. *Id.* ¶¶ 3, 80.

262. *Id.* ¶ 3

compensatory function.²⁶³ The Court referred to the lawyer's fees, which are in principle not recoverable given the American rule on attorney's fees.²⁶⁴ Awarding attorney's fees through punitive damages enables the plaintiff to achieve full compensation.²⁶⁵ The American court indicated its desire to shift these attorney's fees to the losing party, which then could have made it possible to enforce these fees. However, the German Supreme Court required that a foreign court clearly state its intention to charge this cost against the punitive damages.²⁶⁶ The Court held that the California Superior Court did not fulfill this requirement because the American court granted 40% of the *entire* award to the plaintiff's attorney.²⁶⁷ The German Supreme Court could not find sufficient evidence in the California judgment or in the transcript to substantiate the claim that the punitive damages were awarded to cover the plaintiff's attorney's fees.²⁶⁸ Therefore, the German Supreme Court could not exclude the possibility that the compensatory damages contained an element addressing those costs.²⁶⁹

The German Supreme Court's approach is sound. A reviewing court should accept punitive damages to the extent they serve a compensatory function. However, the foreign judgment should explicitly identify the court's intention to attach a compensatory function to the punitive award.²⁷⁰ It should also indicate which numerical part of the punitive damages is to be used for this compensatory objective. This reasoning does not only apply to legal fees but to any form of loss. In addition to the lawyer's fees, the *Bundesgerichtshof* made reference to losses that are difficult to prove and losses that are not covered by other types of damages.²⁷¹ It also imagined that damages stripping the defendant of the gains acquired through the wrongful behaviour are recoverable through the head of punitive damages.²⁷² In essence, any *disadvantage* that the foreign court clearly

263. *Id.* ¶ 80

264. *Id.* ¶ 30.

265. Behr, *Punitive Damages in American and German Law*, *supra* note 41, at 123.

266. 118 BGHZ 312 (¶ 78) (Ger.).

267. *Id.* ¶ 47.

268. *Id.* ¶ 49.

269. Nagy, *supra* note 72, at 8; 118 BGHZ 312 (¶ 83) (Ger.).

270. A case could be made for allowing the requested court to use the transcript of the foreign court's proceedings if this document makes it possible to know the foreign court's reasoning.

271. 118 BGHZ 312 (¶ 8) (Ger.); Wurmnest, *supra* note 21, at 196–97; Nater-Bass, *supra* note 9, at 156; Wegen & Sherer, *supra* note 61, at 486; Fiebig, *supra* note 61, at 649.

272. See Bundesgericht [BGer] [Federal Supreme Court] July 12, 1990, 116 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 376 (Switz.), for an example of a non-EU case of

deems recoverable via the punitive damages award should be enforced in the EU. Legal costs will likely be the most common and important form of compensation to be recovered via punitive damages awards.

The *Fimez* case in Italy further highlights the need for a clear demarcation, within the punitive damages awarded, between punitive damages pursuing compensatory aims and purely punitive damages. Here, the district court in Jefferson County, Alabama awarded the American plaintiff \$1 million without specifying the nature of the award.²⁷³ The Venice Court of Appeal classified the award as punitive.²⁷⁴ The Alabama wrongful death statute applied to the traffic accident in which the plaintiff's son lost his life.²⁷⁵ Under that legislation, compensatory damages cannot be recovered and only punitive damages can be obtained.²⁷⁶ The Supreme Court of Alabama clarified, however, that the punitive damages in such wrongful death cases pursue punitive as well as compensatory objectives.²⁷⁷ Even if the Venice Court of Appeal would have been aware of the dual intentions of the Alabama wrongful death statute, and would have been willing to enforce the compensatory portion of the award, it would have been unable to do so due to the prohibition of *révision au fond*. The enforcing court cannot ascertain the motives behind the award if the foreign court has not provided clear and comprehensible information itself. Although a compensatory element might be hidden in a punitive award, the

disgorgement of profits. In the case between S.F. Inc. and T.C.S. AG, the California District Court had awarded \$50,000 in punitive damages under English law for the misappropriation of containers. Both the District Court of Basel and the Basel Court of Appeal enforced the \$50,000 since its primary purpose was to reconstitute the unjust profit to the plaintiff, thereby avoiding the unjust enrichment of the defendant. The fact that the amount was a mere estimate of the defendant's unlawful profit was not seen as an obstacle to enforcement. See Bernet & Ulmer, *supra* note 238, at 273 (“[P]unishment of the defendant had been of only secondary importance.”); Daniele Favalli & Joseph M. Matthews, *Recognition and Enforcement of U.S. Class Action Judgments and Settlements in Switzerland*, SCHW. Z. INT. & EU. R., 634–35 (2007) (noting that punitive damages “would balance the unjust enrichment of the defendant who should not be allowed to keep the profit”).

273. Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, 31 HASTINGS INT'L & COMP. L. REV. 753, 753 (2008).

274. *Id.*

275. *Id.*

276. *Id.* at 754.

277. *Savannah & Memphis R.R. Co. v. Shearer*, 58 Ala. 672, 680 (1877); *S. & N. Ala. R.R. Co. v. Sullivan*, 59 Ala. 272, 278 (1877); *Estes Health Care Ctr. v. Bannerman*, 411 So.2d 109, 112 (Ala. 1982); Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, *supra* note 83, at 276; Quarta, *Judicial Recognition in Europe*, *supra* note 84, at 6–7.

rendering court's lack of identification ties the hands of the requested court. If the requested court were to examine the punitive award and were to distinguish the individual grounds that make up the overall amount of punitive damages, the prohibition of review of the merits would be violated.²⁷⁸

The Hague Choice of Court Convention of June 30, 2005 supports the enforcement of the compensatory part of a punitive damages award.²⁷⁹ This Convention is aimed at ensuring the effectiveness of choice of court agreements between parties in international contracts.²⁸⁰ The Convention lays down uniform rules conferring jurisdiction to the court designated by the parties to a cross-border dispute in civil and commercial matters.²⁸¹ In addition, it determines the conditions upon which a judgment rendered by the designated court of a Contracting State shall be recognized and enforced in all other Contracting States.²⁸² The Convention came into force on October 1, 2015, after the EU ratified it in June 2015.²⁸³ The U.S. has signed the Choice of Court Convention, but has not yet ratified it.²⁸⁴

Article 11 of the Hague Choice of Court Convention addresses the issue of damages, and provides:

(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.²⁸⁵ (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.²⁸⁶

Despite the flexible nature of the provision (“may be refused”), Article 11(1) demonstrates mistrust against punitive damages and fear that a

278. Nater-Bass, *supra* note 9, at 160.

279. Convention on Choice of Court Agreements art. 11, Jan. 30, 2005, 44 I.L.M. 1294.

280. *Id.* at Introduction.

281. *Id.* at art. 5.

282. *Id.* at art 8.

283. David Waldron, *Hague Convention Choice of Court Agreements to Take Effect in October*, MORGAN LEWIS (July 13, 2015), <http://www.morganlewis.com/pubs/hague-convention-choice-of-court-agreements-to-take-effect-in-october>.

284. *Id.*

285. Convention on Choice of Court Agreements, *supra* note 279, art. 11 (emphasis added).

286. *Id.* (emphasis added).

favorable attitude toward them might reduce the number of states accepting the Convention. The provision does not require the courts of a Contracting Party to compare the incoming judgment with their international public policy. The punitive portion of the judgment may, but does not have to, be rejected simply because the damages awarded are non-compensatory in nature.²⁸⁷

More importantly, Article 11(2) supports our contention that the compensatory part of a punitive award should be granted enforcement in the EU. It orders the requested court to take the legal costs awarded under the heading of punitive damages into account.²⁸⁸ A court cannot refuse to recognize those parts of the punitive award that are meant to cover legal costs, which in civil law jurisdictions would normally be passed on to the losing party.²⁸⁹ Thus, the Hague Choice of Court Convention confirms, at least for legal costs, that punitive damages should be enforced to the extent that they pursue a compensatory objective. The Convention's scope is limited to cases where the court's jurisdiction is based on the parties' agreement.²⁹⁰ Additionally, Article 11(2) could be applied to other civil and commercial cases because there seems to be no obvious reason why the application of the public policy exception should vary according to the original court's jurisdiction.²⁹¹

In the case of *John Doe v. Eckhard Schmitz*, the German Supreme Court could have applied its own rule differently. Instead of outright rejecting the punitive damages completely, it could have enforced part of them. The American court reserved 40% of the *entire* amount for the plaintiff's attorney's fees. The German Supreme Court could have taken 40% of the *enforceable* compensatory damages, which would have been \$140,104, and charged that amount against the *unenforceable* punitive damages. This would have guaranteed the enforcement of purely compensatory sums.²⁹² Nevertheless, the position taken by the German Supreme Court is not unreasonable given the language of the judgment. The California Superior Court is to blame for the poor formulation of its own decision. If the court would have clearly set out that

287. Berch, *supra* note 180, at 77, 94 n.190.

288. Convention on Choice of Court Agreements, *supra* note 279, art. 11.

289. Nagy, *supra* note 72, at 10.

290. Convention on Choice of Court Agreements, *supra* note 279, art. 1.

291. Nagy, *supra* note 72, at 10.

292. Hay, *German Recognition of American Money-Judgements*, *supra* note 68, at 747.

attorney's fees were awarded under the guise of punitive damages, the judgment would have avoided any interpretational problems on the German side.

E. U.S. Punitive Damages Above a 9:1 Ratio Are, in Principle, Suspect

When contemplating tolerable levels of punitive damages for enforcement purposes, it is fruitful to remind ourselves of the limits the American system has placed on punitive damages awards. In *BMW of North America v. Gore*, the United States Supreme Court created three guideposts to help determine whether a punitive award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the punitive and compensatory damages awarded; and (3) a comparison of the punitive damages to the criminal penalties that could be imposed for similar misconduct.²⁹³ The second guidepost brings some mathematical certainty into the assessment of excessiveness.

In *State Farm Mutual Automobile Insurance v. Campbell*, the United States Supreme Court, in *dicta*, expanded upon this guidepost. It effectively laid down a 9:1 maximum ratio between punitive and compensatory damages by stating "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due-process."²⁹⁴ The Court's establishment of this upper limit has its ramifications for European courts faced with a request for enforcement of an American punitive damages judgment. If the American legal system has identified double-digit ratios between punitive and compensatory awards as constitutionally unacceptable, it seems only logical that European judges should also treat this 9:1 ratio as an outer limit to be conformed with in order to make the judgment enforceable. It makes no sense for a European court to allow the enforcement of judgments that violate the federal constitution in their country of origin.

However, the United States Supreme Court—rightfully—did not construe this bright-line limit as a rigid one. It previously held that an egregious case with small economic damages could warrant an upward deviation from the maximum ratio.²⁹⁵ In *State Farm Mutual Automobile Insurance v. Campbell*, the U.S. Supreme Court then ruled that: "[w]hen

293. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 574, 574–75, 580–81, 583 (1995).

294. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

295. *BMW*, 517 U.S. at 582.

compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”²⁹⁶ In that case, the Court considered an award of \$1 million in compensatory damages to be substantial.²⁹⁷ In the double-digit rule’s flexibility lies its weakness as a guiding rule for European judges. European courts can use the 9:1 ceiling as an important indication, but should remain cautious as the United States Supreme Court itself allows upwards and downwards exceptions to the rule depending on the circumstances of the case.

F. A 1:1 Ratio Might Be the Appropriate Limit

The American legal system imposes the 9:1 ratio ceiling. However, European courts are under no obligation to accept this relatively high threshold as the maximum level of their tolerance. They are entitled to set a lower ratio as the boundary of excessiveness for private international law purposes. The use of a ratio is prompted by the search for numerical guidance for European judges. Linking the punitive damages to the compensatory damages contributes to foreseeability based on economically calculable factors.²⁹⁸ By attaching the acceptable amount of punitive damages to the compensatory damages, the effect becomes more compensation related, thereby narrowing the gap with the American legal system.²⁹⁹

Determining a correct number is inevitably a difficult enterprise and filled with a degree of arbitrariness. When offering concrete guidelines to European judges, a workable ratio is critical. A 1:1 ratio could be the starting point in cases where enforcement of an American punitive damages award is requested.

In *Fontaine Pajot* the French Supreme Court laid down a maximum ratio between punitive and compensatory damages of 1:1. The Court

296. *Campbell*, 538 U.S. at 425.

297. *Id.* at 426.

298. Behr, *Punitive Damages in American and German Law*, *supra* note 41, at 150 (making this statement in the context of the U.S. case law delineating the constitutional boundaries of punitive damages; however, it can, in our view, be used in the debate around the development of the excessiveness test).

299. *Id.* at 117.

rejected the punitive damages awarded by the California court because the punitive damages exceeded the compensatory damages.³⁰⁰

In *John Doe v. Eckhard Schmitz*, the German Supreme Court rejected the punitive damages because the concept is contrary to international public policy.³⁰¹ The Court, nevertheless, hypothetically took its reasoning a step further and subjected the punitive award to an excessiveness analysis. The Court stated that the punitive damages granted by the American court would fail the proportionality test because they were higher than the sum of all the compensatory damages.³⁰² Thus, the Court suggested that a 1:1 ratio might be the outer limit of acceptable punitive damages under international public policy.

The 1:1 ratio is not completely new. In *State Farm Mutual Automobile Insurance v. Campbell*, the United States Supreme Court referred to “a lesser ratio, perhaps only equal to compensatory damages” as “the outermost limit of the due process guarantee,” when the compensatory damages are substantial.³⁰³ Also, in *Exxon Shipping v. Baker*, the Court established a strict 1:1 ratio for federal maritime tort cases.³⁰⁴ Lastly, looking outside the selected four EU countries, it could perhaps be argued that the Greek Supreme Court applied this ratio when rejecting the punitive damages awarded by an American court.³⁰⁵

The chosen ratio might not be perfect in all circumstances. For instance, there could be a situation where the American court issues punitive damages on top of nominal damages. This is entirely possible because punitive damages require a finding of either actual or nominal damages.³⁰⁶ In such a situation the ratio will not work.

Without any guidance, courts are left to their own devices. Scholars who have called for the introduction of an excessiveness test mostly did not offer concrete suggestions. Nagy has undertaken the most praiseworthy effort at formulating guiding rules for the enforcement of foreign punitive

300. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

301. 118 BGHZ 312 (¶ 78) (Ger.).

302. 118 BGHZ 312 (¶ 76) (Ger.).

303. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

304. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476, 515 (2008).

305. *Areios Pagos [A.P.] [Supreme Court]* 17/1999, p. 181 (Greece).

306. Anthony J. Sebok, *Punitive Damages in the United States*, in 25 PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155, 171 (Helmut Koziol & Vanessa Wilcox eds., 2009).

awards.³⁰⁷ However, he fails to provide adequate guidance for the difficult issue of excessiveness. Nagy introduced the “marginal recovery approach,” inspired by the marginal cost concept in economics.³⁰⁸ In a model of perfect competition, an undertaking produces its goods or services until its marginal cost, the cost related to the production of one additional unit, reaches the market price.³⁰⁹ Applying this to the enforcement of punitive damages, Nagy advances that a court should enforce the foreign punitive award to the point that it reaches the court’s level of intolerance.³¹⁰ A court should start from what he calls the “in-the-pocket” compensation, which refers to the amount of money that would remain in the plaintiff’s pocket on the basis of the law of the forum.³¹¹ This means taking the allocation of legal costs through the punitive award into account. This seems to coincide with this article’s contention that the compensatory portion of a punitive award should be enforced, provided it is clearly distinguished. From there, the court is advised to ask itself whether the enforcement of each additional dollar would violate international public policy.³¹² Although a correct theory, it does nothing concrete to help European judges find the point of intolerance. All it does is use an economics model to instruct the courts to determine what amount of punitive damages is unacceptable under international public policy.

This article goes beyond previous scholarship and offers concrete tools for European courts to separate acceptable punitive damages from the intolerable ones. A ratio calculation might not be the only way to tackle the enforcement of U.S. punitive damages judgments, but it can act as a strong first indicator.

The suggested 1:1 ratio reflects a measure of reasonableness: striking the balance between not allowing enough of the foreign remedy and opening the European borders too liberally. Under this proposed ratio, American treble damages would be unacceptable in light of international public policy. The 1:1 ratio is situated below the Spanish Supreme Court’s acceptance in *Miller v. Alabastres* of treble damages, a 2:1 ratio, and the Bételle Proposal for an Article 1386-25 in the French Civil Code, which

307. Nagy, *supra* note 72, at 10.

308. *Id.* at 11.

309. *Id.*

310. *Id.*

311. *Id.* at 4, 11.

312. *Id.* at 11.

allows the imposition of punitive damages to a maximum amount of twice the level of compensatory damages, also a 2:1 ratio.³¹³ On the other hand, by commenting on the situation in Switzerland, author Strebel suggests that it is almost impossible to come up with figures.³¹⁴ He, nevertheless, asserted that punitive damages truly designed to punish and deter are outrageous for enforcement purposes if they exceed 50% of the actual damages, thus a 1:2 ratio.³¹⁵ The 1:1 ratio is slightly lower than Lenz's proposal to enforce U.S. punitive damages in Switzerland in an amount of up to 130% of the actual damages, a 1.3:1 ratio, depending on the intensity of the connection of the facts of the case to the requested forum, also known as *Binnenbeziehung*.³¹⁶ Interestingly, research in the U.S. has shown that the ratio between punitive and compensatory damages lies between 0.88 and 0.98 to 1 in the vast majority of cases.³¹⁷ A European standard of 1:1 thus seems to cover most of the American punitive damages judgments.

Strebel's reference to "truly punitive damages" leads to an important question: should damages awarded for legal fees be counted when calculating the ratio between punitive and compensatory damages?³¹⁸ It is rare for a U.S. court to order the losing party to pay the winning party's legal costs given the American rule on costs. If they do, they usually award compensation for legal fees under a separate heading. That was the case in *Fontaine Pajot* where the California court awarded the sum of \$402,084.33 for legal fees, aside from the normal compensatory damages and the punitive damages. The French Supreme Court did

313. Translation of Article 1386-25 based on: Chantal Mahé, *Punitive Damages in the Competing Reform Drafts of the French Civil Code*, in *THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT?* 262 n.7 (Lotte Meurkens & Emily Nordin eds., 2012).

314. Felix D. Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 *LOY. L.A. INT'L & COMP. L.J.* 55, 104–05 (1999).

315. *Id.*

316. CHRISTIAN LENZ, *AMERIKANISCHE PUNITIVE DAMAGES VOR DEM SCHWEIZER RICHTER [AMERICAN PUNITIVE DAMAGES BEFORE THE SWISS JUDGE]* 183–91 (1992) (Ger.) (asserting that enforcement of the full amount should be granted in cases where there is, apart from the presence of the defendant's assets, no *Binnenbeziehung*); see *infra* Part III.G for a more detailed discussion of the possible influence of this concept on any suggested ratio.

317. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 *J. LEGAL STUD.* 623, 652 (1997); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 *CORNELL L. REV.* 743, 754 (2002); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1886, and 2001 Data*, 3 *J. EMPIRICAL LEGAL STUD.* 263, 278 (2006).

318. Strebel, *supra* note 314, at 104 n.291.

not include the legal fees heading into the ratio calculation.³¹⁹ This method seems reasonable and can be followed. Thus, the legal fees awarded in the form of punitive damages should first be deducted from the punitive award before the court makes the comparison between the punitive and compensatory damages.

Reliance on a ratio is caused by the ambition to bring some measurable certainty into the excessiveness assessment. It has the benefit of not running afoul of the prohibition of review of the merits, *révision au fond*. In contrast, using factors such as the blameworthiness of the conduct would amount to forbidden *révision au fond*. The blameworthiness of the behavior of the defendant corresponds to the first guidepost of *BMW v. Gore* (referred to as the reprehensibility of the conduct in that case).³²⁰ The United States Supreme Court attached utmost importance to the guidepost for determining constitutional reasonableness.³²¹ The French Supreme Court in *Fontaine Pajot* also mentioned the seriousness of the defendant's conduct (our interpretation of "manquements aux obligations contractuelles du débiteur"),³²² although it is not clear if it actually incorporated the factor into its proportionality analysis.

In conclusion, the 1:1 ratio can prove to be a valuable starting point for the European courts' proportionality test. However, it should not be viewed as an all-embracing or rigid rule. As the excessiveness test invariably requires a case-by-case assessment, there are special circumstances and influencing factors that might call for an adaptation of the ratio. One such intervening factor is the case's degree of connection to the requested forum.

*G. The Weaker the Case's Connection to the Forum, the More Tolerance
Should Be Shown*

According to the aforementioned German theory of *Inlandsbeziehung*, also referred to as *Inlandsbezug* or *Binnenbeziehung*, the intensity of the international public policy exception depends on the case's

319. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

320. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 574, 575 (1995).

321. *Id.*

322. *Supra* Part I.C.2; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

proximity to the forum.³²³ The theory of *Inlandsbeziehung* means “forum contacts.”³²⁴ It reflects the forum state’s interest in a close policing of its international public policy.³²⁵ There must be an interest in preventing the foreign judgment from being enforced.³²⁶ The closer the case’s connection to the requested court’s forum, the stronger the international public policy exception will be. The more connected the case is to the territory of the requested state in terms of the facts and the parties, the more interest the requested forum has to let the values of its own legal system influence the enforcement decision, and the less deference is given to the foreign court’s judgment. The connection between the situation and the forum can be of a personal or a territorial nature. On the contrary, if the link to the forum is weaker, the forum’s interest in intervening is less and the level of tolerance toward the foreign judgment is higher. If the level of contacts to the forum being requested to enforce the judgment is low or non-existent, the application of the international public policy clause is softened and more tolerance should, therefore, be granted.³²⁷ In the case of punitive damages, this would mean that the amount deemed acceptable for enforcement should, all other factors being equal, be higher. The European courts’ attitude with regard to U.S. punitive damages awards will thus also depend on the case’s factual connection to their territory.

Case law explicitly highlights the closeness of the underlying case to the requested country as a valuable consideration when deciding on the enforceability of a punitive damages judgment. Both the German Supreme Court in *John Doe v. Eckhard Schmitz* and the Spanish Supreme Court in *Miller v. Alabastres* referred to the concept of *Inlandsbeziehung*³²⁸ in their reasoning.³²⁹

323. Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, *supra* note 49, at 247. See NATALIE JOUBERT, LA NOTION DE LIENS SUFFISANTS AVEC L’ORDRE JURIDIQUE (*INLANDSBEZIEHUNG*) EN DROIT INTERNATIONAL PRIVÉ [THE NOTION OF SUFFICIENT LINKS WITH THE LEGAL SYSTEM (*INLANDSBEZIEHUNG*) IN PRIVATE INTERNATIONAL LAW] 68–69 (2007), for a study of the concept from a German and French perspective.

324. Hay, *German Recognition of American Money-Judgements*, *supra* note 68, at 740; Elena Rodriguez Pineau, *European Union International Order Public*, 3 SPANISH YEARBOOK INT’L L. 43, 65 (1993-1994).

325. Baumgartner, *U.S. Judgments in Europe*, *supra* note 37, at 205 n.189.

326. Behr, *Punitive Damages in American and German Law*, *supra* note 41, at 153.

327. Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, *supra* note 49, at 246.

328. Reference can also be made to the aforementioned Swiss case between S.F. Inc. and T.C.S. AG, *supra* note 272, decided three years before the Bundesgerichtshof’s judgment in *John Doe v.*

The German Supreme Court first briefly provided insight on the extent of the concept of *Inlandsbeziehung*. The Court explained that the international public policy exception mechanism in choice of law, which was found in Article 6 of the German Code of Civil Procedure, *Einführungsgesetzes zum Bürgerlichen Gesetzbuche* (EGBGB),³³⁰ requires a sufficiently strong domestic relationship. This is more so the case for the international public policy exception in enforcement matters, which can be found in Article 328(1) of the German Code of Civil Procedure.³³¹ When a judgment is sought to be enforced, forum contacts are of even higher importance, as the court is no longer called upon to adjudicate the claim or the amount of compensation.³³² When dealing with an enforcement request, the court needs only to ascertain whether *the result* enforcement would produce would be acceptable in the forum.³³³ The German Supreme Court explained that the proportionality test must take the remoteness of the underlying fact pattern into consideration and that the absence of sufficient contacts to Germany mandates that a greater tolerance be shown toward the foreign decision.³³⁴

In the case before the German Supreme Court, the sexual abuse took place in the U.S. and both the victim and the perpetrator held American

Eckhard Schmitz. In that case the District Court of Basel held that there was, apart from the defendant's domicile, no *Binnenbeziehung*. The District Court pointed to the fact that the defendant offered its services worldwide, to the claim related to a contract regarding the transport of military goods between the U.S. and England and to the parties' choice for English law. These findings called for great restraint in the application of the public policy exception. Bundesgericht [BGer] [Federal Supreme Court] July 12, 1990, 116 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 376 (Switz.). See also Bernet & Ulmer, *supra* note 238, at 272–73; Baumgartner, *U.S. Judgments in Europe*, *supra* note 37, at 220–21; Nagy, *supra* note 72, at 9.

329. In the French case *Fontaine Pajot*, the *Cour de cassation* did not analyze the connection between the matter and the forum; it can be assumed that the connection was not at all negligible: Nagy, *supra* note 72, at 9. The damage to the vessel, for instance, occurred in a French port.

330. At the time of the judgment, Article 6 of the EGBGB provided for the public policy clause when determining the applicable law. However, nowadays the specific public policy provision of Article 40, Paragraph 3, of the EGBGB takes precedence and rules out punitive damages completely. EINFÜHRUNGSGESETZES ZUM BÜRGERLICHEN GESETZBUCH [EGBGB] [INTRODUCTORY ACT TO THE CIVIL CODE] §§ 6, 40(c), <http://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html#BJNR006049896BJNG031400377>.

331. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], art. 328, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1259 (Ger.).

332. Hay, *German Recognition of American Money-Judgements*, *supra* note 68, at 740.

333. 118 BGHZ 312 (¶ 53) (Ger.).

334. *Id.*; Zekoll, *supra* note 19, at 653.

citizenship.³³⁵ Thus, the matter involved a tort claim filed by one American against another.³³⁶ Further, both were California residents in the relevant period in which the crime occurred.³³⁷ The defendant only took up residence in Germany after his criminal conviction.³³⁸ The defendant's German nationality was the only other factor connecting the case to Germany.³³⁹ Therefore, the connection to the German forum was very low. Nevertheless, the Court employed the international public policy exception to block enforcement of the California judgment. Despite the slight connection to the forum, the German Supreme Court did not tolerate the punitive award.³⁴⁰ This reveals the Court's profound dislike for punitive damages at the time.³⁴¹

The Spanish Supreme Court, in *Miller v. Alabastres*, also stressed the importance of the case's proximity to the forum. The Court stated that it cannot lose sight of the matter's relation to the Spanish forum when deciding whether there is a violation of international public policy. The Court's statement is a clear reference to the *Inlandsbeziehung*.³⁴² However, the Spanish Supreme Court did not go beyond this mere mention and did not apply the concept to the facts of the case, at least not explicitly in the judgment. Yet, it could be argued that there was at least a certain degree of *Inlandsbeziehung* in the factual pattern because the manufacture of the trademark infringing labels took place in Spain.

In addition, the Rome II Regulation could perhaps harbor a reference to the *Inlandsbeziehung* concept. In the EU the Regulation provides the rules designating the applicable law to non-contractual obligations. Recital 32 reads:

335. 118 BGHZ 312 (¶ 1) (Ger.).

336. *Id.*

337. Nagy, *supra* note 72, at 8.

338. *Id.* at 7.

339. 118 BGHZ 312 (¶ 1) (Ger.). Hay even asserts that citizenship is not a relevant forum contact in the context of the public policy exception in enforcement cases: Hay, *German Recognition of American Money-Judgements*, *supra* note 68, at 741 n.42.

340. The low degree of connection did, however, cause the German Supreme Court to accept the award for pain and suffering. 118 BGHZ 312 (¶ 52) (Ger.).

341. Nagy, *supra* note 72, at 8.

342. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain); Requejo Isidro, *Punitive Damages: How Do They Look from Abroad?*, *supra* note 25, at 326-27; Requejo Isidro, *Punitive Damages from a Private International Law Perspective*, *supra* note 49, at 247.

[A]pplication of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, *depending on the circumstances of the case and the legal order of the Member State of the court seised*, be regarded as being contrary to the public policy (*ordre public*) of the forum.³⁴³

These two criteria, circumstances of the case and the legal order of the forum, could, with some goodwill, be understood as requiring the forum court to include *Inlandsbeziehung* as a factor in its applicable law analysis. However, this is far from certain as it has already been noted that the introduction of a principle of proximity into European Law is currently being discussed in legal theory,³⁴⁴ and that its application to the public policy exception as laid down in European regulations has not yet been established.³⁴⁵

H. The Nature of the Interests Involved

The second parameter to be evaluated before international public policy can be activated is the interest at stake. *Inlandsbeziehung* modulates the strength of the international public policy according to the closeness of the case to the forum. The stronger the interest protected by public policy, the less relevant the link to the forum must be to activate public policy.³⁴⁶ The opposite is also true. The degree of connection to the forum and the importance of the interest thus act as communicating vessels.

343. 2007 O.J. (L 199) 42 (emphasis added).

344. See, e.g., Marc Fallon, *Le principe de proximité dans le droit de l'Union européenne*, in MELANGES EN L'HONNEUR DE PAUL LAGARDE; LE DROIT INTERNATIONAL PRIVE: ESPRIT ET METHODES 241 (Marie-Noëlle Jobard-Bachelier et al. eds., 2005) (discussing the introduction of a principle into European law).

345. Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Public-Policy Exception and the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*, at 18, COM (2009) 154, <http://www.europarl.europa.eu/document/activities/cont/201012/20101210ATT08870/20101210ATT08870EN.pdf>.

346. Elena Rodriguez Pineau, *European Union International Ordre Public*, 3 SPANISH YEARBOOK INT'L L. 43, 65 (1994).

It is perhaps in this regard that the second criterion of the proportionality analysis in the Spanish case of *Miller v. Alabastres* can be given meaning. Here, the Spanish Supreme Court attached particular importance to the nature of the interests protected. The Court found that not only the Spanish legal system,³⁴⁷ but nations all over the world highly value the protection of intellectual property rights. Market economies globally set great store by the upholding of these rights.³⁴⁸ Thus, a common desire to protect the interest at stake might lead to more tolerance on the side of the enforcing court. Human rights, in particular, form an important interest to consider. But also, safeguarding of the environment, freedom, dignity, and legal certainty could be put forward as strong interests.³⁴⁹ The criterion does not cause any conceptual problems as it does not amount to *révision au fond* because the requested court is not reviewing the merits of the case.

I. Reducing the Punitive Award to the Tolerable Level Is Permissible

Once the requested court has determined that the punitive award is not excessive, it can enforce the judgment. The more difficult situation is when the punitive damages award does not pass the excessiveness test. Two possible scenarios are imaginable. First is the “selective partial exequatur,”³⁵⁰ where the court declares the judgement’s whole punitive damages heading unenforceable and enforces only the compensatory damages. Second is the “reductive partial exequatur,”³⁵¹ where the court enforces the punitive damages up to the amount that it deems to be tolerable in light of international public policy.

The first scenario establishes an all-or-nothing approach: either all punitive damages are enforced or all are rejected. Enforcement or rejection should always relate to the whole punitive award. The second scenario allows the judge to reduce the amount of the punitive damages if he finds the awarded sum excessive, instead of having to opt for either total enforcement or total rejection of the punitive award. He can determine the point at which the punitive damages become disproportionate, throw out the

347. Spanish law even provides for a coercive fine in the field of trademarks. Spanish Trademark Act (B.O.E. 2001, 45579) (Spain).

348. S.T.S., Nov. 13, 2001 (J.T.S., No. 1803) (Spain).

349. Requejo Isidro, Presentation, *supra* note 134, at 4.

350. Janke & Licari, *supra* note 31, at 803.

351. *Id.*

excessive amount, and enforce the remaining non-excessive portion of the punitive award.

The French Supreme Court opted for the first approach in *Fontaine Pajot*. The Court determined that the American judgment exceeded the 1:1 ratio between punitive and compensatory damages.³⁵² The Court found this excessive, which led to the rejection of the whole punitive damages award.³⁵³ Similarly, the German Supreme Court in *John Doe v. Eckhard Schmitz* spoke out against partitioning the punitive award by stating that the requested court should not be allowed to cut up the punitive damages awarded based on its own free judgment.³⁵⁴

The choice between both options stems from different interpretations of the prohibition of *révision au fond*. The first approach incorporates the idea that the arbitrary splitting of the punitive award would amount to forbidden *révision au fond*. Under this view, the judge is not allowed to chop the punitive award according to his own discretion to strike the right balance, but can only accept or reject the punitive award as a whole.³⁵⁵ The punitive damages heading should be enforced or rejected in its entirety. Under the second approach, the judge is allowed to cut the punitive award to a level that is acceptable to the forum. The prohibition to review the merits of an incoming judgment does not prevent the requested court to sever the acceptable amount of punitive damages from the excessive, non-tolerable part of the punitive award. Instead of having to rule on the head of punitive damages as a whole, the court is allowed to modify the amount to a numerical level compatible with the international public policy of the forum.³⁵⁶

A European court should be able to reduce the amount of the punitive damages to the level it finds acceptable in light of international public policy. The all-or-nothing approach requiring the court to either take or leave the punitive award should not be followed. Cutting down the punitive

352. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.).

353. *Id.*

354. 118 BGHZ 312 (¶ 68) (Ger.); Nettesheim & Stahl, *supra* note 45, at 423.

355. Nagy, *supra* note 72, at 8.

356. Georges A.L. Droz, *Variations Pordea (À propos de l'arrêt de la Cour de cassation; 1^{re} Chambre civile, du 16 mars 1999)*, in 89 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 181, 194 (2000); Janke & Licari, *supra* note 31, at 803; Licari, *Taking Punitive Damages Seriously*, *supra* note 66, at 1261; Nagy, *supra* note 72, at 11; Strebel, *supra* note 314, at 104; Favalli & Matthews, *supra* note 272, at 635.

award to, for example, the tentatively suggested 1:1 ratio, does not amount to *révision au fond* because the European court is not giving its opinion about the merits of the foreign case. The requested court is not reforming the foreign court's examination of the facts or second-guessing the adjudication of the matter. It is not questioning whether the foreign decision was correct in fact and/or in law. By curtailing the amount of punitive damages, the requested court is merely stating that, for private international law purposes, the forum's tolerance of this particular remedy goes up to a certain mathematical level, but not beyond.

Even if it is not the intention of the requested court, curtailing of the punitive award may, *in effect*, amount to such a forbidden *révision au fond*. Prohibiting the curtailing of compensatory damages while, at the same time, calling for a reduction of punitive damages amounts to a double standard. However, even if the reduction of the punitive damages is seen as a form of *révision au fond*,³⁵⁷ this does not change our preference for the technique. Fellow advocates of the reductive partial exequatur approach call for the setting aside of the prohibition to allow the judge to enforce the punitive award up to the amount that passes the excessiveness scrutiny.³⁵⁸ This is not an absurd proposal because, arguably, any substantive international public policy control already amounts to an explicitly permissible limited *révision au fond*.³⁵⁹ Allowing the numerical chop would then be included in the realm of permissible international public policy review.

The approval of the second approach brings a degree of fairness into the excessiveness analysis. Under the all-or-nothing approach, one excess dollar could theoretically be the difference between being able to enforce all of the punitive damages or none of them. Withholding a large punitive award based on the presence of a small excessive amount of punitive damages would be a denial of justice and an unjust penalty for the plaintiff.³⁶⁰ The possibility of a partial enforcement of the punitive damages leads to fairer results for plaintiffs and defendants who are no longer

357. See HÉLÈNE GAUDEMET-TALLON, 4 COMPÉTENCE ET EXÉCUTION DES JUGEMENTS EN EUROPE 489 (2010) (asserting in the context of the Brussels I Regulation that reducing the amount of a "condamnation" that is considered excessive (i.e., reductive partial exequatur) is not allowed as it is a form of *révision au fond*).

358. Droz, *supra* note 356, at 194; Janke & Licari, *supra* note 31, at 803; Licari, *Taking Punitive Damages Seriously*, *supra* note 66, at 1262.

359. Nater-Bass, *supra* note 9, at 159.

360. Droz, *supra* note 356, at 194; Janke & Licari, *supra* note 31, at 803; Licari, *Taking Punitive Damages Seriously*, *supra* note 66, at 1261.

subjected to a random spin of the wheel. Plaintiffs in American litigation should also not be fearful that the amount of punitive damages that they are requesting is going to be deemed excessive for European enforcement standards. They can claim the amount they feel appropriate before the American courts without concern that they will be unable to enforce any of the punitive damages in Europe because the amount of punitive damages received is too high.³⁶¹

CONCLUSION

The rise of global commerce and intercontinental tourism likely increases the number of cross-border lawsuits. In transnational litigation, legal systems have to deal with concepts that are alien to the substantive law of the forum. Such a situation arises when a European court is requested to enforce an American judgment for punitive damages. As punitive damages are not officially used in continental Europe, the remedy exemplifies “the *Atlantic divide*”³⁶² between Civil Law and Common Law jurisdictions.

In Europe, American punitive awards are subjected to a patchwork of national laws governing the recognition and enforcement of judgments. On the basis of their international public policy exception, EU Member States have adopted divergent attitudes towards American punitive damages awards. The Supreme Courts of Germany and Italy have turned down punitive damages in enforcement proceedings because they argued that the concept itself violates international public policy. On the other hand, the French and Spanish Supreme Courts have accepted the compatibility of punitive damages with international public policy. Both 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 stomach,³⁶³ punitive damages of an excessive nature are problematic in light of the international public policy exception.

361. Admittedly, the use of punitive damages in the U.S. as a pressure method towards the defendant will only increase. This is the so-called *in terrorem* effect of punitive damages. The threat of punitive damages may be abused as a wild card to force higher settlements. See George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 829–30 (1996).

362. de Kezel, *supra* note 1, at 214 (emphasis added).

363. Nagy, *supra* note 72, at 7.

The latter approach is preferred. A dismissal of punitive damages on principle fails to recognize the legal reality in the Member States. The private law systems of the Member States contain remedies and doctrines that deviate from the strictly compensatory agenda of tort law. Their pursuit of deterrence and/or punishment puts pressure on the exclusively compensatory function of the civil liability system. Although this observation might threaten the *dogmatic purity* of the system, it is a reality that cannot be ignored.³⁶⁴ The existence of such punitive-like measures might not be enough to declare a revolution in substantive law, but arguably does have an impact on the international public policy exception. The traditional refusal to enforce American punitive damages should, therefore, be replaced by an examination of the amount of the punitive damages awarded.

This article advanced a number of concrete guiding principles that European judges can work with when confronted with American punitive damages. These rules are not all-encompassing or exhaustive, but can help requested courts make well-informed decisions. Further, these recommendations to the European courts are formulated in such a way as to respect the prohibition of *révision au fond*.

The guidelines can be summarized as follows:

- Enforcement is the rule, and the international public policy mechanism is the exception: a rejection on public policy grounds is an exceptional measure and should be employed as such.
- The compensatory damages awarded should always be granted enforcement: courts are encouraged to enforce separate awards for compensatory damages.
- The compensatory portion of the punitive damages should be enforced: any clearly exposed part of the punitive damages award that fulfils a compensatory role is unproblematic in light of the international public policy exception and should be accepted by the courts of the EU Member States.

364. Hendrik Auf'mkolk, *U.S. Punitive Damages Awards Before German Courts – Time for a New Approach*, FREIBURG L. STUDENTS J., Nov. 2007, at 10; Otero Crespo, *supra* note 127, at 300.

- U.S. punitive damages going above a 9:1 ratio are, in principle, suspect: the United States Supreme Court's rejection of double-digit ratios between punitive damages and compensatory damages should act as a strong signal to Member State courts regarding the maximum level of punitive damages the latter should tolerate.
- A 1:1 ratio could be a possible boundary for the enforcement of U.S. punitive damages awards: in individual cases this maximum ratio can then be further modulated according to (1) the degree of connection between the case and the forum, and (2) the nature of the interests protected.
- Courts may reduce the head of punitive damages to an acceptable amount: the excessiveness analysis of the American punitive damages should not be construed as an all-or-nothing affair.

