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Charting Developments Concerning Punitive Damages: Is the Tide Changing?

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Charting Developments Concerning Punitive Damages: Is the Tide Changing?

John Y. Gotanda

Abstract

This essay discusses a number of developments outside of the United States concerning punitive damages, which may ultimately signal a change in the way other countries view American awards of such damages.

To date, courts in many countries have refused to recognize and enforce American punitive damages awards on the ground that they violate the host country's public policy. In most civil law countries, such as France and Germany, penal damages can only be ordered in criminal proceedings; a civil award of such damages has been viewed as contrary to ordre public. In common law countries, while punitive damages generally may be awarded in civil suits, there is no agreement on the circumstances warranting punitive damages, and courts differ on the appropriate amount of such an award.

While traditionally American awards of punitive damages have been difficult to enforce abroad, this practice may be about to change. Recently developments in France, Germany and the European Union, as well as decisions in Australia, Canada and Spain point toward greater receptivity to punitive damages and enforcement of foreign awards of these damages. In France, proposed revisions to the French Civil Code call for awarding punitive damages in certain cases. In Germany, a study by a prominent scholar finds that German courts are beginning to award penal damages in civil actions. In the European Union, a European Commission Green Paper raises the possibility of allowing the doubling of damages in certain antitrust cases. In Australia, a recent decision by the Supreme Court of South Australia opines that Australian courts would enforce large punitive damages awards ordered by American courts. Moreover, in Canada and Spain, appellate courts affirm decisions to enforce American judgments that included punitive damages. While these developments do not point toward clear sailing for

American punitive damages abroad, when viewed together they may foreshadow a change in the wind that may ultimately lead to greater enforcement of these damages.

CHARTING DEVELOPMENTS CONCERNING PUNITIVE DAMAGES: IS THE TIDE CHANGING?

*John Y. Gotanda**

I. INTRODUCTION

As United States courts decide claims for punitive damages, they continue to stir the waters. Recently, a federal district court ordered Exxon to pay US$4.5 billion in punitive damages arising from the Valdez oil spill;[1] the Florida Supreme Court set aside a US$145 billion punitive damages award against tobacco companies;[2] and the United States Supreme Court decided to revisit its efforts to stem the flow of excessive punitive damages awards.[3] The reaction outside the United States to American court awards of punitive damages has been largely negative.[4]

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[1] *See* In re the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004).

[2] *See* Engle v. Liggett Group, Inc., No. SC03-1856, 2006 WL 1843363 (Fla. July 6, 2006).

[3] *See* Philip Morris USA v. Williams, 127 P.3d 1165, *cert. granted*, 74 U.S.L.W. 3572, 3665, 3668 (U.S. May 30, 2006) (No. 05-1256).

[4] *See* Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission "Damages actions for breach of the EC antitrust rules" (F.R.G.), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/140_en.pdf (stating that "experience in the USA shows a significant potential for misuse [of punitive damages]"); European Chemical Industry Council, The Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules (Apr. 12, 2006), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/022.pdf ("The US system is based on different cultural values and elements that over-encourage individual citizens to fight unduly before law courts, including with regard to anti-trust enforcement such as: treble damages . . . ."); United States Department of State, Enforcement of Judgments,

This should come as no surprise as most civil law countries prohibit punitive damages in private actions and, even in those common law countries that allow awards of such damages, the size of the American awards dwarfs what is allowable in those countries. Accordingly, to date, courts in many countries have barred their courts from enforcing American punitive damages awards on the grounds that they violate the host country's public policy. However, the tide may be about to change.

Recent developments in France, Germany, and the European Union, as well as in Canada, Australia and Spain point toward greater receptivity toward punitive damages and the enforcement of these foreign awards. In France, proposed revisions to the French Civil Code call for the awarding of punitive damages in some cases.[5] In Germany, a study

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http://travel.state.gov/law/info/judicial/judicial_691.html (noting that "a principal stumbling block [preventing other countries from reaching an agreement with the United States on enforcement of judgments] appears to be the perception of many foreign states that U.S. money judgments are excessive according to their notions of liability"); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 VA. J. INT'L L. 809, 879 (2005) (noting that "punitive damages have been subject to a great deal of criticism, both within and without the United States"); George Kerevan, *Price for Democracy in Courts is Ignorance of Law*, SCOTSMAN, Jan. 19, 2001 ("US juries routinely show bias against big business by awarding huge damages in civil cases."); Iain Pester, *The Needs of a Successful Justice System*, TIMES (U.K.), Feb. 7, 1995 (arguing that the "problem" behind "the frenzy of litigation seen in America" is "the excessive and punitive damages awarded by American juries").

[5] *See* Avant-projet de reforme du droit des obligations (Articles 1101 à 1386 du Code civil), et du droit de la prescription (Articles 2234 à 2281 du Code civil), art. 1371 (Sept. 22, 2005). The "working group of reform of the right of the obligations, was a commission of academics sponsored by Association Henri Capitant and directed by Professor Pierre Catala tasked with developing a proposal to reform Book III of Title III of the French Civil code ("Of the Contracts or Conventional Obligations in General"). *See. http://www.henricapitant.org/IMG/pdf/Avant-projet_de_reforme_du_droit_des_obligations_et_de_la_prescription_et_expose_des_m*

by a prominent scholar finds that German courts are beginning to award penal damages in civil actions.[6] In the European Union, a European Commission Green Paper raises the possibility of allowing the doubling of damages in certain antitrust cases.[7] In Australia, a recent decision by the Supreme Court of South Australia opines that Australian courts would enforce large punitive damages awards ordered by American courts.[8] And in Canada and Spain, the courts have enforced American judgments that included punitive damages.[9] While these developments do not point toward clear sailing for acceptance of American punitive damages abroad, when viewed together they may foreshadow a change in the wind that may ultimately lead to greater enforcement of foreign awards of these damages.

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otifs.pdf. For an English translation of the proposed revisions to the Code of Obligations, see http://translate.google.com/translate?hl=en&sl=fr&u=http://www.henricapitant.org/article.php3%3Fid_article%3D47&sa=X&oi=translate&resnum=3&ct=result&prev=/search%3Fq%3Dbicentenaire%2Bdu%2BCode%2Bcivil%2Ble%2B11%2Bmars%2B2004%2Band%2Bhenri%2Bcapitant%26hl%3Den%26lr%3D%26sa%3DG (Alain Levasseur and David Gruning trans., 22 Sept. 2005).

[6] *See* Volker Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 160 (2003).

[7] *See* Commission of the European Communities, Green Paper: Damages Actions for Breach of EC Antitrust Rules (Dec. 19, 2005), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf.

[8] *See* Benefit Strategies Group, Inc. v. Anor Prider, [2005] S.A.S.C. 194 (Australia).

[9] *See* Beals v. Saldanha, [2003] 3 S.C.R. 416, ¶ 76 (Canada); Miller Import Corp. v. Alabastres Alfredo, S.L., STS, Nov. 13, 2001 (Exequátur No. 2039/1999) (Spain), *translated in* Scott R. Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain,* 24 J.L. & COM. 225, 231-43 (2005).

II. OVERVIEW

Punitive damages, also called "exemplary" or "penal" damages, are "sums awarded apart from any compensatory or nominal damages, usually . . . because of particularly aggravated misconduct on the part of the defendant."[10] The primary rationales for punitive damages are to punish and deter certain conduct, especially willful or malicious conduct.[11] Courts and commentators have asserted that punitive damages also "vent[] the indignation of the victimized,"[12] discourage the injured party from engaging in self-help remedies,[13] compensate victims for otherwise uncompensable losses,[14] and reimburse the plaintiff for litigation expenses that are not otherwise recoverable.[15]

Most civil law countries limit recovery of damages in private actions to compensatory damages.[16] These countries prohibit punitive dam-

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[10] DAN B. DOBBS, HORNBOOK ON THE LAW OF REMEDIES 204 (1973) (citing Restatement of Torts § 908 (1939)). *See* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 275 (1935) ("Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment to the plaintiff.").

[11] *See* 1 LINDA SCHLUETER, PUNITIVE DAMAGES § 2.2(A)(1) (5th ed. 2005); Jane Mallor & Brian Roberts, *Punitive Damages: Towards a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980).

[12] Note, *Punitive Damages and Libel Law,* 98 HARV. L. REV. 847, 851 (1985).

[13] *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3–9 (1982).

[14] *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437–38 n.11 (2001); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 179 (2003).

[15] *See* Ellis, *supra* note 13, at 3.

[16] *See, e.g.*, Schweizerisches Obligationenrecht [OR] arts. 45–47 (Switz.); Codice civile [C.C.]. art. 1223 (Italy); Belgian Civil Code art. 1382; Código Civil [C.C.]

ages in private actions because they consider punitive damages a form of punishment that is appropriate only in criminal proceedings.[17]

By contrast, punitive damages are generally available in common law countries, although the circumstances under which they are allowed and the amounts allowed differ from country to country.[18] For example, in England, punitive damages are generally restricted to three categories of cases: (1) suits involving oppressive action by government servants; (2) suits involving conduct calculated to result in profit which may well exceed the compensation payable to the plaintiff; and (3) suits for punitive damages expressly authorized by statute.[19] In New Zealand, while punitive damages are more widely available than in England, the size of punitive damages awards has been significantly smaller than in the United States.[20] Further, while punitive damages are available in antitrust

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arts. 1106, 1902 (Spain); Bürgerliches Gesetzbuch [BGB] [Civil Code] art. 249 (F.R.G.); Finland Damages Act of 1974, *summarized in* THE FINNISH LEGAL SYSTEM, 134 (J. Uotila ed., 2d ed. 1985); Astikos Kodikas [A.K.] [Civil Code] arts. 297−299 (Greece); Civil Code of the Polish People's Republic art. 444; Grazhdanskii Kodeks RF [GK RF] [Civil Code] art. 15 (Russ.); Czech Republic Civil Code § 442 [Czech Civ. C.]; Burgerlijk Wetboek [BW] § 162 (Neth.).

[17] *See* Behr, *supra* note 6, at 127–28; Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 325-26 (1989); Wolfgang Kühn, *RICO Claims in International Arbitration and their Recognition in Germany*, 11(2) J. INT'L ARB. 37, 42 (June 1994).

[18] *See* John Y. Gotanda, *Punitive Damages: A Comparative Analysis,* 42 COLUM. J. TRANSNAT'L L. 391, 398 (2004).

[19] *See* Rookes v. Barnard, [1964] A.C. 1129 (H.L.)*; see also* Cassell & Co., Ltd. v. Broome, [1972] 1 *All E.R.* 801 (H.L.). For a discussion of the awarding of punitive damages in common law countries, see Gotanda, *supra* note 18, at 398–440.

[20] *See* Joanna Manning*, Reflections on Exemplary Damages and Personal Injury Liability in New Zealand,* 2002 N.Z. L. REV. 180-81 (2002).

cases in the United States,[21] they have not thus far been awarded in the United Kingdom.[22] Moreover, there is no consensus among common law countries on whether an arbitrator, as opposed to a judge, may award punitive damages.[23]

All countries prohibit excessive awards of damages, including excessive awards of punitive damages. What constitutes an excessive award varies from country to country.[24]

It is unclear whether countries that do not allow punitive damages will enforce a foreign arbitral award or foreign court judgment of such damages. Furthermore, it is uncertain whether countries that allow punitive damages will enforce a large foreign award of such damages, particularly one that is much larger than would be permissible in the enforcing country. In addition, no consensus exists over whether a common law country would enforce a foreign punitive damages award that results from a claim for which the enforcing country would allow only compensatory relief.

Whether a country will enforce a foreign arbitral award or a for-

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[21] *See* Clayton Act § 4, 15 U.S.C. § 15(a) (1997).

[22] However, in Healthcare at Home v. Genzyme Limited, Case No. 1060/5/7/06, 5 April 2006, the court is considering whether exemplary damages may be awarded for the first time in a competition case in the United Kingdom. *See* Office of Fair Trading (U.K.), *Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules*, May 2006 [hereinafter Comments of the Office of Fair Trading], *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/130.pdf.

[23] *Compare* Garrity v. Lyle Stuart, Inc, 353 N.E.2d 793 (N.Y. 1976) *with* Bonar v. Dean Witter Reynolds Inc., 835 F.2d 1378, 1386–87 (11th Cir. 1988).

[24] *See* Gotanda, *supra* note 18, at 442.

eign court judgment often depends on whether it has entered into a treaty or convention providing for its enforcement. Most trading nations have entered into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention, which has been adopted by 137 countries to date, provides that arbitral awards rendered in signatory countries are enforceable in all other signatory countries, subject to a narrow list of exceptions.[25] The exception that is most relevant with regard to the enforcement of punitive damage awards is found in article V(2)(b), which states that a court may refuse to recognize and enforce a foreign arbitral award if it "would be contrary to the public policy of that country."[26]

The scope of the public policy exception has been the subject of considerable controversy. Some countries have interpreted this exception broadly so that any award violating domestic public policy may be denied recognition and enforcement.[27] Others, such as France, interpret the pub-

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[25] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 17 U.S.T. 1270, 575 U.N.T.S. 159. *See also* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp (listing participant countries).

[26] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 25, art. V(2)(b). In addition, the Inter-American Convention on International Commercial Arbitration, which requires member states to recognize and enforce arbitral decisions made in other member states, has a similar public policy exception. *See* The Inter-American Convention on International Commercial Arbitration art. 5(2)(b), *adopted* January 30, 1975, *available at* http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp.

[27] *See* Karen J. Tolson, Comment, *Punitive Damages Awards in International Arbitration: Does the 'Safety Valve' of Public Policy Render Them Unenforceable in Foreign States?*, 20 LOY. L.A. L. REV. 455, 492-94 (1986-87) (discussing case in which Indian court refused to enforce arbitral award based on domestic public pol-

lic policy exception narrowly. In these countries, the exception refers to international public policy.[28] Unlike domestic public policy, which includes all of the imperative rules of the State in which enforcement is sought, international public policy encompasses only those basic notions of morality and justice accepted by civilized countries.[29]

By contrast to arbitral awards, no similar treaty or convention on the enforcement of foreign court judgments has been adopted by a large number of countries. In the absence of an agreement (such as a bilateral treaty) on the subject, each country is free to decide whether to recognize or enforce a foreign court judgment. Thus, it is typically more difficult to enforce a foreign court judgment than a foreign arbitral award. Furthermore, enforcement decisions have varied greatly, and it is therefore difficult to predict with any degree of certainty whether a court will enforce a foreign award.

Recently, there was an attempt to reach an agreement on the enforcement of court judgments, which culminated in the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Mat-

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[28] *See, e.g.*, Code de procédure civile [C. PR. CIV.] art. 1502 (Fr.), *reprinted in* 7 Y.B. COM. ARB. 281–82 (1982). *See also* Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J., 511, 513–31 (1988).

[29] *See* JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 534–35 (1978); *see also* Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974) (ruling that the New York Convention's "public policy defense should be construed narrowly" and "[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the state's most basic notions of morality and justice.").

ters.[30] However, a final convention was never concluded, with punitive damages being a major source of disagreement.[31] Efforts then shifted to concluding a more limited multilateral treaty on choice of court agreements, which resulted in the 2005 Convention on Choice of Court Agreements.[32] The Choice of Court Convention "establish[es] rules for enforcing private party agreements regarding the forum for the resolution of disputes, and rules for recognizing and enforcing decisions issued by the chosen forum."[33] Article 11 of the Convention addresses the issue of punitive damages. It states:

> 1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
>
> 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.[34]

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[30] *See* PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, Oct. 30, 1999, *reprinted in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE app. 1 (John J. Barcelo and Kevin M. Clermont, eds., 2002).

[31] *See* Mark E. Hankin, *Proposed Convention Would Help IP Owners*, NAT'L L.J., July 23, 2001, at C20; *see also* Elaine Massock, et al., *Recent Developments in International Tort and Insurance Law and Practice,* 34 TORT & INS. L.J. 519, 539 (1999) ("The existence of noncompensatory or excessive damages in U.S. judgments continues to be a dilemma" in the Hague foreign judgments convention meetings.).

[32] *See* Convention on Choice of Court Agreements, 30 June 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98%20.

[33] Ronald A. Brand, The New Hague Convention on Choice of Court Agreements, *available at* http://www.asil.org/insights/2005/07/insights050726.html.

[34] Convention on Choice of Court Agreements, supra note 32, art. 11; see Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 549 (2005) (stating "some member states were attracted by the provisions of Article 11 that may limit the recognition of damage awards to compensatory damages; this

It remains to be seen whether the Convention on Choice of Court Agreements will be as widely adopted as the New York Convention.

To date, the enforcement of foreign awards of punitive damages has varied. For example, courts in Japan and Italy have refused to enforce American punitive damage awards.[35] Results in Switzerland have been mixed.

In a 1997 decision, the Supreme Court of Japan upheld a judgment of the Tokyo District Court that refused to enforce punitive damages awarded by a California court in a case involving misrepresentations with respect to a lease contract.[36] The Supreme Court of Japan ruled that "(1) punitive damages contravened the principles of civil procedure and judicial justice of Japan; [and] (2) they would not come within the scope of Article 118 of the Code of Civil Procedure (CCP) and Article 24 of the Civil Execution Code, or at least run counter to public policy of Japan."[37]

In Italy, the Intermediate Court of Appeal in Venice refused to

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allows a country to refuse recognition of what these member states consider excessive American awards, especially punitive damages").

[35] *See* Bryant v. Mansei Kogyo Co., *summarized in* Takonobu Takehara, *Japan*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 54, 58 (C. Platto & W.G. Horton, eds., 2d ed. 1993) (where the court enforced the portion of the judgment awarding compensatory damages, but disallowed the portion of the judgment awarding punitive damages); Parrot v. Fimez S.p.A., 2002 Guir. It. II 2001 (2002), *translated in* Lucia Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 251–62 (2005).

[36] *See* Takao Tateishi, *Recent Japanese Case Law in Relation to International Arbitration*, 17(4) J. INT'L ARB. 63, 71 (Aug. 2000).

[37] *Id.* at 71–72. In a subsequent case, the Japanese Supreme Court found that a Hong Kong court's award of litigation costs, including attorneys' fees, did not contradict public policy. *See id.* at 73.

enforce an American award of punitive damages.[38] At issue in that case was the attempted enforcement of an American judgment of US$100,000 for defective design of a motorcycle helmet which allegedly contributed to the death of the plaintiff's son.[39] Although the American award did not differentiate between the categories of damages, the Italian court determined that the damages were punitive and, thus, contrary to the public order.[40] The court stated:

> Punitive damages . . . clearly have features in common with criminal law, since in punitive damages cases the private party exercises the capacity of public authority. It is clear, therefore, that public damages are in contrast with public order, since in tort actions (as well as in contract cases) the civil law principles of our legal system assume that compensation to the injured party shall be due based on the damages that the party actually suffered.[41]

In Switzerland, the courts appear to be divided on the issue of enforcing foreign punitive damage awards. In a 1982 case, a Court of First Instance in the Canton of St. Gallen refused to recognize and enforce a United States judgment containing punitive damages on the ground that such damages were contrary to public policy.[42] In that case, a Texas state court had "awarded the plaintiffs three times the amount of the actual damages, on the basis of the defendant's misrepresentation in connection

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[38] *See* Parrot v. Fimez S.p.A., *supra* note 35.
[39] *See id.*
[40] *See id.*
[41] *Id.*
[42] *See* Bezirksgericht Sargans, 1 Oct. 1982, *discussed in* Klaus J. Beucher & John Byron Sandage, *United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement*, 23 VAND. J. TRANSNAT'L. L. 967, 986 n.83 (1991).

with the sale of real estate in Texas."[43] In refusing to enforce the punitive damages award, the Swiss court "held that the Texas judgment violated Swiss substantive public policy because it disregarded the fundamental Swiss principle of . . . prohibition against unjust enrichment [of the plaintiff]."[44] The court also held that the penal nature of the award was inappropriate in a civil case.[45]

By contrast, in a 1989 decision, the Appeals Court of Basel affirmed a lower court decision enforcing a California court's award of punitive damages.[46] In that case, a California court had awarded US$120,060 in actual damages and US$50,000 in punitive damages based on "the defendant's fraudulent misappropriation of cargo containers."[47] The Basel Court of First Instance recognized the judgment, finding that it did not contradict Swiss public policy because the "primary purpose [of the punitive damages] had been to force the defendant to restitute to the plaintiff the unjust profit the defendant had realised, and that punishment of the defendant had been of only secondary importance."[48]

Even common law countries that generally permit the awarding of punitive damages may choose not to enforce foreign awards of such damages. For example, Canada has enacted legislation that gives the Attor-

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[43] Martin Bernet & Nicolas C. Ulmer, *Recognition and Enforcement in Switzerland of US Judgments Containing an Award of Punitive Damages,* 22(6) INT'L BUS. LAWYER 272(4), 273 (1994).

[44] *Id.*

[45] *See id.*

[46] *See id.*

[47] *Id.*

ney General of Canada the discretion to refuse to recognize or enforce a foreign judgment of treble damages in antitrust cases if it (1) adversely affects significant Canadian businesses engaged in international trade or commerce, or (2) either infringes or is likely to infringe on Canadian sovereignty.[49] Similarly, England's Protection of Trading Interests Act of 1980 bars English courts from enforcing foreign judgments of multiple damages.[50]

In sum, because many civil law countries prohibit punitive damages in private actions, parties often have been unsuccessful in having American awards of such damages recognized and enforced in these countries. Moreover, because in common law countries there is no agreement on the circumstances warranting punitive damages and courts

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[48] *Id.*

[49] *See* Foreign Extraterritorial Measures Act, ch. 49, § 8 (1984) (Canada).

[50] *See* Protection of Trading Interest Act 1980, *in* 47 HALSBURY'S STATUTES, 569 (4th ed. 2002) (U.K.) (providing that foreign judgments for multiple damages "shall not be registered under Part II of the Administration of Justice Act or Part I of the Foreign Judgments Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such judgment."). The Act also states:

> [W]here a court of an overseas country has given a judgment for multiple damages . . . and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favor the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of such damages[,] . . . the qualifying defendant shall be entitled to recover from the party in whose favor the judgment was given so much of the amount referred to . . . as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded that party.

differ on the appropriate amount of an award of such damages, parties have found it difficult to enforce an American award of punitive damages in these countries as well.

III. SHIFTING CURRENTS?

Up until now, it has been rough sailing for American awards of punitive damages seeking recognition and enforcement on foreign shores. Perhaps that is about to change, however. France, Germany and the European Union may soon be more receptive to awards of punitive damages. In addition, Spain, a civil law country that does not award punitive damages in civil actions, recently enforced an American judgment including punitive damages. Furthermore, Australia and Canada, common law countries, recently enforced American punitive damages awards even though the same amounts might not have been awarded if the actions had been brought in those countries.

A. *Civil Law Recognition of Punitive Damages in Private Actions*

1. *France*

Like most civil law countries, France has long adhered to the traditional rule that prohibits awards of penal damages in civil actions.[51] However, the days of this long standing rule may be numbered.

Under the French Civil Code, damages for breach of contract or

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Id. § 6, at 574.

[51]*See* John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitration in the Wake of* Matrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59, 66 (1997).

tort claims are typically limited to restoring the aggrieved parties to the position they would have been in had the damaging event not occurred.[52] While France allows damages for non-pecuniary harm, including moral damages for mental suffering, such relief is not considered punitive in nature because they are given to compensate the victim and not to punish the wrongdoer.[53]

In 2004, pursuant to a request from President Jacques Chirac, a commission was formed to reform the Civil Code. This resulted in a preliminary draft to reform the Code of Obligations, which was presented to the Ministry of Justice in late 2005.[54] Most significantly, the proposed revision to the Code includes a provision allowing for the awarding of punitive damages, in addition to compensatory damages, when a party has engaged in an obviously deliberate and notably lucrative fault.[55] Specifically, proposed Article 1371 provides:

> One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim.[56]

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[52] *See* Code civil [C. CIV.] art. 1382 (Fr.).

[53] *See* Maurice S. Amos & Frederick Walton, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 209 (F.H. Lawson et al. eds., 3d ed, 1967); 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 8, at 10 (1986).

[54] *See* Avant-projet de reforme du droit des obligations (Articles 1101 à 1386 du Code civil), et du droit de la prescription (Articles 2234 à 2281 du Code civil), *supra* note 5.

[55] *See id.*, art. 1371.

[56] *Id.*

2. *Germany*

Like France, Germany prohibits awards of punitive damages in civil actions. In fact, German courts have traditionally considered this rule to be a matter of fundamental public policy.

In a 1992 decision, the German Federal Court of Justice (the German Supreme Court) refused to recognize and enforce a punitive damages award from a California court on the ground that the award violated German *ordre public*.[57] In that case, a California court awarded US$350,000 in compensatory damages and US$400,000 in punitive damages to a claimant who had alleged that a citizen of both the United States and Germany had sexually abused him.[58] The Federal Court of Justice enforced the compensatory damages award, but refused to enforce the punitive damages award. The court explained that the "enforcement of the [punitive damages] judgment would be contrary to the 'compensation idea underlying damages,' which stems from the constitutional principle of reasonableness, and also contrary to the 'penal monopoly of the State' to impose punitive sanctions."[59]

Although Germany has historically been steadfastly against any recognition of punitive damages in civil actions, a recent study by Ger-

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[57] *See* Judgment of the Bundesgerichtshof, IXth Civil Senate, June 4, 1992, Docket No. IX ZR 149/91, [1992] *Wertpapiermitteilungen* 1451, *summarized in pertinent part in* Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 730–31 (1992).

[58] *See id.* at 730.

man scholar Volker Behr finds that the opposition to such damages may be eroding. He states that, while German law states that damages must be purely compensatory, "[German] courts frequently award damages that cannot seriously be considered compensatory."[60] For example, in one case involving infringement of the right to personality,[61] the German Federal Supreme Court held that the amount of damages awarded by the lower court was too small to have a deterrent effect.[62] Further, in intellectual property cases, some of the methods available for calculating damages go beyond mere compensation of the plaintiff.[63] Moreover, in response to a European Community Directive and two decisions of the European Court of Justice, German courts must now allow damages sufficient to act as a deterrent in sex discrimination cases.[64] A similar approach is likely in other discrimination cases now that the European community has enacted additional directives regarding discrimination.[65]

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[59] Kühn, *supra* note 17, at 45 (quoting German Supreme Court).

[60] Behr, *supra* note 6, at 130.

[61] BGHZ 128, 1 (1) (Caroline I) (F.R.G.).

[62] *See id*.

[63] *See* Behr, *supra* note 6, at 137–38.

[64] *See id.* at 139–44 (arguing that in light of European Community Directive 76/207/EEC (calling for equal treatment of men and women and judicial recourse for persons wronged by failure to comply with the principle of equal treatment) and Case C-180/95, Draehmpaehl v. Urania Immovbilienservice oHG, 1997 E.C.R. I-2195 (holding new BGB section 611a, enacted to implement the EC directive, was inadequate and stating that damages must adequately deter the defendant and other employers from discriminating on the basis of gender), courts in Germany must have the authority to award what amounts to punitive damages in employment cases involving claims of gender discrimination).

[65] *See* Behr, *supra* note 6, at 145 (citing European Community Directive 2000/78/EEC (prohibiting employment discrimination and harassment based on religion or belief, disability, age, or sexual orientation) and European Community Directive 2000/43/EEC (prohibiting discrimination on the basis of racial; or ethnic

Professor Behr predicts that, although German courts have in the past refused to enforce American punitive damages awards, they may eventually do so as long as the punitive damages awards are not excessive.[66]

Finally, it should be noted that the German Monopolies Commission has called for the awarding of double damages in certain antitrust cases to deter parties from engaging in anticompetitive behavior and to encourage private claims to enforce anticompetitive laws.[67] While to date legislation has not been introduced to award such damages, the fact that the Commission has called for its introduction may signal a shift away from the absolute prohibition on the award punitive damages in civil actions.

3. *European Union*[68]

The most significant change, however, would come if the European Commission were to adopt a proposal calling for the awarding of punitive damages for breach of EC antitrust rules. The Commission floated such a change in a recent Green Paper entitled "Damages Actions

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origin)).

[66] *See* Behr, *supra* note 6, at 160.

[67] *See* Das allgemeine Wettbewerbsrecht in der 7, GWB-Novelle, Special Report of the Monopolies Commission provided in accordance with s44(1) section 4 ARC, March 2004, marginal no. 83*, discussed in* Ulf Böge & Konard Ost, *Up and Running, or is it? Private Enfrocement – The Situation in Germany and Policy Perspectives*, 27(4) EUR. COMPETITION L. REV. 197, 201 (Apr. 2006).

[68] "The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals." NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, [1963] ECR 3.

for breach of EC Treaty antitrust rules."[69] This Green Paper was "part of an effort to improve the enforcement of competition law[,] . . . identify obstacles to a more efficient system for bringing [damages claims for infringement of EC antitrust law,] and propose options for solving these problems."[70] One of the proposals called for allowing double damages for horizontal cartels,[71] which the Commission saw as a means to provide "a sufficient incentive to bring [antitrust actions] in relation to the most serious infringements. . . ."[72]

Comments to the proposal from member States have been mixed. The Office of Fair Trading of the United Kingdom indicated an openness to considering this type of damage,[73] but a number of civil law countries

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[69] The Commission publishes Green Papers to generate discussion and seek input from interested parties on a specific subject. Green papers may lead to legislation. *See* European Commission, http://europa.eu/documents/comm/index_en.htm (last visited July 18, 2006).

[70] Green Paper: Damages Actions for Breach of EC Treaty Antitrust Rules, *supra* note 7, at 3.

[71] *See id.* at 7.

[72] *See* European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – frequently asked questions (December 20, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en (suggesting that double damages could serve as an incentive to bring an antitrust action).

[73] However, the Office of Fair Trading noted that its comments might change depending on the outcome of Healthcare at Home v. Genzyme Limited, case number 1060/5/7/06, registered on 5 April 2006, where exemplary damages in a competition case, which have never been awarded in England or Wales, are being considered. *See* Comments of the Office of Fair Trading, *supra* note 22 (opposing "compulsory multiple damages," but stating that "it may be appropriate for the 'double damages' concept to form the focus or starting point for the court when it is considering an award of exemplary damages for breaches of competition law"). *But see* Comments of the Department of Trade and Industry (U.K.), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/085.pdf (stating that while the UK allows punitive damages in certain circumstances, "[t]he

saw this as making an unacceptable change in their fundamental public policy rules.[74]

Commentators are similarly divided on the issue. Some have argued that changes, such as those proposed in the Green Paper, must be made to ensure that antitrust rules are enforced.[75] Others have argued that they are unnecessary and, in particular, the introduction of double damages would be incompatible with the constitutional principles in many civil law countries that view the imposition of penal sanctions as exclusively available in state-instigated actions.[76]

4. *Spain*

Although Spain is a civil law country that does not award punitive

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Government's current policy is that there should be no further lessening through statute of the restrictions on the availability of punitive damages in civil proceedings").

[74] *See, e.g.*, Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission "Damages actions for breach of the EC antitrust rules" (F.R.G.), *supra* note 4; Comments of the Finnish Ministry of Trade and Industry, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/046_en.pdf; Comments of the Irish Competition Authority, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/040.pdf; Comments of Lithuania's Competition Council, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/061.pdf; Comments of the Royal Ministry of Government Administration and Reform (Nor.), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/069.pdf; Comments of the Romanian Competition Council (in consultation with the Romanian Ministry of Justice), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/020.pdf.

[75] *See, e.g.*, John Phesant, *Damages Actions for Breach of the EC Antitrust Rules: The European Commission's Green Paper* 27(7) EUR. COMPETITION L. REV. 365, 369, 378–9 (Jul. 2006).

[76] *See, e.g.*, Christian Diemer, *The Green Paper on Damages: Actions for Breach of the EC Antitrust Rules*, 27(6) EUR. COMPETITION L. REV. 309, 314–15 (Jun. 2006).

damages in private actions, the Tribunal Supremo recently enforced an American judgment that included treble damages for "unauthorized use of intellectual property, violation of a registered trademark, and unfair competition."[77] There, Miller Import Corp. (an American company) and Florence S.R.L. (an Italian company) filed an action in the federal district court in Texas against Alabastres Alfredo, S.A. (a Spanish company) for the unauthorized use of intellectual property, violation of a registered trademark and unfair competition.[78] Miller Import and Florence S.L.R. obtained a judgment, which included an award of treble damages, and sought to have that judgment recognized and enforced in Spain.[79] The defendant claimed that the Spanish courts should not recognize and enforce a treble damages award, because it was penal in nature and contrary to the public policy of Spain.[80] The Tribunal Supremo disagreed and enforced the award notwithstanding the fact that it contained an award of punitive damages.

The court initially noted that the award in this case served several purposes: compensation for the defendant's conduct, a sanction to show disapproval for engaging in wrongful behavior, and to prevent similar behavior in the future.[81] It also pointed out, however, that "it is not always that easy, in addition, to differentiate concepts of compensation, and

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[77] *See* Miller Import, *supra* note 9, at 231.
[78] *See id.*
[79] *See id.*
[80] *See id. at 241.*

to limit the corresponding sum of the coercive sanction and the sum which corresponds to reparation for moral damages[,]" which are allowed in Spain.[82] Indeed, the court noted that Spanish law permits some (albeit minimal) overlap between civil and criminal concepts of compensation for injuries and, as a result, the concept of punitive damages was not completely contrary to Spain's public policy.[83] It also took notice of the fact that U.S. courts have adopted the principle of "proportionality" in awarding punitive damages, and here the treble damages award corresponded to "the material injuries effectively caused" and was part of the "legal norm."[84] The court also opined that there existed among countries a common desire to protect intellectual property rights and that the underlying interest served by the award were not unknown in Spanish law.[85] Based on these considerations, the court concluded that punitive damages cannot be considered a concept that is completely counter to public policy of Spain.[86]

B. *Recent Decisions in Common Law Countries Enforcing American Punitive Damages Awards*

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[81] *See id. at 241–42.*
[82] *See id.242.*
[83] *See id.*
[84] *See id.*
[85] *See id.*
[86] *Id.* One author has cautioned that this decision should be interpreted narrowly. See Jablonski, *supra* note 9, at 230. He points out that "[t]he Court stressed that the damages award reflected the defendant's intentional and egregious conduct in violating the plaintiffs' intellectual and industrial property rights, conduct which is

Despite generally negative views concerning American awards of punitive damages, courts in Australia and Canada have recently enforced American awards of punitive damages.[87]

1. *Australia*

While punitive damages are available in Australia, the Supreme Court of New South Wales, in *Schnabel v. Lui*, declined to enforce the punitive damages portion of an American court judgment.[88] However, a more recent decision by the Supreme Court of South Australia indicates that there is no general prohibition on the enforcement of American awards of punitive damages and that *Schnabel v. Lui* is an exceptional case.

In *Schnabel v. Lui*, a U.S. federal court in California had awarded plaintiffs approximately US$8.7 million in punitive damages. The damages were based on claims for "breach of written contract, breach of oral contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, conversion, fraud, and constructive fraud."[89] In denying enforcement of the punitive damages award, the Supreme Court of New South Wales determined that the California court had awarded punitive damages because of the failure to comply with the court's discovery orders, not because of the defendants' behavior toward the plain-

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and must be sanctioned with vigor in countries with market economies." *Id.*

[87] *See* Benefit Strategies Group, *supra* note 8; Beals v. Saldanha, *supra* note 9; Miller Import, *supra* note 9.

[88] *See* Schnabel v. Lui, [2002] N.S.W.S.C. 15 (unreported decision) (Australia).

tiffs.[90] The distinction was important because, according to the Supreme Court of New South Wales, "the Courts of one country are prohibited from executing the penal laws of another or enforcing penalties recoverable in favour of the State." [91] The court concluded that the punitive damages in this case were "within the categories of a penal law or other public law of the foreign jurisdiction."[92]

Schnabel v. Lui illustrates one Australian court's clear unwillingness to enforce an American punitive damages award where that award was associated with foreign penal sanctions. However, this result should be contrasted with that of *Benefit Strategies Group, Inc. v. Anor Prider*, another recent case where the Supreme Court of South Australia opined that an American award of punitive damages may be enforceable in Australia.[93]

In that case, the plaintiffs obtained in an American court a judgment by default against defendants in the amount of US$16,466,731.73, which included US$13,125,000 in punitive damages (five times the amount that was allegedly stolen from the plaintiffs). Plaintiffs then sought to enforce the judgment in South Australia, but conceded in the enforcement proceedings that the award of punitive damages was unenforceable in Australian courts. The trial court *inter alia* entered an order

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[89] *Id.*
[90] *See id.*
[91] *Id.*
[92] *Id.*

enforcing the judgment awarding actual damages, attorneys' fees and costs, and interest, but excluding the award of punitive damages. On appeal, Justice Bleby of the Supreme Court of South Australia noted:

> The judgment sought to be enforced in this case, although described as "punitive damages," was a judgment in respect of a private right for [the defendant's] 'brazen and fraudulent conduct'. There was no public element in the remedy being enforced [which might have implicated the general principle that the courts of one country do not execute the criminal laws of another]. In my view, it did not fall within the type of judgment which this Court would refuse to enforce on public policy grounds relating to the non-enforcement of foreign penal or revenue laws.[94]

He then distinguished *Schnabel v. Lui* on the ground that the award denied enforcement in that case was a penal award having public connotation, because it was given for the failure to comply with a court order. With respect to the size of the award in *Benefit Strategies*, Justice Bleby stated:

> The amount awarded in this case[, approximately US$16.5 million,] is substantially more than might be awarded by this Court, but that is not the point. In this country an award of exemplary or punitive damages may be justified where the defendant's conduct shows a cruel and reckless disregard of the plaintiff, thereby demonstrating the defendant's callousness and indifference towards the plaintiff in committing the wrong. Such an award of punitive damages is not contrary to public policy in Australia. It is not for this Court to question the amount awarded by the United States court.[95]

2. *Canada*

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[93] *See* Benefit Strategies Group, *supra* note 8.
[94] *Id.* at ¶ 68.
[95] *Id.* at ¶ 73.

Similarly, in *Beals v. Saldanha,*[96] Canada's Supreme Court enforced an American judgment that included punitive damages. In that case, a Florida court had entered a default judgment against the defendants, residents of Ontario, and a jury had awarded compensatory damages of US$210,000, punitive damages of US$50,000, and post-judgment interest.[97] When the enforcement action was brought in Canada, the damages, including interest, totaled CAN$800,000.[98] The Canadian Supreme Court found that the defense of public policy, as well as other defenses, did not prevent enforcement in this case.[99] The Court held that "the public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada."[100] The Court noted, however, that "it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument."[101]

IV. FORECASTS

Do these developments indicate a change toward enforcement of American punitive damages awards? While only by watching future developments will it be possible to know the answer to this question for certain, the cases and legislative proposals discussed herein appear to

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[96] [2003] 3 S.C.R. 416.
[97] *Id.* at ¶¶ 8–9.
[98] *Id.* at ¶ 11.
[99] *Id.* at ¶¶ 43–77.

represent a shift in the current thinking on punitive damages, but not a tidal wave that will sweep away all barriers to enforcement of foreign awards of such damages. Specific forecasts for the countries discussed earlier in this essay are elaborated below.

A. *Calmer Seas?*

If France ultimately enacts the proposal to allow punitive damages in civil actions, the enactment would constitute a sweeping change in that country's position, and may mean that France will be more willing to enforce American punitive damages awards in the future. Further, while Germany still claims not to award punitive damages and court decisions have held that such damages violate German *ordre public*, elements of this type of damage appear to be awarded in cases involving employment discrimination, the right to personality and intellectual property. These cases suggest that Germany may be moving closer to accepting punitive damages in certain categories of private actions, which would also be a major change in its public policy.[102]

Moreover, the European Commission seems to be open to awarding of damages in private actions that would penalize a party for engaging in certain conduct, deter others from engaging such conduct and provide an incentive for parties to enforce laws prohibiting such conduct.[103] If the

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[100] *Id.* at ¶ 76.
[101] *Id.*
[102] *See* Behr, *supra* note 6, at 159–60.
[103] *See* Green Paper: Damages Actions for Breach of EC Antitrust Rules, *supra*

Commission ultimately adopts the proposal to allow the awarding of punitive relief in antitrust cases, its action would significantly affect how its twenty-five member states[104] treat such damages, particularly since most of those countries do not allow punitive damages in private actions and a number have historically considered them to be contrary to public policy. The allowance of punitive damages—even in the relatively limited context of civil antitrust actions—would not only signal a significant shift in public policy, but also could require constitutional changes in some of the affected countries.[105]

The greater receptivity toward awarding punitive damages in Europe suggests that perhaps there is no longer such a fundamental public policy as to prevent the enforcement of all foreign punitive damage awards.[106]

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note 7, at 4 (stating that one of the purposes of damages was deterrence); European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – frequently asked questions, *supra* note 72 (suggesting that double damages could create an incentive to bring certain antitrust actions); Behr, *supra* note 6, at 144 (discussing European Court of Justice holding that damages must be sufficient to deter and punish acts of discrimination).

[104] *See* European Union, http://europa.eu/abc/governments/index_en.htm (last visited July 24, 2006) (listing twenty-five member countries, as well as five "candidate countries").

[105] See generally, *Comments on the Green paper on Damages actions for breach of the EC antitrust rules*, at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

[106] As noted, there is a difference between domestic policy and international public policy, the later of which encompasses only those basic notions of morality and justice accepted by civilized countries. *See supra* text accompanying notes 28–29. Because international public policy is much narrower in scope than domestic public policy, many have argued that, in a civil law country that applies the international public policy standard, a foreign award of punitive damages would not be per se unenforceable. *See* Gotanda, *supra* note 51, at 103 (1997) (citing authorities).

Recent decisions enforcing foreign awards of punitive damages in Australia, Canada and Spain also suggest that traditional hostility to American awards of such damages may be dissipating. However, while the Supreme Court of South Australia noted that it was not for Australian courts to question the amount of punitive damages awarded by a foreign court, the court in that case had before it a US$13 million punitive damages award that was only four times the compensatory damages award. It is unclear how the court would rule on a case like *In re The Exxon Valdez* where the punitive damages award was US$4.5 billion, or *Bullock v. Philip Morris USA, Inc.*,[107] where the US$38 million punitive damages award was thirty-three times the compensatory damages award. In Spain, where the Tribunal Supremo enforced treble damages, the court emphasized the importance of "proportionality," thus suggesting that it might not enforce a foreign award where the amount of punitive damages greatly exceeds the amount of compensatory damages.[108] Further, the Canadian Supreme Court left open the possibility that a very large award of punitive damages might not be recognized and enforced.[109]

B. *Clouds on the Horizon*

Not all recent developments point toward greater enforceability of

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[107] 138 Cal. Rptr. 3d 140 (Cal. Ct. App. 2006).

[108] *See* Miller Import, *supra* note ___. In the United States, the U.S. Supreme Court has emphasized that "few awards exceeding a single-digit ratio between compensatory and punitive damages, to a significant degree, will likely satisfy due process." State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003); *see also* BMW of North America v. Gore, 517 U.S. 559 (1996).

[109] *See* Beals v. Saldanha, *supra* note 9, at 76.

foreign punitive damages awards. Unlike the New York Convention which contains a public policy exception, the 2005 Convention on Choice of Court Agreements not only contains a similar public policy exception, but also explicitly states that a country may refuse to enforce a judgment that includes punitive damages to the extent that the award does not compensate a party for "actual loss or harm suffered."[110] Thus, the Convention on the Choice of Court Agreements would allow a country to refuse to enforce a foreign judgment containing punitive damages even if such judgment would not violate the country's public policy.

Similarly, in Canada, the Uniform Enforcement of Foreign Judgments Act,[111] which was drafted by the Uniform Law Conference of Canada but has not yet been enacted anywhere in Canada, states that when a Canadian court is asked to enforce foreign award of non-compensatory damages, it "shall limit enforcement of the damages . . . to the amount of similar or comparable damages that could have been awarded in [the enacting province or territory.]"[112]

Moreover, while the divide between common law and civil law countries on the awarding of punitive damages in private actions may be

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[110] Convention on Choice of Court Agreements, supra note 32, art. 11. The Convention also gives the court the authority to "take in account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceeding." *Id.*

[111] *Available at* http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e5.

[112] *Id.* at § 6. According to one scholar, "[h]ad the Uniform Act been in effect in Ontario when the *Beals* judgment was presented for recognition and enforcement, the result might well have been different." Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too*

shrinking, American courts continue to award very large punitive damage awards in some cases and, as noted previously, courts in other countries are likely to view such awards as excessive.

V. CONCLUSION

American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognized and enforced in other countries. While obstacles to the enforcement of such awards may be dissipating, there still are significant hurdles that may bar enforcement in some cases. Public policy concerns are most likely to block enforcement when punitive damage awards are large or in cases where the defendant's conduct is not particularly egregious. However, courts may be more willing to enforce awards of punitive damages where they serve purposes in addition to punishing the defendant, such as preventing defendants from retaining profits obtained through unlawful conduct, deterring others from engaging in similar activity, encouraging enforcement of certain types of claims, or paying for attorneys' fees and other costs.

Far, 24 J.L. & COM. 181, 192 (2005).