

Who's Afraid of Punitive Damages?

Edited by
TOBIAS LUTZI

*Max-Planck-Institut
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*Beiträge zum ausländischen
und internationalen Privatrecht*

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Mohr Siebeck

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Who's Afraid of Punitive Damages?

A Turning Point for Punitive Damages?
Zeitenwende beim Strafschadensersatz?

Volume I

Edited by

Tobias Lutzi

Mohr Siebeck

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Preface

This book is the first of two volumes resulting from the Project ‘Zeitenwende beim Strafschadensersatz? / A Turning Point for Punitive Damages?’. The project aims to bring together international developments in case law and empirical research on punitive damages with recent developments in German and European law. Specifically, it seeks to answer the question of whether and to what extent the complete refusal of the German courts to recognize and enforce foreign punitive damage awards is still tenable today.

The present volume contains the papers presented at the project’s first conference, held at the University of Augsburg on 8 and 9 March 2024.¹ Titled ‘Who’s Afraid of Punitive Damages?’, the conference took a comparative approach and explored international trends in the legal framework of punitive damages, with a focus on recognition and enforcement of foreign awards. In addition to the papers presented in Augsburg, the book features a contribution by *Marta Requero Isidro* on the treatment of punitive damages in Spanish law and a new translation of the leading German decision on the (non-)recognition of US punitive damages awards in Germany by *Clara Ffion Wenzel*.

I would like to express my profound gratitude, first and foremost, to all colleagues who have so generously contributed their thoughts and insights to the conference and this book. I would also like to thank the *Daimler and Benz Foundation* for generously funding the underlying research project. Finally, I am indebted to my team in Augsburg, in particular *Patricia Jauch*, *Vivien Kleebauer*, *Rodas Mehari*, and *Franziska Rödling*, whose assistance in the organisation of the conference and in the production of this volume have been instrumental in the success of the project.

Augsburg, March 2025

Tobias Lutzi

¹ Conference reports have been published by Salih Okur, *ConflictofLaws.net*, 24 March 2024, <<https://conflictoflaws.net/?p=43463>>, and Jeffrey Bruls, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2025, 215–17.

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Abbreviations

Art(s)	Article(s)
BGB	Bürgerliches Gesetzbuch [German Civil Code]
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen [Decisions by the German Federal Court of Justice in Private Law Cases]
BVerfGE	Entscheidungen des Bundesverfassungsgerichts [Decisions by the German Federal Constitutional Court]
ch	chapter
cf	confer – compare
CC	Codice Civile [Italian Civil Code]
CJEU	Court of Justice of the European Union
CCP	Codice di Procedura Civile [Italian Code of Civil Procedure]
DM	Deutsche Mark
D&O	Directors and Officers
EC	European Commission
ECHR	European Convention on Human Rights
ed(s)	editor(s)
edn	edition
eg	exempli gratia – for example
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche [Introductory Act to the German Civil Code]
et al	et alii – and others
et seq	et sequens – and the following
EU	European Union
EUR	Euro
FCA	Financial Conduct Authority (UK)
FINC	Financial Interest Cover
fn(s)	footnote(s)
GDPR	Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
HCCH	Hague Conference on Private International Law
HGB	Handelsgesetzbuch [German Commercial Code]
ibid	ibidem – in the same place
ie	id est – that is
InsO	Insolvenzordnung [German Insolvency Act]
IP	Intellectual Property
LG	Landgericht [Regional Court in Germany]

LRJS	Ley reguladora de la jurisdicción social [Spanish Law on Jurisdiction in Labour Matters]
n	footnote
no	numero – Number
OFT	Office of Fair Trading (UK)
OJ	Official Journal (EU)
OLG	Oberlandesgericht [Higher Regional Court in Germany]
para(s)	paragraph(s)
p(p)	page(s)
s(s)	section(s)
StGB	Strafgesetzbuch [German Criminal Code]
sub nom	sub nomine – under the name
UK	United Kingdom
US	United States
v	versus
vol	volume

Dashed Hopes and Good Intentions

Changing Attitudes Towards Punitive Damages around the World

Tobias Lutzi

‘Dashed hopes and good intentions’ – this description of an academic career in Edward Albee’s play ‘Who’s Afraid of Virginia Woolf?’, to which the title of this book alludes, can also be read as a (very short) summary of the changing attitudes towards punitive damages over the last three decades. When the German *Bundesgerichtshof* famously refused to enforce a Californian punitive damages award of 400,000 US dollars for sexual misconduct involving a minor,¹ this decision could be understood – somewhat counterintuitively, given the facts – as being driven by good intentions:² According to the court, the enforcement of punitive damages would not just raise significant problems of proportionality but also undermine the strict distinction between private and criminal law and thus deprive defendants of the safeguards from which they would benefit in criminal proceedings; as such, it was irreconcilable with German public policy.

At the time, the decision was very much in line with the limited case law that existed outside of the common law world.³ But attitudes have meanwhile started to shift. Following three landmark decisions in which the US Supreme Court significantly limited the power of lower courts to award high amounts of money in punitive damages – *BMW v Gore*,⁴ *State Farm Mutual*,⁵ and *Philip Morris v Williams*⁶ – apex courts in many other jurisdictions have started to take

¹ Bundesgerichtshof 4 June 1992, IX ZR 149/91, BGHZ 118, 312; translated by Clara Ffion Wenzel for this volume, see pp 217–30 below. The *Bundesgerichtshof* (Federal Court of Justice) is Germany’s highest court in civil and criminal matters.

² This is not to say that the US decision awarding the damages in question could not also be readily considered as well-intentioned, especially considering the tort in question.

³ See, eg, Bezirksgericht Sargans (Switzerland) 1982 (cited without further reference by Jens Drolshammer and Heinz Schärer [1986] *Schweizerische Juristen-Zeitung* 310); Landgericht Berlin 13 June 1989, 20 O 314/88, [1989] *Recht der Internationalen Wirtschaft* 988. See also Seoul District Court Eastern Branch, Judgment of 10 February 1995, Case No. 93Gahap 19069; Hof ’s-Gravenhage (The Netherlands), 29 October 1996, no. 95/0825, (1997) *Nederlands Internationaal Privaatrecht* (NIPR) 244; Japanese Supreme Court 11 July 1997, 51 Minshū 6 (1998) 2573.

⁴ *BMW of North America, Inc v Gore*, US Supreme Court 20 May 1996, 517 US 559.

⁵ *State Farm Mutual Automobile Insurance Co v Campbell*, US Supreme Court 7 April 2003, 538 US 408.

⁶ *Philip Morris USA v Williams*, US Supreme Court 20 February 2007, 549 US 346.

significantly more nuanced approaches to punitive damages, looking at a range of factors (including, most importantly, proportionality as between the compensatory and punitive elements of the award) rather than their punitive label or character.⁷ Still, any hopes that German courts would eventually follow suit⁸ have repeatedly been dashed. Even though the *Bundesgerichtshof* never had an opportunity to expressly confirm its position (arguably as a result of the uncompromising wording of its 1992 decision),⁹ some *dicta* by German courts¹⁰ and the unwavering support for the high court's position in legal scholarship¹¹ continue to make the adoption of a more flexible approach seem unlikely.

⁷ See, most prominently, Tribunal Supremo (Spain) 13 November 2001, ECLI:ES:TS:2001:1803A; Cour de Cassation (France), Ch. civ. 1^{re}, 1 December 2010, n° 09-13.303, *Fontaine Pajot*; Corte Suprema di Cassazione (Italy), Sezioni Unite Civili 5 July 2017, n 16601. See also Αρειος Πάγος (Greece), 10 June 1999, no. 17/1999; Nejvyšší soud České republiky (Czech Republic), 8 December 2008, Ref. No. 21 Cdo 4196/2007 and 22 August 2014, Ref. No. 30 Cdo 3157/2013; Sąd Najwyższy (Poland) 11 October 2013, I CSK 687/12; Daebeobwon (South Korea) 11 March 2022, Case No. 2018Da231550; Superior Tribunal de Justiça (Brazil) 16 May 2022, STJ HDE 586/CA, *Apotex v Kalinka*.

⁸ For such arguments see, eg, Volker Behr, 'Strafschadensersatz – Poenale Elemente im Schadensrecht', in Stefan Hiebl et al (eds), *Festschrift für Volkmar Mehle zum 65. Geburtstag* (Nomos 2009), 33, 47; Lukas Fedler, *Exemplary Damages nach englischem Recht* (Nomos 2024), 477–78; Marc Lendermann, *Strafschadensersatz im internationalen Rechtsverkehr* (Mohr Siebeck 2019), 187 and 206–250; Peter Müller, *Punitive Damages und deutsches Schadensrecht* (De Gruyter 2000), 360–68; Florian Alexander Sippel, *Die Anerkennungsfähigkeit von US-amerikanischen punitive damages awards vor den Hintergrund der Wirkung des Verhältnismäßigkeitsprinzips im Schadensrecht* (Peter Lang 2020), 169–188; Astrid Stadler, '§ 328 ZPO', in Wolfgang Voit (ed), *Musielak/Voit. Zivilprozessordnung* (21st edn, Vahlen 2024), [25]; Astrid Stadler, Recognition of Punitive Damages in Germany and Switzerland, in Stefania Bariatti et al (eds), *Punitive Damages and Private International Law: State of the Art and Future Developments* (Wolters Kluwer 2019), 127, 149–50.

⁹ See also Johannes Ungerer, in this volume, p 99.

¹⁰ See, in particular, Oberlandesgericht Düsseldorf 4 April 2011, I-3 W 292/10, [2011] BeckRS 8116; Kammergericht Berlin 5 July 1994, 1 VA 4/94, [1994] OLGZ 587, 590. The latter decision has been confirmed by the Constitutional Court (Bundesverfassungsgericht 7 December 1994, 1 BvR 1279/94, 91 BVerfGE 335), although with a very cautious reference to the 1992 decision; for similarly noncommittal *dicta*, see also Bundesverfassungsgericht 9 January 2013, 2 BvR 2805/12, [2013] Neue Juristische Wochenschrift 990; Kammergericht Berlin, 25 October 2012, 1 VA 11/12, [2012] BeckRS 25092; Bundesgerichtshof 8 May 2000, II ZR 182/98, [2000] Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht 1372.

¹¹ See, eg, Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?', (2006) 206 Archiv für die civilistische Praxis 352, 476; Herbert Roth, '§ 322 ZPO', in Reinhard Bork and Herbert Roth (eds), *Stein/Jonas. Zivilprozessordnung* (23th edn, Beck 2015), [108]. See also the contributions by Lukas Rademacher (pp 13–25) and Johannes Ungerer (pp 87–104) to this volume.

Of course, Germany is not alone with this approach. Courts in the Netherlands,¹² Japan,¹³ and China¹⁴ also continue to refuse to recognize and enforce any foreign judgment awarding punitive damages. The European Court of Justice has recently sanctioned such a refusal even with regard to an intra-EU judgment, at least in the specific circumstances of a (seemingly) punitive award against a journalist and his employer.¹⁵ International instruments like the 2019 Hague Judgments Convention¹⁶ continue to carve out specific exceptions for the recognition of punitive damages awards, supposedly to reflect the remaining diversity of approaches.¹⁷ Meanwhile, the shape and legal framework of punitive damages also continues to evolve in those jurisdictions in which they are routinely awarded.¹⁸

And yet, much of the debate, in both civil-law and common-law jurisdictions as well as internationally, revolves around the same questions: Do punitive damages exclusively serve aims of punishment and retribution, or should they – occasionally, or even primarily – be understood as a means of deterrence? To what extent are such purposes at odds with the aim of compensation? And to what extent do they justify a refusal to recognize and enforce punitive damage awards in legal systems that, domestically, have long accepted that the remedy of civil damages may serve non-compensatory, especially preventive functions?

–

¹² See Hof ‘s-Hertogenbosch 31 August 2021, no. 200.269.335/01, ECLI:NL:GHSHE:2021:2699 (2022) *Jurisprudentie Burgerlijk Procesrecht* 368; and André Janssen, p 105, below in more detail.

¹³ See Japanese Supreme Court 25 May 2021, 75 Minshū 6 (2022) 2935; and Bélig Elbalti, p 125, below in more detail.

¹⁴ See Guangzhou Intermediate People’s Court 4 March 2022 (2019) Yue 01 Xie Wai Ren No 3, *Anqin WANG v Fang ZENG et al* and (2019) Yue 01 Xie Wai Ren No 58, *Hui JIANG, Jun HUANG v Fang ZENG et al*; Guangzhou Intermediate People’s Court 7 March 2022, (2019) Yue 01 Xie Wai Ren No 22, *Yeqing XIA v Fang ZENG et al*; discussed in detail by Wenliang Zhang and Yingqi Zhong, ‘Punitive Damages in China: Codification, Developments and Global Cooperation’, in Cedric Vanleenhove and Lotte Meurkens (eds), *The Recognition and Enforcement of Punitive Damages Judgments Across the Globe* (eleven 2023), 39, 54–56.

¹⁵ *Real Madrid Club de Fútbol*, Court of Justice of the European Union 21 March 2023, Case C-633/22, ECLI:EU:C:2024:843; see also Tobias Lutzi, ‘Meinungs- und Pressefreiheit als Grenze der Anerkennung mitgliedstaatlicher Schadensersatzurteile’, [2024] *Juristenzeitung* 98.

¹⁶ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Art 10(1).

¹⁷ See F Garcimartin and Geneviève Saumier, ‘Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’, [293]–[294]; Trevor Hartley and Masato Dogauchi, ‘Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements’, [205].

¹⁸ In addition to Catherine M Sharkey, pp 49–59, below, see also James Goudkamp and Eleni Katsampouka, ‘An Empirical Study of Punitive Damages’, (2018) 38 *Oxford Journal of Legal Studies* 90; Felicity Maher, ‘An Empirical Study of Exemplary Damages in Australia’ (2019) 43 *Melbourne University Law Review* 694. See also the contributions to Elise Bant et al (eds), *Punishment and Private Law* (Hart 2021), in particular Catherine M Sharkey, ‘Punitive Damages Transformed into Societal Damages’, *ibid*, 155, and James Goudkamp and Eleni Katsampouka, ‘Punitive Damages: Ten Misconceptions’, *ibid*, 187, as well as the contributions to Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages. Is Europe Missing Out?* (Intersentia 2012), at 65–210.

The contributions to this book constitute a collective attempt to take stock of these questions and the answers they have been given in national case law and scholarship in order to paint a comprehensive picture of the current state of play of punitive damages and ultimately answer our guiding question: Who is (Still) Afraid of Punitive Damages?

I. *Afraid of What?*

In the first section of this book, *Lukas Rademacher* and *Jan Lüttringhaus* take a closer look at the aforementioned German decision from 1992¹⁹ and critically discuss two of the court's core arguments.

Rademacher first focuses on the strict distinction between private and criminal law as emphasized by the court.²⁰ For this distinction to justify the complete refusal to enforce any punitive judgment in Germany, he argues that two things need to (still) be true: first, German private law must not itself contain punitive elements; and second, there must be safeguards in criminal law that do not exist (to the same extent) in private law. Although both points have been challenged in German scholarship,²¹ *Rademacher* comes to the conclusion that each of the arguments still holds water. Distinguishing punitive elements from considerations of prevention and satisfaction, he explains how none of the remedies (with one arguable exception)²² suspected of blurring the line between compensation and punishment ultimately fall outside the realm of compensation, as they still aim to 'restore the equilibrium' between the parties. He also points out some important differences regarding fact-finding and the standard of proof as important distinctions between civil and criminal proceedings, leading him to conclude that the German decision observes and protects 'fundamental principles of German private and constitutional law'.

Lüttringhaus then subjects another important consideration of the *Bundesgerichtshof* to even greater scrutiny.²³ According to the German court, punitive damages in the US 'have led to a rapid increase in the overall economic burden of damages in the US up to the limit of what is a calculable and insurable risk.'²⁴ Yet *Lüttringhaus* shows that, from an actuarial point of view, punitive damages are neither incalculable nor uninsurable. While he admits that the legal framework governing attempts to insure against punitive damages is complex and, in many jurisdictions, unclear, he explains how policy considerations would support a

¹⁹ Bundesgerichtshof 4 June 1992 (n 1).

²⁰ On pp 13–25. See, eg, Bundesgerichtshof 4 June 1992 (n 1), [73]: 'Punishment and – within the scope of what is appropriate for guilt – deterrence are possible objectives of the criminal penalty [...], but [are] not objectives of private law.'

²¹ See in particular Phillip Hellwege, 'Schadensersatz und Sanktion' in Phillip Hellwege and Marta Soniewicka (eds), *Die Einheit der Rechtsordnung* (Mohr Siebeck 2020), 153.

²² Namely, damages for discrimination: see p 21.

²³ On pp 27–45.

²⁴ Bundesgerichtshof 4 June 1992 (n 1), [91].

liberal approach, at least in certain cases. His argument finds further support in existing practices of the insurance market, an industry which has long found ways to circumvent regulatory restrictions.

II. *Why to be Afraid?*

Lüttringhaus' call for a more liberal approach to insurance against punitive damages reverberates further in *Catherine M Sharkey*'s contribution on punitive damages in products liability cases.²⁵ According to her, these cases constitute a 'new frontier' for punitive damages as they are concerned with reckless, rather than malicious or intentionally wrongful conduct and, accordingly, focus on deterrence rather than retribution.²⁶ *Sharkey* retraces this turn towards societal deterrence before discussing its interplay with the insurability of punitive damages, which in her view provides further evidence 'that punitive damages can serve non-retributive deterrence purposes'. The same is arguably true for two interesting statutory innovations: split-recovery schemes (which allocate a portion of the award to a public fund) and the one-award rule (which imposes a unitary punitive award for the same course of conduct); these two approaches can be seen as also responding to a growing societal focus of punitive damages, especially in products liability cases. *Sharkey*'s contribution thus underscores the ever-evolving nature of punitive damages²⁷ – and casts further doubt on whether a blanket refusal to enforce punitive damages awards can (still) be justified.

III. *When to be Afraid?*

With many countries having taken an increasingly liberal approach to the recognition and enforcement of foreign judgments over time, the refusal to enforce punitive damages awards is usually based on the public policy exception, a universally recognized 'safety valve'²⁸ for States to preserve the fundamental prin-

²⁵ On pp 49–59.

²⁶ Indeed, courts have repeatedly emphasized deterrence as the core function of punitive damages in products liability cases: see, eg, *Calles v Scripto-Tokai Corp*, Supreme Court of Illinois 16 February 2007, 864 NE2d 249, 263: 'the policy of preventing future harm, which is at the heart of strict liability law.' (cited with approval in *Cassidy v China Vitamins, LLC*, Supreme Court of Illinois 18 October 2018, 120 NE3d 959, 968).

²⁷ See also the references in n 18, above.

²⁸ See International Court of Justice, 28 November 1958, *Guardianship of an Infant (Netherlands v Sweden)* [1958] ICJ Reports 55, Separate Opinion of Hersch Lauterpacht (in the context of the applicable law), at 95: 'It is that residuum of discretion, it is that safety valve, which has made private international law possible at all and which, if kept within proper limits, is one of the principal guarantees of its continued existence and development.'

ciples of their domestic legal orders.²⁹ As mentioned earlier, though, the extent to which this safety valve has been used to prevent the enforcement of foreign punitive damages awards has significantly evolved over the last few decades, but without reducing the diversity of approaches.

This diversity is reflected in international instruments such as the 2005 Hague Choice of Court Convention³⁰ and the 2019 Hague Judgments Convention,³¹ which both contain specific provisions that essentially create exceptions for such awards.³² In his contribution, *Marko Jovanović* retraces the history of the 2019 Hague Judgments Convention and its public policy exception, comparing it to a range of similar provisions in other international instruments and discussing its expected operation in practice, before explaining why it was ultimately found to be ill-suited as the sole filter for punitive damages awards. According to *Jovanović*, the drafters of the Convention were right to adopt a solution tailored to the problem of punitive damages in order to avoid inconsistencies regarding the scope of the convention³³ and the prohibition of substantive review (Art. 4(2)) and to encourage partial recognition of punitive damages awards.

IV. *Who is (Still) Afraid?*

The final part of this book aims to draw a picture of the different approaches that have been taken in different jurisdictions. Although the contributions are organized according to whether or not punitive damages can or cannot be enforced in a given legal system, it should be noted that almost all of them put a seemingly universal trend in their domestic laws at the centre of their analysis: a drastically increased openness towards damage awards that do not exclusively – or even primarily – aim to compensate the victim but that are supposed to further additional societal goals. Interestingly, though, this trend has led to a reconsideration of the treatment of foreign punitive damages awards only in some jurisdictions.

Starting with those that continue to refuse to enforce foreign punitive damages awards, *Johannes Ungerer* takes another stab at the aforementioned German

²⁹ Not every divergence of a foreign decision from the *lex fori* challenges such fundamental values; accordingly, the term public policy refers to a narrower set of rules and principles (often called *ordre public international*) than it might refer to domestically (*ordre public interne*). See also Pietro Franzina, ‘The Purpose and Operation of the Public Policy Defence as Applied to Punitive Damages’ in Bariatti et al (n 8), 43, 55.

³⁰ Convention of 30 June 2005 on Choice of Court Agreements, Art 11(1).

³¹ Above, n 16, Art 10(1).

³² See F Garcimartin and Geneviève Saumier, ‘Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’, [293]–[294]; Trevor Hartley and Masato Dogauchi, ‘Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements’, [205].

³³ In particular, the provision solves the problem that punitive damages awards have occasionally been characterized as falling outside the scope of private law entirely: see also Rademacher, p 14, below and Elbalti, 118–19, below.

decision from 1992.³⁴ He agrees with *Rademacher* that the instances in which German courts appear to award over-compensatory damages – e.g. when compensating personality rights infringements or other intangible losses – must be distinguished from Anglo-American punitive damages awards. But he also considers several other aspects: the potential impact of the enforcement of foreign punitive damages on the domestic system of liability, the limits imposed on lower US courts by the Supreme Court in *BMW v Gore*,³⁵ the permission of service in cases where punitive damages may be awarded,³⁶ and the developments in other European jurisdictions. On this basis, he concludes that the rejection of punitive damages awards remains an ‘unafraid’ and ‘principled’ position.

Turning to the Netherlands – which takes a highly restrictive approach to foreign judgments in general³⁷ – *André Janssen* paints a similar, if slightly more nuanced picture.³⁸ He agrees that the over-compensatory elements which also can be found in Dutch law (in remarkably similar places to German law) do not call into question the strict adherence to the principle of compensation. This position is generally shared by the Dutch courts, with the leading case³⁹ considering the enforcement of a US punitive damages award as ‘incompatible with the fundamental nature of Dutch liability and compensation law’ based on arguments that directly echo the concerns of the German *Bundesgerichtshof*. Still, it is worth pointing out that other courts have been less categorical in their rejection of foreign punitive damages awards, with one court even enforcing such an award (albeit a relatively small one of just 5,000 Euros).⁴⁰

The rejection of punitive damages appears to be more categorical in Japan, at least as far as the courts are concerned. In his contribution,⁴¹ *Bélig Elbalti* describes how the Supreme Court has in two leading cases found punitive damages to be ‘contrary to the basic principles or basic ideas of the tort compensation system in Japan’.⁴² But he also retraces the scholarly debate that surrounded these decisions, a debate which mostly supports the Supreme Court’s decisions but which also includes more critical voices. What is more, *Elbalti* also discusses an interesting follow-up question that arose in the second decision: if an amount equal to or exceeding the punitive portion of a larger damages award has already been satisfied through compulsory execution in the state of origin, should this amount be allocated to the compensatory or to the punitive portion of the foreign award, potentially allowing for the remainder of the award to be enforced

³⁴ On pp 87–104.

³⁵ See n 4, above.

³⁶ See cases cited in n 10, above.

³⁷ The most conclusive statement regarding the relevant requirements can be found in Hoge Raad 26 September 2014, no. 13/04272, ECLI:NL:Hoge Raad:2014:2838, Nederlandse Jurisprudentie (NJ) 2015/478 (*Gazprombank*).

³⁸ On pp 105–24.

³⁹ Hof ‘s-Hertogenbosch 31 August 2021 (n 12).

⁴⁰ Rechtbank Amsterdam 15 June 2012, KG ZA 12-417 MvW/BB, ECLI:NL:RBAMS:2012:BW9838.

⁴¹ On pp 125–48.

⁴² Japanese Supreme Court 11 July 1997, 51 Minshū 6 (1998) 2573; Japanese Supreme Court 25 May 2021 (n 13).

in Japan? The fact that the Supreme Court attributed the amount paid to the compensatory part as the punitive part was deemed non-existent (due to its incompatibility with Japanese public policy) can be seen as a particularly strong affirmation of the court's earlier decision. But, as *Elbalti* points out, the criticism that the decision has generated in scholarship might still provide some hope to those wishing for a more flexible approach.

Of course, a less rigid approach has already been adopted – to varying degrees – in a growing number of jurisdictions, usually for the same reasons that have cast doubt on the more restrictive approaches employed elsewhere. The present volume concludes with accounts from three of these jurisdictions.

The adoption of a flexible approach is most recent, and seemingly most limited, in South Korea, where the Supreme Court found a Hawaiian award of punitive damages for unfair competition practices to be enforceable.⁴³ Yet, as *Min Kyung Kim* reports, the decision found its justification in Korean legislation that allows for multiple damages in similar cases of unfair competition. Thus, despite a general turn towards extra-compensatory damages in Korean law, recognition and enforcement of foreign punitive damages awards seem to be limited to cases in which a specific Korean statute allows for such damages to be awarded domestically. Still, *Kim* believes that the Supreme Court's decision might mark the first step towards a universally more flexible approach to the recognition and enforcement of punitive damages.

Uncertainties as to the scope of such a flexible approach also seem to persist in Spain. As *Marta Requejo Isidro* reports,⁴⁴ the Spanish Supreme Court has taken note of the growing number of instances in which Spanish law allows for extra-compensatory awards (in areas such as intellectual property, labour law, and even company law), and a landmark decision from 2001 indeed allowed a US punitive damages award to be enforced in Spain.⁴⁵ While the court set out two requirements for such recognition – a sufficiently close link to the forum and respect for the proportionality principle – *Requejo Isidro* points out that the practical application of these criteria was not explained by the Supreme Court in any detail. This is particularly unfortunate regarding the factors against which the proportionality of the award is supposed to be assessed and regarding the extent to which a disproportionate award can be enforced.⁴⁶ The only subsequent decision to address the issue (rendered almost 20 years later)⁴⁷ appears to provide only limited guidance.

A more robust basis for the enforcement of foreign punitive damages awards seems to have been found in Italy. In her contribution,⁴⁸ *Caterina Benini* retraces

⁴³ Korean Supreme Court 11 March 2022 (n 7).

⁴⁴ On pp 149–68.

⁴⁵ Tribunal Supremo 13 November 2001 (n 7).

⁴⁶ See also Jovanović, p 74, below. And on similar concerns more generally Vanleenhove, 'A Helicopter Overview of the Recognition and Enforcement of Punitive Damages', in Bariatti et al (n 8), 235, 249–52, and Wolfgang Wurmnest, 'Towards the Europeanization of Public Policy Regarding Punitive Damages: An Inquiry Between Theory and Practice', *ibid*, 253, 277–85. See al

⁴⁷ Audiencia Provincial of Barcelona 14 October 2019, ECLI:ES:APB:2019:7550A.

⁴⁸ On pp 169–94.

the case law leading to the seminal decision of the Joint Sections of the Supreme Court, which held in 2017 that ‘the institute of punitive damages of US origin is not ontologically incompatible with the Italian legal order’.⁴⁹ Here again, the decision appears to have been primarily motivated by an acknowledgement of the increased range of purposes served by civil liability in Italian law, beyond the mere compensation of the claimant’s loss.⁵⁰ Accordingly, the court held that a foreign punitive damages award could be recognized and enforced in Italy, provided that two conditions are met: the legal basis for their award must create a sufficient degree of foreseeability and the punitive portion of the award must not be disproportionate to the compensatory portion and to the wrongdoer’s conduct. In the second half of her contribution, *Benini* discusses how these requirements can be applied in practice and the role that private international law may play in this context.

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The degree to which jurisprudence and, more importantly, the corresponding academic discourse in different parts of the world seem to converge may instil some hope into those who consider a nuanced approach to the enforcement of foreign punitive damages awards preferable, be it merely for consistency with a – seemingly universal – trend to acknowledge the existence of extra-compensatory aims of damage awards, or owing to a more general suspicion towards overly broad interpretations of the public policy exception.

For now, however, noticeable differences persist in the treatment of punitive damages,⁵¹ and it may be too early to tell if a global trend towards their more liberal enforcement is emerging. To rely once again on the words of Edward Albee’s characters: ‘Truth or illusion, George; you don’t know the difference.’ ‘No, but we must carry on as though we did.’

⁴⁹ Corte Suprema di Cassazione 5 July 2017 (n 7).

⁵⁰ For a similar understanding, see also Giulio Ponzanelli, ‘Punitive Damages and the Functions of Reparation: Some Preliminary Remarks after the Decision of the Italian Supreme Court, Joint Divisions, 5 July 2017, No 16601’, in Bariatti et al (n 8), 33, 34–40.

⁵¹ In addition to the above, see also Alex Mills, ‘Recognition of Punitive Damages in the United Kingdom’ in Bariatti et al (n 8), 173, 183–92, on the uncertain status of foreign punitive damages in English and Scots Law and Cedric Vanleenhove, ‘Enforcement of Punitive Damages in Europe: an Overview’, in Vanleenhove/Meurkens (n 14), 1.

I. Afraid of What?