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ABSTRACT

This Article addresses the problems United States plaintiffs may face when seeking enforcement of United States court awards of punitive damages in German courts. The authors show the close relationship between service of process and subsequent enforcement procedures in Germany. The analysis focuses on two recent German court decisions that provide indications of how German courts might respond to requests to serve process and to enforce judgments in actions seeking punitive or multiple damages. The fundamentally different approaches to punitive damages taken by the German and the United States legal systems create the difficulties encountered when these two systems intersect.

The Article first addresses the potential for difficulty in the service of process. Punitive damage complaints, if viewed as criminal in nature, would fall outside the scope of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention or Convention). A decision by the Oberlandesgericht München *(Court of Appeals at Munich), however, held that punitive damages would be characterized as civil in nature for the limited purpose of service of process under the Convention. Therefore, a United States plaintiff would be able to effect valid service under the Hague Service Convention via the German Central Authorities. Although the decision of the* Oberlandesgericht München *is not binding on other German courts, the authors suggest that other German courts likely will*

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adopt this characterization of punitive damages for service of process. The authors caution, however, that the question whether a German court would enforce a punitive damage judgment remains unresolved. According to the authors, a decision by the Landgericht Berlin *(Trial Court at Berlin) indicates the manner in which a German court would analyze such a case. The* Landgericht Berlin *decision deals with "excessive," rather than punitive, damages. Nevertheless, the authors cite the decision as suggesting that civil damages characterized as punitive or multiple may violate German public policy, and thus the judgments would not be enforced by German courts.*

The authors criticize the reasoning of the Landgericht Berlin *decision. They categorize the court's reweighing of the evidence and its application of German substantive law to the facts as an impermissible* révision au fond *(a reexamination of the substantive basis of the foreign judgment). The authors speculate that if the* Landgericht Berlin *view prevails, this hostile approach could prompt United States courts to retaliate by refusing to enforce German court judgments.*

The authors also question the blanket refusal of the Landgericht Berlin *to enforce even the compensatory portion of the United States judgment. As a result of this refusal, the authors suggest that a litigant might have to forgo seeking punitive or multiple damages in the United States to ensure the enforceability of any compensatory award in Germany. The article concludes by emphasizing that the* Landgericht Berlin *decision, although not binding on subsequent courts, illustrates the skepticism United States plaintiffs may encounter when seeking enforcement of punitive damage awards in German courts.*

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I. INTRODUCTION

Of the many uncertain points at the intersection of German and United States private international law, two have recently been subjects of review by German courts. Commentators have long questioned the likelihood of perfecting service of process related to United States legal actions for punitive or multiple damages in Germany under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention or Convention).[1] They likewise have doubted the prospects of enforcing United States court awards of such damages through the German courts.

A recent decision by the *Oberlandesgericht München* (Court of Appeals at Munich)[2] held that the responsible German authorities must assist United States plaintiffs in serving process in Germany for punitive damage actions. A decision of the *Landgericht Berlin* (Trial Court at Berlin), however, suggests that civil damages characterized as punitive or multiple may violate German public policy and will not be enforced by German courts.[3] These developments have important implications for United States litigants.

This Article discusses the nature of punitive damages under German and United States law and considers the problems such damages pose under German law. The Article considers service of process generally under the Hague Service Convention and specifically in Germany in light of the decision of the *Oberlandesgericht München*. The Article then addresses the enforceability of United States judgments in Germany in light both of the decision of the *Landgericht Berlin* and of the decision of the United States Supreme Court in *Volkswagenwerk Aktien-*

1. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention or Convention].

2. Oberlandesgericht München, Decision of 9 May 1989, *in* 35 RECHT DER INTERNATIONALEN WIRTSCHAFT 483 (1989) [hereinafter Decision of 9 May 1989].

3. Landgericht Berlin, Decision of 13 June 1989, *in* 35 RECHT DER INTERNATIONALEN WIRTSCHAFT 988 (1989) [hereinafter Decision of 13 June 1989].

gesellschaft v. Schlunk.[4] The Article concludes with observations concerning the implications of these developments on United States litigants under German law.

II. PUNITIVE DAMAGES IN GERMANY AND THE UNITED STATES

A. *German Law*

Under the *Bürgerliche Gesetzbuch* (German Civil Code), damages serve solely to compensate injured parties for the losses they have suffered at the hands of defendants. As with Anglo-American common law tort damages, damages under the *Bürgerliche Gesetzbuch* are designed to restore plaintiffs to the positions they would have occupied had the tort not been committed.[5] Under German law, however, plaintiffs cannot claim common law style punitive damages[6] in civil actions.[7] The only relevant exception to this rule is the "smart money" provision, section 847 of the *Bürgerliche Gesetzbuch*, which provides limited damages to compensate for physical and emotional suffering in tort cases.[8] Because German courts do not award punitive damages, and because the amount

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4. Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988).

5. *Compare* BGB § 249 (1978) *with* United States v. Hatahley, 257 F.2d 920, 923 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958); Hill v. Varner, 4 Utah 2d 166, 167, 290 P.2d 448, 449 (1955).

6. Punitive damages at common law are those imposed in civil actions over and above any compensatory damages. They have the purpose of "punishing the defendant or of setting an example for similar wrongdoers . . . ." BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

7. BGB § 339. This statute provides that parties to a contract may agree to a penalty provision enforceable against a party in breach. It has been cited by some commentators as evidence that German law itself provides for remedies similar to punitive damages. *See* Stiefel & Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe*, 1987 VERSICHERUNGSRECHT 829, 837; Stürner & Stadler, *Zustellung von "punitive damage"—Klagen an deutsche Beklagte nach dem Haager Zustellübereinkommen?*, 1990 INTERNATIONALE PRAXIS 157, 159. This view, however, mischaracterizes the purpose of section 339, which is solely to provide a contractual remedy independent of any showing of tortious misconduct.

By contrast, exemplary damages in contract under United States law ordinarily were not available and, when they were awarded, did not derive from express contractual terms. Such awards were made with frequency only for breach of a promise to marry, and only occasionally for malicious, wanton, or fraudulent breaches. *See* K. REDDEN, PUNITIVE DAMAGES § 2.5 (1980); Comment, *Punitive Damages on Ordinary Contracts*, 42 MONT. L. REV. 93, 94-96 (1981).

8. *See* 18 BGHZ 149 (1955). Despite some surface similarities to the common law notion of punitive damages, smart money damages retain an essentially compensatory nature. They are not awarded to punish or deter cases of malicious conduct and they can be awarded in cases of negligence.

of compensatory damages awarded in the German civil law system is fixed by the judge and not the jury, the staggering cash awards that have become daily events in United States courts[9] are unknown in Germany.

B. *United States Law*

In the United States, by contrast, punitive damages take several forms and are awarded widely to private parties[10] to "advance the interests of punishment and deterrence."[11] In the common law tort context, punitive damages are awarded most notably in product liability cases[12] and in cases involving willful or wanton misconduct,[13] libel or slander,[14] and conversion.[15] Moreover, United States statutes pertaining to antitrust,[16] civil rights,[17] racketeering,[18] patent,[19] and other matters[20] also provide

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9. *See* Texaco v. Penzoil, 784 F.2d 1133 (2d Cir. 1986) ($3 billion); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981) ($125 million punitive damage award, reduced to $3.5 million by remittitur); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) (en banc) ($6.2 million); Ford Motor Co. v. Durrill, 714 S.W.2d 329 (Tex. Ct. App. 1986) ($100 million punitive damage award reduced to $10 million by remittitur), *vacated*, 754 S.W.2d 646 (Tex. 1988) (award vacated following settlement by parties prior to disposition on appeal); *see also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 145 n.23 (1986) (collecting court judgments of $1 million or larger); Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 23-24 & nn.127-29 (1985-86) (collecting cases).

10. Foreign sovereigns, however, are largely immune from suit in United States courts for punitive damages. 28 U.S.C. § 1606 (1988).

11. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2920 (1989).

12. Some of the more notable punitive damage judgments in mass product liability actions, involving Agent Orange, asbestos, automobiles, the Dalkon Shield, DES, formaldehyde, and tampons, are assayed, together with helpful citations, in Seltzer, *Punitive Damages in Mass Tort Liability: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983).

13. *See* Dunn v. Koehring Co., 546 F.2d 1193 (abuse of process), *modified on other grounds*, 551 F.2d 73 (5th Cir. 1977); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954) (drunken driving).

14. *See* Loftsgaarden v. Reiling, 267 Minn. 181, 126 N.W.2d 154 (Minn. 1964) (libel per se), *cert. denied*, 379 U.S. 845 (1964).

15. *See* Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969) (forcible conversion of personal property to secure debt); *see generally* PROSSER AND KEETON ON THE LAW OF TORTS 9-15 (5th ed. 1984) (discussing other common law causes of action).

16. *See* Clayton Antitrust Act, 15 U.S.C. § 15 (1988) (treble damages).

17. *See* Fair Housing Act (Civil Rights Act of 1968), 42 U.S.C. § 3613(c) (1988) (punitive damages).

18. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1988) (treble damages).

expressly for punitive damages or for multiple damage awards that, in many respects, are functionally equivalent to common law punitive damages.[21]

United States courts frankly concede that punitive damages serve to punish wrongful actions by the defendant.[22] Justice O'Connor, for example, observed that United States case law "abound[s] with the recognition

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19. *See* 35 U.S.C. § 284 (1988) (multiple damages).

20. *See generally* K. REDDEN, *supra* note 7, § 6.1 (discussing federal statutes providing for award of punitive or multiple damages).

21. While the two types of damages share common practical implications for the litigants, United States courts have distinguished between statutory multiple damages and ordinary punitive damages. Statutory multiple damages must bear a clear relation to actual injury. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). The Supreme Court has noted that:

> [o]f course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing . . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.

Id. at 485-86 (citations and footnote omitted). Ordinary punitive damages, however, need not bear such a precise relation to the actual injury. As the Supreme Court has observed, "juries assess punitive damages in wholly unpredictable amounts [that bear] no necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

The two differ as well in that, while courts freely concede that punitive damages are designed purely to punish, *see Browning-Ferris*, 109 S. Ct. at 2932 (O'Connor, J., concurring in part and dissenting in part) (United States case law "abound[s] with the recognition of the penal nature of punitive damages"), multiple damages, such as treble damage awards under the Clayton Act, though punitive, are characterized as having a primarily remedial purpose, *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) ("[n]otwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury.").

22. *See Gertz*, 418 U.S. at 350 (punitive damages not compensatory; "they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Browning-Ferris*, 109 S. Ct. at 2920 (punitive damages under United States law designed to "advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"); RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979) (purpose of punitive damages is "to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future"); Jeffries, *supra* note 9, at 149 ("punitive damages are, as the name implies, a form of punishment"); Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242 (1985) (purposes of punitive damages fall "squarely under the ambit of criminal law"); *cf.* Ausness, *supra* note 9, at 2-6, 38 (discussing various theoretical justifications for punitive damages); K. REDDEN, *supra* note 7, § 2.2 (same).

of the penal nature of punitive damages."[23] United States courts, however, have been just as resolved that private actions for punitive damages should be characterized[24] as civil rather than criminal matters,[25] which renders the constitutional requirements governing the latter inapplicable to the former.[26]

C. *The Problem*

The fundamentally different approaches that the German and United States legal systems take in regard to punitive damages creates difficulties at two principal points of intersection between the two systems: service of process and enforcement of judgments in actions by United States plaintiffs against German defendants.[27] While German corporations are free from the risk of such liability in Germany, they nevertheless may be served with process in actions for punitive damages in United States

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23. *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).

24. United States courts decide whether to characterize statutes that incorporate punitive damage provisions as remedial or penal by using a two-pronged analysis that looks first at whether the legislature intended the statute to be construed as civil or criminal and, if civil, whether "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." United States v. Ward, 448 U.S. 242, 248-49, *reh'g denied*, 448 U.S. 916 (1980) (construing criminal nature of penalties under Federal Water Pollution Control Act Amendments); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (articulating factors to guide characterization of sanction as penal or remedial); *see generally* Huntington v. Attrill, 146 U.S. 657, 673-74 (1892) (characterization as penal or civil "depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.").

25. Many court decisions upholding this view are set forth and analyzed in some detail in Grass, *supra* note 22.

26. The Supreme Court refused to apply the eighth amendment protection against excessive fines to a private civil judgment for tort and antitrust claims, stating "our concerns in applying the Eighth Amendment have been with criminal process, and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns." *Browning-Ferris*, 109 S. Ct. at 2912. The Court noted further that, "[w]hile we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties." *Id.* at 2920.

The Supreme Court also upheld a large punitive damage award against fourteenth amendment due process claims, while nevertheless noting its concern "about punitive damages that 'run wild.' " Pacific Mutual Life Ins. Co. v. Haslip, No. 89-1279, slip op. at 15 (U.S. Mar. 4, 1991).

27. A third principal source of difficulty arises in the taking of evidence, a subject beyond the scope of this Article.

courts if they are amenable to personal jurisdiction. When a German entity maintains sufficient assets within the United States, a judgment rendered against the entity can be satisfied by these assets. German law cannot prevent the German entity's United States-based assets from being used to satisfy the judgment[28] because in such circumstances, all relevant questions concerning service of process and enforcement are resolved under United States law. When a United States plaintiff must serve process in Germany or bring its judgment to Germany for enforcement, however, German courts could interdict the United States action. As this Article will explain, this has been only a theoretical concern of United States plaintiffs until recent judicial decisions in Germany.

III. APPLICATION OF THE HAGUE SERVICE CONVENTION IN GERMANY

A. *Background*

Under the Hague Service Convention, legal documents related to civil or commercial matters in one state may be transmitted by its courts to the "Central Authority" of the receiving country, which then will effect service on its nationals as prescribed by the Convention.[29] In Germany, the Ministry of Justice of each *Bundesland* (State) fulfills this role. A United States plaintiff ordinarily would have process transmitted to the *Bundesland* where the defendant has its principal place of business.[30]

Initially, many courts[31] and commentators[32] in Germany and the

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28. Hollmann, *Auslandszustellung in US-amerikanischen Zivil- und Verwaltungssachen*, 28 RECHT DER INTERNATIONALEN WIRTSCHAFT 784, 794 (1982).

29. Hague Service Convention, *supra* note 1, art. 3. For a more general discussion of the mechanics of service of process under the Convention, see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 (1986) [hereinafter THIRD RESTATEMENT OF FOREIGN RELATIONS LAW]; G. BORN & D. WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 136 (1989).

30. *See* Law of the 22d December 1977 Implementing the Hague Service Convention, BGBl.I 3105; S. BLACK & D. LANGE, CIVIL LITIGATION IN THE UNITED STATES: A PRACTICAL GUIDE FOR GERMAN COMPANIES 129, App. 2 (1985).

31. *See* Kadota v. Hosagai, 125 Ariz. 131, 135-36, 608 P.2d 68, 71 (Ct. App. 1980); Dr. Ing. H.C.F. Porsche A.G. v. Superior Court, 123 Cal. App. 3d 755, 760-61, 177 Cal. Rptr. 155, 158-59 (Cal. Ct. App. 1981); Cintron v. W & D Mach. Co., 182 N.J. Super. 126, 135, 440 A.2d 76, 81 (N.J. Super. Ct. Law Div. 1981); Low v. Bayerische Motoren Werke, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (N.Y. App. Div. 1982); Cipolla v. Picard Porsche Audi, Inc., 496 A.2d 130, 132 (R.I. 1985). *But see* Zisman v. Sieger, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985) (Convention does not control service within state of origin); Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95, 97 (S.D. Fla. 1985) (same), *aff'd sub nom.* Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir.), *cert. denied*, 488 U.S. 822 (1988); *Ex parte* Volkswagenwerk A.G.,

United States viewed foreign defendants residing in signatory states as subject to United States legal actions exclusively by effecting service under the Hague Service Convention. The governments of France, Germany, Great Britain, and Japan also took the view that the Hague Convention constituted the exclusive means of service abroad.[33] This prevailing view rejected the acceptability either of service in the United States upon domestic subsidiaries, branches, or agents of German companies or by other means of extraterritorial service available under United States federal or state law.[34]

The United States Supreme Court's recent decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, however, refused to require first use of the Hague Service Convention in cases in which the foreign defendant corporation operates a wholly-owned subsidiary in the United States that is subject to service of process within the United States as an involuntary agent under state law.[35] In such cases, the court held, a United States plaintiff may disregard the Hague Service Convention in favor of other

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443 So. 2d 880, 881 (Ala. 1983) (same); McHugh v. International Components Corp., 118 Misc. 2d 489, 491, 461 N.Y.S.2d 166, 168 (N.Y. Sup. Ct. 1983) (Convention does not control service of foreign parent through United States agent outside state but subject to long arm statute.).

32. *See* Hollmann, *supra* note 28, at 793; S. BLACK & D. LANGE, *supra* note 30, at 29. The *Restatement of Foreign Relations Law* noted that where service is made in the territory of a Convention signatory by a method not provided for by the Convention, or by a method to which the receiving state has objected, "the service is ineffective in the United States . . . ." 1 THIRD RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 29, § 472, comment a.

33. *See* Brief for the United States as amicus curiae at la-7a (Sept. 1987) in Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988); *see also* Heidenberger, *U.S. Supreme Court befaßt sich mit Haager Zustellungsübereinkommen*, 34 RECHT DER INTERNATIONALEN WIRTSCHAFT 90 (1988) (discussing views of German government).

34. *See* G. BORN & D. WESTIN, *supra* note 29, at 143, 146-47.

35. Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988); *see also* Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55, 63-66 (1990); Comment, *Service of Process: Application of the Hague Service Convention in United States Courts*—Volkswagenwerk Aktiengessellschaft v. Schlunk, 108 S. Ct. 2104 (1988), 30 HARV. INT'L L.J. 277 (1989).

Given the expansive nature of many United States long-arm statutes and the likelihood that foreign defendants doing business in the United States would be acting through domestic subsidiaries, the effect of *Schlunk* was to reduce substantially the applicability of the Hague Service Convention and, likewise, to remove from foreign entities many of the procedural protections that their governments sought to guarantee by entering into the Convention in the first place. *Id.* at 286; *see also* Note, *The Hague Service Convention and Agency Concepts:* Lamb v. Volkswagenwerk Aktiengesellschaft, 20 CORNELL INT'L L.J. 391, 411-12 (1987).

means of local service available under federal or state law.[36]

Thus, although the *Schlunk* decision has been criticized heavily,[37] it is settled, at least from the United States perspective, that a United States litigant has two avenues for serving a German defendant. The first avenue is serving process in the United States through a subsidiary, branch, or agent of the defendant by employing the ordinary domestic procedural steps. The second avenue is service directly in Germany by utilizing Hague Service Convention procedures. As explained below, however, the prevailing view in Germany is that a United States court judgment premised on service as sanctioned in *Schlunk* is unenforceable in Germany.[38]

B. *The Applicability of the Hague Service Convention to Punitive Damage Actions*

Commentators also dispute whether service of process can be effected under the Hague Service Convention when the plaintiff seeks punitive damages. The Convention, by its own terms, applies to "all cases, in civil or commercial matters."[39] The general consensus is that "criminal" matters are outside the scope of the Convention.[40] The treatment of quasi-governmental subjects, such as administrative matters, is less clear.

Some German commentators argue that punitive damage actions are criminal in nature and, therefore, are not governed by the Convention's service of process requirements.[41] On the other hand, the recent United States Supreme Court decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, indicates clearly that United States

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36. However, when process is to be served in another member state and the Convention applies, dictum suggested that the Convention's mechanism *must* be used. *Schlunk*, 486 U.S. at 700-01, 705; *see also* G. BORN & D. WESTIN, *supra* note 29, at 147.

37. *See* Heidenberger & Barde, *Die Entscheidung des United States Supreme Court zum Haager Zustellungsübereinkommen*, 34 RECHT DER INTERNATIONALEN WIRTSCHAFT 683 (1988); Comment, *The Hague Service Convention as Enabler:* Volkswagenwerk Aktiengesellschaft v. Schlunk, 20 U. MIAMI INTER-AM. L. REV. 175, 193-98 (1988); Comment, *supra* note 35, at 284-86; Vollmer & Hoing, *Local Laws Ruling by Supreme Court*, Financial Times, June 23, 1988, at 5.

38. *See infra* text accompanying notes 71-84. The Supreme Court expressly anticipated this outcome in *Schlunk*. *Schlunk*, 486 U.S. at 706.

39. Hague Service Convention, *supra* note 1, art. 1.

40. *See* G. BORN & D. WESTIN, *supra* note 29, at 139.

41. *See* Schütze, *Die Anerkennung und Vollstreckbarkeitserklärung US-amerikanischer Schadensersatzurteile in Produkthaftungssachen in der Bundesrepublik Deutschland*, in FESTSCHRIFT FÜR HEINRICH NAGEL 392, 395-97 (1987); *see also* Hollmann, *supra* note 28, at 785-86 (concerning action claiming punitive damages only).

law views punitive damage actions as civil in nature.[42] Thus, the United States position presumably would be that the Convention permits service of punitive damages actions.[43] The United States Central Authority repeatedly has sought to have punitive damage complaints served under the Convention.[44]

C. *The Decision of the* Oberlandesgericht München

The *Oberlandesgericht München* (Court of Appeals at Munich) is the first German court to address the applicability of the Convention to punitive damage actions. In its Decision of 9 May 1989,[45] the court held that, for the limited purpose of service of process under the Hague Service Convention, punitive damages would be characterized as civil in nature.[46] Therefore, the Convention does apply, and United States litigants may serve German defendants through a German Central Authority.

The Decision of 9 May 1989 involved a United States insurance company that placed a reinsurance contract with a Munich-based company. Ultimately, the United States company filed a claim for reimbursement that the Munich company did not honor. The United States company

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42. Browning-Ferris Indus. of Vt. v. Kelco Disposal Inc., 109 S. Ct. 2909 (1989).

43. In any event, the characterization of an action as "commercial" or "criminal" is of practical importance to a United States litigant only if the law of the receiving state alone defines the nature of the action under the Hague Convention. The prevailing view on that question, however, has been that the law of the state seeking service should control. *See* Böckstiegel & Schlafen, *Die Haager Reformübereinkommen über die Zustellung und die Beweisaufnahme im Ausland*, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 1073, 1074; *see also Reports on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, June 1978, *reprinted in* 17 INT'L LEGAL MATERIALS 1417, 1426 (1978).

Alternatively, some have argued that the law of the state seeking service should control, at least when no comparable remedy exists under the law of the receiving state, as is the case with punitive damages under German law. *Id.* at 1425-26 (1978) (Report notes that views on choice of law question under Hague Evidence Convention are similar to those under Hague Service Convention); *see also* Hollmann, *supra* note 28, at 786.

44. *See* Brief for the United States as amicus curiae, *supra* note 33, at 20 n.32.

45. Decision of 9 May 1989, *supra* note 2, at 483.

46. The Court also decided a minor point regarding translation of documents which is of practical importance to United States plaintiffs. The Hague Service Convention, article 5(a), provides that a Central Authority may specify that documents to be served be translated into the language of the receiving state. The Law Implementing the Hague Service Convention, section 3, 1977 BGBl.I 3105, requires that all documents must be translated into German before being served under the Convention. The Court, however, held that failure to translate some of the appendices of a claim does not invalidate service so long as the translations are produced subsequently. *See* Decision of 9 May 1989, *supra* note 2, at 484.

filed suit in the United States for recourse and damages, including a punitive damage claim for malicious and intentional delay of reimbursement. The United States company then applied to the Bavarian Ministry of Justice for service of process under the Hague Service Convention, and was refused.[47]

The *Oberlandesgericht München* analyzed the nature of punitive damages in three ways. First, it considered the identity of the parties. Punitive damages ordinarily arise in disputes between private parties rather than between government entities. This generalization distinguishes punitive damages from criminal sanctions, which may be imposed only in a state prosecution.[48] Second, the court considered which recipients may be awarded punitive damages. Unlike criminal fines, punitive damage awards ordinarily are made in favor of private entities, not the government.[49] Third, the court observed that the party paying punitive damages in a civil action does not thereby acquire a criminal record and is neither deprived of any civil right nor stigmatized as a criminal.[50]

The *Oberlandesgericht München* rejected the contention that, even if punitive damage actions properly are characterized as civil in nature and, therefore, eligible for service under the Convention, it should still deny service pursuant to article 13 of the Convention. Article 13 allows the receiving state to refuse service when "compliance would infringe its sovereignty or security."[51]

The court noted the argument that the right to refuse service on grounds of "sovereignty or security" includes those instances involving actions or remedies that are contrary to the general public policy of the receiving state.[52] The court also considered the more expansive theory

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47. *See id.* at 483.
48. *See id.* at 484.
49. *See id.*
50. *See id.*
51. Article 13 of the Hague Service Convention provides:

> Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.
>
> It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.
>
> The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Hague Service Convention, *supra* note 1, art. 13.

52. *See* Decision of 9 May 1989, *supra* note 2, at 484; von Hülsen, *Kanadische und europäische Reaktionen auf die US "pre-trial discovery,"* 28 RECHT DER INTERNATIONALEN WIRTSCHAFT 537, 550 (1982).

that any state may refuse to carry out international treaty obligations when doing so would violate international public policy, even when the treaty in question, as with the Hague Service Convention, contains no general public policy clause.[53]

The court ultimately concluded, however, that it was not necessary to decide whether article 13 could be invoked on public policy grounds or whether a broader international theory of public policy would permit a German Central Authority to refuse to serve process in a punitive damage action on the grounds that punitive damages are not available under German law. Assuming *arguendo* that such objections could be raised at all, the court concluded that service of process for punitive damage claims does not contravene German or international public policy.[54]

For these reasons, the *Oberlandesgericht München* held that punitive damages are sufficiently civil in character to come within the scope of the Hague Service Convention, and that article 13 may not be used to bar execution of service in Germany. The court concluded that the German Central Authorities should cooperate with United States requests for assistance under the Convention.[55]

Importantly, the *Oberlandesgericht München*'s Decision of 9 May 1989 does not guarantee that other German courts faced with similar facts will reach the same result. Prior decisions in the civil law system are invoked as helpful guidance to a court, as are scholarly articles, but they do not bind judges in subsequent cases.[56] This decision, nonetheless,

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53. *See* Decision of 9 May 1989, *supra* note 2, at 484.

54. *Id.* The court noted that it would not be enough to show that punitive damages are not available under German law because article 13 expressly provides that this fact alone does not amount to a threat to national sovereignty or security. *See id.* Article 13 may be invoked only in cases involving a particularly serious violation of the basic values underlying the receiving state's legal system. Punitive damages in civil cases do not violate these basic-values, the court reasoned, because they do not amount to a misuse of the state's penal power by private parties. *See id.* That United States court awards tend to be vastly larger than comparable German judgments is not dispositive. *See id.* at 485.

55. An interesting question is whether the United States Supreme Court would have reached the same result in *Schlunk* had that case been decided after the Decision of 9 May 1989. The Supreme Court had been advised of the problems United States plaintiffs claimed to be having in trying to serve process under the Hague Service Convention in Germany. *See* Brief for the United States as amicus curiae, *supra* note 33, at 20 n.32; *see also* Reisenfeld, *supra* note 35, at 66. The Supreme Court might have been more willing to make resort to the Convention mandatory had it not been concerned about protecting the ability of United States plaintiffs to effectuate service of process.

56. *See* R. DAVID & C. JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 425 (9th ed. 1988) ("Les décisions de jurisprudence peuvent bien avoir une certaine autorité; elles ne sont pas considérées, hormis des cas exceptionnels, comme fixant des règles de droit"); *see also* R. CROSS, PRECEDENT IN ENGLISH LAW (3d ed. 1977).

is important and helpful. It confirms the view of a number of German commentators on the issue of punitive damages,[57] and expresses the position other German courts will likely adopt.

Accordingly, the Decision of 9 May 1989 provides some comfort to United States plaintiffs seeking service of punitive judgment actions in Germany. The decision signifies that United States plaintiffs may bring a German corporate parent into a case by directly effecting service of process under the Hague Service Convention. This eliminates one potential hurdle to enforcement of punitive damage judgments in Germany—that the action was not served in accordance with the Hague Service Convention—an otherwise serious impediment.

The *Oberlandesgericht München* decision is important as well for what it did not decide. The court's analysis clearly hinged upon the fact that the request was for service of process alone. At that stage in the litigation, the prospects of winning a punitive damage award would be only speculative. The court left for future determination the question whether a German court actually would enforce a punitive damage judgment once rendered.

IV. THE ENFORCEABILITY OF PUNITIVE DAMAGE JUDGMENTS IN GERMANY

A. *Background*

The enforcement[58] of foreign judgments[59] between Germany and the United States is not subject to bilateral or multilateral agreement.[60]

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57. *See* Stürner & Stadler, *supra* note 7, at 158; *see also* D. MARTINY, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS Vol. III/1, Ann. 507 (1984).

58. Under both German and United States law there is a distinction between "recognition" and "enforcement" of judgments. The former term refers *inter alia* to use of an earlier foreign court judgment to preclude relitigation of matters in subsequent, related causes of action. The latter term refers to use of an earlier judgment as a basis for the grant by one court of an award entered by another. *See* Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721, 728 (1987); *see also* Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POL'Y INT'L BUS. 325, 326 n.2 (1987); 1 THIRD RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 29, §§ 481-82; von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968).

59. References to "foreign" judgments in this Article mean judgments from non-European Community (EC) courts brought to Germany for enforcement.

60. Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in*

Thus, the enforceability of foreign judgments in each country is a question of domestic law.[61]

Germany tends to take a liberal, cooperative view toward requests for enforcement of foreign civil or commercial judgments.[62] The question is controlled by the *Zivilprozeßordnung* (German Code of Civil Procedure or ZPO),[63] which sets forth the requisites for securing enforcement of foreign court decisions. Pursuant to ZPO section 722, subsection 1, the enforcement of a foreign judgment requires a separate enforcement decree (*Vollstreckungsurteil*) that a judgment creditor can obtain by instituting an action for enforcement in a court having jurisdiction over the judgment debtor or his assets.[64] Under ZPO section 723, subsection 1, this enforcement decree must be issued by a court, without an impermissible *révision au fond* (a reexamination of the substantive basis of the foreign judgment),[65] except when there exists any one of the five bases delineated in section 328, subsection 1,[66] for refusing enforcement:

(1) where the original court lacked jurisdiction;
(2) where the judgment was entered by default against a defendant not

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the Federal Republic of Germany, 11 INT'L LAW. 261, 261-63 (1977). The absence of a treaty regarding enforcement of judgments contrasts with enforcement of arbitration awards, which is provided for by two treaties. *See* Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VI, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *reprinted in* A. REDFERN & M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 411 (1986).

61. *See* Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 303 (1989); Westin, *supra* note 58, at 327; Kraus, *Enforcement of Foreign Money Judgments in the Federal Republic of Germany—Some Aspects of Public Policy*, 17 TEX. INT'L L.J. 195, 196 (1982). Since 1987, enforcement in Germany of judgments from other EC courts has been controlled by the particular rules of the "Brussels Convention." Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 21 O.J. EUR. COMM. (No. L 304) 77 (1978).

62. *See* Zekoll, *supra* note 61, at 323. German law on enforcement does not distinguish between money judgments and those granting other types of relief. *See* Bertram-Nothnagel, *Enforcement of Foreign Judgments and Arbitral Awards in West Germany*, 17 VA. J. INT'L L. 385, 398-99 (1977).

63. *See* ZPO § 328 (recognition of judgments), §§ 722-23 (enforcement of foreign judgments); D. MARTINY, *supra* note 57, at Vol. III/1, III/2.

64. Martiny, *supra* note 58, at 728.

65. *See* ZPO § 723II.

66. In addition to the five bases set forth in ZPO § 328, § 723II requires that the judgment to be enforced be final. A final judgment is one not subject to further appeals in the courts of the state rendering the judgment. *See* ZPO §§ 723II, 322, 705.

given proper notice;
(3) where the judgment conflicts with a previous action or decision in the German courts;
(4) where enforcing the foreign judgment would lead to a result repugnant to fundamental notions of German law; or
(5) where reciprocity is not warranted.[67]

The second and fourth exceptions in particular are relevant for United States litigants seeking to enforce judgments in Germany.

B. *Inadequate Notice as a Basis for Refusing Enforcement*

A German court can refuse to enforce a default judgment under ZPO section 328, subsection 1(2), when the judgment debtor is not given adequate notice. German commentators agree unanimously that German courts may deny enforcement of a United States judgment under section 328, subsection 1(2), upon a showing of three factors:[68] (1) that service of process in Germany was not effected through the Central Authorities;[69] (2) that the German defendant affirmatively pleaded improper service at the enforcement proceeding in German Court; and (3) that the German defendant had not entered a general appearance in the United

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67. *See* ZPO §§ 723II, 328.

68. Martiny, *supra* note 58, at 741-42. It is not yet resolved whether a German court could refuse to recognize a default judgment, on grounds that service of process was not in compliance with the Hague Service Convention, solely under section 328, subsection 1(2), or whether lack of notice could also amount to a violation of public policy, permitting refusal of enforcement under section 328, subsection 1(4). *See* R. GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 70 (1987); R. SCHÜTZE, DEUTSCHES INTERNATIONALES ZIVILPROZESSRECHT 141-42 (1985); D. MARTINY, *supra* note 57, at Vol. III/1, Anns. 1023, 1024. If the latter view prevails, a German judgment debtor would probably need to show only that service was not effected through the Central Authority in order to prevent enforcement.

A recent judgment of the Bundesgerichtshof, rendered under article 27(2) of the Brussels Convention, supports this view. The court held that there will be no recognition of a foreign judgment if the originating process was not properly served. *Bundesgerichtshof*, Decision of 20 September 1990 *in* 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 1010 (1990) (referring to the European Court of Justice Decision of 3 July 1990, in 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 302 (1990)).

69. In acceding to the Convention, Germany expressly refused to permit service of process by means provided by the Convention other than via the Central Authorities. *See Declarations Concerning the Hague Service Convention, reprinted in* G. BORN & D. WESTIN, *supra* note 29, App. D, at 660; *see also* Brief for the Federal Republic of Germany as amicus curiae at 16 (Dec. 11, 1987), in Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988); Heidenberger & Barde, *supra* note 37, at 687; Martiny, *supra* note 58, at 742; Zekoll, *supra* note 61, at 306; Hollmann, *supra* note 28, at 793-94.

States action.[70] Thus, a United States judgment creditor who attempted to bring a German defendant into a United States action under the procedures sanctioned in *Schlunk* could be left with a judgment that German courts would not enforce if the judgment creditor did not in addition serve the German corporate parent in accordance with the Hague Service Convention. Moreover, after the decision of the *Oberlandesgericht München*, a United States judgment creditor could not argue successfully in a German court that he was forced to resort to the *Schlunk* approach because of uncertainty whether the German Central Authorities would effect service seeking punitive damages.

C. *Public Policy Objections to Enforcement of United States Punitive Damage Judgments in Germany*

The second important basis for refusing enforcement of United States court judgments in Germany is ZPO section 328, subsection 1(4), which permits German courts, on public policy grounds, to refuse to enforce an otherwise valid foreign judgment.[71] The court can invoke this statute if it concludes that recognition of the proffered judgment "would produce a result which would be manifestly irreconcilable with the essential basic principles of German law including basic constitutional rights."[72]

Commentators advance three lines of public policy argument against the enforcement of foreign punitive damage awards in German courts:

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70. *See* Geimer, Comment, in ZIVILPROZESSORDNUNG § 328 n.135 (R. Zöller 15th ed. 1986); Hartmann, Comment, in A. BAUMBACH, W. LAUTERBACH, J. ALBERS & P. HARTMANN, ZIVILPROZESSORDNUNG § 328, Ann. 3 (47th ed. 1989); Schumann, Comment, in STEIN & JONAS, ZIVILPROZESSORDNUNG § 328, Ann. 186 (20th ed. 1989); Reisenfeld, *supra* note 35, at 65-66.

Recognition may not, however, be rejected merely due to technicalities if the German defendant received actual notice of the action. *See* 65 BGHZ 291 (1975); Bayerisches Oberstes Landesgericht, *in* 1978 DIE DEUTSCHE RECHTSPRECHUNG ZUM INTERNATIONALEN PRIVATRECHT 176; Bayerisches Oberstes Landesgericht, *in* 1976 NEUE JURISTISCHE WOCHENSCHRIFT 1032; Bayerisches Oberstes Landesgericht, *in* 1974 DIE DEUTSCHE RECHTSPRECHUNG ZUM INTERNATIONALEN PRIVATRECHT 181; *see also* OBERLANDESGERICHT KÖLN, 1989 VERSICHERUNGSRECHT 727, 728 (service of default judgment does not amount to cure of failure to give timely actual notice); J. KROPHOLLER, EUROPÄISCHES ZIVILPROZESSRECHT Art. 27, Ann. 38 (2d ed. 1987).

71. *See* ZPO § 328, subsection 1(4); Zekoll, *supra* note 61, at 311; Martiny, *supra* note 58, at 724; Kegel, Comment, in SOERGEL, BÜRGERLICHES GESETZBUCH vor Art. 7 EGBGB Ann. 649; Schumann, Comment, in STEIN & JONAS, *supra* note 70, at ZPO § 328, Ann. III(2). United States courts too will sometimes refuse to enforce a foreign judgment on grounds of public policy. *See* Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986); *see also* G. BORN & D. WESTIN, *supra* note 29, at 573-74.

72. Martiny, *supra* note 58, at 745; *see also* Westin, *supra* note 58, at 340.

(1) punitive damages are penal in nature and thus may not be awarded or enforced in a civil action in Germany; (2) punitive damage awards of one state are unenforceable in another state under public international law; and (3) foreign punitive damage awards are contrary to German principles of private international law. The most prevalent argument is that punitive damages granted in United States tort actions[73] and statutory multiple damages awarded in private antitrust or racketeering actions[74] are penal and retributive in nature and, therefore, unenforceable on public policy grounds in German civil proceedings.[75] Commentators reason that German court enforcement of such judgments in civil proceedings would violate the constitutional protections of the *Grundgesetz* (German Basic Law), because punitive damage awards amount to the imposition of criminal penalties without according the defendant the important procedural safeguards of the criminal law.[76]

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73. Schütze, *supra* note 41, at 395-97; *see also* von Hippel, *Schadensersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten*, 1971 BETRIEBS-BERATER 61, 64; P. HOECHST, DIE US-AMERIKANISCHE PRODUZENTENHAFTUNG 120 (1986); von Westphalen, *Punitive damages in US-amerikanischen Produkthaftungsklagen und der Vorbehalt des Art. 12 EGBGB*, 27 RECHT DER INTERNATIONALEN WIRTSCHAFT 141, 142 (1981); D. MARTINY, *supra* note 57, at Vol. III/l, Anns. 504, 1046; *but see* Stiefel & Stürner, *supra* note 7, at 835-38 (United States punitive damages serve compensatory purpose, such as providing cost allocation provided by ZPO § 91 but unavailable under United States law).

74. *See* Martiny, *supra* note 58, at 747-48; *see also* Rehbinder, Comment, in U. IMMENGA & E. MESTMÄCKER, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN § 98, Ann. 353 (1981); D. MARTINY, *supra* note 57, at Vol. III/l, Ann. 504; Brenscheidt, *supra* note 60, at 267 ("unclear whether American antitrust judgments granting treble damages will be accorded recognition"); *but see supra* note 21 and accompanying text (explaining the distinction under United States law between punitive and multiple damages). This distinction has caused some commentators to argue that German courts should regard multiple damages differently from punitive damages. *See* Zekoll, *supra* note 61, at 330 n.159; Grass, *supra* note 22, at 260-65.

75. Similarly, commentators argue against the availability of service of process in punitive damage actions under the Hague Service Convention and against the taking of evidence under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Oct. 26, 1968, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. Critics argue that such actions are not civil or commercial in nature and hence are beyond the scope of either Convention's concern. *See* Hollmann, *supra* note 28, at 785-86 (Hague Service Convention); Stiefel, *"Discovery"-Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtsverkehr*, 25 RECHT DER INTERNATIONALEN WIRTSCHAFT 512 (1979) (Hague Evidence Convention); *see also* G. BORN & D. WESTIN, *supra* note 29, at 311 n.113 (discussing unsettled nature of antitrust actions under Hague Evidence Convention).

76. *See* Zekoll, *supra* note 61, at 329-30; *see also* Hoechst, *Zur Versicherbarkeit von punitive damages*, 1983 VERSICHERUNGSRECHT 13, 17; von Hülsen, *Produkthaftpflicht*

On the other hand, some commentators argue that punitive damages in the United States are not significantly different from the damages available under the German "smart-money" provision.[77] Other commentators reason that punitive damages serve, at least in part, as compensation to the prevailing party for his legal fees.[78] In Germany, the prevailing party normally is entitled to legal fees,[79] while in the United States, each side generally bears its own legal costs. From this perspective, punitive damages can be viewed as a fee-shifting arrangement.[80]

The second argument contends that punitive damages are unenforceable under ZPO Section 328, subsection 1(4), because they run afoul of the public international law principle that no state will enforce the criminal statutes of another.[81] The flaw in this argument is that there is no consensus in public international law on the characterization of punitive damages.

The third argument derives from article 38 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB), the provision codifying German private international law. Article 38 specifies that a German defendant who commits a tort abroad but is sued in Germán court cannot be subject to greater liability than would be available under German law had the tort been committed in Germany.[82] Some commentators argue that this provision could be used to interdict foreign awards of punitive damages.[83] A recent decision by the Federal Supreme Court, however,

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USA 1981, 28 RECHT DER INTERNATIONALEN WIRTSCHAFT 1, 8 (1982); *see also* Grass, *supra* note 22 (canvassing objections to punitive damages under United States constitutional law).

77. *See* Stürner & Stadler, *supra* note 7, at 159.

78. *See* D. MARTINY *supra* note 57, at Vol. III/1, Ann. 507 (canvassing case law); Stiefel & Stürner, *supra* note 7, at 835-38.

79. Recoverable fees are limited, however, to the amounts laid down in the Federal Fee Regulation for Attorneys (Bundesrechtsanwalts-Gebührenordnung) and contingency fees are not permitted. *See* ZPO § 91II.

80. *See* Ausness, *supra* note 9, at 68.

81. *See* 31 BGHZ 367, 371 (1959); Bundesgerichtshof, *in* 1970 Wertpapiermitteilungen 785, 786; G. KEGEL, INTERNATIONALES PRIVATRECHT 405 (1977); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another."); Brenscheidt, *supra* note 60, at 266-67 & n.46.

By contrast United States courts, even in states that do not permit award of punitive damages, will enforce sister state judgments for punitive damages, despite the usual prohibition against one state enforcing the penal statutes of another. *See* K. REDDEN, *supra* note 7, § 3.3(E).

82. *See* EGBGB art. 38.

83. *See* Kreuzer, Comment, in MÜNCHENER KOMMENTAR ZUM BGB Art. 12 EGBGB Ann. 285 (2d ed. 1983); *see also* Schack, *Art. 12 EGBGB in deutschen Urteilsanerkennungs- und Regreßverfahren*, VERSICHERUNGSRECHT 422 (1984) (collecting

suggests that EGBGB article 38 probably would not prevent the enforcement of United States judgment awards exceeding those available under German law.[84] These various arguments existed in theory rather than practice until recently, when the *Landgericht Berlin* issued a seminal decision on the enforceability of foreign judgments for "excessive" damages.

D. *The Decision of the* Landgericht Berlin

The *Landgericht Berlin* decision turned on the court's willingness to enforce what it characterized as "excessive" damages. While the decision does not deal expressly with punitive damages, it does provide important indications of the way in which a German court would analyze such a case. In the Decision of 13 June 1989,[85] the court considered a suit to enforce a United States product liability judgment rendered in Massachusetts[86] in favor of a United States plaintiff who was injured while operating a machine manufactured by a German corporation. The suit was based on theories of negligence and implied warranty of merchantability. The plaintiff sought compensatory damages for reduced working ability and damages for pain and suffering. The jury awarded the plaintiff a total of 275,000 dollars in damages,[87] and the plaintiff

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commentaries).

A Swiss court, for example, has used a similar provision in the Swiss Civil Code as a basis for refusing recognition of a United States judgment on the grounds that punitive damages are contrary to the public policy of Switzerland. *See* Bezirksgericht Sargans, 1 Oct. 1982, partially reproduced and commented upon in Drolshammer & Scharer, Comment, 82 REVUE SUISSE DE JURISPRUDENCE 309 (1986); *see also* A.-C. IMHOFF-SCHEIER & P. PATOCCHI, L'ACTE ILLICITE ET L'ENRICHISSEMENT ILLÉGITIME DANS LE NOUVEAU DROIT INTERNATIONAL PRIVÉ SUISSE 72 & n.109 (1990). It appears that Swiss courts take a similarly hostile view toward treble damages. *Id.* at 72.

84. *See* 88 BGHZ 17 (1983). This case involved the enforcement of an Italian judgment under the Brussels Convention and was welcomed, at least by some commentators, *see, e.g.,* Zekoll, *supra* note 61, at 317 n.84; *but see* Schack, *supra* note 83, at 423 (criticizing decision for inconsistent application of tort law and conflict of law principles).

A majority of commentators have argued that this decision is also applicable to the enforcement of judgments outside the scope of the Brussels Convention, and thus possibly to non-signatory countries, like the United States. *See* Heldrich, Comment, in PALANDT, KOMMENTAR ZUM BGB Art. 38 EGBGB Ann. 4; Lüderitz, Comment, in SOERGEL, KOMMENTAR ZUM BGB Art. 12 EGBGB Ann. 67; D. MARTINY, *supra* note 57, at Ann. 1045; *see also* Zekoll, *supra* note 61, at 317 n.84 (decision "may arguably apply to judgments which were rendered outside the scope of the Convention").

85. Decision of 13 June 1989, *supra* note 3, at 988.

86. *See* Solimene v. B. Grauel & Co. K.G., 399 Mass. 790, 507 N.E.2d 662 (1987).

87. *See id.* at 792-94, 507 N.E.2d at 664-65.

sought enforcement of the award by bringing her judgment to Germany.[88]

The *Landgericht Berlin* refused to enforce the judgment. It began, however, by rejecting the contention that the public policy provision of article 38 of EGBGB provided the basis for refusing enforcement under ZPO section 328, subsection 1(4), because the magnitude of the award exceeded that which the plaintiff could have obtained in a German court.[89] Following a 1983 decision of the *Bundesgerichtshof*,[90] the *Landgericht Berlin* concluded that application of article 38 to decide the enforceability of a foreign judgment would amount to an impermissible reexamination of the substantive basis of the foreign judgment (*révision au fond*).[91]

Having first decided that the United States court judgment could not be measured against the available remedy under German law, the court proceeded to do exactly that. It determined that the award was unenforceable because of various "shortcomings" in the judgment that, when taken together, violated German public policy. The *Landgericht Berlin* found first that the United States court opinion provided no written grounds detailing the causal link between the design defect and the plaintiff's injury.[92] The *Landgericht Berlin* noted that, under German law, a court's decision must include a clear statement setting forth a finding of causation, not merely a description of circumstances that might have led to the damage.[93] The German court found such a clear state-

88. Decision of 13 June 1989, *supra* note 3, at 988.

89. *Id.* at 989.

90. *See supra* text accompanying note 84.

91. Decision of 13 June 1989, *supra* note 3, at 989.

92. *See id.*; *see also* ZPO § 313III; BGB § 823. In fact, the Massachusetts opinion indicates that the plaintiff had two theories of design defect: placement of the machine's on/off switch; and lack of a guard over a moving machine part. *Solimene,* 399 Mass. at 797, 507 N.E.2d at 667. What apparently troubled the German court was the fact that under Massachusetts law the plaintiff was permitted to meet her burden of proving negligence by offering both theories. The jury was left to choose which theory was plausible. It was not clear from the jury's verdict which theory it accepted, although the trial court judge noted in ruling on post-trial motions that he believed that the jury had accepted the guard theory of design defect. *Id.* at 798, 507 N.E.2d at 667.

93. Decision of 13 June 1989, *supra* note 3, at 989. The German court evidently objected to the fact that the plaintiff could prevail simply by proving "that there was a greater probability that the harm which occurred was due to causes for which [the defendant] was responsible," rather than upon some greater showing of proof, such as actual negligence. *Solimene*, 399 Mass. at 798, 507 N.E.2d at 667. But the *Landgericht Berlin* ignored the fact that, under German product liability law, the plaintiff need not clearly establish causation in all cases. *See* Bundesgerichtshof, *in* 1972 BETRIEBSBERATER 13; 104 BGHZ 323, 332 (1988).

ment lacking in the Massachusetts decision.

Second, the court held that the Massachusetts opinion offered no factual basis for its conclusion that the defendant bore approximately ninety-five percent of the responsibility for the damages.[94] From the facts available, however, the court concluded that the amount awarded "far exceeds the amount which would have been awarded in Germany in comparable cases."[95]

Third, the court also objected that, from the face of the judgment, it was impossible to determine which portion of the award was attributable to purely compensatory damages and which was attributable to pain and suffering.[96] Even if it were possible to distinguish among the constituent elements of the award from the face of the judgment and to enforce those portions that did accord with German public policy, the court said it would not do so because partial enforcement would amount to a *révision au fond*. Thus, no portion of the judgment was enforceable in a German court.[97]

While the court conceded that the pre-trial discovery sought by the plaintiff did not, on its own, violate German public policy, it was relevant to the court's analysis and, taken "[t]ogether with the other aforementioned aspects . . . results in a clear violation of German public policy."[98]

The reasoning of the *Landgericht Berlin* decision suffers from a number of serious flaws. The most blatant flaw is the court's attempt to impose the decisional standards of German law upon a foreign judgment, an imposition that the Federal Supreme Court and scholarly commentators condemn.[99] The *Landgericht Berlin* offered nothing beyond unsubstantiated assertions to suggest that the differences between German and United States tort law produced results "manifestly irreconcilable with

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94. From the Massachusetts opinion, it appears that this issue was a question of fact determined by the jury, not by the judge. *See Solimene*, 399 Mass. at 794-95, 507 N.E.2d at 665. Hence, it is not surprising that the opinion omits any explanation for how the 95% figure was chosen.

95. Decision of 13 June 1989, *supra* note 3, at 989.

96. Again, the problem lies in the fact that fixing the quantum of damages is uniquely within the province of the jury in United States tort litigation. The jury found the German defendant to be negligent and to have breached its warranty of merchantability, however, the jury did not apportion its award as between the two bases for liability. *Solimene*, 399 Mass. at 793-94, 507 N.E.2d at 665.

97. Decision of 13 June 1989, *supra* note 3, at 990.

98. *Id.*

99. *See* Zekoll, *Zur Vollstreckbarkeit eines US-amerikanischen Schadensurteils*, 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 302 (1990).

the essential basic principles of German law."[100] Two of the court's principal justifications for refusing enforcement, that causation was not established properly and that the award was excessive, were made by the German defendant and rejected on appeal in the Massachusetts action.[101] It would be difficult to describe the *Landgericht Berlin*'s reweighing of the evidence, and its application of German substantive law to the facts, as anything other than a *rêvision au fond.*

The court's willingness to make selective use of the doctrine of *rêvision au fond*, first in undermining a portion of a United States court judgment and then in justifying refusal to enforce any portion of the award, denotes a highly critical attitude toward United States punitive and multiple damage judgments. It would certainly be troubling to United States plaintiffs if the *Landgericht Berlin* view were to prevail in Germany. Moreover, the court did not appear to consider that a hostile approach toward enforcement of United States judgments could prompt United States courts, on grounds of reciprocity, to refuse to enforce German court judgments in the United States.[102]

Although the decision did not specifically involve punitive or multiple damages, the court's approach to what it characterized as "excessive" damages probably is illustrative of the treatment that the court would have given to such a claim.[103] The court's first and fourth concerns, regarding lack of clarity on the question of causation and on the apportionment of the award, are inherent in the common law system, in which such questions are decided by the jury and, therefore, are unavoidably ambiguous.

The court's third concern, regarding the award of "excessive" damages, almost certainly would be invoked against claims for punitive or multiple damages. The *Landgericht Berlin* was responding in part to the question of proportional liability. The same reasoning, however, could apply to a multi-million dollar punitive damage award added on top of a relatively nominal compensatory award, an outcome not unusual in United States tort litigation. To the extent the court's characterization of the award as "excessive" was in reference to relief available under

100. Martiny, *supra* note 58, at 745.

101. *Solimene,* 399 Mass. at 802-04, 507 N.E.2d at 670-71.

102. G. BORN & D. WESTIN, *supra* note 29, at 586-87 (explaining approach of United States courts to reciprocity requirements in enforcement context).

103. The first and fifth concerns of the *Landgericht Berlin* are not especially applicable to punitive or multiple judgment actions, but generally tend to undermine the enforceability of any United States court judgment.

German law, this would necessarily apply with greater force to a punitive damage award.

V. CONCLUSION

The two recent German court decisions discussed in this Article provide important indications to litigants in both the United States and Germany about how German courts will respond to requests to serve process or enforce judgments in actions seeking punitive or multiple damages. The decision of the *Oberlandesgericht München* suggests that a United States plaintiff seeking punitive or multiple damages against a German defendant would be able to effect valid service under the Hague Service Convention via the German Central Authorities. When a Central Authority is uncooperative, the German courts would likely side with the United States plaintiff and order the German Central Authority to effect service.[104]

Service pursuant to the Hague Convention is necessary to have a United States judgment enforced in Germany. Thus, the *Schlunk* decision presents the United States litigant with a difficult choice. The litigant may resort to the faster and less expensive means of service under *Schlunk* if the litigant is confident that the domestic subsidiary, branch, or agent has the resources to satisfy the judgment. If the litigant wants access to the larger coffers of the German corporate parent, however, the litigant apparently has no choice but to resort to the more cumbersome method of service of process through the Convention.

The question of enforcement of a valid United States judgment for punitive or multiple damages in Germany is unresolved. The *Landgericht Berlin* decision is not binding in subsequent proceedings, and discussion on this matter in German legal circles is far from resolved. Nonetheless, the decision offers some important insights into the approach subsequent German courts might take in similar circumstances, and illustrates starkly the skepticism with which United States plaintiffs may be greeted when they seek enforcement of United States punitive or multiple damage judgments in German courts.

The *Landgericht Berlin* decision also is troublesome in its blanket refusal to enforce even the purely compensatory portion of the United States judgment. Punitive damage and antitrust claims in the United

104. United States litigants reportedly encountered difficulties in persuading several German Central Authorities to serve United States complaints seeking punitive damages. *See* Brief for the United States as amicus curiae, *supra* note 33, at 20 n.32; Railway Express Agency, Inc. v. E.P. Lehmann Co., No. Civ. 1069, 1989 WL 99816 (S.D.N.Y. Aug. 23, 1989); Reisenfeld, *supra* note 35, at 66-67.

States regularly are brought together as part of a single action alleging other claims that otherwise would be fully redressable under German law. Thus, the decision presents a United States litigant with another difficult choice: If he likely would have to try to enforce his judgment in Germany, he might have to forego seeking punitive or multiple damages in United States courts in order to ensure the enforceability of any compensatory award.

Whether these two decisions will prevail in other German courts will become known only with the passage of time. For now, however, they provide practitioners with interesting indications as to what the German approach ultimately may be on these important questions.