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Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far

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PUNITIVE DAMAGES REVISITED: TAKING THE RATIONALE FOR NON-RECOGNITION OF FOREIGN JUDGMENTS TOO FAR

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I. INTRODUCTION

Several years ago I wrote an article on punitive damages largely for the purpose of informing our negotiating partners at the Hague Conference on Private International Law about the role of punitive damages in U.S. law.[1] This was done in the midst of negotiations toward a general convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[2] Those negotiations have moved to the more modest (and more realistic) goal of a Convention on Exclusive Choice of Court Agreements.[3] Punitive damages, however, have remained a controversial aspect of U.S. law; an aspect often criticized both at home and abroad. They are the subject of a special provision on recognition of judgments in the draft Convention on Exclusive Choice of Court Agreements, and continue to generate a good deal of interest.

Neither U.S. law on punitive damages, nor the foreign climate regarding their reception has remained static, and there are significant recent

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1. Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETH. INT'L L. REV. 143 (1996) [hereinafter *Punitive Damages*]. Portions of the initial discussion of the current article rely heavily on this earlier work of the author.

2. For a discussion of those negotiations and the failure to reach a comprehensive convention, *see* Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View From the United States*, XL RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 31 (2004); Ronald A. Brand, *Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 75 (John J. Barcelo, III & Kevin M. Clermont eds., 2002).

3. *See* Ronald A. Brand, *A Global Convention on Choice of Court Agreements*, 10 ILSA J. INT'L & COMP. L. 345 (2004). Information on the negotiations can be found on the "work in progress" section of the Hague Conference website at http://hcch.e-vision.nl.

developments that deserve attention. The other three articles in this symposium focus on the reception of punitive damages judgments in Germany, Italy, and Spain, and there is no need to repeat that information here. It is useful, however, to note the continuing legislative attack on punitive damages in the United States at both the state and federal level, as well as recent developments in case law and treaty negotiations concerning their reception abroad.[4]

In the discussion below, I first provide a brief review of the background against which current punitive damages law in the United States continues to operate. This includes consideration of the continuing evolution of U.S. Supreme Court jurisprudence on punitive damages. Next, I give attention to a specific case in the Supreme Court of Canada dealing with the recognition of a U.S. (Florida) punitive damages judgment—and the corresponding, but inconsistent, effort at new uniform Canadian legislation that would limit punitive damages recognition in the courts of that country. Finally, I note the current approach to punitive damages in the recognition and enforcement provisions of the draft Hague Convention on Exclusive Choice of Court Agreements, and the possible implications of that development on future multilateral arrangements.

II. THE HISTORICAL CONTEXT

Damages designed to punish a particular party are neither a recent development nor a remedy unique to litigation in the United States. They have a history of at least four thousand years—including mention in the Code of Hammurabi,[5] and the *Book of Exodus*[6]—that has involved repeated debates on their value and purpose.[7] They were a part of English law in multiple damages statutes as early as 1278,[8] and in cases as early as the eighteenth

4. This article will not deal with state and federal statutory efforts aimed at limiting punitive damages. Most of the discussion of U.S. law will be limited to the courts, with specific emphasis on recent U.S. Supreme Court decisions. For further information on statutory change, *see* Brand, *Punitive Damages*, *supra* note 1; John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 401 (2004).

5. *See* Code of Hammurabi §§ 5, 8, 12, 107, 112 & 265 (from 2000 B.C.), *compiled in* 1 ALBERT KOCOUREK & JOHN H. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW (1915).

6. "If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep." *Exodus* 22:1.

7. *See* Brand, *Punitive Damages*, *supra* note 1, at 145; 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3 (2d ed. 1989); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984).

8. The statute of Gloucester provided for treble damages for waste. 6 Edw. I, c. 5. *See* SIR

century.[9] Not only have punitive damages continued to be a part of the English legal system,[10] but the House of Lords recently expanded the conditions under which they are available.[11] Courts in other leading Commonwealth nations—Australia,[12] Canada,[13] and New Zealand[14]—also have demonstrated general receptivity to awarding punitive damages.[15]

As in other areas of the law, U.S. law on damages borrows heavily from English doctrine. Nonetheless, the propriety and availability of damages designed to punish a defendant in civil actions has been a subject of consistent debate. In the mid-nineteenth century, this debate was focused in treatises by Simon Greenleaf and Theodore Sedgwick. Greenleaf believed that, "[d]amages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more, nor less."[16] Sedgwick accepted a principal focus on compensation, but wrote that when a

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FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 522 (2d ed. 1899) ("under Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to 'the party grieved.'"); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957).

9. *See, e.g.*, Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (where the jury was specifically instructed that they could award damages, and the court stated that, "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."); Huckle v. Money, 95 Eng. Rep. 768, 769 (C.P. 1763) (where "exemplary damages" were awarded in recognition that a jury could return a verdict in excess of actual compensatory loss).

10. *See, e.g.*, Rookes v. Barnard, [1964] A.C. 1129, 1221 (H.L.) (where Lord Devlin noted that a jury can take into account the motives, conduct and wealth of the defendant in awarding damages beyond mere compensation). *See also* Cassell & Co., Ltd. v. Broome, [1972] A.C. 1027, 1087-88 (H.L.) (listing the categories of cases in which punitive damages are available).

11. *See* Kuddus v. Chief Constable of Leicestershire Constabulary, [2002] 2 A.C. 122 (H.L.) (rejecting an earlier Court of Appeals limitation of the types of cases in which punitive damages may be awarded in AB v. S.W. Water Serv. Ltd., [1993] Q.B. 507, 523 (C.A.)). *See* Gotanda, *supra* note 4, at 401.

12. *See, e.g.*, Uren v. John Fairfax and Sons Pty. Ltd., 117 CLR 118 (High Court 1996) ("if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights" (Taylor, J. at ¶ 3) then "damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner' for his outrageous conduct." (Menzies, J. at ¶ 15)).

13. *See* Vorvis v. Insurance Corp. of British Columbia, [1989] 58 D.L.R. (4th) 193, 208 (McIntyre, J.) (punitive damages might be awarded when the defendant's conduct has been harsh, vindictive, reprehensible, or malicious).

14. *See* Fogg v. McKnight, [1968] N.Z.L.R. 330.

15. For a more detailed comparative discussion of punitive damages, *see* Gotanda, *supra* note 4, at 398-439.

16. SIMON GREENLEAF, II A TREATISE ON THE LAW OF EVIDENCE 244 (3d ed. 1850, reprint ed. 1972).

case involves fraud, malice, gross negligence, or oppression, a "wholly different rule" applies."[17] In such cases, according to Sedgwick, the law "permits the jury to give . . . punitory, vindictive, or exemplary damages" that "blend[] together the interest of society and of the aggrieved individual," and "not only . . . [compensate] the sufferer, but [ ] punish the offender."[18]

In the early twentieth century, some U.S. courts emphasized English common law traditions, the role of the jury, and individual liberty in justifying awards of civil damages designed to punish:

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished by the criminal law.[19]

The U.S. Supreme Court has struggled with the law on punitive damages for more than one and one-half centuries. Until recently, the Court took a rather hands off approach, allowing lower courts to deal with exemplary damages with little interference from above. In the 1852 case of *Day v. Woodworth*,[20] the Court sided with Sedgewick, finding it to be "a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."[21] Thirty-three years later, in *Missouri Pacific Railway Co. v. Humes*,[22] the Court further emphasized the leeway given to trial courts, stating that "[t]he discretion of the jury in [punitive damages] cases is not controlled by any very

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17. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38-39 (1847, reprint ed. 1972).

18. *Id.* at 39.

19. Luther v. Shaw, 157 Wis. 234, 238, 147 N.W. 18, 19-20 (1914). *Compare* Fay v. Parker, 53 N.H. 342 (1872), in which the court, though finding itself bound to allow an award of exemplary damages, denounced the concept, stating that "[t]he idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law." *Id.* at 382. *See also* Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891); Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1891).

20. 54 U.S. (13 How.) 363, 371 (1851).

21. *Id.* at 371. For similar decisions, *see* Scott v. Donald, 165 U.S. 58, 86 (1897); Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. (40 Davis) 101, 107 (1893); Wilmington & Baltimore R.R. v. Quigley, 62 U.S. (21 How.) 202, 213 (1858).

22. 115 U.S. 512 (1885).

definite rules."[23] Deference to jury awards remains to this day one of the principal driving forces behind allowing damage awards in excess of simple compensation to the plaintiff, and the subject of a constitutional debate that has molded recent jurisprudence.

Despite repeated acknowledgment of the availability of punitive damages, U.S. courts and commentators have not always agreed on the rationale underlying that availability. Generally, however, the focus has been on a combination of punishment and deterrence.[24] It is perhaps ironic that one of the best elaborations of the purpose of punitive damages is found, not in a U.S. decision, but in a 1992 decision of the German Federal Supreme Court (Bundesgerichtshof).[25] That case involved an attempt to enforce in Germany a California judgment in a civil sexual abuse case, including punitive damages, against a defendant who had returned from California to Germany in order to avoid parallel criminal proceedings. While the Bundesgerichtshof refused recognition and enforcement of the punitive damages award as being a function of criminal proceedings in the German legal system,[26] it provided a useful summary in noting that punitive damages serve "up to four principal purposes."[27] It described those purposes as:

1) to punish the offender for its improper conduct;
2) to add a sufficient sum to the compensatory damages to deter the offender and others from such improper conduct in the future;
3) to reward the injured party for its part in enforcement of the law and "the associated improvement in general law and order;"[28] and
4) to supplement otherwise inadequate compensatory damages.[29]

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23. 115 U.S. at 521.

24. "[U]nder the law of most states, punitive damages are imposed for purposes of retribution and deterrence." Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991). *See also* Coryell v. Colbough, 1 N.J.L. 77 (N.J. 1791) (in which the jury was instructed to give damages "for *example's* sake, to prevent such offenses in [the] future") (italics in original); Vincent v. Morgan's La. & Tex. R.R. & S.S. Co., 74 So. 541 (La. 1917); Boyer v. Barr, 8 Neb. 68 (1879); and Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072 (Wash. 1891); Sales & Cole, *supra* note 7, at 1119-24.

25. BGHZ 118, 312 (1993), *translated in* 32 I.L.M. 1320 (1993). For a more complete discussion of the case, *see* Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211 (1994).

26. 32 I.L.M. at 1339-40.

27. *Id.* at 1337.

28. *Id.*

29. Here it should be noted that the U.S. diverges from most other legal systems of the world by generally not allowing the winning party in litigation to collect its attorney fees from the losing party (the loser pays rule). The Bundesgerichtshof's reference to inadequate compensation was in part an effort to suggest that punitive damages could be seen to compensate the plaintiff for the combination of the loss of value through the U.S. contingent fee payment to the winning plaintiff's attorney, and the failure to collect

The past two decades have brought new focus to punitive damages law in the United States. Since the law of damages generally is a matter for state (as opposed to federal) regulation, much of this development has come in the form of state statutory restrictions and limitations. These have included caps on the level of damages, limitations on the types of cases in which punitive damages may be awarded, and restrictions on instructions to juries. These developments have served to limit the availability and amount of punitive damages awards. While they are important, they are not the focus of this discussion, however.[30]

More general restrictions on the availability and amount of punitive damages have come as the result of seven decisions of the U.S. Supreme Court rendered over the past two decades. While the earliest of these cases confirmed both the availability of punitive damages and the authority of juries to exercise discretion in awarding such damages, the more recent ones have imposed important limitations on such awards.

In the 1989 case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[31] the Court held that the Excessive Fines Clause of the Eighth Amendment[32] does not apply to a punitive damages award in a civil case between private parties,[33] and that federal common law does not allow a court to interfere with the jury's punitive damages award.[34] The first of these holdings focused on the distinction between punishment under the criminal law system and damages in the civil law that are payable to a private party. The Court determined that "the Eighth Amendment . . . Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government,"[35] and that the Amendment "points to an intent to deal only with the prosecutorial powers of government,"[36] and not to issues of civil damages.

With the Eighth Amendment Excessive Fines Clause thus made unavailable for an attack on punitive damages, litigants turned to the Due

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attorney fees from the other party.

30. For further discussion of these restrictions, *see* Brand, *Punitive Damages*, *supra* note 1, at 159-63, Appendix; Gotanda, *supra* note 4, at 423.

31. 492 U.S. 257 (1989).

32. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

33. 492 U.S. at 259-60.

34. *Id.* at 280.

35. *Id.* at 268.

36. *Id.* at 275.

Process Clause of the Fourteenth Amendment,[37] arguing that due process places limits on a jury's ability to award punitive damages.[38] In the early 1990's, this argument too brought little relief for punitive damages defendants; but that changed as the issue was repeatedly brought to the Court.

In *Pacific Mutual Life Insurance Co. v. Haslip*,[39] a verdict of $1,040,000 "contained a punitive damages component of not less than $840,000,"[40] thus presenting a 4/1 ratio of punitive to compensatory damages. Pacific Mutual argued that the amount of punitive damages, as compared to compensatory damages, was so unbalanced as to violate due process. In his majority opinion, Justice Blackmun acknowledged that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[41] He refused, however, to adopt a formula for determining the outer limits of punitive damages under a due process analysis, stating that the Court, "need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[42] He instead placed a very high burden on a party arguing for any limits on punitive damages, suggesting substantial deference to the jury,[43] and noting that "'a thing . . . practised for two hundred years by common consent, . . . will need a strong case for the Fourteenth Amendment to affect it,'"[44] Justice Blackmun suggested that it was enough to satisfy due process that the state Supreme Court (Alabama in this case) had provided review to confirm the relationship between the punitive damages award and the goals of deterrence and retribution.[45] Thus, the punitive damages award did not "cross the line into the area of constitutional impropriety."[46]

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37. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

38. Due process was not raised in *Browning Ferris*. "Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award." 492 U.S. at 277.

39. 499 U.S. 1 (1991).

40. *Id.* at 6 n.2.

41. *Id.* at 18.

42. *Id.*

43. *Id.* at 16-17.

44. *Id.* at 17 (*quoting* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

45. *Pacific Mut. Life Ins. Co.*, 499 U.S. at 20-21.

46. *Id.* at 24.

Like many earlier cases, *Haslip* emphasized deterrence and punishment of the civil defendant as goals of punitive damages.[47] Whether deterrence could justify a punitive damages award substantially in excess of compensatory damages was left open for the case-by-case approach sanctioned by the majority opinion.[48]

The idea that a punitive damages award far in excess of related compensatory damages could violate due process again reached the Court in its 1992 term in *TXO Production Corp. v. Alliance Resources Corp.*[49] In a West Virginia slander of title case, the jury had awarded $19,000 in actual damages and $10 million in punitive damages. While in *Haslip* the Court had stated that a four-to-one ratio of punitive to actual damages, "may be close to the line" of constitutional permissibility,[50] the *TXO* decision upheld the West Virginia award of punitive damages at a 526/1 ratio. The *TXO* decision in fact rejected a test based on a simple comparison of a punitive damages to compensatory damages.[51] Justice Stevens' plurality opinion "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages,"[52] focusing instead on a reasonableness test.[53]

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47. *Id.* at 21.

48. Justice Scalia, in a concurring opinion, took a more aggressive approach. After a review of punitive damages in U.S. law, and a dissertation on the historical development of the concept of due process, he concluded that "[t]o effect their elimination may be wise, but is not the role of the Due Process Clause." *Id.* at 39 (Scalia, J., concurring). He found categorical support for punitive damages, in any amount, as a result of their consistent and continual existence in U.S. jurisprudence. "[N]o procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law." *Id.* at 38.

49. 509 U.S. 443 (1993).

50. 499 U.S. at 23.

51. 509 U.S. at 458.

> [W]hile we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.

52. *Id.* at 460.

53. Justice Scalia, in a concurring opinion, rejected the idea of a "substantive due process" right that punitive damages be reasonable. "To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct 'reasonableness' determination—which is, in my view, what the plurality tries to assure today." *Id.* at 471 (Scalia, J., concurring). The plurality found reasonableness in a $10 million punitive damages award "in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth. *Id.* at 462.

In the 1993 term, the Court heard *Honda Motor Co., Ltd. v. Oberg*,[54] challenging a 1910 amendment to the Oregon Constitution prohibiting judicial review of punitive damages verdicts "unless the court can affirmatively say there is no evidence to support the verdict."[55] Stating that "'meaningful and adequate review [of punitive damages awards] by the trial court' and subsequent appellate review"[56] are required by the Due Process Clause, the Court sent the matter back to the Oregon Supreme Court with instructions to provide such review.

The fifth case in this recent line of decisions is *BMW of North America, Inc. v. Gore*,[57] decided in 1996. Mr. Gore originally received a verdict for $4,000 in compensatory damages and $4 million in punitive damages. By the time the case reached the U.S. Supreme Court, however, the Alabama Supreme Court had cut the punitive award to $2 million, resulting in a 500/1 punitive-to-compensatory ratio. While a 526/1 ratio had been upheld in *TXO*, in *BMW*, the Court held the punitive award to be "grossly excessive," and thus prohibited by the Fourteenth Amendment Due Process Clause. The Court's analysis, however, also brought in interstate commerce interests, focusing on the individual state's interest in awarding punitive damages and the resulting "burdens on the interstate market" for the goods in question (automobiles).[58] This led to the elaboration of three guideposts to be considered in any punitive damages decision:

1) the degree of reprehensibility of the [conduct involved];
2) the disparity between the harm or potential harm suffered by [the plaintiff] and the punitive damages award; and
3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[59]

This was a radical departure from the approach in *TXO*, now limiting the analysis to only three factors, and making the ratio of punitive to compensatory damages one of those factors. The limitation to conduct within the jurisdictional state further insured that future punitive damages awards would be smaller than in past cases.

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54. 512 U.S. 415 (1994).
55. OR. CONST. art. VII, § 3.
56. 512 U.S. at 420, *quoting Haslip*, 499 U.S. at 20.
57. 517 U.S. 559 (1996).
58. *Id.* at 571.
59. *Id.* at 575.

The 2001 case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[60] added further to this line of cases by holding that a court should apply a *de novo* standard when reviewing the trial court's determination of the constitutionality of punitive damages. Thus, the application of the *BMW* test is a matter of law that will result in limited deference to the decision of the trial court.

The seventh, and most recent, in the line of Supreme Court decisions came in 2003 with *State Farm Mutual Automobile Insurance Co. v. Campbell*.[61] The Court was again faced with a punitive damages award ($145 million) that was much larger than the corresponding compensatory award ($1 million). For the first time, however, the court engaged in providing specific guidelines regarding the ratio of punitive to compensatory damages. The Court retained a focus on punishment and deterrence as the goals of punitive damages,[62] and, like it did in *BMW*, made clear that punitive damages are to be limited to the goals of the state in which the action is brought.[63] While the Court "decline[d] to impose a bright-line ratio which a punitive damages award cannot exceed," it stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[64] Thus, while no specific numbers were given, the decision clearly indicated that any ratio beyond 9 to 1 was likely to be too large.[65]

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60. 532 U.S. 424 (2001).

61. 538 U.S. 408 (2003).

62. *Id.* at 409:

> It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence.

63. Punitive damages are to be awarded only in an amount necessary to "satisf[y] the State's legitimate objectives," and a State does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction." *Id.*

64. *Id.* at 425.

65. The Court further fudged the numbers, stating:

> [R]atios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." . . . . The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Id.

III. THE RECEPTION OF U.S. PUNITIVE DAMAGES JUDGMENTS ABROAD

Foreign courts have struggled with punitive damages judgments brought from the United States for recognition and enforcement.[66] The German Bundesgerichtshof in 1992 determined that it would be against German public policy to enforce the punitive damages portion of a California judgment.[67] A similar result was reached in Japan, at least in regard to the specific facts of the case involved.[68] A 1989 Swiss decision, on the other hand, recognized for enforcement purposes a California punitive damages judgment in the face of public policy arguments.[69]

Most recently, the Supreme Court of Canada upheld enforcement of punitive damages awarded by a Florida court in *Beals v. Saldanha*.[70] The *Beals* case was rather controversial because of its unusual facts. A Canadian couple purchased land in Florida for $6,000 in 1981, and were offered $12,000 for it in 1984. A series of lawsuits resulted when the purchasers began building on the wrong lot. While the Canadian couple responded to the first suit, which was subsequently dismissed, they did not respond to later suits, and a default judgment was ultimately entered against them for $210,000 in compensatory damages, and $50,000 in punitive damages, all subject to 12% interest. By the time the judgment was brought for enforcement in Ontario, its value was in excess of Cdn$800,000. The *Beals* case is significant in that it clearly extends the earlier analysis of inter-provincial recognition and enforcement of judgments in *Morguard Investments Ltd. v. De Savoye*[71] to judgments from other countries. In doing so, it reviewed as bases for non-recognition the grounds of fraud, natural justice, and public policy, rejecting

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66. *See, e.g.*, the discussions of recent Spanish and Italian cases in the accompanying articles by Scott Jablonski and Lucia Ostani, discussing *Miller Import Corp. v. Albastres*, STS, Nov. 13, 2001 (Exequátur No. 2039/1999) (Spain), and *Parrott v. Fimez S.p.A.*, Court of Appeal of Venice, Oct. 15, 2001 (Italy).

67. BGHZ 118, 312 (1993), *translated in* 32 I.L.M. 1320 (1993).

68. Northcon I v. Yoshitaka Katayama; Mansei Kogyo Kabushiki Kaisha, Tokyo District Court Judgment, Feb. 18, 1991; H.J. (1376) 79 [1991], H.T. (760) 250 [1991], *translated in* 35 JAPANESE ANNUAL INT'L L. 177 (1992). *See* Kurt Siehr, *Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "punitive damages,"* 37 RECHT DER INTERNATIONALEN WIRTSCHAFT 705 (1991), approving the Swiss court's approach.

69. Decision of the Civil Court of Basel City of 1 Feb. 1989, 1991 BASLER JURISTISCHE MITTEILUNGEN 31, affirmed by the Court of Appeals of Basel City 1 Dec. 1989, *appeal denied*, Federal Court of Switzerland, 12 July 1990 (enforcing California judgment reported only as *Trans Container Services (Basel) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483 (9th Cir. 1985)).

70. [2003] 3 S.C.R. 416.

71. [1990] 3 S.C.R. 1077.

each of them as applied to the specific case. The result is a strong indication that challenges that could have been raised in the original foreign litigation are not to be raised later when the resulting judgment is brought for recognition and enforcement in Canada.

The *Beals* Court ultimately had little trouble enforcing the punitive damages portion of the Florida award along with the rest of the judgment. This is particularly significant in light of the parallel development in Canada of a new Uniform Enforcement of Foreign Judgments Act.[72] Had the Uniform Act been in effect in Ontario when the *Beals* judgment was presented for recognition and enforcement, the result might well have been different. Section 6 of the Act reads as follows:

> Section 6:
> Limit of damages
> 6. (1) Where the enforcing court, on application by a judgment debtor, determines that a foreign judgment includes an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes, it shall limit enforcement of the damages awarded by the foreign judgment to the amount of similar or comparable damages that could have been awarded in [the enacting province or territory.]
> Excessive damages
> (2) Where the enforcing court, on application by the judgment debtor, determines that a foreign judgment includes an amount of compensatory damages that is excessive in the circumstances, it may limit enforcement of the award, but the amount awarded may not be less than that which the enforcing court could have awarded in the circumstances.
> Costs and Expenses
> (3) In this section, a reference to damages includes the costs and expenses of the civil proceeding in the State of origin.

This provision allows courts to limit recognition and enforcement of both punitive and "excessive" damages. As to punitive damages, section 6(1) allows limitation to the amount that "could have been awarded in" the province or territory in which recognition is sought. Canadian law does recognize and allow punitive damages,[73] even in the civil law jurisdiction of Quebec.[74] Thus, analysis for recognition purposes would require that the court effectively reopen the damages award of the originating foreign court and determine what amount would have been awarded in the Canadian court in which recognition and enforcement is sought.

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72. *Available at* http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e5.
73. *See* Gotanda, *supra* note 4, at 431-40.
74. Civil Code of Quebec, ch. 64, 1991 S.Q. 1621 (Can.).

IV. THE MULTILATERAL CONTEXT

The Canadian Uniform Enforcement of Foreign Judgments Act has not been adopted by the Uniform Law Conference of Canada, and thus is not in effect in any province or territory. Its language is borrowed from earlier drafts at the Hague Conference on Private International Law of a provision meant to be part of a comprehensive global convention on jurisdiction and the recognition and enforcement of judgments. That project has since been limited to the development of a convention on exclusive choice of court agreements.[75] The Canadian delegation at The Hague was instrumental in having included in the text of the larger convention, and now in the choice of court convention, a provision that allows a court asked to recognize and enforce a foreign judgment to revisit both non-compensatory (punitive and exemplary) damages and "grossly excessive" compensatory damages. Article 33 of the Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Hague Special Commission on 30 October 1999,[76] reads as follows:

> Article 33 Damages
> 1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.
> 2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.
> b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.
> 3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

When the project turned to a focus on the enforcement of exclusive business-to-business choice of court agreements, and the recognition and enforcement of the resulting judgments, this provision was retained in the draft text with only slight alteration.[77]

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75. For a discussion of the broader negotiations, *see* Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View From the United States*, *supra* note 2. The new focus on a choice of court convention is discussed in Brand, *A Global Convention on Choice of Court Agreements*, *supra* note 3.

76. *Available at* http://hcch.e-vision.nl/upload/wop/jdgm_drafte.pdf.

77. Article 15 of the 2004 Draft on Exclusive Choice of Court Agreements provides:

Canada obviously has the option of adopting whatever internal law it desires on the recognition of foreign judgments. A decision to incorporate language from earlier multilateral treaty negotiations, however, should include consideration of just how this language would change current Canadian law, as well as whether it is appropriate outside of the original context.

Obviously, the language in Section 6 of the draft Uniform Act would change Canadian law and require courts to reopen the issue of both compensatory and non-compensatory damages at the request of a party. As to punitive damages, this may not be particularly troublesome. Stating that exemplary damages may be recognized and enforced only to the extent they could have been awarded in the court being addressed may, as a practical matter, be little more than another way of approaching the traditional public policy defense to recognition and enforcement of foreign judgments. Thus, the analysis might not be much different from that applied by the Canadian Supreme Court in *Beals* when faced with the question of recognition and enforcement of a Florida judgment that included punitive damages,[78] or that applied by the German Bundesgerichtshof in its application of the public policy ground for non-recognition.[79] The approach, however, is different, and specifically authorizes the court to reopen the damages determination made by the originating court, listing principles applicable in the recognizing court.

Having such a provision in a uniform act, or in a multilateral convention, thus may not do much to change the results in individual cases. It may be little more than codification of existing practice. From a civil law perspective,

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Article 15 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the requested State could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

b) In no event shall the court addressed recognise or enforce the judgment for an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.

3. In applying the preceding paragraphs, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Available at http://hcch.e-vision.nl/upload/wop/jdgm_wd110_e.pdf.

78. *See supra* note 70 and accompanying text.

79. *See supra* notes 25-29 and accompanying text.

this may be an appropriate approach to the law. From a common law approach, the matter may be very different. Such a provision locks in the current approach to recognition and enforcement of judgments that include punitive damages elements, and does not allow for natural judicial development of the law. It may be that legislatures want to capture this position and not allow judicial development. Common law traditions, however, have demonstrated that this is not always a wise approach to matters that are subject to change in ways we cannot always predict.

The greater problem comes in the extension of the Canadian statute and the draft Convention on Exclusive Choice of Court Agreements to allow reopening the determination of compensatory damages. Such an approach may arguably have been appropriate in a comprehensive multilateral convention dealing with (most) all aspects of originating court jurisdiction and then creating a basic obligation to recognize the resulting judgments. Even there, however, its effect was a back-door reopening of the entire case through the determination of damages by the recognizing court. In a uniform act such as that proposed in Canada it would be a major step back from the *Moorguard* and *Beals* decisions of the Canadian Supreme Court; decisions that demonstrate a liberal approach to foreign judgment recognition that is appropriate in a modern business climate.[80]

In a modern international convention applicable only to cases in which two business parties (and not consumers) have made an exclusive agreement on the court that is appropriate to hear disputes between them, allowing a court asked to recognize and enforce the resulting judgment to reopen the merits of the case through the back-door approach of reconsideration of the amount of damages is wholly inappropriate. Not only is it inconsistent with a desire for predictability of results, but it could completely destroy the value of other provisions of the convention that compel recognition of the choice of court and of the resulting judgment. Business parties who willfully and knowingly choose a specific court for adjudication of their disputes certainly can be assumed to have chosen the damages rules of that court as well as other procedural elements. Their choice is meaningless if it can be reopened by a court asked to recognize and enforce any judgment from the chosen court. This is exactly what the provision in the Canadian uniform act and the draft Convention on Exclusive Choice of Court Agreements would authorize with

80. *See, e.g.*, Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, *in* THE ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 592 (Jagdeep Bhandari & Alan O. Sykes eds., 1997).

language that goes beyond punitive damages to the consideration of "excessive" compensatory damage awards.

V. CONCLUSION

The concept of punitive damages has a long history throughout the world, and a particularly rich genealogy in the common law. Recent U.S. Supreme Court cases have moved from allowing extensive discretion in the trial court on the issue of punitive damages to the adoption of the view that due process requires quantitative limitations on the amount of punitive damages, to be imposed by reviewing courts such that judgments not exceed "a single-digit ratio between punitive and compensatory damages."[81]

While this evolution has occurred in the United States, so has the law regarding reception of punitive damages judgments in foreign courts developed. In judicial decisions of a number of countries, in proposed uniform acts, and in multilateral treaties, the rules on recognition and enforcement of punitive damages judgments have been the subject of debate and development. That development is not yet complete at the writing of this article. While it may result in rules that simply reflect current practice in the application of the public policy basis for non-recognition of foreign judgments, it has the potential to go much further and lock in rules that are less flexible and perhaps less appropriate than a public policy analysis. Even if such an approach is appropriate, even more troubling is the use of such provisions for the attachment of rules that would allow recognizing courts to reopen the issue of compensatory damages from the originating court. This would be a major step back in the development of the law, wholly inconsistent with the needs of a twenty-first century business community for certainty and predictability in legal relationships.

81. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003).