U.S. - Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries

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I. Encounter with the Supposedly "Unknown"

Punitive damages, also called exemplary damages, are damages awarded to the plaintiff in excess of any compensatory or nominal damages, i.e. over and above what will compensate him for his loss. The intended purpose is, mainly, deterrence and punishment in cases where a party is guilty of outrageous misconduct, for example, where the imputed acts are wanton, reckless, malicious or oppressive. Other possible purposes include, among others, compensation of unlawful profit obtained by the defendant, reimbursement of legal fees or other damages and recovery of non-pecuniary losses.[1]

The concept of punitive damages awarded to civil plaintiffs is largely unknown in civil-law countries such as Switzerland.[2] Generally, civil-law countries consider punitive damages to be a penal sanction. Due to the penal monopoly of the state, sanctions that are penal in nature may be imposed only in criminal proceedings.[3] Common-law countries, by contrast, permit punitive damages awards in private actions. Punitive damages are typically limited to tort actions where the defendant has engaged in exceptionally objectionable conduct. Less commonly, punitive damages are awarded for breach of contract, as well.[4]

Along with the emergence of the global economy, the shrinking distances between countries and the expansion of business enterprises around the world, there has been a big increase in the number of litigation cases between common-law-based plaintiffs and defendants based in civil-law jurisdictions. Accordingly, the effects of punitive damages increasingly are being felt outside the realm of common law, and the confrontation of Switzerland's and other civil-law countries' judiciary systems with the concept of punitive damages is inevitable. Such encounters occur, for the most part, in connection with the enforcement of foreign punitive damages awards. Besides, civil-law courts face the issue of punitive damages in adjudication proceedings when, based on their own international private law, they are applying foreign law, such as U.S. tort law. A third field of encounter exists in mutual judicial assistance proceedings in civil matters.[5]

This paper focuses mainly on questions of enforcement of U.S.- style punitive damages awards in Switzerland and, to a limited extent, in other civil-law countries.

II. The Great Divide: What Is Its Origin?

Why is it that punitive damages are generally unknown, and not admissible in, civil-law countries, while they proliferate in common-law countries? The difference is to be put down, primarily, to procedural particularities or, more specifically, to the basic principles of awarding damages as observed by juries in common-law countries versus judges in civil-law countries. In addition, it originates from the different approaches of civil-law and common-law countries to compensating a party for damage suffered in tort actions or in cases of breach of contract.

A. Procedural Particularities

In England, juries originally consisted of local citizens who were familiar with the controversy. They determined both the outcome of the trial and the amount of damages awarded. In the nature of things, a jury was more likely than a judge to compensate an injured party for intangible harms, such as hurt feelings, wounded dignity or insults when there were aggravating circumstances. This tendency occasionally led to damage awards that exceeded the actual amount of harm suffered.[6]

In civil-law countries, by contrast, it is not juries but judges that decide controversies, and they are bound to cite the exact statutory provision on which their decision is based. Indeed, in civil-law systems, the primary source of law is codified legislation, which does not allow awards of exemplary relief. Judges in civil-law countries do not possess broad power to fashion remedies that are not sanctioned by statute. Accordingly, they cannot award punitive damages.[7]

Another procedural particularity concerns the allocation of legal fees. In civil-law countries, legal fees and costs, consisting of, in particular, procedural costs and lawyers' fees, have to be borne by the defeated party. In the U.S., this concept is, to some extent, replaced by punitive damages. In some states, for example, Connecticut, legal costs are compensated exclusively by way of punitive damages; in other states, they are compensated to the extent contingency fees are awarded in favor of the plaintiff's lawyers.[8]

B. Different Approach to Compensation

The compensation systems of Switzerland and other civil-law countries rely on the same fundamental principle, namely, that plaintiffs may not enrich themselves at the expense of the tortfeasor.[9] Although the prohibition of unjust enrichment is not specifically expressed in any statute, it is inherent in the general provisions of the Swiss Code of Obligations ("SCO") regarding the determination of, and compensation for, damage. These provisions reflect the basic principle applicable throughout Swiss private law, including the laws of torts and contracts, that the term "damages" shall designate compensatory damages only, and that a damages award must not put the plaintiff in a better financial position than he would be in if the damaging event had not occurred.[10]

As a consequence, the possible damages for contract and tort claims are limited, in general, to the amount that will restore the parties' position to what it would be if the damaging event had not occurred.[11] Apart from this maximum, they allow recovery for non-pecuniary loss, including damages for pain and suffering, emotional distress and moral harm and also reimbursement of legal fees. All these non-pecuniary damages components, however, are not regarded as punitive since they are not imposed to deter or punish the wrongdoer, but rather to fully compensate the victim.[12]

As explained, common-law countries' compensation systems are not subject to any limitation. The jury's discretion to award damages is staggeringly wide. The only kind of limitation exists in cases where punitive damages are granted by statute, for instance, based on provisions of U.S. federal law, most notably, antitrust statutes. This kind of punitive damages is often referred to as multiple damages because statutes authorizing exemplary relief typically calculate the damages by multiplying the amount of the compensatory damages by a specific factor. Unlike the traditional form of punitive damages, multiple damages have a fixed upper limit and do not hinge on the defendant's financial circumstances. The most commonly applied form of multiple damages is treble damages.[13]

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1 Cf. Black's Law Dictionary (7th Edition, 1999), p. 396; John Yukio Gotanda, Supplemental Damages in Private International Law, 1998 Kluwer Law International, p. 194 ("GOTANDA"); Adrian Dörig, Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz, St. Gallen, 1998, p. 62 and 63 ("DÖRIG"); Christian Lenz, Amerikanische Punitive Damages vor dem Schweizer Richter, Schweizer Studien zum internationalen Recht, Vol. 77, Zürich 1992 p. 183-186 ("LENZ").

2 Kurt Siehr, Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "Punitive Damages", RIW 1991, p. 706 ("SIEHR").

3 Cf. IV.B.

4 GOTANDA, p. 193; SIEHR, p. 706.

5 For U.S.-related matters, the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970, in particular, are to be considered.

6 GOTANDA, p. 200.

7 GOTANDA, p. 201.

8 Felix Dasser, Punitive Damages: Vom "Fremden Fötzel" zum "Miteidgenoss"?, SJZ 96 (2000) Nr. 5, p. 105 ("DASSER"); LENZ, p. 182; Heinrich Honsell, Amerikanische Rechtskultur, Festschrift für Prof. Roger Zäch, Zürich 1999, p. 48 ("HONSELL"); Hanno Merkt, Abwehr der Zustellung von "punitive damages"-Klagen, Schriftenreihe der internationalen Wirtschaft, Vol. 49, Heidelberg 1995, p. 70.

9 Cf. III.

10 Jens Drolshammer, Heinz Schärer, Die Verletzung des materiellen Ordre Public als Verweigerungsgrund bei der Vollstreckung eines U.S.-Amerikanischen "Punitive Damages-Urteils" (Urteilsanmerkung), SJZ 82 (1986) Nr. 20, p. 315-316 ("DROLSHAMMER|SCHÄRER"); Theo Guhl, Alfred Koller, Das Schweizerische Obligationenrecht, 9th ed., Zurich 2000, § 10, N 14 ("GUHL|KOLLER"); for Germany, cf. Juliana Mörsdorf-Schulte, Funktion und Dogmatik US-amerikanischer punitive damages, Tübingen 1999, p. 35.

11 GUHL|KOLLER, § 10, N 18.

12 Wolfgang Wiegand, Kommentar zum Schweizerischen Obligationenrecht I, 2nd ed., Basel 1996, N 53 to Art. 97 SCO; Decision of the Swiss Federal Supreme Court, BGE 116 II 444. Cf. also DROLSHAMMER|SCHÄRER p. 310; Markus Wirth, Thomas Müller, Ueli Huber, Franz Hoffet, René Bösch: Transnational Litigation: A Practitioner's Guide, Switzerland, 1997, Oceana Publications, Inc., New York, p. 74, 75 ("TRANSNATIONAL LITIGATION"); For Germany, cf. Manfred Baumbach, Christoph Henkel, Anerkennung und Vollstreckung von punitive damages-Entscheidungen amerikanischer Zivilgerichte vor dem Hintergrund des Verfahrens BMW vs. Gore, RIW 1997, p. 731 ("BAUMBACH|HENKEL").

III. Enforceability of U.S. - Style Punitive Damages Awards

A. The Situation in Switzerland

Awards of U.S. courts are enforced in Switzerland in accordance with the Federal Statute on Private International Law ("PIL"), which entered into force on January 1, 1989.

Pursuant to Art. 25 PIL[14], a foreign judgment is recognized in Switzerland if all of the following three prerequisites are fulfilled:

(i) The courts or authorities of the state where the judgment was rendered had proper jurisdiction; [15]

(ii) No further ordinary appeal against the judgment is available; and

(iii) There is no violation of the substantive or procedural Swiss public policy pursuant to Art. 27 PIL.

In connection with the enforcement of U.S. - style punitive damages awards, defendants regularly invoke Art. 27 para. 1 PIL, which deals with one specific ground for non-recognition. According to this provision, a Swiss court cannot recognize a foreign judgment that is clearly irreconcilable with Swiss substantive public policy.

Swiss law, as already mentioned, still adheres to the principle of only allowing recovery of compensatory damages (cf. II.B), and there is, consequently, no basis in Swiss law for awarding punitive or exemplary damages. Awarding punitive or otherwise non-compensatory damages, therefore, is often considered to be a violation of public policy. Art. 135 para. 2 and Art. 137 para. 2 PIL clearly reflect this attitude: While the former concerns product liability cases, the latter deals with antitrust matters. Both provisions prohibit Swiss courts from awarding damages in excess of what a Swiss court would grant, even if the foreign law that the Swiss judge has to apply would, for instance, allow punitive damages for product liability cases or treble damages in antitrust cases. The idea behind the Swiss legislature was to protect defendants resident in Switzerland from exposure to punitive damages claims that are not part of the Swiss legal system.[16]

What has just been said applies to the adjudication procedure, but what about the recognition and enforcement of foreign punitive damages awards in Switzerland? The PIL is silent in this regard except for the previously mentioned principle of ordre public in Art. 27 para. 1 PIL, on the grounds of which certain foreign judgments cannot be recognized and enforced in Switzerland. At a closer look, the relevant PIL provision of Art. 27 para. 1 provides that the foreign decision has to be *clearly* contrary to Swiss public policy to justify non-recognition. A Swiss adjudication judge might consider that, based on Art. 17 PIL, a specific provision of foreign law – for instance, one that provides for punitive damages – is contrary to Swiss public policy, whereas a judge deciding on the enforceability of an award may find in favor of the plaintiff because he considers the foreign decision not *clearly* contrary to Swiss public policy in accordance with Art. 27 para. 1 PIL.[17]

This said, it can hardly surprise that the status of punitive damages judgments under Swiss law, as yet, is not completely resolved, and that case law is not very consistent. To illustrate this, let me cite two examples:[18]

In the first case, the court of first instance (i.e. the "Bezirksgerichtspräsidium Sargans") refused to recognize and enforce a U.S. judgment providing for punitive damages on the grounds that such damages are contrary to Swiss public policy. The defendant, a German citizen domiciled in Switzerland, was sentenced to payment of "exemplary damages" to U.S. companies. The punitive damages amounted to three times the amount of the actual damages to account for misrepresentations that the defendant allegedly had made in connection with a certain real estate sale in the U.S. state of Texas. The Swiss court qualified the Texas judgment as a civil judgment, but held that the Texas judgment violated Swiss substantive public policy by disregarding the fundamental Swiss principle prohibiting unjust enrichment (cf. II.B). The court, furthermore, held that some features of the exemplary damages (such as punishment, deterrence or teaching the defendant a lesson) showed that they lacked civil character and that the judgment was unenforceable in civil proceedings for this reason, as well. [19]

In the second case (in re S.F. Inc. vs. T.C.S. AG), a decision of the district court of Basel rendered on February 1, 1989, a U.S. judgment against a company domiciled in Basel, Switzerland, was enforced – including punitive damages. Based on English private law, the U.S. Court of the Northern District of California had awarded the plaintiff, a Californian corporation, USD 120'060 in actual damages and USD 50'000 in punitive damages for the defendant's fraudulent misappropriation of cargo containers. The Basel court found that the punitive damages award was mainly intended to compensate the plaintiff for profit unjustly realized by the respondent, and that the idea of punishment was clearly secondary in the awarding of damages. The court explicitly held that the award was not a criminal one but a civil award, even though it did contain punitive damages. In other words, the district court clearly found for the civil nature of the decision because it had been awarded under English private law and because its primary purpose was to force the defendant to make restitution to the plaintiff for the unjust profit that the defendant had realized. The fact that the punitive damages had been awarded in addition to the compensatory damages and as a flat amount, rather than in the exact amount of the unlawful profit actually realized by the defendant, was not held to be a violation of public policy.[20]

The appellate court of Basel affirmed this decision, and an appeal to the Swiss Federal Supreme Court was rejected, too, albeit on purely procedural grounds and without any considerations regarding the substantive issues. It should be noted, however, that the Federal Supreme Court came up with a different reasoning with respect to the qualification of the U.S. decision as a civil decision: The Federal Supreme Court considered the decision a civil one because the punitive damages were not awarded to the state but to an individual. According to the Federal Supreme Court, penalties and verdicts to restitute costs have to be awarded in favor of the state to qualify as penal judgments. [21]

To understand the significance of this decision and its potential impact on future decisions, it is important to note that, in this case, there was no domestic relationship (*"Binnenbeziehung"*) apart from the defendant's domicile being in Switzerland. As I show further below, this is of greatest consequence in applying the public policy reservation: the stronger the relationship with Switzerland, the more rigorously the public policy exception must be applied.[22]

B. The Situation in Other Civil-Law Countries

1. Germany

In § 321 para. 1 no. 4 of the German Code of Civil Procedure ("GCCP"), there is a very similar provision to that of Art. 27 para. 1 PIL. It provides

13 GOTANDA, p. 194 and 195.

14 For contracts and tort actions, cf. Art. 149 PIL.

15 Note, however, that, pursuant to Art. 149 para. 2 lit. a or f PIL, a U.S. decision is generally not enforceable against a defendant with Swiss domicile, except for cases where the defendant made an appearance in the U.S. without reservation or where the defendant has subjected himself to U.S. jurisdiction by an agreement that is valid under the PIL; cf. also LENZ, p. 178.

16 TRANSNATIONAL LITIGATION, p. 80; Robert P. Umbricht, Kommentar zum Schweizerischen Privatrecht, Internationales Privatrecht, Basel 1996, N 15 et seq. to Art. 135 PIL ("UMBRICHT"); Felix Dasser, Jens Drolshammer, Kommentar zum Schweizerischen Privatrecht, Internationales Privatrecht, Basel 1996, N 19 et seq. to Art. 137 PIL ("DASSER|DROLSHAMMER").

17 Art. 17 PIL instructs the judge in *adjudication proceedings* to preclude the application of a provision of foreign law if he considers that it would lead to a result *incompatible* with Swiss public policy. Less restrictive, by contrast, Art. 27 para. 1 PIL, which is applicable for *enforcement procedures*, requires that a foreign decision be *manifestly incompatible* with Swiss public policy to justify non-recognition.

18 Only very little case law exists. As a matter of fact, the two cases presented are the only ones known to the author.

19 DROLSHAMMER|SCHÄRER, p. 310; Martin Bernet, Nicolas Ulmer, Recognition and Enforcement in Switzerland of U.S. Judgments Containing An Award of Punitive Damages, International Business Lawyer, June 1994, p. 273 ("BERNET|ULMER").

20 Decision of the Civil Court Basel-Stadt of February 1, 1989, BJM 1991, p. 31 et seq.; cf. also: BERNET|ULMER, p. 273; UMBRICHT, N 17 to Art. 135 PIL; LENZ, p. 164 et seq.; SIEHR 1991, p. 705.

21 Decision of the Swiss Federal Supreme Court, BGE 116 II 376 et seq.

22 Cf. IV.A.

that recognition of a judgment must be refused in cases that are clearly incompatible with essential principles of German law, particularly if the recognition is irreconcilable with fundamental German rights.

Not surprisingly, therefore, the situation in Germany is, for the time being, quite similar to that in Switzerland. As a general rule, German courts are very reluctant to recognize or enforce foreign judgments containing punitive damages, too. The decisive 1992 decision of the highest German court, the German Federal Court of Justice (*"Bundesgerichtshof"*), held that punitive damages awards violate the German ordre public. The enforcement of such judgments would be contrary to the general concept of damages as compensation, which derives from the constitutional principle of reasonableness. Moreover, it would also violate the penal monopoly of the state to impose punitive sanctions.[23]

In a more recent decision rendered in 1993, the German Federal Court of Justice deviated from its very strict position and opted in favor of a controlled case-by-case recognition. It confirmed the enforcement of the compensatory damage components of a U.S. judgment that contained a large punitive damages award. In other words, it partially recognized the U.S. judgment by reducing the damages down to the amount that it considered compatible with German constitutional principles of reasonableness. The court underscored that punitive damages awards, in general, still would not be recognized and enforced, except for cases where the reasoning of the U.S. judgment contains plausible statements according to which the damages serve not only a penal function but are, indeed, aimed at compensating the victim for an actual economic loss or restituting to the plaintiff the profit unjustly realized by the defendant.[24]

It remains to be seen whether the German Federal Court of Justice will relax its practice even further. At any rate, this is what certain legal commentators are predicting based on a recent decision of the German Federal Constitutional Court (*"Bundesverfassungsgericht"*) rendered on March 8, 2000. In this decision, the court approved the admissibility of damages that serve a penal or preventive function in cases of invasion of privacy or infringement of person-inherent rights (*"Persönlichkeitsrechtsverletzungen"*), in order to deter potential injurers.[25]

In light of this decision of the German Federal Constitutional Court, legal commentators expect the German Federal Court of Justice to modify its practice when an opportunity presents itself. In their opinion, the German Federal Court of Justice can no longer refuse to enforce punitive damages awards based on the argument that they are of a penal nature now that the German Federal Constitutional Court has approved damages that serve penal or preventive functions, albeit in the limited field of infringement of person-inherent rights (invasion of privacy).[26]

Future practice in Germany should be closely observed. It will also be interesting to observe whether Swiss courts will be influenced by the German Federal Court of Justice's approval of a partial recognition of a foreign judgment awarding punitive damages. As I will show further below, the admissibility of a partial enforcement is still a controversial issue in Switzerland.[27]

2. Italy

In the Italian legal system, as well, the concept of punitive damages is not known. There are a few somewhat similar remedies, such as liquidated damages or aggravated damages, which are available in litigation cases that were brought or resisted in bad faith. However, the fundamental principle is that damages awards serve the purpose of restituting the actual loss suffered by the victim.

In conformity with this principle, the Venice Court of Appeal recently refused to recognize and enforce a U.S. judgment of the District Court of Jefferson County (Alabama). The Jefferson court held the Italian helmet manufacturer Fimez SpA liable for the negligent manufacture of a crash helmet that a U.S. teenager had been wearing when he died in a motorcycle accident in the city of Opelika, AL. In the absence of any information that might justify the damages award in the amount of USD 1 million, the Venice Court of Appeal ruled that the damages awarded against Fimez SpA were of purely punitive nature, even though the U.S. judgment did not expressly declare them so.

On a general level, the Venice court held that, unlike other forms of aggravated damages, punitive damages are essentially intended to impose a significant punishment on a party that is guilty of serious misconduct. The punishment is expressed in terms of a money amount to be paid to the victim as damages. In other words, punitive damages essentially aim at imposing exemplary punishment on the perpetrator of the tort rather than compensating the loss suffered by the victim. The court, therefore, dismissed the plaintiff's action for recognition and enforcement in Italy because it considered the concept of punitive damages incompatible with Italian public order, i.e. with the fundamental principles of the Italian legal system.[28]

3. France*

The concept of punitive damages is also unknown in French law. In principle, French courts seek to compensate the loss sustained by the victim and, thus, refuse to award any punitive damages.[29] The *Cour de cassation* has frequently stated that the objective is to *"restore, as exactly as possible, the balance destroyed by the damage and to re-establish the victim in the situation he would have found himself had the damaging act not occurred"*.[30]

There are, however, situations when a court will award damages higher than the actual loss suffered. Such is the case regarding unfair competition, where French courts only require proof of the illicit behavior, inferring that its existence demonstrates the loss.[31] This also occurs in "games and lotteries" mail-advertising cases, when a person wrongly has been led to believe that he has won a prize. French courts consider the advertiser contractually bound to deliver the reward, which can be of substantial value, to the victim.[32] Therefore, even though there is no actual loss, the victim receives a significant indemnity.

It appears that the French courts have never had to decide whether to recognize and enforce a judgment or award providing for punitive damages, and commentators disagree on the possible outcome. In the context of international arbitration, it has been suggested by a French commentator that French courts might enforce arbitral awards granting punitive damages.[33] On several occasions the *Cour de cassation* has enforced decisions granting damages lower than the loss suffered by the victim[34], and by applying *e contrario* reasoning, it is possible that it would reach a similar conclusion should the damages granted exceed the loss. To the extent that the amount of damages awarded remains proportional to the loss suffered,[35] decisions granting punitive dam-

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23 Judgment of the German Federal Court of Justice of June 4, 1992 - IX. ZR 149/91 (Düsseldorf); NJW 1992, p. 3096 et seq.; IPrax 1993, Vol. 5 No. 36b.

24 Decision of the German Federal Court of Justice, BGHZ 118, 312 1993; Richard Zöller, Reinhold Geimer, Zivilprozessordnung, 23rd ed., Köln 2002, N 169b to § 328 of the GCCP; Reinhold Geimer, Internationales Zivilprozessrecht, 4th ed. Köln 2001, N 2974; cf. also the reasons of the German Federal Court of Justice, as analyzed by Gerhard Wegen, James Sherer, International Business Lawyer, November 1993, p. 485 et seq. ("WEGEN|SHERER").

25 Decision of the German Constitutional Court, 1BvR 1127/96, NJW 2000, p. 2187 et seq.

26 Peter Müller, Sind US-amerikanische Punitive-damages-Urteile in Deutschland vollstreckbar?, Der Betrieb, Vol. 2 of January 12, 2001, p. 83 et seq.

27 Cf. V.B.

28 Traverso & Associati, Foreign Punitive Damages Awards Conflict With Italian Public Order, reported in: International Law Office - Legal Newsletter, dated May 27, 2003, http://www.internationallawoffice.com.

* The author would like to thank Peter Turner of Freshfields Bruckhaus Deringer, Paris, for this contribution on the situation in France.

29 Punitive damages are often compared to the French notion of *"amende civile"* (civil fine), as both seek to punish and discourage illicit behavior. Civil fines differ from punitive damages as they are not paid to the victim and, thus, are compatible with an exact compensation of the actual loss. Civil fines may be awarded by courts in non-criminal proceedings if expressly authorized to do so by a legal text. In 2001, the French legislature introduced such a fine in French competition law, specifically to deter companies from engaging in profitable anti-competitive behavior; such fine is based on the potential profits, exceeding the compensatory damages incurred. French law also provides for a civil fine in the event that a building is built without a construction permit, or that its intended purpose is changed unlawfully.

30 *"le propre de la responsabilité est de rétablir, aussi exactement que possible, l'équilibre détruit par le dommage et de replacer la victime dans la situation où elle se serait trouvée si l'acte dommageable n'avait pas eu lieu"*, Civ. 2e, December 20, 1966, D., 1967, p. 169; Civ. 2e, May 9, 1972, JCP, 1972, IV, p. 164; Civ. 2e, July 9, 1981, Gaz. Pal., October 8 and 9, 1982; Civ. 1ère, May 30, 1995, JCP, 1995, IV, p. 1810; G. Viney, P. Jourdain, Les effets de la responsabilité, 2nd edition, 2001, at 111-125.

31 Com., February 9, 1993, B., IV, N°53, p. 34; Crim., February 5, 1997, Bull. crim., N°46, p. 141.

32 Ch. mixte, September 6, 2002, avis M. de Gouttes, rapp. M. Gridel, D. 2002, AJ, p.2531, obs. A. Lienhard, JCP 2002 Act. 389.

33 J. Ortscheidt, Les Dommages et Intérêts Punitifs en Droit de l'Arbitrage International, Petites Affiches, November 20, 2002, N°232, at 25.

34 Cass. crim., June 16, 1993, Bull. crim., N°214, p. 537; Cass. civ. 1ere, April 4, 1991, JDI 1991, p. 990, obs. G. Legier.

35 Art. 8 of the 1789 French Declaration of Human Rights, this article applies to every penalty with a punitive nature (Cons. const., déc. N°89-260 D.C., Rec. p. 71).

ages, therefore, might be enforceable in France. This line of reasoning is not followed by Professor Audit, who considers that public policy forbids the enforcement of foreign decisions awarding punitive damages.[36]

4. Other Civil-Law Countries

Other civil-law countries not explicitly mentioned so far have taken an approach to damages for contract and tort claims similar to that presented for Switzerland, Germany, Italy and France. None of them observe the concept of punitive damages. Damages have to serve the purpose of restituting an actual loss. One of the few exceptions among the civil-law countries is Norway, where, apparently, punitive damages are admissible, if only within very limited areas involving infringement of liberty, violation of sexual integrity and honor, or invasion of privacy.

A survey on the position of European countries with respect to the *enforceability* of foreign judgments of punitive damages came to the conclusion that in Austria, the Czech Republic and Denmark, such awards are not enforceable, whereas Finland, Hungary, Poland, Portugal, Spain and Sweden allow enforcement.[37]

C. International Arbitral Awards

There is hardly any case law or written commentary regarding the topic of enforcement of an international arbitral award containing punitive damages. Even in the U.S., awarding punitive damages in arbitration proceedings is a controversial issue, but the trend appears to be in favor of recognizing that arbitral tribunals have the authority to do so.[38]

In civil-law countries that do not know the concept of punitive damages, the situation is even more confusing. Most civil-law countries have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), which facilitates the enforcement of international arbitral awards. According to the New York Convention, arbitral awards that were rendered in a signatory country are enforceable in all other signatory countries, subject only to a very short list of defenses. In fact, it is possible to say that, as a general rule, foreign arbitral awards are more readily enforced than foreign court judgments. This seems, at first sight, rather surprising, considering that Art. 5(2)(b) of the New York Convention, which deals with enforcement, contains a public policy exception, as well. Pursuant to this article, the recognition and enforcement of an arbitral award may be denied if the competent authority of the country where the recognition and enforcement is sought establishes that it would be contrary to the public order. Nevertheless, it seems that punitive damages awards are, indeed, more readily recognized and enforced than punitive damages judgments. This derives from the fact that, quite obviously, there is a common understanding in civil-law countries, as well, that the public policy exception of Art. 5(2)(b) of the New York Convention does not refer to the domestic public policy exception but, in a far narrower sense, to an international public policy standard. [39]

Although there is no case law and hardly any legal writing regarding the topic of recognition and enforcement of arbitral punitive damages awards, many legal writers are of the opinion that, unless they contain excessive financial penalties, such awards should not be considered contrary to an international public policy standard, even if they violate a mandatory rule of the enforcing state. Moreover, they are of the opinion that the standards for adjudicating a partial recognition of an arbitral award should be even easier and more flexible than for court judgments.[40]

IV. Are the Objections Against Enforcing Punitive Damages Awards Still Defensible?

Summing up the case law presented, the main objections that are raised against enforcing punitive damages awards are the following:

- Ordre public reservation: Civil-law courts consider punitive damages awards to be in conflict with the fundamental principles of the respective country, in particular for the following reasons:
  - Punitive damages are considered to contain mainly penal components, which is irreconcilable with civil proceedings (cf. IV.A.1).
  - Due to the penal monopoly of the state, sanctions that are penal in nature may only be imposed in criminal proceeding;
  - In cases where the punitive damages are not predominantly of compensatory nature, they are considered a violation of the prohibition of unjust enrichment (cf. IV.A.2).
- Conflict with penal monopoly of the state: Penal sanctions may only be awarded in criminal proceedings. Civil-law courts understand the punitive damages award as a penal judgment and, accordingly, deny enforcement in civil proceedings (cf. IV.B).

In the following, I analyze whether, in light of the current, primarily Swiss, developments, these objections are still defensible and if so, to what extent.

A. Substantive Public Policy Reservation

The substantive public policy reservation of Art. 27 para. 1 PIL requests a Swiss judge to deny the recognition and enforcement of a foreign judgment if it is clearly irreconcilable with Swiss public policy. According to leading legal commentators[41] and case law[42], the Swiss substantive public policy exception must be construed very narrowly. Quoting the language habitually used by the Swiss Federal Supreme Court, the Swiss public policy defense can be successful only in cases where *"a foreign judgment violates domestic legal concepts in an intolerable manner, because the judgment disregards fundamental principles of the Swiss legal order"*.[43]

In the absence of any clear definition of the term substantive public policy, the public policy defense must be analyzed on a case-by-case basis. The degree of scrutiny varies considerably, depending on how closely a case is connected with Switzerland (domestic relationship). In fact, judges applying the public policy reservation tend to take a much more rigid view the closer the relationship of the case with Switzerland, be it through one party's Swiss nationality or residence, the issues in controversy, or the applicable law. It is only natural that, in such cases, Swiss public policy is given greater priority than in cases where there is no domestic relationship at all. [44]

1. Penal Elements in Civil Judgments

Punitive damages are primarily aimed at punishing and deterring exceptionally objectionable conduct.[45] Their function, thus, being a penal one, it is often argued that a penal element is unknown to civil law and that, consequently, punitive damages have to be considered an offense against substantive Swiss public policy. A comparison of domestic instruments with punitive damages shows, however, that the notion that civil punishment is unknown in our jurisdiction is not quite correct.

As a matter of fact, there are at least three Swiss instruments that allow awarding damages of a clearly penal character:

The first one is in the domain of employment law, where damages are awarded in cases of abusive termination or immediate termination of an employment relationship without valid reasons. In either case, a judge has the discretion, based on Art. 336a para. 2 or Art. 337c para. 3 SCO, respectively, to award up to six monthly salaries of the employee, irrespective of the actual damage occurred.

Second, a similar provision exists in Art. 5 of the Swiss Federal Act on Sexual Equality ("Equal Rights Act"). It also gives the judge the dis-

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36 B. Audit, Droit international privé, 3rd edition, 2000, 666 § 779.

37 Further references in: GOTANDA, p. 201 et seq.

38 Cf. BERNET|ULMER, FN 4.

39 Albert Jan Van den Berg, The New York Arbitration Convention of 1958, 1989 reprinted 1994, Kluwer Law and Taxation Publishers, p. 360 et seq.; Paolo Michele Patocchi, Eliot Geisinger, Internationales Privatrecht, Internationale Übereinkommen und Schiedsgerichtsordnungen, N 16 to Art. 5(2)(b) of the New York Convention ("PATOCCHI|GEISINGER"); Wolfgang Kühn, RICO Claims in International Arbitration and their Recognition in Germany, Journal of International Arbitration, Vol. 11 (June 1994), p. 42 et seq. ("KÜHN").

40 GOTANDA, p. 204 et seq. and p. 226 et seq.; KÜHN, p. 42 et seq., particularly p. 48-49; dissenting opinion: Ursula Stein, Punitive Damages - eine Herausforderung für die Internationale Wirtschaftsschiedsgerichtsbarkeit, EuZW 1994, Vol. 1, p. 21.

41 Stephen V. Bertil, Anton K. Schnyder, Kommentar zum Schweizerischen Privatrecht, Internationales Privatrecht, Basel 1996, N 6 to Art. 27 PIL ("BERTIL|SCHNYDER"); Paul Volken, IPRG Kommentar, Zürich 1993, N 24 to Art. 27 PIL ("VOLKEN"); BERNET|ULMER, p. 272; LENZ, p. 163 et seq.; Martin Bernet, Nicolas Ulmer, Recognition and Enforcement of Foreign Civil Judgments in Switzerland, International Lawyer, Vol. 27, no. 2 (1993), p. 326 et seq. ("BERNET|ULMER, RECOGNITION").

42 Decisions of the Swiss Federal Supreme Court, BGE 116 II 630; BGE 103 Ia 204 Consideration 4.a; BGE 102 Ia 313-314; BGE 102 Ia 581 Consideration 7.d;

43 Cf., for instance, Decisions of the Swiss Federal Supreme Court, BGE 111 Ia 14; BGE 107 Ia 199.

44 BERTIL|SCHNYDER, N 6 to Art. 27 PIL; VOLKEN, N 21 to Art. 27 PIL; LENZ, p. 168 et seq.; BERNET|ULMER, RECOGNITION, p. 326.

45 Cf. I.

cretion to award compensation to the victim of discrimination or sexual harassment, the only limitation being that the payment may not exceed three monthly salaries for discrimination and six monthly salaries for sexual harassment. Commentaries to the Equal Rights Act show that the legislature deliberately opted against subjecting the compensation to the occurrence of an actual damage. Instead, the idea was to implement a penal sanction with a deterrent function.[46]

A similar situation exists in EU countries. Lacking any clear provision in the EU regulations, the case law of the European Court of Justice (*"Europäischer Gerichtshof"*) is quite unambiguous in stating that, in cases of employment discrimination, it ought to be possible to award damages with a decidedly deterrent function. Consequently, according to the European Court of Justice, national law should not provide for a fixed upper limit of the amount that can be awarded in damages.[47]

Third, liquidated damages, which can be agreed on in case of contractual non-performance or improper performance within the limits of Art. 160 to Art. 163 SCO, undoubtedly contain a penal element. However, unlike the above-mentioned compensation payments, which are to be determined at a judge's discretion, the penalty payment is part of a contractual agreement of the parties.[48]

Apart from the above three instruments, recent developments in the field of infringement of intellectual property rights show, as well, that penal elements in civil law are no longer so unfamiliar. Tariffs of private patent utility companies, for instance, those of the SUISA for cases of infringement of copyright, provide for damages of twice the ordinary license fee. This amounts to a double absorption of the putative profit. While in 1996 the Swiss Federal Supreme Court left unanswered the question of whether such tariff provisions are contrary to public policy[49], it explicitly approved, only one year later, the admissibility of the double tariffs in accordance with Section 18 of SUISA's Tariff S.[50]

This development in Switzerland is no surprise but, on the contrary, in line with the developments in other EU countries. Multiple damages are also discussed in the newest proposal for a EU Directive for Measures and Procedures with regard to the Protection of Intellectual Property Rights. Art. 17 of the current draft provides that the owner of an intellectual property right that has been infringed upon may claim the double amount in damages. Double damages clearly serving a preventive and penal function, until very recently they would have been considered taboo. Leading legal commentators consider this option given in the EU Directive as a further indication that protection against U.S. punitive damages judgments is slowly disintegrating.[51]

In summary, Switzerland, like other European civil-law countries[52], certainly does know penal elements in civil law. Therefore, the argument that punitive damages are contrary to public policy because our jurisdiction presumably does not know the concept of civil punishment is no longer defensible.[53]

2. Infringement of the Prohibition of Unjust Enrichment

As mentioned, the compensation systems of Switzerland and other civil-law countries are based on the fundamental principle that plaintiffs may not enrich themselves at the expense of the tortfeasor (prohibition of unjust enrichment).[54] This concept has ordre public quality[55] and is valid not only for delicticious but also for contractual compensation payment.[56]

Again, an analysis of certain Swiss judicial instruments yields the result that some of them are in conflict with the fundamental principle of prohibition of unjust enrichment. For instance, in the case of an employer who terminates an employment relationship immediately, without valid reason, or abusively, it is possible, in accordance with Art. 337 c SCO and 336 a SCO, to award damages that are unrelated to the actual damage. Admittedly, the erosion of the prohibition of unjust enrichment does not go very far. In fact, the legislature's conscious deviation from said principle was motivated entirely by considerations of social policy. In addition, the possible payments are limited, so as not to exceed a maximum of six monthly salaries.

Moreover, liquidated damages payments based on Art. 160 to Art.163 SCO can also lead to unjust enrichment. But again, things must be put into the proper perspective. First of all, liquidated damages payments are based on an agreement of the parties. Second, Art. 163 para. 3 SCO prevents any excessive payments by conveying to the judge the discretion to reduce the agreed-upon liquidated damages.

The same can be said regarding the possibility to recover non-pecuniary loss in reparation for pain and suffering, emotional distress and moral harm, which is subject to very strict prerequisites.[57] Even though such reparation payments are generally qualified as compensation for the harm suffered by the victim, the question remains whether they are, after all, an infringement of the prohibition of unjust enrichment.[58] Leading legal commentators admit that the traditional reluctance of Swiss courts to award non-pecuniary loss is subsiding, little by little.[59] In fact, in recent years, Swiss courts have been increasingly liberal in awarding satisfaction for non-pecuniary loss[60], but by no means at a level approaching the enormous punitive damages that are occasionally awarded by U.S. juries. Nevertheless, Swiss jurisdiction may draw nearer to the punitive damages amounts generally known in the U.S.

Last but not least, unjust enrichment definitely takes place when applying Art. 423 SCO, according to which, in cases where an agent conducts business in his own, and not in the principal's interest, a principal may appropriate the profits resulting from the agent's acts over and above the principal's entitlement to ordinary damages.[61] This provision relies on the rule that a tortfeasor shall under no circumstances benefit from his unlawful acts.[62] An analogous possibility exists in the field of infringement of intellectual property rights, where the appropriation of unlawful profits, corresponding to the ordinary license fees, is quite commonplace.[63] Accordingly, punitive damages awards that serve the purpose of allowing a plaintiff to appropriate the unlawfully realized profit, which is often the case, cannot be considered an infringement of the Swiss substantive ordre public.[64]

The above examples demonstrate that there are certain exceptions to the prohibition of unjust enrichment in Switzerland's legal system. However, it is fair to say that the prohibition of unjust enrichment is, at present, still more or less an intact principle of Swiss recovery and compensation law.[65] While the above-mentioned exceptions either serve a specific purpose or are otherwise limited, the only real exception is the possibility to appropriate the profits resulting from unlawful acts (particularly based on Art. 423 SCO).

Whether exceptions or not, a judge who has to decide on the enforcement of a punitive damages award containing components for which there is an equivalent in Switzerland must, in my opinion, uphold the said punitive damages award, at least to the extent that damages also

46 Message of the Swiss Federal Counsel to the Swiss Federal Parliament (*"Botschaft des Bundesrates"*) of February 24, 1993, BBL 1993 I 1248, 1299 et seq.
47 Olivier Steiner, Das Verbot der indirekten Diskriminierung aufgrund des Geschlechts im Erwerbsleben, Basler Studien zur Rechtswissenschaft, Vol. 46, Basel 1999, p. 367 et seq.
48 In fact, it was the existence of the Swiss instrument of liquidated damages payment that helped the Swiss Federal Supreme Court to approve the civil character of the punitive damages in the S.F. Inc. vs. T.C.S. AG litigation and to deny an infringement of Swiss substantive public policy, cf. III.A.
49 Decision of the Swiss Federal Supreme Court, BGE 122 III 467.
50 Decision of the Swiss Federal Supreme Court of June 20, 1997, in: sic! 1998, 38, Consideration 6.a; cf. also DASSER, p. 106.
51 Thomas Hoeren, High-noon im europäischen Immaterialgüterrecht, Überlegungen zum Vorschlag für eine EU-Richtlinie über die Massnahmen und Verfahren zum Schutz der Rechte an geistigem Eigentum, MMR 5/2003, p. 299 et seq.
52 For Germany, cf. Joachim Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht, NJW 1996, p. 1935 et seq.; cf. also the critical analysis by MÖRSDORF-SCHULTE, p. 32 et seq.

53 Concurring opinion LENZ, p. 141; dissenting opinion Walter J. Habscheid, Die Schiedsgerichtsbarkeit und der Ordre Public, Festschrift für Max Keller, Zurich, 1989, p. 580 FN 13 ("HABSCHEID"); DROLSHAMMER|SCHÄRER, p. 316 et seq.
54 Cf. II.B and case law presented under III.
55 DROLSHAMMER|SCHÄRER, p. 315-316; HABSCHEID, p. 580, FN 13.
56 GUHL|KOLLER, § 10, N 14.
57 Cf. Art. 47 and 49 SCO.
58 DROLSHAMMER|SCHÄRER, p. 315 and p. 317, are of the opinion that the possibility to obtain non-pecuniary reparation payments in Swiss law is of purely compensatory nature and, thus, lacking a penal element.
59 DASSER, p. 105.
60 This is particularly true for reparation payments based on Art. 49 SCO, which are awarded in case of infringement of person-inherent rights. Cf. GUHL|KOLLER, § 10 N 12; Anton K. Schnyder, Kommentar zum Schweizerischen Obligationenrecht I, 2nd ed., Basel 1996, N 21 to Art. 47 SCO.
61 This concept is also known in German law. Accordingly, the same kind of discussion is taking place in Germany. Cf. MÖRSDORF-SCHULTE, p. 35.
62 Cf. Decision of the Swiss Federal Supreme Court, BGE 97 II 177, 178; Theo Guhl, Anton K. Schnyder, Das Schweizerische Obligationenrecht, 9th ed., Zurich 2000, § 49, N 45 ("GUHL|SCHNYDER").
63 DASSER, p. 105.
64 This was one of the reasons why the Basel District Court upheld the U.S. punitive damages award in the case of S.F. Inc. vs. T.C.S. AG, cf. III.A.

would be allowable in accordance with the respective Swiss instrument.[66]

B. Qualification As Penal Judgment

In the course of a recognition and enforcement proceeding, the qualification of a foreign decision is of foremost importance. Most international rules, for example, the Swiss PIL, merely address the recognition and enforcement of foreign *civil* decisions but not decisions of predominantly penal or administrative character.[67] If the enforcement judge arrives at the conclusion that a foreign decision is not a civil one, he has to deny recognition and enforcement.

The traditional commentators in Germany and Switzerland hold the view that punitive damages awards are not civil but, *per se*, penal judgments. Consequently, under their view, punitive damages judgments could not be enforced in accordance with the applicable international private law provisions (e.g. PIL in Switzerland).[68] Contrary to this opinion, the courts in both of the above-discussed Swiss enforcement proceedings regarding punitive damages categorized the U.S. punitive damages decisions as civil decisions.[69]

Whether penal in nature or not, given the increasing number of judicial instruments in civil-law countries that serve a penal function[70], the traditional standpoint is no longer defensible. Refusing enforcement of a punitive damages award merely by qualifying it as a penal judgment, in most cases, would be inappropriate.[71]

V. Constructive Approach

A. Case-By-Case Analysis

The above discussion of the traditional civil-law objections to the enforcement of punitive damages awards has yielded a clear result: Both the qualification of a foreign decision as penal, as well as a mere reference to the penal character or to a violation of the prohibition of unjust enrichment, are insufficient reasons for denying enforcement of a punitive damages award in a blanket manner. Instead, each case has to be analyzed on its merits.

Where the analysis leads to the conclusion that the punitive damages award contains components (especially of compensatory nature) similar to the ones also known in civil-law countries, the enforcement of such punitive damages awards generally should be granted. Consequently, *reasonable* punitive damages awarded in excess, or irrespective of, actual damage should be recognized in the areas of abusive or immediate termination of an employment relationship without valid reasons or where they can be qualified as reparation payments[72], compensation payments for legal fees[73] or agreed-upon liquidated damages payment.[74] Moreover, punitive damages for unjustly realized profit should, without doubt, be enforceable.

To the extent a punitive damages award contains components that are in no way similar to any of the Swiss instruments presented under IV., the test set out by Art. 27 para. 1 PIL should be applied, according to which non-recognition is justified only in case of punitive damages awards, or components thereof, that are *clearly* contrary to Swiss public policy.[75] In this respect, the criterion of whether there is a domestic relationship is of paramount importance: The stronger the relationship to Switzerland, the stricter the application of the public policy exception.[76] Applying this test, a punitive damages award still may be enforced if it complies with the following criteria:

1. Where the punitive damages are predominantly compensatory, i.e. compensate an actual loss suffered by the plaintiff, they should be enforceable, even if they contain a *penal element*. This derives from the fact that penal components have increasingly gained entrance into Swiss civil law.[77] Only in cases where punishment is the sole, or clearly predominant, purpose of the foreign award, should a Swiss court conclude that the said judgment is irreconcilable with Swiss substantive public policy.[78] Critical issues are, therefore, the enforcement of treble damages awarded in antitrust and product liability cases and the like, as they are generally to a great extent "penal" or "administrative" rather than "civil" in nature. Hence, the enforcement of such punitive damages awards may be denied with the argument that they are not within the scope of the PIL's enforcement provisions.[79] The result is acceptable, as Art. 135 para. 2 and Art. 137 para. 2 PIL clearly instruct a judge not to award any damages in antitrust and product liability cases in excess of what a Swiss judge would award to a defendant in a comparable case in Switzerland.[80]
2. In cases where the punitive damages awarded are not predominantly compensatory, but there is, nevertheless, some reasonable relation between the amount of punitive damages awarded and the damage or loss actually suffered, the punitive damages award should not be found a violation of the prohibition of unjust enrichment and, therefore, of Swiss substantive public policy. After all, even Switzerland's strict compensation and recovery system does know certain exceptions.[81] Depending, in particular, on the extent of the domestic, i.e. Swiss, relationship, a violation of Swiss substantive public policy should be found only in cases of excessive punitive damages.[82]

B. Partial Enforcement

Applying the above criteria is not a problem, provided that the U.S. jury has rendered a specific verdict, i.e. one where punitive damages are split into different categories, such as general damages, special damages, punitive damages, contingency fees, etc. Under these circumstances, the judge in charge of recognition and enforcement of the U.S. punitive damages award may go through the various components and apply the above criteria. He will either find for a similar instrument in Switzerland and, therefore, allow enforcement, or else, if the penal character predominates, or if a reasonable relation between the amount of damages awarded and the damage or loss actually suffered is questionable, decide whether or not to enforce the U.S. judgment, always considering, of course, the extent of the domestic relationship of the matter.

This approach, however, depends on whether or not a partial enforcement is considered admissible, which is still a controversial issue. The main objection brought up by some leading legal commentators is the argument that a partial recognition would amount to a material re-examination by the enforcement judge. This would violate the prohibition of "révision au fond".[83] As, however, any public policy control amounts to an explicitly admissible *limited* "révision au fond"[84] the argument is not very convincing.

Personally, I share the opinion of those authors who opt in favor of the possibility of partial recognition, at any rate in cases where the different damages components are clearly separable, as is the case in a

65 DROLSHAMMER|SCHÄRER, p. 315-316.
66 Cf. hereto V.
67 Anton K. Schnyder, Das neue IPR-Gesetz, 2nd ed., Zurich 1990, p. 37; Teddy S. Stojan, Die Anerkennung und Vollstreckung ausländischer Zivilurteile in Handelssachen, Zürcher Studien zum Verfahrensrecht, Vol. 72, Zurich 1986, p. 60 ("STOJAN"). The same problem exists in Germany, cf. BAUMBACH|HENKEL, p. 731.
68 LENZ, p. 135 et seq. with further references.
69 Cf. III.A. LENZ, as well, approves the qualification of punitive damages decisions as civil decisions, cf. LENZ, p. 140.
70 Cf. the instruments presented under IV.A.1.
71 DASSER, p. 107.
72 LENZ, p. 179 (with references to other authors) is even of the opinion that, whenever a U.S. judge awards reparation payments, they have to be recognized and enforced, irrespective of whether they qualify as excessive according to Swiss principles. The fact that, in some countries, an individual's life and physical health is assigned a higher financial value, according to Lenz, is not to be seen as a violation of our fundamental concepts of law.
73 As explained at II.A, the civil-law concept that legal fees must be borne by the defeated party is, in the U.S., often replaced by punitive damages. To the extent punitive damages serve this purpose, they cannot be considered contrary to public policy. Cf. LENZ, p. 182 and MÖRSDORF-SCHULTE, p. 29 and 30.
74 SIEHR, p. 709.
75 IV.A.
76 Cf. IV.A,. as well as the detailed analysis of LENZ, p. 183-186.
77 IV.A.1.
78 GOTANDA, p. 203, BERNET|ULMER, p. 273.
79 The Swiss PIL merely addresses the recognition and enforcement of foreign *civil* decisions but not decisions of predominantly penal or administrative character, cf. IV.B.
80 BERNET|ULMER, p. 274 FN 15; LENZ, p. 150 et seq., cf. also II.B.
81 IV.A.2.
82 BERNET|ULMER, p. 274.
83 HABSCHEID, p. 580, N 13; Gabrielle Kaufmann-Kohler, Enforcement of United States Judgments in Switzerland, Wirtschaft und Recht, Vol. 35 (1983), p. 244; STOJAN, p. 75.
84 This derives from Art. 27 para. 1 and 3 PIL, which explicitly allows a re-examination of the merits with regard to public policy.

specific verdict.[85] Even though there is, so far, no Swiss case law, chances are good that Swiss courts will follow the decision of the German Federal Court of Justice, which confirmed the partial enforcement of the compensatory damage components of a U.S. punitive damages judgment.[86] In fact, recent discussions on an international level, for example, at the Hague Conference on Private International Law, held on June 6 - 20, 2001, allow the conclusion that partial recognition will be the future standard (not only in Germany but also internationally). Commission II of the said conference produced an interim text, which demands, in Art. 33[87], that partial recognition of punitive damages (among other things) should be available, at least to the extent to which a court in the respective state, itself, could have awarded comparable damages.[88]

The situation is, of course, more complicated if a jury has rendered a general verdict, i.e. one that does not state separate components but simply the overall amount of punitive damages. In this situation, the enforcement judge, in effect, would have to examine the award closely and distinguish the individual grounds that make up the overall amount of punitive damages. Without question, a judge cannot do so without interpreting the U.S. judgment in light of certain hypothetical assumptions. Therefore, his examination of the U.S. judgment, indeed, carries the risk of constituting a "révision au fond", which is prohibited.[89]

Lenz[90] has presented a possible solution that I, for my part, rather doubt to be capable of solving the problem. Lenz proposes that, in an analogous manner to Art. 16 para. 1 PIL, the judge might ask the plaintiff to prove that components of the overall punitive damages awarded result from considerations that also exist in Swiss instruments. If this is not practical, the plaintiff might be asked to prove either that there is no dominant penal element, or else, that the punitive damages awarded are not excessive.[91]

VI. Conclusion

This presentation of the current enforcement situation of U.S. - style punitive damages awards in civil-law countries has shown that the traditional standpoint, according to which punitive damages awards *per se* are not enforceable, is no longer defensible. Clearly, a more liberal trend is perceptible, a trend that can be ascribed to the fact that punitive damages elements have found their way into civil-law legal systems. As a consequence, such awards should be enforceable, at least to the extent that they meet certain criteria that provide for sufficient protection from massive punitive and multiple damages awards.

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85 BERNET|ULMER, p. 274; BERNET|ULMER, RECOGNITION, p. 329 N 58; LENZ, p. 172-174; DÖRIG, p. 360. For Germany, cf. MÖRSDORF-SCHULTE, p. 43 and 44.

86 Cf. II.B.

87 Article 33 Damages
"1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.
2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.
b) In no event shall the court addressed recognise or enforce the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.
3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

88 A web link to the interim text of Commission II of the Hague Conference on Private International Law of June 6 - 20, 2001 is available at http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/index_de.htm.

89 Regrettably, Art. 33 regarding the recognition and enforcement of, among others, punitive damages, which is currently discussed by Commission II of the Hague Conference on Private International Law, does not at all address this problem, since it does not differentiate between awards that were rendered as specific verdicts or general verdict; cf. above, FN 86.

90 LENZ, p. 189 et seq.

91 Without making the distinction between specific and general verdicts, this solution is also proposed by DASSER, p. 110.

Verstösst die Kulanz gegen US-Recht?

Von *Dr. Kevin M. McDonald,* LL.M. Eur.*

1. Einleitung

Nach dem Ford-Firestone Fall aus dem Jahre 2000 und den daraus entstandenen Klagewellen sind eine Reihe verbraucherschutzrechtlicher Gesetze wieder in den Vordergrund getreten. Dieser Aufsatz befasst sich mit einem solcher Gesetze, das darauf hinzielt, „versteckte" Gewährleistungen zu verhindern.

2. Wortlaut eines typischen Gesetzes

Das kalifornische Gesetz gegen das Betreiben versteckter Gewährleistung lautet wie folgt[1]:

Hersteller[2] haben die folgenden Pflichten:

(a) Ein Hersteller muss innerhalb von 90 Tagen nach der Aufstellung eines Gewährleistungsanpassungsprogrammes (*warranty adjustment program*), vorbehaltlich einer Priorität für sicherheits- oder abgasrelevante Rückrufaktionen, alle nach dem Programm berechtigten Fahrzeugbesitzer und Fahrzeugmieter über den das Programm auslösenden Zustand sowie die Hauptbedingungen des Programmes per Briefpost benachrichtigen.

(b) Kopien aller Mitteilungen müssen an dem *New Vehicle Motor Board* innerhalb des *Department of Motor Vehicles* und der Öffentlichkeit zur Verfügung gestellt werden.

(c) Ein Hersteller muss innerhalb von 30 Tagen nach der Aufstellung irgendeines neuen Gewährleistungsanpassungsprogrammes seine Händler über alle Bedingungen schriftlich informieren.

(d) Ein Hersteller, der ein Gewährleistungsanpassungsprogramm aufstellt, muss Maßnahmen einführen, welche die Kostenerstattung jedes nach dem Gewährleistungsanpassungsprogramm berechtigten Kunden sicherstellen, der vor der Inkenntnissnahme des Programmes Kosten auf sich nahm. Die Kostenerstattung muss mit den Bedingungen des einzelnen Programmes vereinbar sein. Der Hersteller muss innerhalb von 21 Geschäftstagen nach Eingang des Anspruches auf Kostenerstattung dem Kunden mitteilen, ob der Anspruch genehmigt oder abgelehnt wird. Wenn der Anspruch abgelehnt wird, müssen die spezifischen Gründe für die Absage schriftlich genannt werden.

(e) Jeder Kunde, der vor der Inkenntnisnahme eines Gewährleistungsanpassungsprogrammes Kosten für den Ersatz eines nach der Gewährleistungs-anpassungsprogrammes geregelten Zustandes auf sich nehmen musste, darf Anspruch auf Kostenerstattung nach Paragraph (d) erheben. Dieser Anspruch muss schriftlich innerhalb von zwei Jahren nach Zahlung des Kunden für den Ersatz des Zustandes an den Hersteller erfolgen.

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* Attorney-at-Law, Volkswagen of America, Inc., Auburn Hills, Michigan / USA. - Die herein vertretenen Ansichten geben ausschliesslich meine Ansichten wieder. Auf keinen Fall stellen sie die Ansichten von Volkswagen, Audi oder ihren Mitarbeitern dar. Für seine kritische Durchsicht und hilfreichen Anregungen möchte ich mich bei Herrn *Thomas Urban* ganz herzlich bedanken. Eine ausführlichere Version des Aufsatzes findet man im RIW 9/2003, S. 655 ff.

1 Siehe Cal. Civil Code § 1795.92 (Duties of manufacturers). Siehe auch das Kapitel 1.5 (Motor Vehicle Warranty Adjustment Programs) des kalifornischen Gesetzbuches unter Titel 1.7 (Consumer Warranties).

2 „Hersteller" bedeutet jede Person (juristischer oder natürlicher Art), Firma, oder Unternehmen, ob ansässig oder nicht ansässig, die/das Fahrzeuge für Verkaufs- oder Vertriebszwecke in Kalifornien herstellt oder montiert. Im Falle der nicht in den Vereinigten Staaten hergestellten Fahrzeuge, schliesst der Begriff „Hersteller" auch jede Person (juristischer oder natürlicher Art), Firma oder Unternehmen ein, dessen Geschäft das Import von Fahrzeugen ist. Siehe Cal. Civil Code § 1795.90(b)).

3. Tatbestandselemente

Die Gesetze zur Verhinderung „versteckter" Gewährleistungen zielen darauf hin, die Ungleichbehandlung zwischen Kunden auszuräumen.[3] Die Ungleichbehandlung entsteht durch eine Politik, wonach nur bestimmte Kunden ihre Reparatur- bzw. Ersatzteilkosten zurückerstattet bekommen, während andere Kunden (beziehungsweise unabhängige Werkstätte) nichts bekommen, weil sie von dieser Politik nichts wussten.

Aus dem oben zitierten kalifornischen Gesetz - was die typischen Anforderungen von Gesetzen zur Verhinderung „versteckter" Gewährleistungen widerspiegelt - lassen sich drei grundsätzliche Tatbestandselemente ableiten: 1. der Mangel (möglichst breit auszulegen) wird von einem Hersteller anerkannt, 2. die Aufstellung eines „Gewährleistungsanpassungsprogrammes", wonach der Hersteller entweder einen Teil oder die gesamten Kosten für bestimmte Reparaturen oder Ersatzteile übernimmt und 3. die Unterlassung des Herstellers, allen betroffenen Kunden über die ausgedehnte Gewährleistung in Kenntnis zu setzen.

3.1 Der Mangel

Ein bestimmter Rechtsbegriff für das Bestehen eines Mangels gibt es leider nicht. Allerdings lässt sich der Begriff weit auslegen, so dass ein Mangel mit einem Zustand gleichzusetzen ist, der möglicherweise die Haltbarkeit, Zuverlässigkeit oder Leistung eines Fahrzeuges im Wesentlichen betrifft.[4] Solche „Zustände" sind oft Themen technischer Merkblätter, die häufig neue Reparaturmethoden, Diagnostikprozeduren u.ä. ankündigen. In den meisten Fällen, insbesondere wo technische Merkblätter das grundlegende Problem („Zustand") beschreiben, wird dieses Element erfüllt.

3.2 Die Aufstellung eines Programmes

Viel schwieriger zu interpretieren ist das zweite Tatbestandselement: die Aufstellung eines „Gewährleistungsanpassungsprogrammes". Ein auf englisch genanntes *„adjustment program"* bedeutet nach dem kalifornischen Gesetz „jedes Programm oder Politik (*„policy"*), wonach die Verbrauchergewährleistung nach der angegebenen Begrenzung ausgedehnt oder verlängert wird, oder wonach ein Hersteller die Kostenerstattung des ganzen oder eines Teils des Ersatzes anbietet oder den Verbrauchern die Kosten des ganzen oder eines Teils der Reparatur zurückerstattet von einem Zustand, der die Haltbarkeit, Zuverlässigkeit oder Leistung eines Fahrzeuges wesentlich betrifft, außer Wartungsmaßnahmen, die nach den Bestimmungen einer sicherheits- oder abgasrelevanten Rückrufaktionen durchgeführt werden.

Ein *„adjustment program"* schliesst einzelne *ad hoc* Anpassungsmaßnahmen aus, die von einem Hersteller lediglich von Fall zu Fall durchgeführt werden.

Wenn die Fälle sich wiederholen, gilt dies *de facto* als „Programm". Es kann manchmal schwierig sein, zu entscheiden, ob mehrere *ad hoc* Entscheidungen, die auf derselben Basis getroffen wurden, kumulativ als *de facto* verbotenes „Programm" angesehen werden sollten. Zu diesem Thema hat das *Wisconsin Department of Transportation* bereits im August 1992 eine öffentliche Stellungnahme veröffentlicht.[5] Danach schreibt das Amt: „Da das Gesetz nicht vorschreibt, wieviele von Fall zu Fall getroffene „Einzelmaßnahmen" für das gleiche Problem oder den gleichen Zustand eine „versteckte Gewährleistung" darstellen oder welche Zustände die Haltbarkeit, Zuverlässigkeit oder Leistung eines Fahrzeuges wesentlich betrifft, werden die Gerichte im Endeffekt über diese Fragen entscheiden. Die Grenze zwischen „Einzelmaßnahmen" und „Anpassungsprogramme" ist nicht immer einfach zu ziehen.

Nach einer gewissen Zeit können sich „Einzelfälle" häufen, so dass man vielleicht von einem *de facto* „Programm" reden kann. Nach den Gesetzen zur Verhinderung „versteckter" Gewährleistungen muss aber ein *Programm* vom Hersteller aufgestellt werden. Unter „Programm" werden aber nach allen Gesetzen zur Verhinderung „versteckter" Gewährleistungen *ad hoc* Einzelanpassungsmaßnahmen ausgenommen.

Die Hersteller werden aufgefordert, „good judgment" (gutes Urteilsvermögen) bei der Entscheidung anzuwenden, wenn Einzelmaßnahmen sich in eine „versteckte Gewährleistung" umwandeln. Folgende Beispiele deuten nach Ansicht des Amtes auf eine „versteckte Gewährleistung" hin:

1 viele Kunden beschweren sich über den gleichen Zustand, welcher die Haltbarkeit, Zuverlässigkeit oder Leistung der Fahrzeuge betrifft, die nicht mehr von der ausdrücklichen Gewährleistung geschützten sind;

2 ein Hersteller informiert schriftlich oder mündlich sein regionales Personal oder seine Händler, dass der Hersteller in ausgewählten Fällen die Reparaturkosten eines bestimmten Zustandes, der die Haltbarkeit, Zuverlässigkeit oder Leistung der nicht mehr von der ausdrücklichen Gewährleistung geschützten Fahrzeuge betrifft, übernehmen wird;

3 der Hersteller oder sein regionales Personal stellt eine übliche Verhaltensweise auf, die von Fall zu Fall Einzelmaßnahmen vorsieht für den gleichen Zustand, der die Haltbarkeit, Zuverlässigkeit oder Leistung der Fahrzeuge betrifft, die nicht mehr von der ausdrücklichen Gewährleistung geschützt sind.

In solchen Fällen sollte der Hersteller seine Händler und Kunden über die Einzelheiten des Anpassungsprogrammes benachrichtigen.

Folgende Maßnahmen dürfen Hersteller durchführen, ohne gegen ein Gesetz zur Verhinderung „versteckter" Gewährleistungen zu verstoßen:

1 Der Hersteller darf für die Reparaturen, die durch die ausdrückliche Gewährleistung gedeckt sind, bezahlen.

2 Der Hersteller darf für Reparaturen bezahlen, die gemäss einer abgas- oder sicherheitsrelevanten Rückrufaktion durchgeführt werden.

3 Der Hersteller darf für Zustände bezahlen, die zwar nicht mehr von der Gewährleistung gedeckt sind solange die Zustände nicht die Haltbarkeit, Zuverlässigkeit oder Leistung des Fahrzeuges betreffen.

4 Der Hersteller darf für die Reparatur von Zuständen, die nicht mehr von der Gewährleistung gedeckt sind, die zwar die Haltbarkeit, Zuverlässigkeit oder Leistung des Fahrzeuges betreffen, wenn die Reparaturen lediglich in einzelnen Fällen vorkommen, solange sich keine übliche Verhaltensweise für getroffene Maßnahmen für den gleichen Zustand ereignet.

Keiner der Bundesstaaten schreibt vor, dass Hersteller die Kunden über einzelne *ad hoc* Maßnahmen in Kenntnis setzen muss, die von Fall zu Fall entschieden werden. Zu diesem Thema hat auch der Bundesgericht für den nördlichen Bezirk in Illinois kürzlich entschieden, dass ein Hersteller, der einen Kunden über eine einzelne *ad hoc* Maßnahme nicht in Kenntnis setzt, keinen „Betrug" begeht[6].

3.3 Die Untersagung des Bescheids

Das dritte Tatbestandselement wird als erfüllt angesehen, wenn nicht *jeder* nach den Bestimmungen eines Anpassungsprogrammes berechtigter Kunde benachrichtigt wurde. Dadurch, dass nur bestimmte Kunden über die „versteckte" Gewährleistung Bescheid wissen, entsteht eine Ungleichbehandlung.

In diesem Zusammenhang sollte auf den Rechtsbegriff eines „Kunden" kurz eingegangen werden. Nach dem typischen Gesetz gelten Kunden als:

1 der Käufer eines neuen Fahrzeuges für nicht Wiederverkaufszwecke;

2 der Leasingnehmer eines neuen Fahrzeuges gemäss eines schriftlichen Leasing-Vertrages;

3 jeder, dem das Fahrzeug während des Zeitraumes der Gewährleistung übertragen wird (für nicht Wiederverkaufszwecke);

4 jeder, der die Gewährleistung gerichtlich durchsetzen darf.

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3 In Wisconsin: „Zweck dieses Gesetzes ist es, die Gleichheit zwischen Kunden zu schaffen, und zwar dadurch, dass es Herstellern verboten ist, „versteckte Gewährleistungen" anzubieten, welche die nicht mehr von der Gewährleistung gedeckten Reparaturkosten für einige Kunden erstatten, aber nicht für alle Kunden, die vom gleichen Fahrzeugmangel betroffen sind." Siehe Wisconsin Department of Transportation, Motor Vehicle Warranty Adjustment Program, Act 298, Wisconsin's New „Secret Warranty" Law, veröffentlich im August, 1992.

4 Vgl. hierzu der Begriff eines „warranty adjustment" nach dem o.g. kalifornischen Gesetz. Cal. Civil Code § 1795.90(d)).

5 Siehe Wisconsin Department of Transportation, Motor Vehicle Warranty Adjustment Program, Act 298, Wisconsin's New „Secret Warranty" Law, veröffentlich im August, 1992.

6 Siehe Jacobson v. Ford Motor Co., 1999 U.S. Dist. LEXIS 16213 (1999) (U.S. N.D. Ill., Eastern Division). Aus dem Urteil geht hervor, dass Hersteller nicht verpfichtet sind, einzelne *ad hoc* Kundendienstmaßnahmen Kunden mitzuteilen. Des weiteren sind Hersteller nicht gesetzlich verpflichtet, überhaupt eine Unternehmenspolitik zu haben, die eine Kundendienstmaßnahme (z.B. Kulanz) von Fall zu Fall auf *ad hoc* Basis vorsieht.