FROM DOWN UNDER ALL THE WAY TO THE EUROPEAN UNION – A COMPARATIVE LEGAL ANALYSIS OF THE ENFORCEMENT OF AUSTRALIAN EXEMPLARY DAMAGES IN THE EU

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When an Australian court grants exemplary damages, the defendant must pay this amount to the plaintiff. If the defendant is unwilling to pay, the judgment needs to be enforced against his assets. However, if the debtor has no or insufficient assets in Australia, enforcement might have to take place abroad, for instance in the European Union (EU) Member State where the judgment-debtor does have assets. The authors use several examples ranging from 'defective' products to sport injuries to discuss the intercontinental enforcement of the remedy of exemplary damages. The article first examines to what extent and under which circumstances exemplary damages are available in Australia. The answer to this question subsequently paves the way for the far more prominent issue regarding the enforcement of exemplary damages in the EU Member States. The analysis shows that this can be problematic considering that the traditional stance in the EU with regard to the enforcement of exemplary damages is one of hostility and aversion. There are, however, signs of acceptance in some EU countries. The article discusses the current position in five important EU Member States: Germany, Italy, Spain, France and England. When enforcement of the Australian judgment containing exemplary damages in Europe becomes necessary, the victim's chances (as far as the exemplary damages are concerned) thus depend on the location of the wrongdoer('s assets).

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I INTRODUCTION

The article focuses on the enforcement of Australian exemplary damages[3] in the European Union (EU). Exemplary damages punish the defendant for conduct that involves a certain degree of aggravation and deter him and others from similar misbehaviour in the future. When an Australian court orders exemplary damages against the defendant, he or she must pay the amount due to the plaintiff. If a debtor is unwilling to pay, the judgment needs to be enforced against his assets. However, it is conceivable that the debtor has no or insufficient assets in Australia. As a consequence, enforcement might have to take place outside Australia, for instance in the EU Member State where the judgment-debtor does have assets. Several examples show that this cross-border legal scenario is not purely hypothetical and that parties at one point or another might be confronted with this situation.

[3] In this regard, Tilbury and Luntz conclude that '[i]n Australian law, we tend to speak of "exemplary" rather than "punitive" damages. At first sight, this seems a mere matter of terminology; it is, however, much more. The distinction points to the origins of our modern law of exemplary damages, and to some of the difficulties occasioned by those origins' (Michael Tilbury and Harold Luntz, 'Punitive Damages in Australian Law' (1995) 17 (4) *The Loyola of Los Angeles International and Comparative Law Review* 769, 773). The article, therefore, uses exemplary damages to refer to punitive damages.

Product liability, for instance, offers an interesting perspective from which to study the intercontinental enforcement of the remedy of exemplary damages.[4] Australia is an important economic and trading partner for the EU and the converse is even more true.[5] Despite the fact that the EU and Australia are 'like-minded partners who share many common concerns in today's international trade environment',[6] problems can arise when defective or unsafe products manufactured in EU Member States cause damage, harm or physical injuries to consumers buying these products on the Australian market. If the European manufacturer of the defective product is merely exporting its goods, it mostly has no corporate presence in Australia and, therefore, no assets. In such a case, enforcement will need to take place in the European country where the manufacturer has its seat or possibly in any other European country where it holds assets. The PIP breast implant case can be taken as an illustration. The case concerned a French company (*Poly Implant Prothèse*) which produced defective breast implants. As of 2001, manufacturers of breast implants were only allowed by French legislation to use one type of medical silicone gel for their products. However, PIP did not comply with this requirement. It developed an elaborate scheme of deceit and continued to use sub-standard industrial silicone gel for breast implants in order to cut costs.[7] Hundreds of thousands of PIP breast implants filled with sub-standard silicone gel were distributed around the world including Australia. Currently, Australian women face ruptures of the implants which might cause physical injuries.[8] In this regard, reference can be made to the *Fimez* case. In that case an American citizen claimed damages in Alabama from an Italian manufacturer of a defective crash helmet for harm suffered due to its malfunctioning and had to enforce the judgment in Italy. Although having its roots in the United States (U.S.), the *Fimez* litigation shows

[4] It should be noted that the applicable law in international product liability disputes may not always be Australian even if the defendant manufacturer is an EU company and the plaintiff an Australian consumer. However, for the purposes of this article we assume that Australian law governs cross-border cases involving products manufactured in the EU. Similarly, the question whether damages is classified as substance or procedure in Australia is not the cornerstone of this article. Therefore, we start from the hypothesis that in both cases (substance and procedure), Australian law exclusively applies.

[5] See in this regard: EU-Australia Partnership Framework of October 2008. European Commission, 'European Union – Australia Partnership Framework. A strategic partnership built on shared values and common ambition' (October 2008) <http://eeas.europa.eu/delegations/australia/documents/more_info/partnership_framework2009_en.pdf>. See also: European Commission, 'Australia' (27 October 2015) <http://ec.europa.eu/trade/policy/countries-and-regions/countries/australia/>.

[6] Ibid.

[7] See for more information on the PIP-case: Barend van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 *European Journal of Risk Regulation* 338, 338-350; Baylie M. Fry, 'A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry' (2014) 22 *Willamette Journal of International Law & Dispute Resolution* 161, 169-170.

[8] Australian Government, Department of Health Therapeutic Good Administration, 'PIP breast implants - an updated Australian perspective' (23 March 2012) <https://www.tga.gov.au/alert/pip-breast-implants-updated-australian-perspective>.

that the enforcement of a judgment awarding exemplary damages following injuries caused by defective products might at one point become necessary in the EU.[9]

Another situation in which Australian victims might have to seek enforcement in the EU of an Australian ruling awarding exemplary damages can occur in the field of sports. Take the example of a rugby player who tackles an opponent during a professional game in Australia. Those tackles can be committed with the intention to hurt the other player or with disregard for the latter's safety. Once the victim has filed a law suit to recover the damages he suffered following such a deliberate act, it is conceivable that exemplary damages become available.[10] Given the unpredictable nature of professional athletes' careers and the structure of the global rugby market, it is possible that by the end of the suit the tortfeasor has transferred to another club in an EU Member State (think of major rugby nations such as France, Spain, Italy and England[11]) and that enforcement outside of Australia thus becomes necessary.

Finally, an analogy with decisions in the United States awarding punitive damages is particularly interesting. It is, for instance, not unthinkable that a U.S.-like 'stiletto case' or other cases in which visiting foreigners (and more specifically: EU citizens) cause physical injuries to local residents can occur in Australia. In the 'stiletto case' of 2014, a Belgian female tourist wounded an American girl at a party in a hotel in New York by stabbing her with her stiletto. The victim brought proceedings in New York, requesting punitive damages in addition to compensation. As the Belgian girl was merely visiting the United States and has since returned to her home country, the necessity of enforcing the judgment in Belgium becomes probable.[12] Likewise, reference can be made to a recent Florida jury verdict that hit Gawker Media and its founder with $25 million in punitive damages for publishing a sex tape of ex-pro wrestler Hulk Hogan.[13] An EU citizen or a media company with assets in the European Union might also violate an Australian citizen's privacy when publishing a similar tape. If the Australian court awards exemplary damages in such a case, the plaintiff might have to seek their enforcement in Europe.

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[9] See for a discussion of the case *infra* part III.B.2.
[10] See in this regard *Rogers v. Bugden* (1993) Aust. Torts Reports 81-246.
[11] These nations are all in the top 10 of the current rugby world ranking (see for more information: <http://www.worldrugby.org/rankings>).
[12] The case is currently still pending before the Supreme Court of the State of New York (*Amanda Keisoglu v. Gansevoort et al*, reference number: 160631/2014).
[13] This has been reported in several (online) newspapers (e.g. Tamara Lush, 'Hulk Hogan-Gawker Jury Awards $25M in Punitive Damages' (22 March 2016) *ABS News* <http://abcnews.go.com/Entertainment/wireStory/jury-punitive-damages-hogan-sex-tape-lawsuit-37807856>).

The article examines to what extent and under which circumstances exemplary damages would be available in Australia (part II). The answer to this question subsequently paves the way for the far more prominent issue regarding the enforcement of exemplary damages in the EU Member State where the defendant has its assets. The analysis shows that this can be problematic considering that the traditional stance in the EU with regard to the enforcement of exemplary damages is one of hostility and aversion. The article discusses the current position in five important EU Member States, both in terms of size and in terms of economy and export: Germany, England, France, Spain and Italy (part III). The main findings of the article are then summarised in the conclusion (part IV).

II GENERAL CONSIDERATIONS ON EXEMPLARY DAMAGES IN AUSTRALIA

After a discussion of the notion and availability of exemplary damages in Australia (part A), it is shown that several restrictions exist with regard to awarding such damages (part B). Despite these restrictions, exemplary damages might, nevertheless, become available which makes a study of their enforcement in the European Union highly relevant. Finally, both elements are combined in a concluding framework, which opens the door for a thorough analysis of the enforcement of Australian exemplary damages in the selected EU Member States (part C).

A *Use and Availability of Exemplary Damages in Australia*

Exemplary damages provide civil plaintiffs with additional monetary relief beyond the value of the harm incurred.[14] They are thus awarded in excess of any compensatory or nominal damages.[15] The remedy transcends the corrective objective of re-establishing an arithmetical equilibrium of gains and losses between the injurer and the injured.[16] The attitude with regard to exemplary/punitive damages in Australia and in several other common law countries such as the United States is quite different than the (current) stance in civil law countries.

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[14] Bryan A. Garner, *Black's Law Dictionary* (West Group, 2006) 175.
[15] Gabrielle Nater-Bass, 'U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries' (2003) 4 *DAJV Newsletter* 154. <http://www.arbitralwomen.org/files/publication/0210141916206.pdf>.
[16] Francesco Quarta, 'Foreign Punitive Damages Decisions and Class Actions in Italy' in Duncan Fairgrieve and Eva Lein, (eds), *Extraterritoriality and Collective Redress* (Oxford University Press, 2012) 280; Richard A. Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1998) 10 *The Journal of Legal Studies* 187.

In both civil law and common law systems, the victim of a tort committed by another person, a legal entity or the government is entitled to be placed in the situation he or she would have been in had the tort not taken place.[17] The tortfeasor must pay damages to compensate for the harm suffered by the plaintiff as a result of the tort. These compensatory damages (also referred to as actual damages) are further categorised into patrimonial and non-patrimonial damages. The former serve to reimburse the plaintiff's quantifiable monetary losses such as property damage and medical expenses. The latter compensate for non-monetary forms of damage, with physical or emotional pain and suffering and loss of reputation as most common examples.[18] Exemplary damages, on the other hand, are not (primarily) intended to compensate the plaintiff for harm done. They extend beyond the amount needed to compensate the victim. In contrast to their acceptance within common law jurisdictions, they are said to be relatively non-existent in civil law countries. Civil law countries in the European Union are wary of exemplary damages as they are administered in civil proceedings but pursue objectives which are traditionally the focus of criminal law. Exemplary damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff.[19]

Several Australian decisions have held that the purpose of exemplary damages is punishment and deterrence. They are awarded to punish the wrongdoer and deter others from behaving in the same way.[20] A similar picture emerges when taking a brief comparative look at the United States. *The Second Restatement of Torts* and *Black's Law Dictionary* also define punitive damages as 'damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future'.[21] The U.S. Supreme Court views punitive damages as 'private fines levied by civil juries to punish reprehensible conduct and to deter its future

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[17] See for a general discussion of the principles of tort law in Europe: Cees Van Dam, *European Tort Law* (Oxford University Press, 2013). See for an extensive overview of the enforcement of punitive damages in several Member States of the European Union: Cedric Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Intersentia, 2016), forthcoming.

[18] Madeleine Tolani, 'U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public', (2011) 17 *Annual Survey of International & Comparative Law* 185, 187; Thomas Rouhette, 'The availability of punitive damages in Europe: growing trend or nonexistent concept?' (2007) 74 *Defense counsel journal* 320, 325.

[19] See in that regard the case law elaborated upon *infra* in part III.

[20] See for example: *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149. See for an extensive discussion and further references to case law: Michael J. Legg, 'Economic Guidelines for Awarding Exemplary Damages' (2004) 30 (2) *Monash University Law Review* 303, 304 footnotes 7-12; Tyrone Kirchengast, 'The Purification of Torts, the Consolidation of Criminal Law and the Decline of Victim Power' (2008) 10 *University of Notre Dame Australia Law Review* 83, 91-92, footnote 41.

[21] Restatement (Second) of Torts § 908 (1979); Garner, above n 14, 175.

occurrence'.[22] In sum, punitive damages focus on the socio-legal significance of the wrongdoing and on the importance of discouraging its repetition.[23]

However, exemplary damages are not always available in Australia.[24] It is required that the defendant committed a 'conscious wrongdoing in contumelious disregard of another's right'.[25] Exemplary damages only apply where the conduct of the defendant merits punishment, which is considered to be the case where his conduct is wanton (e.g. fraud, malice, violence, cruelty or insolence).[26] Australian law does not restrict exemplary damages to any particular section of the law or a specific tort. The remedy is available whenever the plaintiff shows that the defendant acted with contumelious disregard of the former's rights.[27] It is thus no surprise that exemplary damages have already been awarded for trespass to the person, deceit or defamation.[28] More importantly, exemplary damages are also available in case of negligence but only when the defendant acted consciously in contumelious disregard of the plaintiff's rights.[29] Consequently, exemplary damages cannot be awarded in a case of alleged negligence when there is no conscious wrongdoing by the defendant. This implies that the question with regard to the availability of exemplary damages will not arise in most cases of simple negligence.[30]

The situation in Australia is once again not surprising within a comparative legal approach. The fact that the defendant has acted in an unlawful manner equally does not suffice for punitive damages to be awarded in the United States. The conduct in question must involve a degree of aggravation.[31] The *Restatement of*

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[22] *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 350 (1974).
[23] Quarta, above n 16, 280.
[24] In this regard, Legg concludes that as 'a result there must be something more than a tort for which damages are permissible' under Australian law (Legg, above n 20, 305).
[25] See for example: *Whitfeld v. DeLauret & Co. Ltd*. (1920) 29 C.L.R. 71, 77; *Tan v. Benkovic* (2000) N.S.W.C.A. 295, 46; *Uren v. John Fairjax* (1966) 40 A.L.J.R. J24, 126; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985)* 155 CLR 448, 471. See in this regard the discussion in: John Y. Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 *Columbia Journal of Transnational Law* 391, 408-409; Tilbury and Luntz, above n 3, 782, footnote 73.
[26] Harvey McGregor, *Mayne and McGregor on Damages* (Sweet & Maxwell, 1961) 196.
[27] Ian Renard, 'Uren v. John Fairfax & Son PTY. Ltd. Australian Consolidated Press v. Urew' (1968) 6 *Melbourne University Law Review* 439, 439.
[28] Gotanda, above n 25, 408; Kirchengast, above n 20, 100.
[29] See in this regard *Gray v. Motor Accident Comm'n* (1998) 196 CLR 1, 9-10, 27-29, 51. See for an extensive discussion of the availability of exemplary damages in case of negligence: Rachael Mulheron, 'The Availability of Exemplary Damages in Negligence' (2000) 4 *Macarthur Law Review* 61.
[30] *Gray v. Motor Accident Comm'n* (1998) 196 CLR 1, 9. See for a discussion of the case: Danuta Mendelson, 'Punitive Damages Sensu Stricto in Australia' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 145-160.
[31] 22 Am. Jur. 2d Damages § 569; Lotte Meurkens, 'The punitive damages debate in Continental Europe: food for thought' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 10.

Torts emphasises that 'punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others'.[32] Across the different U.S. states various terminology is employed to express this required high standard of misconduct: 'egregious', 'reprehensible', 'bad faith', 'fraud', 'malice', 'outrageous', 'violent', 'wanton', 'wicked' and 'reckless'.[33] Mere negligence can never form the basis for a punitive damages award.[34] Some states allow punitive damages in cases where the tortfeasor's behavior amounts to gross negligence, but then the negligence must be so gross that there was a conscious indifference to the rights and safety of the plaintiff.[35]

B *Restrictions on the Availability of Exemplary Damages in Australia*

Besides the requirement that the defendant's behaviour needs to qualify as conscious wrongdoing in contumelious disregard of another's right, there are three other limitations on the availability of exemplary damages in Australia.

Firstly, exemplary damages are not available if the defendant has already been substantially punished for the same conduct in criminal proceedings. This is because the purposes for awarding exemplary damages, namely punishment and deterrence, have already been met if substantial punishment is imposed by criminal law.[36]

Secondly, there are restrictions with regard to the amount of exemplary damages that can be awarded. Any relevant fact may be considered (e.g. the nature of the defendant's conduct, the extent of the injury caused by the defendant and the latter's capacity to pay exemplary damages) to establish the amount of exemplary damages. The principal focus, however, is on the wrongdoer and not on the wronged party or the tort.[37] More importantly, Australia prohibits excessive awards of exemplary damages. In general, an award of exemplary damages is excessive if

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[32] Restatement of Torts, § 908.
[33] 22 Am. Jur. 2d Damages § 558; Anthony J. Sebok, 'Punitive Damages in the United States' in Helmut Koziol and Vanessa Wilcox, (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer Vienna, 2009) 181; Kathleen Browne, 'Punitive damages in the U.S.: a primer for insurance buyers and brokers' (2011) 4 *Swiss Reinsurance Company* <http://www.thefederation.org/documents/06.Punitive_Damages_in_the_US-Browne.pdf>.
[34] 25 C.J.S. Damages § 205; Linda L. Schlueter and Kenneth Robert Redden, *Punitive Damages* (LEXIS Pub., 2005) 162.
[35] Schlueter and Redden, above n 34, 161; Sebok, above n 33, 155.
[36] See for example *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 14. See in this regard also: Legg, above n 20, 305; Mendelson, above n 30, 152; Andrew Robertson and Hang Wu Tang, *The Goals of Private Law* (Bloomsbury Publishing, 2009) 276; Gotanda, above n 25, 409.
[37] *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 7. See for an extensive discussion and further references: Gotanda, above n 25, 409-411.

no reasonable jury could have arrived at the number or if the award is out of all proportion to the circumstances of the case.[38] In this regard, Gotanda even concludes that 'Australian courts have expressed concern about the size of punitive damages awards and, as a result, they have insisted that juries be appropriately instructed on the need for restraint and moderation'.[39]

Thirdly, the 'power of courts to award punitive damages' has been restricted in several cases by legal constraints.[40] Although legislation can explicitly stipulate that courts are allowed to award exemplary damages in specific circumstances,[41] their availability is subjected to limitations in other fields. For instance, the Defamation Act in New South Wales prevents courts from awarding exemplary damages in defamation claims.[42] In the field of product safety, Section 87ZB of the *Australian Consumer Law*, which applies to manufacturers of goods with safety defects, contains one of the most important limitations. The Section stipulates that a court is not allowed to grant exemplary damages or aggravated damages in respect of death or personal injury.[43] The prohibition applies to negligently and intentionally caused personal injury.[44] Although Section 87ZB does not apply to all sections of the ACL,[45] it includes Division 2 of Part 3.5. of the ACL dealing with defective goods actions against manufacturers.[46] Consumers thus need to find recourse in other grounds to claim exemplary damages from the manufacturer. This is once again quite challenging. All the Australian Parliaments, for instance, enacted Tort Reform legislation, which imposes tests for the availability of damages and caps on their quantum.[47] The Northern Territory Parliament even prohibited 'exemplary damages in respect of a personal injury'.[48] Several other States have implemented legislation which places limits on the award of exemplary damages under the tort of negligence. In Queensland, Section 52 of the *Civil Liability Act 2003* provides that a court cannot award exemplary damages in

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[38] *Coyne v Citizen Finance Ltd* (1991) 172 CLR 21 1, 238 as referred to in Legg, above n 20, 306. See on the discussion of the amount of exemplary damages: Tilbury and Luntz, above n 3, 789-792.
[39] Gotanda, above n 25, 410-411 with further references in footnote 111.
[40] Mendelson, above n 30, 158.
[41] See in this regard the discussion and references *infra* in footnote 66 to the new Commonwealth Act that would provide for a statutory cause of action for serious and intentional invasions of privacy.
[42] Defamation Act 2005 (NSW) s 35 as reported in https://www.alrc.gov.au/publications/11-remedies-and-costs/exemplary-damages#_ftn32
[43] *Competition and Consumer Act 2010 – Schedule 2* (Australian Consumer Law), s 87ZB.
[44] Mendelson, above n 30, 158.
[45] Section 87ZB (2) of the ACL stipulates that the 'section does not affect whether a court has power to award exemplary damages or aggravated damages: (a) otherwise than in respect of death or personal injury; or (b) in a proceeding other than a proceeding to which this Part applies'.
[46] Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 324.
[47] Mendelson, above n 30, 158.
[48] *Personal Injuries (Liabilities and Damages) Act 2003 (NT),* s 19 as reported in Mendelson, above n 30, 158.

relation to a personal injury claim unless the act causing injury was an unlawful intentional act done with intent to cause personal injury.[49] Some States (e.g. New South Wales[50] and the Northern Territory[51]) even went further and abolished exemplary damages for negligence claims.[52] At the same time, there are States (e.g. Tasmania,[53] Southern Australia[54] and Western Australia[55]) where legislation dealing with civil liability does not (explicitly) refer to exemplary damages in relation to either intentionally or negligently inflicted personal injuries. This implies that exemplary damages might still be available for negligence in those states[56] and governed by common law.[57]

C *Exemplary Damages Down Under Before the Enforcement in the European Union?*

Australian legislation can impose restrictions on the amount or availability of exemplary damages in Australia. Moreover, the award of exemplary damages in case of mere negligence raises 'difficult questions'.[58] The defendant's conduct must have been deliberate in order for exemplary damages to be awarded. This is not always required in cases of simple negligence. In this regard, Australian courts have ruled that exemplary damages are not limited to intentional torts but that the defendant's action must be reckless or deliberate before liability for exemplary damages for non-intentional torts such as negligence can be imposed.[59] Exemplary damages can be granted if the defendant had a conscious appreciation of the risk and was subjectively reckless.[60] A defendant must have engaged in conscious

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[49] *Civil Liability Act 2003 (Qld),* s. 52. See for a discussion: Jocelyn Kellam and Luke Nottage, 'Australian Product Liability Law. Overview and Introduction' (September, 2007) *British Institute of International & Comparative Law* 15
<http://www.biicl.org/documents/239_overview_australia_-_sept_2007.pdf>.
[50] *New South Wales, Civil Liability Act 2002 (NSW),* s 21.
[51] *Personal Injuries (Liabilities and Damages) Act 2003 (NT),* s 19.
[52] See in this regard: Barnett and Harder, above n 46, 317; Gotanda, above n 25, 409-410; Mark Doepel and Chad Downie, 'A Comprehensive Guide to Tort Law Reform throughout Australia' (2006) *Kennedys* 11
<http://www.kennedyslaw.com/files/Uploads/Documents/AusGuidetoTortLaw_November2006.pdf>.
[53] *Civil Liability Act 2002* (Tas).
[54] *Civil Liability Act 1936* (SA), s 70 (2).
[55] *Civil Liability Act 2002* (WA), s 6(1); *Civil Liability Act 2002* (WA), s 3A(1)(a) and (b).
[56] Barnett & Harder, above n 46, 317 with references in footnote 88.
[57] Mendelson, above n 30, 159; Ian R. Freckelton and Kerry Anne Petersen, *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 402.
[58] Barnett & Harder, above n 46, 317.
[59] See in this regard the discussion above in part II.B. See for example: *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 9-10 & 27-29 as reported in Barnett & Harder, above n 46, 317. See for a discussion of exemplary damages in case of negligence: Mulheron, above n 29, 69 concluding that following the decision in *Gray* 'the High Court confirmed that there may be rare cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff'.
[60] Barnett and Harder, above n 46, 317 with references in footnote 88.

wrongdoing or must have acted with contumelious disregard of the plaintiff's rights.[61] Although it remains challenging for plaintiffs to establish such behaviour, exemplary damages might, nevertheless, become available under the examples previously mentioned.

This situation can, for instance, present itself in cases of defective products imported from the EU into Australia. In the PIP case, the founder and former CEO Jean-Claude Mas of the French company admitted filling the implants with an unapproved homemade recipe made of industrial-grade silicone gel. Mas and four PIP executives, including the chief financial officer, have recently been charged with aggravated fraud by a French court.[62] Such charges can amount to conscious wrongdoing or behaviour with contumelious disregard of the plaintiff's rights. In this regard, the American *Ford Pinto* case illustrates that it is not unthinkable that exemplary damages become available if a manufacturer knows that its products are defect. The driver of a Ford Pinto was killed when the car exploded after a rear-end collision and his passenger was badly burned and scarred for life. The jury's original punitive damages verdict amounted to $125 million. This award was reduced on appeal to $3.5 million. The plaintiffs alleged that the car's design allowed its fuel tank to easily be damaged in the event of a rear-end collision resulting in an explosion. Ford was aware of this design flaw and the corresponding risk but failed to undertake an $11 repair as it reasoned that it would be cheaper to pay off possible lawsuits for resulting deaths.[63]

Similarly, a professional rugby player's assault of an opponent during a sports game might be qualified as conduct with contumelious disregard of the plaintiff's rights. In *Rogers v. Bugden*, for instance, the defendant was found to have assaulted Rogers during a rugby match. The trial judge found that Bugden had delivered a blow to Rogers's head with his forearm. It ruled that the assault was done deliberately with the intent to hurt and that it constituted an infringement of the

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[61] See for example: *Whitfeld v. DeLauret & Co. Ltd*. (1920) 29 C.L.R. 71, 77; *Tan v. Benkovic* (2000) N.S.W.C.A. 295, 46; *Uren v. John Fairjax* (1966) 40 A.L.J.R. J24, 126; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985)* 155 CLR 448, 471. See in this regard the discussion in Gotanda, above 25, 408-409; Tilbury and Luntz, above n 3, 782, footnote 73.

[62] *Tribunal Correctionnel Marseille*, December 10, 2013. See for a discussion: Christian Fraser, 'Breast implants: PIP's Jean-Claude Mas gets jail sentence' (10 December 2013) *BBC News* <http://www.bbc.com/news/world-europe-25315627>.

[63] *Grimshaw v. Ford Motor Co*., 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) as discussed by Andrew Morrison and Mary Sheargold, '"The reports of my death are greatly exaggerated": Exemplary damages in Australia', (10 December 2007) *Clayton Utz, Product Risk Insights* <www.claytonutz.com/publications/newsletters/product_risk_insights/20071210/the_reports_of_my_death_are_greatly_exaggerated_exemplary_damages_in_australia.page>. This phenomenon is referred to as a 'lucrative wrong' ('faute lucrative' in French). Punitive damages are a tool to combat such behaviour and to convey the message to the wrongdoer and to the public at large that 'tort does not pay'.

rules of the game. An appeal to the Court of Appeal in New South Wales was dismissed and damages were even increased. Bugden was eventually ordered to pay $79,154.60, which included $7500.00 in exemplary damages.[64]

Finally, the dissemination of a sex tape by a publisher in the EU involving an Australian citizen might be qualified as an exceptional circumstance, which both seriously and intentionally or recklessly infringes the plaintiff's privacy. In this regard, the proposal for a new Commonwealth Act that provides for a statutory cause of action for serious and intentional invasions of privacy is particularly topical.[65] The Australian Law Reform Commission proposed that a court should be given discretion to award exemplary damages in exceptional circumstances. If the court does indeed decide to grant exemplary damages for the publication of such a tape infringing the privacy of an Australian citizen, the question of enforcement in the EU becomes particularly relevant.[66]

III ENFORCEMENT OF AUSTRALIAN EXEMPLARY DAMAGES IN THE EUROPEAN UNION

Once a final judgment has been rendered in Australia, the subsequent step is to obtain payment through the execution of the judgment. If the defendant does not have any (or insufficient) assets in Australia, enforcement of the judgment within the EU might become necessary. The venue for enforcement can be located in the EU Member State where the defendant has its seat or in any other Member State where the individual or company holds property (in the broadest sense of the word).

The compensatory damages awarded in Australia will generally not pose any problems in terms of enforcement in the European Union.[67] The exemplary damages granted by the Australian court, however, are a far more tricky issue given the divergent views on the exequatur of exemplary/punitive damages within the European Union. Traditionally, the European Member States have exhibited an attitude of distrust and antipathy towards exemplary/punitive damages. However,

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[64] *Rogers v. Bugden* (1993) Aust. Torts Reports 81-246. See for a discussion of the case: Pauline Sadler, Cameron Yorke and Kyle Bowyer, 'The Effect of the Decision in McCracken v Melbourne Storm Rugby League Football Club on Professional Sport in Western Australia' (2006) 12 *Journal of Contemporary Issues in Business and Government* 29, 36; Pauline Sadler and Rob Guthrie, 'Sport Injuries and the Right To Damages' 2001 (3) *Sports Administration* 9, 13.

[65] Proposal 11-5 in Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era', Discussion Paper 80, 31 March 2014 <https://www.alrc.gov.au/publications/serious-invasions-privacy-dp-80>.

[66] See for more information <https://www.alrc.gov.au/publications/11-remedies-and-costs/exemplary-damages>.

[67] Enforcement could of course be rejected for reasons of procedural public policy such as a violation of the rights of defence.

judicial decisions in Spain and France indicate an increased openness for this controversial remedy.

In this article, we discuss the enforcement chances of exemplary damages in five EU countries: Germany, Italy, Spain, France and England. The selection of these five Member States is inspired by two considerations. First, over 60 % of the European Union's population lives on the territory of any of these five nations.[68] Moreover, these countries represent the five largest economies of the European Union.[69] Second, in an area of law where the available case law is sparse, Italy, Germany, France and Spain are particularly interesting because the Supreme Courts of those countries have decided on the issue of the enforceability of (American) punitive damages. Their approaches represent the different sides of the spectrum. England is also included because of its familiarity with exemplary damages. As English law provides for exemplary damages[70], it is interesting to get acquainted with its private international law position on foreign exemplary damages.

It should be noted that the cases discussed below all originated in the United States. In the five EU Member States that fall within the scope of this article courts have, at least as far as the reported case law is concerned, thus far only had to deal with American awards for punitive damages. The inferences that can be drawn from these decisions are, nevertheless, equally valid for Australian awards for exemplary damages. Therefore, the references to punitive damages in the following paragraphs should be read as applying to exemplary damages as well unless indicated otherwise.

First, the pivotal mechanism of (international) public policy is discussed. The (international) public policy exception plays a crucial role in the enforcement process as it is the argument used to deny exequatur to punitive damages awards (part A). Subsequently, the judgments of the German and Italian Supreme Court with regard to the enforcement of punitive damages are scrutinised. The Supreme Courts of both Germany and Italy have demonstrated a negative stance toward American punitive damages (part B). Conversely, decisions of the Spanish and French Supreme Courts provide for a much more tolerant attitude toward such

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[68] European Union, 'EU member countries' (4 November 2015) <http://europa.eu/about-eu/countries/member-countries/index_en.htm>. In our calculation the United Kingdom instead of England is used.

[69] The figures of the year 2013 are available on the website of the International Monetary Fund: International Monetary Fund, 'World Economic and Financial Surveys – World Economic Outlook Database' (October 2013) <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx>.

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

damages, although the openness is by no means unbridled (part C). Finally, the situation in England, the birthplace of common law punitive damages[71], is elaborated upon. Despite the current legal uncertainty, the outlook tends be more positive than negative (part D).

A *International Public Policy Exception*

There is no treaty between the European Union and Australia arranging for the mutual recognition and enforcement of judgments. Individual Member States equally have not concluded bilateral or multilateral conventions with Australia. The only exception is the United Kingdom (of which England forms a part). There is an Agreement regarding reciprocal recognition and enforcement of civil and commercial judgments between the UK and Australia but this instrument does nothing more than enumerating the legislation under which each party recognizes and enforces the judgments of the other nation.[72] The recognition and enforcement of Australian decisions in the examined EU Member States is, therefore, governed by the respective countries' national rules of private international law.

The decision whether to grant enforcement to Australian awards of exemplary damages or to refuse it boils down to the question whether exequatur of the award would be compatible with the public policy of the requested forum. Contrariety to public policy is a ground for refusal in all five selected EU Member States. The notion of public policy should, however, be understood as *international* public policy.

In private international law, we deal with a more restricted form of public policy, namely international public policy.[73] A legal system is required to be more tolerant in cross-border matters than in purely domestic affairs.[74] International

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[71] Gotanda, above n 25, 398.

[72] Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters of 23 August 1990, Australian Treaty Series 1994, n 27, UK Treaty Series 1995, n 45, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1994/27.html>.

[73] Pierre Mayer and Vincent Heuzé, '*Droit international privé*' (Montchrestien, 2004) 149 n 205; Alex Mills, '*The Confluence of Public and Private International Law – Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*' (Cambridge University Press, 2009) 275-277; Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 *Journal of Private International Law* 201, 213; Patrick Bernard and Hiba Salem, 'Further developments for qualification of foreign judgments for recognition and enforcement in France: the test for punitive damage awards' (April 2011) *International Bar Association* 16, 18.

[74] Benjamin Janke and François-Xavier Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) 60 *The American Journal of Comparative Law* 775, 792.

public policy is, despite its name, a purely national concept.[75] It contains those fundamental rules of internal public policy that a legal system wants respected in international cases as well.[76] International cases thus trigger the more narrow concept of international public policy. This is the appropriate yardstick when dealing with cases which are not purely domestic.

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

B *Traditional Hostility*

In the European Union 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. These jurisdictions include Germany (part 1) and Italy (part 2).

1 *A Clear German 'Nein'*

When it comes to the enforcement of foreign punitive damages, a loud '*Nein*!' resonates throughout the German legal system. In Germany, the Supreme Court has put forward the idea that punitive damages are contrary to public policy and should thus be prohibited from entering the German legal order via a foreign judgment (part a). It has, however, left the door open for punitive damages to the extent that they pursue a compensatory function (part b).

(a) *Principled Refusal*

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

[76] Amaury S. Sibon, 'Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy' <http://ssrn.com/abstract=2382817>. Both concepts can be visualised as two concentric circles, with domestic public policy being the larger of the two. All principles belonging to international public policy also have domestic public policy status but not vice versa.

The first landmark case on the enforcement of punitive damages took place in Germany. The German Supreme Court's decision in *John Doe v. Eckhard Schmitz* of 4 June 1992 exemplifies the European courts' deeply ingrained disapproval of punitive damages. The *Bundesgerichtshof*'s judgment denied enforcement of the punitive damages portion of a California judgment on the basis of the public policy clause of article 328 (1), 4 of the German Code of Civil Procedure.

The case involved a fourteen year old boy, a California resident, who had been the victim of sexual abuse. The defendant, also living in Stockton, California, had been sentenced in California to a lengthy prison term for the sexual misconduct. The victim sought to recover damages from the culprit. Before the case was tried before the civil courts, the perpetrator, who had dual (American and German) citizenship, fled to Germany where he owned property. He did not appear in the civil case and left no property in California. The California Superior Court (County of San Joaquin) awarded the victim USD 150.260 for past and future medical expenses. For anxiety, pain and suffering the Court held an amount of USD 200.000 to be appropriate. In addition to these compensatory damages, the culprit had to pay USD 400.000 in punitive and exemplary damages. The California Court ruled that 40% of the entire award represented the plaintiff's lawyer's fees.[77] The lack of any assets in the U.S. forced the victim to enforce the judgment against the perpetrator's assets in Germany. During these enforcement proceedings the question arose as to whether a decision containing a punitive award could be enforced on German territory.[78] This issue had never been addressed before as previous awards against German parties did not need to be enforced in Germany because the defendants had sufficient assets in the U.S.[79]

At the first instance level, the judgment was allowed complete enforceability in Germany by the *Landgericht* Düsseldorf.[80] On appeal, the *Oberlandesgericht* (Court of Appeal) Düsseldorf confirmed this decision with regard to the medical expenses but rejected the USD 200.000 for pain and suffering on the basis that it was excessive in light of German public policy. It reduced the award to USD

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[77] California Superior Court (County of San Joaquin) 24 April 1985, John Doe v. Eckhard Schmitz, n 168-588, *unpublished*. The facts are to be found in the judgment of the *Bundesgerichtshof*: BGH 4 June 1992, *BGHZ* 118, 312, *NJW* 1992, 3096, *RIW* 1993, 132, *ZIP* 1992, 1256 (English translation of the relevant parts of the judgment by Gerhard Wegen & James Sherer, 'Germany: Federal Court of Justice decision concerning the recognition and enforcement of U.S. judgments awarding punitive damages' (1993) 32 *International Legal Materials* 1320, 1329); Joachim Zekoll, 'The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice' (1992) 30 *Columbia Journal of Transnational Law* 641, 644; Samuel Baumgartner, 'How well do U.S. judgments fare in Europe?' (2009) 40 *George Washington International Law Review* 173, 203.

[78] Tolani, above n 18, 186.

[79] Zekoll, above n 79, 656.

[80] Landgericht Düsseldorf 12 April 1990, 13 O 456/89, *unpublished*.

70.000. The Court also limited the punitive damages award to USD 55.065, an amount the Court believed represented acceptable lawyer's fees awarded in the guise of punitive damages.[81]

The *Bundesgerichtshof* upheld the lower courts' ruling on the medical expenses. However, it reversed the appellate court's decision regarding the damages for pain and suffering and the punitive damages. The Court accepted the full USD 200.000 for pain and suffering but rejected the punitive award in its entirety on the basis of the public policy clause.[82] In addressing the fate of the punitive award, the German Supreme Court stated that a foreign judgment awarding lump sum punitive damages of a not inconsiderable amount in addition to the damages for material and immaterial losses generally cannot be enforced in Germany.[83] The judgment was thus declared enforceable for an amount of USD 350.260.

The Court then elaborated on the reasons why the punitive damages awarded to the American plaintiff violated the public policy standard. These arguments led the *Bundesgerichtshof* to the conclusion that the punitive damages were unenforceable because they violated essential fundamental principles of German law. The German private law system provides compensation for damage suffered but does not intend an enrichment of the victim.[84] The Court held the legal principle of awarding the victim damages with the sole purpose of reimbursing what he has lost to be a fundamental principle of German law.[85] Punishment and deterrence, the main objectives pursued by punitive damages, are aims of criminal law rather than of civil law. Punitive damages allow a plaintiff to act as a private public prosecutor. This interferes with the state's monopoly on penalisation. Besides, the defendant cannot rely on the special procedural guarantees provided for in criminal law.[86]

The *Bundesgerichtshof* noted the existence of a penal institution within German civil law. Contractual penalties provide for punishment in civil law.[87] This

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[81] Oberlandesgericht Düsseldorf 28 May 1991, *RIW* 1991, 594; Zekoll, above n 79, 644.
[82] BGH 4 June 1992, *NJW* 1992, 3096-3106; Zekoll, above n 79, 644-645.
[83] BGH 4 June 1992, *NJW* 1992, 3102 and 3104; Volker Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts' (2003) 78 *Chicago–Kent Law Review* 105, 158.
[84] Wolfgang Kühn, 'Rico Claims in International Arbitration and their Recognition in Germany' (1994) 11 *Journal of International Arbitration* 37, 44.
[85] Volker Behr, 'Punitive Damages in Germany' (2005) 24 *Journal of Law and Commerce* 197, 205.
[86] BGH 4 June 1992, *NJW* 1992, 3103; Tolani, above n 18, 202; Patrick J. Nettesheim and Henning Stahl, 'Recent Development – Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award' (1993) 28 *Texas International Law Journal* 415, 419; Nils Jansen and Lukas Rademacher, 'Punitive Damages in Germany' in Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009) 76.
[87] Article 340-341 BGB (German Civil Code).

finding could have dismantled the civil-criminal division that the Court embraced and could have created an opening for punitive damages. However, contractual penalties originate from a legal agreement between parties and are, therefore, irrelevant in the eyes of the German Supreme Court.[88]

It was further held that the core aims of punitive damages, punishment and deterrence, cannot be compared with the function of satisfaction or gratification ("*Genugtuungsfunktion*"). The latter function is a component in the assessment of damages for pain and suffering in cases of bodily harm.[89] Damages for pain and suffering are meant to compensate the plaintiff but also to satisfy his feelings.[90] The *Genugtuungsfunktion* addresses the victim's need for (legal) redress after having been violated.[91] The *Bundesgerichtshof* denounced the idea that the punitive award could be enforced because it could be viewed as comparable to the *Genugtuungsfunktion*.[92] It stated that the primary factor in the assessment of damages is not the function of satisfaction but rather the degree and duration of the pain and suffering. Furthermore, because the function of satisfaction is inextricably linked with the function of compensation, the *Genugtuungsfunktion* does not give the damages for pain and suffering an immediate penal effect.[93] The German Supreme Court specified that punitive damages would be enforceable if they are intended to compensate for immaterial damage. The general amount awarded on top of the tangible and intangible damages, however, does not correspond to the *Genugtuungsfunktion*. The latter had already been served by the separate award for pain and suffering.[94] We agree with the reasoning of the *Bundesgerichtshof* on this point. The *Genugtuungsfunktion* should be viewed as a representation of the plaintiff's interest in the preservation of his subjective rights. A violation of that interest leads to an autonomous injury which requires compensation.[95]

Finally, the *Bundesgerichtshof* developed the argument that enforcement of the punitive damages award should be rejected because their availability in the U.S. and subsequent enforcement in Germany would put foreign creditors in a better position than domestic creditors. The former would be able to gain access to the

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[88] BGH 4 June 1992, *NJW* 1992, 3103.
[89] Article 253 BGB; BGH 29 November 1994, *BGHZ* 128, 117; Nettesheim and Stahl, above n 88, 421.
[90] Ulrich Magnus, 'Punitive Damages and German Law' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 252; Ernst C. Stiefel, Rolf Stürner and Astrid Stadler, 'The Enforceability Of Excessive U.S. Punitive Damage Awards In Germany' (1991) 39 *American Journal of Comparative Law* 779, 794.
[91] Stiefel, Stürner and Stadler, above n 92, 794; Nettesheim and Stahl, above n 88, 421.
[92] Nettesheim and Stahl, above n 88, 421.
[93] BGH 4 June 1992, *NJW* 1992, 3103; Behr, above n 85, 158 and 159; Tolani, above n 18, 202; Andre R. Fiebig, 'The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments' (1992) 22 *Georgia Journal of International & Comparative Law* 635, 654-655.
[94] BGH 4 June 1992, *NJW* 1992, 3103; Nettesheim and Stahl, above n 88, 421.
[95] Jansen and Rademacher, above n 88, 79-80.

assets of German debtors to a considerably greater extent than the latter would be able to, even if the latter had suffered more damage. The fact that foreign creditors can obtain punitive damages leads, according to the Court, to a lack of equal treatment.[96],97 It thus seems that the *Bundesgerichtshof* tried to protect the German industry from U.S. litigation.[98] The Court also pointed to the significant economic consequences on the insurance industry resulting from excessive punitive damages.[99]

We can turn the reasoning of the *Bundesgerichtshof* around and look at the policy-oriented argument from the point of view of an American competitor of the German judgment debtor. We can wonder why the German debtor (who is active on the American territory) should receive immunity from liability for punitive damages incurred in the United States whereas an American market participant cannot escape this liability. Furthermore, the enforcement of American pain and suffering awards seems to be unproblematic in Germany, even if they are substantially larger than the amounts German courts would grant. This would make the foreign creditor better off than the domestic one but the Court does not make mention of this scenario.[100] This line of thought applies *mutadis mutandis* to Australian exemplary damages. It seems difficult to justify that German (and by extension European) companies which place their products on the Australian market would be shielded from claims for exemplary damages by Australian consumer while at the same time Australian companies would be held liable for such damages on the basis of the same type of behaviour.

The *Bundesgerichtshof* also noted that the application of the public policy clause requires a strong link between the facts of the case and the forum where enforcement is sought.[101] For the public policy exception to apply a connection between the case and the requested state is needed. This connection is referred to as *Inlandsbeziehung* or *Inlandsbezug*. The weaker the connection, the less likely the exception will apply and the more likely enforcement will be granted.[102] If the connection to the forum country is low, that country has less interest in a close

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[96] BGH 4 June 1992, *NJW* 1992, 3104.
[97] Marta Requejo Isidro, 'Punitive Damages From a Private International Law Perspective' in Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009) 246.
[98] Samuel Baumgartner, 'Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad' (2013) 45 *New York University Journal of International Law and Politics* 965, 998.
[99] BGH 4 June 1992, *NJW* 1992, 3104; Nettesheim and Stahl, above n 88, 424.
[100] Peter Hay, 'The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court' (1992) 40 *The American Journal of Comparative Law* 729, 746-747, footnote 72.
[101] BGH 4 June 1992, *BGHZ* 118, 348.
[102] Requejo Isidro, above n 99, 245-246.

policing of its public policy.[103] In *John Doe v. Eckhard Schmitz*, there was no close connection to Germany. The crime was committed in the U.S. The young victim was a U.S. citizen. The perpetrator had dual citizenship but had only moved to Germany after having being convicted of the crime. Under these circumstances one would expect the public policy exception to be more restrained. The rejection of punitive damages despite the slight connection of the case to the forum indicates a strong German antipathy towards this type of damages.[104] Australian lawsuits for defective products on the Australian market have a weak factual link to the German territory. The judgment of the *Bundesgerichtshof*, however, learns that a low level of connection does not prevent a fully-fledged application of the public policy. The rejection in Germany of exemplary damages granted in Australia is thus highly likely.

Although the finding of incompatibility with public policy was reason enough to reject the punitive award, the Supreme Court, nevertheless, continued its analysis. It looked at the punitive damages to determine whether they would pass the proportionality test.[105] This principle gives German courts the responsibility to ensure that a damage award does not exceed the amount needed to compensate the injured party.[106] The Court did emphasise the compensation of the victim as the sole appropriate aim of a civil action. It expressed its disapproval of sums of money imposed on top of the compensation for damages. Such an approach would leave no room for any amount of punitive damages. However, the Court found that enforcement of the punitive damages award in the case before it would be excessive because the punitive damages awarded are higher in amount than the sum of all the compensatory damages.[107] This statement leads us to believe that the *Bundesgerichtshof* views a 1:1 ratio between compensatory and punitive damages as the maximum allowed.[108] This opinion was merely academic for the *John Doe v. Eckhard Schmitz* case. However, the *Bundesgerichtshof*'s opinion on proportionality will prove to be crucial if the compatibility of punitive damages with (German) international public policy can be demonstrated. Indeed, if the compatibility of the concept of punitive damages with international public policy can be demonstrated, the excessiveness check is the only obstacle remaining before

[103] Baumgartner, above n 79, 205, footnote 189.
[104] Csongor Istvan Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe' (2012) *Nederlands Internationaal Privaatrecht* 4, 8.
[105] BGH 4 June 1992, *NJW* 1992, 3104.
[106] Nettesheim and Stahl, supra n 88, 423-424.
[107] BGH 4 June 1992, *NJW* 1992, 3104.
[108] In our opinion the French Cour de Cassation adopted the same 1:1 ceiling 18 years later in *Fountaine Pajot* (see the discussion *infra* in part III.C.2.).

the judgment can be enforced.[109] The *Bundesgerichtshof*'s judgment gave no explicit indication as to the consequences of a finding of excessiveness for the enforcement of the non-excessive part of the punitive damages award, although it did mention that a court should not cut up the punitive award at its own free discretion.[110]

(b) *An Opening for Exemplary Damages Pursuing Compensation*

The *Bundesgerichtshof* carved out an exception to the unenforceability of punitive damages. It ruled that it would allow the enforcement of punitive damages if and to the extent that the punitive award serves a compensatory function.[111] Punitive damages in the U.S. can, perhaps surprisingly, serve a compensatory function. The underlying idea is that punitive damages can offer compensation for injuries that were not fully redressed by compensatory damages. In recent years scholars have rediscovered the value of punitive damages in forcing wrongdoers to reimburse the victim for all losses suffered.[112] It is possible that material and/or legal obstacles prevent the recovery of full compensation. The impossibility to prove the extent of the loss sustained can, for instance, be classified as a material obstacle.

It was to this example that the German Supreme Court most notably referred in its judgment. Under the U.S. system, the prevailing party cannot recoup legal costs from the losing party. In the United States system each party is responsible for its own attorney's fees[113], except if specific authority granted by contract or statute allows the recovery of these costs.[114] Whereas the winning party in a litigation in almost every Western democratic country can recover the attorneys' fees from the losing side, the American rules do not allow such transfer of costs. The *Bundesgerichtshof*, however, refused to accept that one of the reasons for

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[109] Interestingly, in its decision the *Bundesgerichtshof* rejected punitive damages of 'a not inconsiderable amount'. This is surprising because the amount should have been irrelevant to the German Supreme Court, given that the non-compensatory nature of the remedy alone was enough to refuse enforcement: Behr, above n 85, 159. It might indicate an opening for punitive damages after all.

[110] BGH 4 June 1992, *NJW* 1992, 3104. Likewise, the French Supreme Court in *Fountaine Pajot* seems to have decided that the exceeding of the maximum ratio leads to the rejection of the whole punitive award (see the discussion *infra* in part III.C.2).

[111] BGH 4 June 1992, *NJW* 1992, 3103.

[112] David G. Owen, 'Punitive Damages as Restitution' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 120-121; Steve P. Calandrillo, 'Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics' (2010) 78 *George Washington Law Review* 774, 802; Meurkens, above n 31, 9.

[113] Terence J. Centner, *America's Blame Culture. Pointing Fingers and Shunning Restitution* (Carolina Academic Press, 2008) 34-35.

[114] The Federal Magnuson-Moss Warranty Act forms one of the many exceptions to the default rule. It allows the prevailing consumer to obtain reimbursement of the reasonable legal costs.

awarding punitive damages is invariably the shifting of the victorious party's legal costs onto the losing party.[115]

Rather than acknowledging an automatic fee shifting intention in every punitive award, the German Supreme Court required that the foreign judgment clearly indicates the (partly) compensatory purpose of the punitive award.[116] Unless the foreign court provides clear and comprehensible information itself, the German enforcing court cannot ascertain the motives behind the award, as doing so would run counter to the prohibition of *révision au fond* laid down in article 723, (1) of the German Code of Civil Procedure. The *Bundesgerichtshof* did not find any reliable information in the California judgment or in the transcript to support the finding that the punitive damages were intended to cover the legal costs incurred by the plaintiff. Although the American court had awarded 40% of the judgment to the plaintiff's lawyer, the German Supreme Court argued that, since the 40% related to the *entire* judgment, it could not exclude the possibility that the sums paid as compensatory damages – which the *Bundesgerichtshof* appeared to find generous – already included an element addressing those costs.[117,118] The *Bundesgerichtshof* therefore could not deviate from the conclusion that the punitive award in its entirety should be rejected.[119]

The exception for legal costs is unlikely to be of great importance for Australian judgments granting exemplary damages as the sole purpose of exemplary damages in Australia is punishment and deterrence.[120] Moreover, as Australia does not follow the American rule on distribution of costs[121] but instead gives courts the power to award costs in civil proceedings at their discretion[122], there is no corresponding need to circumvent a prohibition on transfer of costs through the guise of exemplary damages.

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[115] Hay, above n 102, 747; BGH 4 June 1992, *NJW* 1992, 3103.
[116] Zekoll, above n 79, 657.
[117] Nagy, above n 106, 8.
[118] BGH 4 June 1992, *NJW* 1992, 3103.
[119] BGH 4 June 1992, *NJW* 1992, 3104.
[120] Francis Trindale and Peter Cane, *The Law of Torts in Australia* (Oxford University Press, 1985) 243; Mendelson, above n 30, 148; Legg, above n 20, 304.
[121] Mary V. Capisio and Henry Cohen, *Awards of Attorneys Fees by Federal Courts, Federal Agencies & Selected Foreign Countries* (Nova Science Publishers, 2002) 137.
[122] Australian Law Reform Commission, 'Report 75, Costs Shifting – who pays for litigation', no. 4.2. and the references contained therein < https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC75.pdf>.

2 *Similar Rejecting Attitude in Italy*

In the first Italian case dealing with the enforcement of American punitive damages, the Italian Supreme Court (*Corte di Cassazione*) took the same stance as the German *Bundesgerichtshof*. The decision of the Italian Supreme Court centred around the public policy exception found in article 64, g) of Law Number 218 of 31 May 1995.[123]

The matter originated in the U.S. state of Alabama. In September 1985, fifteen year old Kurt Parrott got involved in a traffic accident in the city of Opelika, Alabama. A car did not give way and hit the boy's motorcycle, causing him to be thrown off his bike. The buckle of his helmet failed and his unprotected head hit the pavement, resulting in instant death. His mother, Judy Glebosky, sued the driver, the American distributor of the helmet as well as some additional defendants for the amount of USD 3 million before the District Court of Jefferson County in Alabama. Fimez SpA, the Italian manufacturer of the helmet, was later also brought into the proceedings. At trial all parties agreed to a settlement, the amount of which remains undisclosed. Fimez SpA, however, had abandoned the case before this settlement agreement. In a judgment of 14 September 1994 the District Court of Jefferson County in Alabama held the defendant liable for the negligent design of the defective crash helmet.[124] The District Court awarded the victim's mother USD 1 million in damages, without further specification.[125]

When the case reached Italy's highest court in 2007, the *Corte di Cassazione* first explained that the classification of the USD 1 million damages depends on the facts of the individual situation. This analysis is left to the Court of Appeal whose factual finding cannot be reserved.

The Court of Appeal of Venice had found that the foreign judgment lacked a rationale, making it impossible to understand the grounds on which the amount was awarded, the nature of the damages recovered and the basis for the recovery of damages. It was, therefore, unable to establish and assess the criteria used by the Alabama Court to qualify the nature of the damages awarded and to quantify those damages. This led the Venice Court to the conclusion that the damages awarded

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[123] Legge italiana 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale private, *Gazzetta Ufficiale* 3 giugno 1995, n. 128, S.O. n. 68.

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

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

were punitive in nature, even though the U.S. Court did not expressly qualify them as such.[126]

The Venice Court of Appeal must have been unaware of the exact meaning of the Alabama wrongful death statute,[127] which applied in this case.[128] Under this unique rule the descendants or heirs are only allowed to recover punitive damages for wrongful death. Compensatory damages are not available. The Alabama Supreme Court, however, explained that the remedy serves multiple functions.[129] It provides a 'mere solatium to the wounded feelings of surviving relations, [or] compensation for the [lost] earnings of the slain'[130] but it also aims 'to prevent homocides'[131] by making the amount of damages dependent on 'the gravity of the wrong done'[132].[133] It was, therefore, clear that the award rendered against Fimez SpA pursued a compensatory objective, in addition to the sanctioning and deterring purposes.[134] The Venice Court did not consider this and instead seems to have based the penal classification of the judgment on the amount awarded.[135] This judicial mistake, nevertheless, does not affect the Venice Court's message as to the unacceptability of punitive damages. Besides, in light of the Alabama wrongful death statute, the American court would have probably classified the damages as punitive if it had decided to label the damages it awarded.

Although it could not have intervened even if it wanted to, the Supreme Court indicated that the Venice Court of Appeal's finding of a violation of public policy seemed justified in this case. The Supreme Court is only entitled to reverse matters of law such as a different definition of public policy. However, the Supreme Court did not find fault with the interpretation of public policy rendered by the Venice Court.[136]

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[126] Court of Appeal Venice 15 October 2001, *Rep Foro it* 2003, *Delibazione* no. 29; *Giur. It.* II 2002, 1021; Ostoni, above n 128, 249.
[127] Alabama Code § 6-5-410 (1975).
[128] Quarta, above n 16, 276.
[129] Francesco Quarta, 'Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe', Conference paper – "Extraterritoriality and Collective Redress", London 15 November 2010, Draft 19 November 2010, 7.
[130] *Savannah & Memphis Railroad v. Shearer*, 58 Ala. (1877), 680.
[131] *South & North Alabama Railroad v. Sullivan*, 59 Ala. (1877), 278.
[132] *Estes Health Care Ctrs Inc v. Bannerman*, 411 So2d (1982), 113.
[133] Quarta, above n 132, 6-7.
[134] Quarta, above n 16, 276; Quarta, above n 132, 7.
[135] Requejo Isidro, above n 99, 248; Nagy, above n 106, 7.
[136] Cass. Civ. 19 January 2007, no. 1183, *Rep Foro it* 2007 *v Delibazione* no. 13 and *v Danni Civili* no. 316; *Corr. Giur.*, 2007, 4, 497; Francesco Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' (2008) 31 *Hastings International & Comparative Law Review* 753, 757.

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

It held that penalty clauses are not punitive in nature and do not have a retributive aim. They serve to strengthen a contractual relationship and quantify damages in advance. The Supreme Court noted that the amount of the contractual penalty can be reduced if the judge finds an abuse of the parties' freedom of contract contrary to the principle of proportionality. It concluded that penalty clauses cannot be compared to punitive damages, despite the penalty being due regardless of proof of the damage suffered and a strong correlation with 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.[137]

The Court rejected the suggested equivalence between punitive damages and moral damages as well. Moral damages reflect a loss suffered by the victim and recovery is based on that loss. The focus of moral damages lies on the injured party, not on the wrongdoer. 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.[138]

According to the Italian Supreme Court, damages in private law are unrelated to the idea of punishment or to the wrongdoer's misconduct. These damages are intended to restore damage incurred by the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money. This is true for every type of civil damages, moral damages included, which are not influenced by the victim's conditions and the wrongdoer's wealth but require concrete and factual evidence of the loss suffered.[139] In other words, Italy's highest court made a clear distinction between compensatory and punitive damages, with absolutely no room for overlap whatsoever. Compensatory damages, such as moral damages, focus on the victim, relate to his or her loss and intend to make him or her whole. Punitive damages, on the other hand, centre around the wrongdoer's

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

behaviour, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.

In sum, the Supreme Court dismissed the analogy between penalty clauses and moral damages on the one hand and punitive damages on the other, as had the German Supreme Court in *John Doe v. Eckhard Schmitz*. It confirmed the Venice Court of Appeal's view that punitive damages are in violation of public policy and declined to enforce the Alabama USD 1 million award.[140] As a result, the plaintiff was left without any compensation. It has been argued that such an outcome is inconsistent with Articles 24 and 25[141] of the Italian Constitution and contrary to public policy.[142] Furthermore, given the Court's reasoning, there should be no doubt about the enforcement of compensatory damages. As long as the compensatory damages are clearly distinguished from the punitive damages, the enforcement should not pose any public policy concerns.[143]

The Italian Supreme Court affirmed its position in a judgment of 8 February 2012.[144] The Middlesex Superior Court in Massachusetts had ordered an Italian company to pay USD 8 million to an employee who had suffered injuries in an accident at the Italian corporation's U.S. subsidiary. The judgment did not mention punitive damages nor the criteria used to quantify the award. As was the case in *Fimez*, the Italian courts were confronted with a global award without further specification or demarcation. The Court of Appeal of Turin declared the whole award enforceable because the judgment did not refer to punitive damages and the amount was reasonable and fair in light of the seriousness of the employee's injuries. The Supreme Court, however, overturned the Court of Appeal's decision. It yet again labelled the damages as punitive in nature despite the fact that the U.S. judgment never discussed punitive damages. The Court reiterated that the Italian civil liability system is strictly compensatory and not punitive. The USD 8 million

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

[141] Article 24 provides: 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.' Article 25 reads: 'No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time tehe offence was committed. No restriction may be placed on a person's liberty save for as provided by law.' English translation available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

[142] Nagy, above n 106, 7; Quarta, above n 132, 8.

[143] Nagy, above n 106, 7.

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

in damages awarded was thus unenforceable on the basis of the public policy exception.[145]

In both Germany and Italy the odds of getting an Australian award for exemplary damages enforced are not very high. The *Bundesgerichtshof*'s willingness to embrace punitive damages with a compensatory purpose seems of little use for Australian exemplary damages.

C *More Welcoming Approaches*

As exemplified by the jurisdictions of Germany and Italy, the majority of EU countries will not accept punitive damages awards for enforcement. There are, however, EU Member States which adopt a far more receptive attitude toward these extra-compensatory damages. The analysis of the selected countries reveals that both Spain (part 1) and France (part 2) exhibit this new-found stance.

1 *Reversing '¡No Pasarán!' in Spain*

The Spanish Supreme Court (*Tribunal Supremo*) was the first to move away from the conservative position displayed in the other European countries.[146] In the case of *Miller Import Corp. v. Alabastres Alfredo, S.L.* of 13 November 2001, the Spanish Supreme Court dealt with a request for enforcement of a U.S. judgment containing punitive damages.[147] At the time, the civil division of the Spanish Supreme Court had exclusive jurisdiction over a request for enforcement of judgments coming from abroad.[148] Litigation between the plaintiffs Miller Import

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[145] LS Lexjus Sinacta, 'Italian Supreme Court Confirms Stance On Punitive Damages' (21 December 2012) *International Law Office* <http://www.intemationallawoffice.com>; X, 'Italian Supreme Court Affirms Position Against Punitive Damage Awards' (31 January 2013) <http://www.goldbergsegalla.com/resources/news-and-updates/italian-supreme-court-affirms-position-against-punitive-damage-awards>; Quarta, above n 16, 275, footnote 32.

[146] At least as far as the countries selected in this article are concerned. In 1999 the Greek Supreme Court (*Areopag*), for instance, ruled on the enforceability of a Texas judgment awarding punitive damages. The *Areopag* accepted that punitive damages are not as such a violation of (international) public policy. Instead, it investigated the possible excessiveness of the punitive damages. It found that the punitive award was disproportionate to the compensatory part as the amount of the punitive damages was more than the damage sustained. See: Greek Supreme Court, decision no. 17/1999, *Nomiko Bina i Miniaion Nomikon Periodikon* 2000, 461-464; Christos D. Triadafillidis, 'Anerkennung und Vollstreckung von punitive damages – Urteilen nach kontinentalem und insbesondere nach griechischem Recht' (2002) *IPRax* 236, 236-238; Marta Requejo Isidro, 'Punitive Damages: How Do They Look Like When Seen From Abroad?' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 326; Requejo Isidro, above n 99, 247; Nagy, above n 106, 9.

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

[148] Francisco Ramos Romeu, 'Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments' (2004) 38 *International Lawyer* 945, 951; Marta Requejo Isidro, 'Punitive Damages – Europe Strikes Back?', (2 November 2011) presentation delivered at the British Institute of International and Comparative Law.

Corp. (domiciled in the U.S.) and Florence S.R.L. (domiciled in Italy) and defendant Alabastres Alfredo, S.L. (domiciled in Spain) arose before the Federal District Court for the Southern District of Texas (Houston Hall) in Houston. The plaintiffs alleged that the Spanish defendant had infringed intellectual property rights by manufacturing falsified labels of a registered trademark in Spain. In a judgment of 21 August 1998, the American court followed the plaintiffs' arguments and awarded treble damages.[149] Before the Supreme Court the defendant argued, among other things, that enforcement should be refused on public policy grounds.

The section of the Supreme Court's judgment addressing the punitive damages is at times very confusing and incoherent. It offers very little structure and leaves the reader to find his own way through the vague sentences in an attempt to retrieve the Court's reasoning. After noting that punitive damages are not acknowledged in Spanish law, the Supreme Court first emphasised that its intent was not to usurp legislative competence in the matter but rather to assess the foreign judgment under substantive public policy as identified by Spanish courts.[150]

It noted that the Texas money award contained some damages that did not serve a compensatory objective but were more punitive, sanction-like and preventive in nature. The Court classified compensation for injuries as part of (Spanish) international public policy. However, it added that coercive, sanctioning mechanisms are not uncommon in the areas of (Spanish) substantive law, specifically contract law, and procedure. According to the Court, the presence of such punitive mechanisms in private law to compensate the shortcomings of criminal law is consistent with the doctrine of minimum intervention in penal law. This doctrine is embedded in the Spanish legal system and requires the legislature to first counter unwanted conduct by employing less invasive remedial intervention, such as civil penalties. Criminal penalties should only be used as *ultimum remedium*.[151] 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.[152] In Spanish law, a minimal overlap between civil law (compensation)

[149] Federal District Court for the Southern District of Texas (Houston Hall) 21 August 1998, *unpublished and archived*. The exact amount of the treble damages is unknown as it is not mentioned in the judgment of the Spanish Supreme Court.
[150] Scott R. Jablonski, 'Translation and comment: enforcing U.S. punitive damages awards in foreign courts – a recent case in the Supreme Court of Spain' (2005) 24 *Journal of Law and Commerce* 225, 229.
[151] Quarta, above n 132, 10.
[152] Nagy, above n 106, 9.

and criminal law (punishment) is thus not completely unknown.[153,154] In making their public policy analysis, the Court finally added, courts should not lose sight of the connection between the matter and the (Spanish) forum. This is of course a reference to the theory of *Inlandsbeziehung*, which regulates the strength of the public policy exception according to the case's proximity to the forum.[155] All these reasons led the Court to the revolutionary conclusion that punitive damages as a concept do not oppose public policy.[156]

This finding, however, did not end the public policy test. The principle of proportionality was the second and final yardstick the award needed to overcome before enforcement could be allowed. The Court considered two elements to be relevant when assessing the (potentially) excessive nature of the treble damages: (1) the predictability of the award and (2) the nature of the interests protected.[157]

The Court first referred to the fact that the treble damages arose *ex lege*. 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 account and foresaw a tripling of the amount of compensatory damages. This reliance on the statutory origin of the punitive damages begs the question whether punitive damages developed by case law would be predictable enough for the Spanish Supreme Court.[158] In our opinion, the absence of a written provision would not automatically rule out the enforcement of the judgment.[159] Whether Australian exemplary damages arise from case law or are based on a statute thus does not matter.

It should be remarked that legality leads to foreseeability but it does not guarantee proportionality. Furthermore, a foreign country's idea of proportionality may vary from the Spanish legislature's estimation.[160] In any case, Australian exemplary damages should in general pose less problems than American punitive damages judgments when it comes to excessiveness. A 2005 survey of trials in state courts in the United States' seventy-five most populous counties indicates that in

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[153] Jablonski, above n 153, 229; Nagy, above n 106, 9.
[154] Compare with the *Fimez* judgment of the Italian Supreme Court which completely ruled out such an overlap: see *supra*.
[155] Requejo Isidro, above n 149, 326-327; Requejo Isidro, above n 99, 247.
[156] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, *Aedipr* 2003, 914; Marta Otero Crespo, 'Punitive Damages Under Spanish Law: A Subtle Recognition?' in Lotte Meurkens and Emily Nordin, (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia, 2012) 289; Requejo Isidro, above n 99, 247-248; Requejo Isidro, above n 149, 326.
[157] Requejo Isidro, above n 149, 327-328.
[158] Requejo Isidro, above n 149, 328.
[159] Requejo Isidro, above n 151.
[160] Ibid.

27% of cases in which punitive damages were awarded the amount granted exceeded USD 250.000. In 13% of the matters the quantum went above USD 1 million.[161] In contrast, the numbers in Australia are significantly lower. In personal injury cases exemplary damages are modest, often below AUD 10.000 (around USD 7.000).[162] There have been awards for more than AUD 100.000 (around USD 70.000)[163] but as far as the authors are aware up until today no multi-million dollar awards have been reported.

As to the second aspect of the proportionality criterion the Court argued that in a market economy the safeguarding of intellectual property rights is important. Moreover, this interest in offering protection to such rights is not strictly local but is shared universally by countries that harbour similar judicial, social and economic values.[164] The common desire to protect the interests at stake justified the awarding of an amount of twice the compensatory damages on top of the compensation granted.[165] The importance of the underlying *ratio legis* will thus determine the outcome of the proportionality analysis.[166] 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.[167] With regard to Australian exemplary damages for product liability one could argue that many countries around the world attach importance to the underlying goal of consumer protection. Consumer rights could be added to the category of important rights, triggering a high level of tolerance towards the amount of the Australian exemplary award.

2 *France Follows Spanish Openness*

In a much anticipated ruling in 2010 in the case *Schlenzka & Langhorne v. Fountaine Pajot,* the French Supreme Court (*Cour de Cassation*) showed a willingness to accept foreign punitive damages awards.[168] A decade before the judgment, a California couple, Peter Schlenzka and Julie Langhorne, purchased a 56-foot Marquises catamaran from Rod Gibbons' Cruising Cats USA, an authorised dealer and agent for the French manufacturer, Fountaine Pajot S.A. The

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[161] Thomas H. Cohen and Lynn Langton, 'Civil Bench and Jury Trials in State Courts, 2005' (28 October 2008) Bureau of Justice Statistics 6.
[162] Tilbury and Luntz, above n 3, 791.
[163] Law Council of Australia, 'Second Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence' (2 September 2002) para. 11.237.
[164] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, *Aedipr* 2003, 914.
[165] Jablonski, above n 153, 230.
[166] Requejo Isidro, above n 149, 328.
[167] Requejo Isidro, above n 151.
[168] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, 423.

sale price amounted to USD 826.009. At delivery, the couple believed the catamaran to be in excellent condition. However, the vessel had suffered extensive damage in a storm while moored in the port of La Rochelle, where it was manufactured. The seller had not disclosed this information to the buyers and had performed superficial repairs. The structural problems were, however, not resolved and the buyers soon experienced issues with the catamaran.[169]

On 26 February 2003 the California Superior Court (Alameda County) found in favour of the plaintiffs and awarded USD 1.391.650,12 in actual damages. It further ruled that Fountaine Pajot's behaviour in relation to the sale amounted to fraud under California law. It determined that USD 1.460.000 in punitive damages would be sufficient to punish and deter the French company without causing financial ruin. Lastly, the court decided to allow an exception to the American rule on attorneys' fees which states that each party shall bear their own costs, even if they prevail in the law suit. On the basis of the federal Magnuson-Moss Warranty Act[170] a victorious consumer may recover reasonable legal costs. The plaintiffs were awarded USD 402.084,33 in attorneys' fees, bringing the total amount to USD 3.253.734,45.[171]

The American couple then had to enforce the judgment against the defendant's assets in France. The matter eventually ended up in France's Supreme Court which for the first time had to take a stance on punitive damages. On 1 December 2010 it ruled: '[…] le principe d'une condemnation à des dommages interest punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur […]' ('[...] the principle of awarding punitive damages is not, in itself, contrary to public policy; this is not the case when the amount awarded is disproportional to the loss suffered and to the contractual breach of the debtor [...]') (own translation).[172] According to the French Supreme Court, punitive damages are in themselves not contrary to (international) public policy. Foreign punitive damages (like Australian exemplary damages) can therefore in principle be enforced in France. The Court's ruling makes it clear that objections against the enforcement of punitive damages based on the idea that they violate the divide

[169] The facts of the case are to be found in the judgment of the French district court of Rochefort: Tribunal de Grande Instance Rochefort, Peter Schlenzka & Julie Langhorne v. S.A. Fountaine Pajot, 12 November 2004, no. 03/01276, *unpublished decision.*
[170] 15 USC 2310(d)(2).
[171] California Superior Court 26 February 2003, Schlenzka v. Pajot, case no. 837722-1; Janke and Licari, above n 75, 782.
[172] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, 423.

between criminal and private law should be dismissed.[173] This liberal, welcoming attitude of France's Supreme Court appears at first sight to be very progressive.

The *Cour de Cassation*'s acceptance of punitive damages is, however, by no means absolute. The French Supreme Court attaches an important caveat to the general rule. Punitive damages do violate international public policy when their amount is 'disproportional to the damage suffered and the breach of the contractual obligations of the debtor' (own translation).[174] In other words: although the concept of punitive damages conforms to international public policy, the proportionality of the award is still a rule of international public policy.[175] The centre of the public policy analysis shifts from the incompatibility of the concept of punitive damages itself to an investigation of their amount.[176] 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 attitude of the Spanish Supreme Court in *Miller Import Corp. v. Alabastres Alfredo, S.L.*

The Supreme Court's judgment in *Fountaine Pajot* did not contain specific criteria on how to determine the excessiveness of a foreign punitive award. It merely stated that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor.[177] The lack of practical guidance leaves lower judges wondering at which point punitive damages become disproportional.[178] As the determination of the proportional nature of the award lies in the discretion of the lower courts, the absence of a bright-line standard creates uncertainty.[179]

On the one hand, one could argue that the French Supreme Court required a comparison between the amount of punitive damages and the amount of compensatory damages awarded (or in the words of the Court: the injury suffered ('prejudice subi')). The *Cour de cassation* concluded in that regard that the punitive damages largely exceeded the compensatory damages (the difference between both

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[173] François-Xavier Licari, 'La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil de la Cour de cassation?' (2011) *Recueil Dalloz* 423, 425.
[174] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, 423.
[175] Sibon, above n 77.
[176] Janke and Licari, above n 75, 794-795.
[177] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, 423.
[178] Bernard and Salem, above n 74, 19; Jennifer Juvénal, 'Dommages-intérêts punitifs: comment apprécier la conformité à l'ordre public international?' (2011) *La Semaine Juridique Edition Générale* 140, 142.
[179] Sibon, above n 77.

being USD 70.000).[180,181] This could be interpreted as establishing a 1:1 maximum ratio between punitive and compensatory damages.[182] Such a 1:1 boundary stands in sharp contrast with the single digit rule (*i.e.* a maximum ratio of 9:1) established by the U.S. Supreme Court when setting limits to punitive awards in the US.[183] In Australia courts have called for restraint and moderation[184] but exemplary damages need not be proportional to the amount of compensatory damages.[185] Although the California Superior Court in the case at hand complied with the U.S. Supreme Court's delineations, the exceeding of a 1:1 limit by only a handful of percentage points proved fatal for the punitive award's chances of enforcement.[186]

On the other hand, one cannot simply ignore the *Cour de Cassation*'s reference in *Fountaine Pajot* to the defendant's breach of contract ('des manquements aux obligations contractuelles du débiteur').[187] The Court presumably means the seriousness of the defendant's breach of contract.[188] It is of course the contractual nature of the dispute between the U.S. litigants and Fountaine Pajot that inspired the language of the Court. The Supreme Court is in principle bound by the description of the facts laid out by the Court of Appeal. However, most punitive damages in the U.S. originate in tort cases. Punitive damages in contract cases are possible if the behaviour constituting the breach of contract is also a tort for which punitive damages are available.[189] Expanding upon the terminology of the Court in an attempt to formulate a general rule applicable to punitive damages, the notion could perhaps be read as the seriousness of the debtor's wrongful behaviour, the degree of culpability or the blameworthiness of the fault.[190] The Court could have used the suggested language, notwithstanding the contractual origin of the litigation, because the punitive damages were probably more connected to

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[180] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, Recueil Dalloz 2011, 423; Nathalie Meyer Fabre, 'Recognition and Enforcement of U.S. Judgments in France – Recent Developments' (Spring 2012) *The International Dispute Resolution News* 6, 9.

[181] It could be argued that the amount awarded for attorneys' fees (*in casu* USD 402.084, 33) should be added to the compensatory damages when calculating the ratio. Legal costs are in essence also a form of loss caused by the defendant. Of course, this scenario is quite exceptional because US litigants almost always bear their own costs, even if they win the case.

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

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

[184] See for instance *Carson v. John Fairfax and Sons Ltd*. (1993) 178 C.L.R. 44, 59; *XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil Australia* (1985) 155 C.L.R. 448, 463.

[185] See *XL Petroleum*, 155 C.L.R. 471 (citing *Merest v. Harvey* (1814) Taunt 442, where minimal compensatory damages were awarded but substantial amount of punitive damages were assessed against the defendant).

[186] Janke and Licari, above n 75, 801 and footnote 113.

[187] Bernard and Salem, above n 74, 19; Nagy, above n 106, 9.

[188] Janke and Licari, above n 75, 776.

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

[190] Meyer Fabre, above n 185, 4; Nagy, above n 106, 9.

Fountaine Pajot's fraudulent and deceitful conduct surrounding the breach of contract than to the actual breach (the non-conformity of the vessel).[191]

Under this second view, in addition to the amount of compensatory damages given to the victim, the defendant's conduct should thus be taken into account when assessing whether the punitive portion of a foreign judgment is excessive.[192] In our view, 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 *révision au fond* which was abolished in 1964.[193]

Despite suggesting the breach of contract as one of the two factors to measure the proportionality of the punitive damages, the *Cour de cassation* did not take the defendant's conduct into account.[194] It merely stated that the 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. As the plaintiffs had not requested enforcement of only the compensatory damages in case the punitive damages were deemed unacceptable, the *Cour de cassation* could not allow partial enforcement but instead had to reject the US judgment in its entirety. The prohibition on *ultra petita* rulings thus left the US plaintiffs empty-handed.

When the enforcement of an Australian judgment containing exemplary damages is requested in Spain or France, the likelihood of enforcement appears to be much higher than in Germany and Italy. In the latter countries, the focal issue is no longer the contrariety of the concept of punitive damages with (international) public policy but rather the question of proportionality or excessiveness of the punitive award. How Spanish and French courts will shape this excessiveness assessment in future cases remains to be seen and is difficult to predict.

D *England's Mixed Approach*

Under the English law of enforcement of judgments a distinction is made between the enforcement of multiple damages and the enforcement of punitive damages *sensu stricto*. Multiple damages are a form of punitive damages arrived at

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[191] Meyer Fabre, above n 183, 9, footnote 25.
[192] Nagy, above n 106, 9.
[193] Cass. Civ. 1st, 7 January 1964, Munzer, *Bull.*, I, no. 15; Numerous authors note that the proportionality test reintroduces a *révision au fond*: Bernard and Salem, above n 74, 19; Juvénal, above n 181, 142; Janke and Licari, above n 75, 801-802.
[194] Meyer Fabre, above n 185, 4.

by multiplying the amount of the compensatory damages. The category of punitive damages *sensu stricto*, therefore, contains all other punitive awards that are not calculated by reference to the compensation granted. Against this background, the following paragraphs shed light on the treatment of foreign multiple damages in English enforcement proceedings (part 1). Afterwards, an attempt to lay bare the English position on the enforcement of foreign punitive damages *sensu stricto* is made (part 2).

1 *Protection of Trading Interest Act 1980 Not Relevant for Australian Judgments*

The Protection of Trading Interest Act (PTIA) is a statute from 1980 which prohibits the enforcement of multiple damages in England. PTIA attempts to thwart the exercise of U.S. extraterritorial jurisdiction over foreign citizens.[195] It provides in its section 5 that a judgment of an overseas country cannot be registered and no court in the UK may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment is for multiple damages.

The rule represents the British belief that the treble damages which are recoverable under U.S. antitrust law are penal in nature and should not be available to private plaintiffs prosecuting as private attorneys general. Section 5 aims to neutralise the treble damages incentive for private parties in U.S. legislation in that it forces private litigants to weigh the benefits and costs of such an action given the unenforceability in the UK. Although intended to apply to multiple damages (treble damages) arising out of antitrust litigation, a literal reading of the Act prohibits the enforcement of any type of multiple damages irrespective of the underlying cause of action.[196] The Act only applies to multiple damages and does not cover other punitive damages. It has to be noted that section 5 of PTIA renders the compensatory element of a multiple damages award unenforceable as well. This follows from a textual interpretation of the Act and is supported by Dicey and Morris who state that: 'Judgments 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'.[197]

However, the American concept of multiple damages (such as treble damages) is not used in Australia. Due to the absence of this type of damages in the Australian

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[195] Tina J. Kahn, 'The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement' (1980) 2 *Northwestern Journal of International Law & Business* 476, 479.
[196] Kahn, above n 199, 479, 489, 510, 513 and 515.
[197] Lawrence Collins (ed.), *Dicey & Morris on the conflict of laws* (Sweet and Maxwell, 2000) 566.

legal system, PTIA has no bearing on the enforcement of Australian exemplary damages awards. The enforceability of Australian judgments containing exemplary damages will, therefore, depend on the interpretation of the public policy exception.

2 *Punitive Damages an Infringement of English (International) Public Policy?*

Forms of punitive damages which do not involve the multiplication of the compensatory damages are outside the ambit of PTIA and thus follow a different regime. As mentioned before, the enforcement of Australian judgments in England can fall under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Both statutes contain a public policy mechanism (section 9(2)(f) and section 4(1)(a)(v) respectively), similar to the one found in the other four EU jurisdictions. English common law equally employs a similar (international) public policy exception.[198] It is, therefore, enriching to include the English common law approach in our analysis as it can serve as useful guidance.

It is well settled in England that an English court will not lend its aid to the enforcement of a foreign penal law.[199] By imposing a penalty a state exercises its sovereign power. Such an act of sovereignty cannot have any effect in the territory of another nation.[200] English courts will, therefore, not enforce a foreign judgment when it is given in respect of a fine or penalty. However, a sum payable to a private individual is not a fine or penalty.[201] The crucial criterion to determine whether a foreign measure is a penalty therefore appears to be the receiver of the sums. If the money goes to the foreign state, the sum has to be classified as penal.

This formalistic approach was confirmed in *S.A Consortium General Textiles v Sun and Sand Agencies Ltd*.[202], the only case touching upon the issue of the enforceability of punitive damages. A French company had sold clothing to English merchants but after delivery the buyers failed to pay the agreed price. The seller brought its payment claim before the Commercial Court of Lille. In addition, it

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[198] Robert Merkin, 'Enforceability of Awards of Punitive Damages in the United Kingdom' (1994) *International Journal of Insurance Law* 18, 19.
[199] *See* for example*: Folliott v Ogden* [1790] 3 Term Rep, 726; *Huntington v Attrill* [1893] AC, 150, *Raulin v Fisher* [1911] 2 KB, 93.
[200] James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 2008) 126.
[201] Michael Polonsky, 'Particular Issues Affecting the Recognition and Enforcement of U.S. Judgments' (2006) 19 *International Law Practicum* 156, 156.
[202] *S.A Consortium General Textiles v Sun and Sand Agencies Ltd.* [1978] Q.B., 279.

sought a further 10.000 francs as 'résistance abusive",[203] a head of damages awardable in France where a defendant has unjustifiably opposed the plaintiff's claim. The Lille court gave judgment in default of appearance for the plaintiffs for the amount claimed, interest and costs. Enforcement of the judgment in England was then governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933 which regulates enforcement for judgments originating in countries with which the UK has a mutual recognition treaty. The defendants resisted enforcement of the 10.000 francs (awarded as a result of the unreasonable refusal by the defendants to pay a plain claim) in England on the ground that the French judgment imposed a penalty. Under section 1(2)(b) of the Act sums payable in respect of a penalty are excluded from enforcement. The defendants further relied on section 4(1)(a)(v) which states that enforcement should be denied when it would violate public policy of the requested state. As to the characterisation of the sum for the 'abusive résistance', all three judges in the Court of Appeal agreed that the amount for the unreasonable withholding of sums under a valid claim was compensatory, not penal and therefore enforceable. Lord Denning believed it to be compensation for losses not covered by an award of interest, such as loss of business caused by want of cash flow, or for costs of the proceedings not covered by the court's order for costs. He, however, expanded *obiter dictum* upon the issue and summarised the defendants' argument as sustaining that the 10.000 francs were punitive or exemplary damages which amounted to a penalty and were therefore unenforceable under section 1(2)(b) of the 1933 Act.[204] He repeated the conventional idea that a fine or other penalty only referred to sums payable to the state by way of punishment and that a sum payable to a private individual was not a fine or penalty.[205]

Although given in *dicta*, Lord Denning's statements relating to punitive damages are interesting given the hybrid nature of punitive damages. They are awarded to punish the wrongdoer for reprehensible conduct. However, they are not payable to the state. Lord Denning's remark seems to explicitly support the view that, despite their inherent criminal nature, for enforcement purposes in England punitive damages avoid the penal label because they are awarded to a private person instead of to the state.[206] Lord Denning further ruled that English public policy does not oppose the enforcement of a claim for exemplary damages because these are 'still considered to be in conformity with the public policy in the United States and many of the great countries of the Commonwealth'.[207] He thereby indicated that punitive damages do not pose a problem under (international) public policy

[203] Article 1153 of French Civil Code.
[204] The other judges in the case, Goff L.J. and Shaw L.J., did not refer to the notion 'punitive damages'.
[205] *S.A Consortium General Textiles v Sun and Sand Agencies Ltd.* [1978] Q.B., 299-300.
[206] Collins, above n 208, 476.
[207] *S.A Consortium General Textiles v Sun and Sand Agencies Ltd.* [1978] Q.B., 300.

either.[208] However, the *obiter* character of his elaboration should be underlined, leading to the conclusion that, at the very least, the enforceability of punitive and exemplary damages in the UK has not yet been definitively settled.

IV CONCLUSION

The contribution at hand focused on the enforcement of Australian exemplary damages in several EU Member States. It has been shown that the availability of exemplary damages in Australia is subjected to restrictions. However, the examples that have been discussed in this article illustrate that exemplary damages can become available if the defendant engaged in conscious wrongdoing or acted with contumelious disregard of the defendant's rights.

The awarding of exemplary damages in Australia against a foreign defendant does not end the matter. When enforcement of the award for exemplary damages in Europe becomes necessary, the award might be blocked on the basis of public policy considerations. The article discussed the various approaches towards the enforcement of U.S. punitive damages taken by the Member States Italy, Germany, France, Spain and England. The European experience with U.S. punitive damages is useful to draw lessons from for Australian judgments for exemplary damages which – to our knowledge – are yet to reach the EU borders.

It became clear that every country has construed the international public policy exception differently. The Supreme Courts in Italy and Germany have rejected punitive damages because they argued that the concept itself violates international public policy. Already in 1992, in the case of *John Doe v. Eckhard Schmitz*, the *Bundesgerichtshof* ruled that U.S. punitive damages awards cannot be enforced in the German territory. The German Supreme Court referred to various arguments underlying this decision. It underlined the compensatory function of German private law and noted that enrichment of the plaintiff is prohibited. The Supreme Court further held that punishment and deterrence are objectives that belong in the realm of criminal law. Punitive damages interfere with the state's monopoly on penalisation because a private person acts as public prosecutor. The defendant cannot rely on the fundamental guarantees that are available to him in criminal law proceedings. The *Bundesgerichtshof* also rejected the parallel between penalty clauses and punitive damages. In 2007 in *Glebosky v. Fimez* the Italian *Corte di Cassazione* refused to accept that Italian private law holds any punitive

[208] The same conclusion was reached by the Supreme Court of Australia (Full Court) and the British Columbia Court of Appeal: *Benefit Strategies Group Inc v Prider* [2005] SASC, 194 and *Old North State Brewing Co v Newlands Services Inc* [1999] 4 WWR, 573.

considerations. It found that penalty clauses and moral damages are not comparable to punitive damages. Five years later it reiterated this position by stating that the Italian civil liability rules only pursue compensatory, and not punitive, aims. The likelihood of recovering Australian exemplary damages in Italy or Germany is, therefore, virtually nil.

France and Spain, on the other hand, have accepted the compatibility of punitive damages with international public policy. The Spanish *Tribunal Supremo* was the first one to accept the enforceability of punitive damages in the case of *Miller v. Alabastres* in 2001. It acknowledged the existence of punitive elements in Spanish private law. The presence of these punitive mechanisms demonstrates that Spanish civil law sometimes concerns itself with punishment in addition to compensation. Punitive damages could thus not be viewed as a violation of international public policy. Around a decade later the French Supreme Court in *Schlenka & Langhorne v. Fountaine Pajot* reached the same conclusion. Australian exemplary damages awards, therefore, stand a better chance at being granted enforcement in Spain and France.

Both the Spanish and the French Supreme Court subsequently focused on an investigation of the amount granted by the foreign court. *Excessive* punitive damages are problematic in light of the international public policy exception. In France the *Cour de cassation* seems to have limited its tolerance of punitive damages to an amount equal to the compensatory damages granted, although it is unclear to what extent the blameworthiness of the defendant's conduct can be taken into account. In Spain the level of acceptance is much higher as the *Tribunal Supremo* allowed the enforcement of the American treble damages judgment. It put forward two criteria to assess the excessiveness of the award: (1) the predictability of the award and (2) the nature of the interests protected. It is very difficult to predict at which point foreign punitive damages will be deemed intolerable in light of public policy considerations. It is equally unclear if and how the excessiveness test proposed in the judgments of the Spanish and French Supreme Courts will be applied to Australian exemplary damages.

England offers an interesting outlook on the enforcement of third state punitive damages as it provides for exemplary damages itself. Whether Australian exemplary damages can survive the English courts' scrutiny is uncertain. Foreign fines or penalties are not enforceable in England. Lord Denning's *obiter dictum* in *S.A. Consortium General Textiles v Sun and Sand Agencies Ltd.* explained that punitive damages cannot be equated to a fine or a penalty because they are not awarded to the state. That reasoning seems to indicate that Australian exemplary damages would meet little resistance in English enforcement proceedings.

Furthermore, according to Lord Denning, English public policy does not oppose punitive damages awards. Further case law is, nevertheless, needed to confirm this welcoming attitude.

When enforcement of the judgment containing exemplary damages in Europe becomes necessary, the victim's chances (as far as the exemplary damages are concerned) thus depend on the location of the wrongdoer. Whether the defective products exported into Australia were made in France or a few kilometres across the border in Italy might thus make an important difference for Australians affected by these products.