

1993

## Enforcing U.S. Excessive and Punitive Damages Awards in Germany

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### Recommended Citation

Hartwin Bungert, *Enforcing U.S. Excessive and Punitive Damages Awards in Germany*, 27 INT'L L. 1075 (1993)

<https://scholar.smu.edu/til/vol27/iss4/11>

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## Enforcing U.S. Excessive and Punitive Damages Awards in Germany

Recognition and enforcement of U.S. excessive damages awards, especially punitive damages awards, has recently become a much debated topic in Germany. At least five important judgments have emerged during the past five years, accompanied by an increase of German and American law review commentary.<sup>1</sup> In 1989, the Landgericht Berlin (District Court of Berlin) denied recognition of a Massachusetts award of \$275,000 for pain and suffering and loss of earnings due to an industrial accident at a machine manufactured by the German defendant.<sup>2</sup>

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1. See, e.g., Ernst C. Stiefel, Rolf Stürner, & Astrid Stradler, *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany*, 39 AM. J. COMP. L. 779 (1991); Kurt Siehr, *Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "punitive damages"*, 37 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 705 (1991); Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301 (1989); Klaus J. Beucher & John B. Sandage, *United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement*, 23 VAND. J. TRANSNAT'L L. 967 (1991); Ernest C. Stiefel & Rolf Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe*, 38 VERSICHERUNGSRECHT [VERS R] 829 (1987); Friedrich Graf von Westphalen, *"Punitive Damages" in US-amerikanischen Produkthaftungsklagen und der Vorbehalt des Art. 12 EGBGB*, 27 RIW 141 (1981); Rolf A. Schütze, *The Recognition and Enforcement of American Civil Judgments Containing Punitive Damages in the Federal Republic of Germany*, 11 U. PA. J. INT'L BUS. L. 581 (1990); Rolf A. Schütze, *Die Anerkennung und Vollstreckbarerklärung US-amerikanischer Schadensersatzurteile in Produkthaftungssachen in der Bundesrepublik Deutschland*, in Festschrift Heinrich Nagel 392 (1987) [hereinafter Festschrift H. Nagel]. See generally Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1 (1988).

2. Judgment of June 13, 1989, 35 RIW 988 (1989); Re the Enforcement of a U.S. Judgment, 3 INT'L LITIG. PROC. 430 (1992); see also Heidenberger, *Zur Vollstreckbarkeit von US-Jury-Urteilen gegen deutsche Hersteller*, 36 RIW 804 (1990); Joachim Zekoll, *Zur Vollstreckbarkeit eines US-amerikanischen Schadensurteils*, 36 RIW 302 (1990). Compare Judgment of Feb. 6, 1991, Landgericht Heilbronn [LG] [Trial Court], 37 RIW 343 (1991), which held enforceable a U.S. \$10,000 Puerto Rican award of damages for pain and suffering for conduct that would not have allowed a claim under German law.

In 1989 and 1992, the Oberlandesgericht Munchen (Munich Court of Appeals)<sup>3</sup> held that a U.S. summons for punitive damages awards can be served upon a German defendant under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.<sup>4</sup> Finally, in June 1992, the Bundesgerichtshof (German Federal Court of Justice, or FCJ) issued the first and extensive opinion in this area of law.<sup>5</sup>

In the proceedings the plaintiff, a U.S. citizen and California resident, asked for enforcement of a California damages award for sexual abuse against the defendant, a German and U.S. citizen who transferred his residence from California to Germany after a runaway period. The U.S. judgment awarded \$260 for medical expenses, \$150,000 for future psychological treatment and placement in an educational facility, \$200,000 for pain and suffering, and \$400,000 as exemplary and punitive damages. The U.S. court allocated 40 percent of the entire damages awarded as the plaintiff's attorney's fees. The case in the second instance had come before the Oberlandesgericht Düsseldorf (Düsseldorf Court of Appeals), which held only a certain percentage of the U.S. award of punitive damages and damages for pain and suffering (\$275,325) enforceable.<sup>6</sup> The FCJ held the sum of \$350,260 enforceable, recognizing all types of damages except for punitive damages. The opinion of the FCJ reads like a handbook on American-German enforcement of judgments. This article discusses some of the legal problems of

3. Judgment of May 9, 1989, 10 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 175 (1990), 35 RIW 483 (1989); Judgment of July 15, 1992, 13 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1271 (1992). Parallel judgments by the Frankfurt Court of Appeals [OLG Frankfurt], Judgment of Mar. 21, 1991, 37 RIW 417 (1991) (no violation of public policy in service of a U.S. complaint for compensatory damages in the area of environmental liability, where an extension to punitive damages was feared) and by the Düsseldorf Court of Appeals, Judgment of Feb. 19, 1992, OLG, 38 RIW 846 (1992) (no violation of public policy in service of complaint with exorbitant, only roughly estimated damages).

4. 20 U.S.T. 361-73, reprinted in GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 802 (2d ed. 1992) (App. D).

5. Judgment of June 4, 1992, 13 ZIP 1256 (1992), 45 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3096 (1992), BGHZ 118, 312. For an extensive discussion of the judgment, see Hartwin Bungert, *Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exorbitanter Höhe in der Bundesrepublik*, 13 ZIP 1707-25 (1992) [hereinafter *Vollstreckbarkeit*]; Hartwin Bungert, *Inlandsbezug und Vollstreckbarkeit US-amerikanischer Produkthaftungsurteile*, 14 ZIP 815-24 (1993) [hereinafter *Inlandsbezug*]; see also Rolf A. Schütze, 39 RIW 139 (1993); Harald Koch, *Ausländischer Schadensersatz vor deutschen Gerichten*, 45 NJW 3073 (1992); Erwin Deutsch, *Urteilsanmerkung*, 48 JURISTENZEITUNG [JZ] 266 (1993); Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641 (1992); Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992); Haimo Schaek, *Anmerkung*, 106 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 104 (1993). For the opposite perspective, see Werner F. Ebke & Mary E. Parker, *Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT'L LAW. 21 (1990).

6. Judgment of May 28, 1991, 37 RIW 594 (1991).

the case,<sup>7</sup> which are part of what is often referred to as a German-American judicial conflict.<sup>8</sup> An opinion by Lord Denning reflects the European perception of the American procedural system:

As a moth drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. . . . The lawyers will charge the litigant nothing for their services but instead they will take 40 percent of the damages, if they win the case in court, or out of the court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 percent before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement.<sup>9</sup>

For lack of a relevant binational or multinational treaty in German-American relations, the legal basis for recognition of foreign money judgments in Germany is section 328(1) of the German Code of Civil Procedure (CCP), which reads in its current version:

The recognition of a foreign judgment is excluded:

1. if the courts of the state to which the foreign court belongs are not competent according to the German law;
2. if the defendant, who has not participated in the proceedings and raises this plea, has not been served with the written pleadings initiating the proceedings in the regular way or in a timely manner, so that he was not in a position to defend himself;
3. if the judgment is inconsistent with a judgment issued here or with an earlier foreign judgment subject to recognition or if the proceedings on which it is based are inconsistent with an earlier proceeding here which has become final;
4. if the recognition of the judgment would give rise to a result which is manifestly incompatible with the basic principles of the German law, especially when the recognition would be inconsistent with the basic rights of the constitution;
5. if reciprocity is not assured.<sup>10</sup>

7. For a fuller discussion, see *Vollstreckbarkeit*, *supra* note 5 and *Inlandsbezug*, *supra* note 5.

8. See *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA* (Walther J. Habscheid ed., 1986) (containing contributions by Stürner, Lange, and Taniguchi); Max Vollkommer, *Disharmonien und Spannungen im internationalen Rechtshilfeverkehr zwischen den USA und Deutschland (Zustellungen und Ladungen)*, 80 ZJP 248 (1967); PETER SCHLOSSER, *DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA* (1985); Böhmer, *Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen*, 43 NJW 3049 (1990); see also Perrott, *Obtaining Evidence Abroad: The Disputed Extraterritorial Reach of Civil and Commercial Litigation Procedure*, in *CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW* 91 (Perrott & Pogany eds., 1988); Fisch, *The Influence of German Civil Procedural Thinking and of the ZPO in the United States*, in *DAS DEUTSCHE ZIVILPROZESSRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN* 400 (Walther J. Habscheid ed., 1991).

9. *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733-34 (Eng. C.A. 1982).

10. *THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 30, 1877*, at 84-85 (Simon L. Goren trans., 1990) [hereinafter CCP] (translation with slight modifications).

Thus, preconditions for recognition—according to CCP sections 722(1) and 723<sup>11</sup> also applicable for enforcement—are (1) a final judgment of a national court in civil matters not void on its face according to the law of the judgment state, (2) international jurisdiction of the foreign court to be determined by inversely applying German jurisdictional rules, (3) proper service of summons, (4) no inconsistency of the foreign judgment with a domestic or a prior enforceable foreign judgment, (5) no infringement of German public policy (*ordre public*), and (6) factual guaranty of reciprocity.<sup>12</sup> In U.S.-German relations reciprocity is generally guaranteed, especially with respect to California.<sup>13</sup> In regard to punitive damages awards special points of discussion are the required civil character of the judgment and a violation of German public policy (*ordre public*).

## I. Civil Character of a Punitive Damages Award

Some commentators have argued that a punitive damages award, due to its general or, in the individual case, predominantly penal character, should be placed out of the reach of sections 328, 722, and 723 of the CCP presupposing a judgment in civil matters.<sup>14</sup> However, the prior question whether to characterize the judgment as civil or penal according to the law of the judgment state, or the recognition state, or of both—left unanswered by the FCJ—should be resolved by characterization according to the law of the recognition state. Consequently, punitive damages are to be demominated as a civil matter. They are a kind of private penalty, structurally comparable to contractual penalties. In U.S. proceedings, the award is generally paid to the plaintiff and not to the state.<sup>15</sup> The judgment is not entered

11. Sec. 722(1) CCP: "The judgment of a foreign court shall only be executed if its admissibility is pronounced by an enforceable judgment." *Id.* at 202. Sec. 723 CCP:

(1) The execution judgment shall be given without examination of the legality of the decision. (2) The execution judgment shall not be given before the judgment of the foreign court became final according to the law governing such court. It shall not be given if the recognition of the judgment is excluded by virtue of § 328.

*Id.* at 202-03.

12. See generally Dieter Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721 (1987).

13. Dieter Martiny, in III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS ch. I annots. 1513-1571 (1984); ROLF A. SCHÜTZE, DEUTSCH-AMERIKANISCHE URTEILSANERKENNUNG 34-157 (1992); Martiny, *supra* note 12, at 751. Judgment of June 4, 1992, 13 ZIP 1256, 1262 (1992).

14. See, e.g., Kaufmann & Kohler, *Enforcement of United States Judgments in Switzerland*, 35 WIRTSCHAFT UND RECHT [WiUR] 211, 243-44 (1983); Festschrift H. NAGEL, *supra* note 1, at 394-97; Hans-Viggo von Hülsen, *Kanadische und Europäische Reaktionen auf die US "pre-trial discovery"*, 28 RIW 537, 550 (1982); Hermann H. Hollmann, *Auslandszustellung in US-amerikanischen Zivil- und Verwaltungssachen*, 28 RIW 784, 786 (1982); Martiny, *supra* note 12, at 748; Wölki, *Das Haager Zustellungsabkommen und die USA*, 31 RIW 530, 533 (1985).

15. In some states, however, a certain percentage has to be paid to the state or a state institution to remove the plaintiff's incentive. See, e.g., ILL. REV. STAT. ch. 110, para. 2-1207 (1992); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992); COLO. REV. STAT. § 13-21-102(4) (1987); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992); FLA. STAT. ANN. § 768.73(2) (West Supp. 1993); see also Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 328-29 (1991). In these cases the judgment should be deemed partially recognizable and enforceable, only the respective percentage to be paid to the state has to be characterized as a criminal matters judgment.

into a criminal register, nor is the defendant deemed to have a criminal record. Private persons initiate and dispose of the proceedings. Civil procedure law, not criminal procedure law, is applicable in U.S. proceedings.<sup>16</sup> The U.S. Supreme Court, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, also denied the criminal law character of punitive damages and held that the double jeopardy clause of the Fifth Amendment was not violated.<sup>17</sup> While the FCJ did not decide the question of characterization, it held that punitive damages awards fall within the range of civil judgments from the perspective of both the German and the U.S. legal systems.<sup>18</sup>

## II. Infringement of German Public Policy

The principal rule of denial of *révision au fond* dominates German recognition law; that is, the German court may not generally review the foreign judgment on the merits in application of the law of either the judgment state or the enforcement state. Exceptions to this principle are, according to CCP section 328(1)(4), violations of German public policy. This provision presupposes (1) an obvious infringement of a (2) fundamental rule of German law, (3) which in the individual case leads to a result that is intolerable, (4) while there are sufficient contacts to the German forum. Unacceptable deviations from essential and mandatory German procedural and substantive rules may be distinguished. These preconditions show that the public policy exception leads only to a very lenient review of the judgment, which will deny recognition merely in extreme cases.

### A. PROCEDURAL PUBLIC POLICY

Before the FCJ decision, much debate focused on whether a U.S. judgment obtained by using extraterritorial pretrial discovery could be enforced under German law or violated German public policy.<sup>19</sup> Although the narrow and con-

16. The same result is proffered by Haimo Schack, in *INTERNATIONALES ZIVILVERFAHRENSRECHT* annot. 818 (1991); Reinhold Geimer, in *ZIVILPROZESSORDNUNG [ZPO]* § 328 annot. 77 (Richard Zöllner ed., 17th ed. 1991) (similarly Zekoll, *supra* note 1, at 324); Beucher & Sandage, *supra* note 1, at 985.

17. 109B S. Ct. 2909, 2912, 2915 (1989); see also *United States v. Halper*, 109 S. Ct. 1892, 1903 (1989); *Pratt v. Duck*, 191 S.W.2d 562 (Tenn. Ct. App. 1945); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 8 (1982); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967); 22 AM. JUR. 2d *Damages* § 736 (1988 & 1992 Supp.); BERNHARD GROSSFELD, *DIE PRIVATSTRAFE—EIN BEITRAG ZUM SCHUTZ DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS* 61 (1961).

18. Judgment of June 4, 1992, 13 ZIP 1256, 1266 (1992).

19. See Stiefel & Stürner, *supra* note 1, at 831-32; Rolf A. Schütze, *Die Anerkennung und Vollstreckbarerklärung US-amerikanischer Zivilurteile, die nach einer pre-trial-discovery ergangen sind, in der Bundesrepublik Deutschland*, in *FESTSCHRIFT STIEFEL* S. 697 (1987); SCHÜTZE, *supra* note 13, at 168-69; Rolf A. Schütze, *Zur Verteidigung im Beweiserhebungsverfahren in US-amerikanischen Zivilprozessen*, 40 WERTPAPIERMITTEILUNGEN [WM] 633 (1986); Rolf A. Schütze, *Probleme der Anerkennung US-amerikanischer Zivilurteile in der Bundesrepublik Deutschland*, 33 WM 1174, 1175 (1979) [hereinafter *Probleme*]; see also Harrold G. Maier, *Extraterritorial Discovery: Cooperation*,

trolled rules of judicial fact-finding under German procedural law do not recognize the concept of pretrial discovery, the FCJ was right to deny a violation of mandatory German procedural rules, since pretrial discovery does not amount to excessive and illicit exploration, and German law knows equivalent, though more narrowly tailored, rules of disclosure of information.<sup>20</sup> Furthermore, the acceptance of a general violation of German public policy would conflict with the intent of the Hague Evidence Convention,<sup>21</sup> to which Germany is party and thus obliged to support optimal mutual legal assistance.<sup>22</sup> An infringement of German public policy by pretrial discovery measures may only be presumed in a concrete and exceptional case when (1) extraterritorial application of U.S. law violates German sovereignty, which presupposes a transgression of the measures of the Hague Evidence Convention, or when the right of privacy guaranteed in German Basic Law articles 2(1) and 1(1) is violated by excessive exploration, and (2) the judgment is directly based on it.<sup>23</sup>

The FCJ rejected the argument that the American rule of costs<sup>24</sup> infringed upon German procedural principles.<sup>25</sup> Some German commentators had argued that the

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*Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239 (1986); BORN & WESTIN, *supra* note 4, at 261-334 (1st ed. 1989); David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986); Donald R. Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465 (1983); Ernst C. Stiefel & Walter I. Petzinger, *Deutsche Parallelprozesse zur Abwehr amerikanischer Beweis-erhebungsverfahren?*, 29 RIW 242 (1983); Ralph Beckmann, *Das Haager Beweisübereinkommen und seine Bedeutung für die Pre-Trial-Discovery*, 10 IPRAX 201 (1990); David J. Gerber, *Essay, Obscured Visions: Policy, Power, and Discretion in Transnational Discovery*, 23 VAND. J. TRANSNAT'L L. 993 (1991).

20. Judgment of June 4, 1992, 13 ZIP 1256, 1261-62 (1992). For German evidence rules see the overview by Dirk-Reiner Martens, *Germany*, in OBTAINING EVIDENCE IN ANOTHER JURISDICTION IN BUSINESS DISPUTES 41 (Charles Platto ed., 1988); see also Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983); Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 21-25 (1992); Christoph E. Hauschka, *Central Issues of Business Litigation in West German Civil Courts*, 19 CAL. W. INT'L L.J. 47 (1988).

21. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970 [entered into force for the United States Oct. 7, 1972], 23 U.S.T. 2555, reprinted in BORN & WESTIN, *supra* note 4, at 855 (App. H); see also Randall D. Roth, Comment, *Five Years After Aérospatiale: Rethinking Discovery Abroad in Civil and Commercial Litigation Under the Hague Evidence Convention and Federal Rules of Civil Procedure*, 13 U. PA. J. INT'L BUS. L. 425 (1992).

22. Cf. PETER HOECHST, DIE US-AMERIKANISCHE PRODUZENTENHAFTUNG 121 (1986); Reiner Martens, *Erfahrungen mit Rechtshilfeersuchen aus den USA nach dem Haager Beweisaufnahme-Übereinkommen*, 27 RIW 725, 729-30 (1981).

23. See also Judgment of June 4, 1992, 13 ZIP 1256, 1262 (1992); Stiefel & Stürner, *supra* note 1, at 830.

24. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-71 (1975); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-21 (1967); Thomas D. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984).

25. Judgment of June 4, 1992, 13 ZIP 1256, 1262 (1992); see also, e.g., Peter Gottwald, in 1 MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 328 annot. 91 (1992); Zekoll, *supra* note 1, at 322-23.

American system provided an incentive for speculative suits due to the lack of a cost risk for the plaintiff.<sup>26</sup> Although under German procedural law the losing party is liable for the prevailing party's attorney fees, in addition to court costs and its own attorney fees, the FCJ viewed the American rule of costs as a functional equivalent of the German system of government-funded legal aid for low income groups. In the author's view, the court's rationale seems odd, since the defendant lost the case, as is usual in U.S. judgments to be enforced in Germany, and thus an application of the German rule of cost allocation would have led to an even greater financial burden for the defendant.<sup>27</sup>

## B. SUBSTANTIVE PUBLIC POLICY

### 1. *Applicability of the Strict Rule of Article 38 of the Introductory Law of the German Civil Code*

In German conflicts of law the highly criticized rule of article 38 of the Introductory Law to the German Civil Code [ILGCC]<sup>28</sup> provides that German citizens shall not be subjected to greater liability under an applicable foreign law than prescribed by German law. Some have argued that this protection of German tortfeasors should be also applied in recognition cases, since German public policy should be indivisible; otherwise ILGCC article 38 might lose its effectiveness, since plaintiffs could sue abroad and thus avoid the curbing regulation. A further consequence would be forum shopping: the plaintiff would always sue before the foreign court of the place of the wrong when the foreign law provided higher damages.<sup>29</sup> The FCJ correctly held the rigid rule of ILGCC article 38 not applicable in the context of the recognition rule of CCP section 328.<sup>30</sup> The public policy exception of CCP section 328(1)(4) provides a flexible instrument, a more lenient standard, and by its approach of national (minimum) contacts,<sup>31</sup> avoids the strict nationality rule of ILGCC article 38.<sup>32</sup> This reading of the public policy exception is certainly one of the several creditor-prone points of the FCJ's judgment.

26. *Probleme*, *supra* note 19, at 1176; Rolf A. Schütze, *Conceptual Differences and Areas of Potential Collision Between the United States and "Civil Law" Procedure from the German Perspective*, in *LITIGATION OF BUSINESS MATTERS IN THE UNITED STATES AND INTERNATIONAL LEGAL ASSISTANCE* 21, 39-41 (Roger Zäch ed., 1984); *see also* Stiefel & Stürner, *supra* note 1, at 831.

27. For a related argument, *see* Zekoll, *supra* note 1, at 323.

28. EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [EGBGB].

29. *See* Haimo Schack, *Art. 12 EGBGB in deutschen Urteilsanerkennungs- und Regressverfahren*, 35 *VERS* 422, 423 (1984); SCHÜTZE, *supra* note 13, at 170-71; FESTSCHRIFT H. NAGEL, *supra* note 1, at 400; Graf von Westphalen, *supra* note 1, at 141-42.

30. Judgment of June 4, 1992, 13 *ZIP* 1256, 1263-64 (1992).

31. For a further discussion of this national contacts requirement, *see infra* part II.B.3.b. and part IV.

32. In Judgment of June 22, 1984, BGHZ 88, 17 (24-25), the FCJ had already held ILGCC art. 38 inapplicable to the enforcement of judgments according to the Brussels Judgments Convention [Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, O.J. (L 304) 777]. For a further discussion of this point of the judgment *see Vollstreckbarkeit*, *supra* note 5, at 1711-14.



When exclusively applying CCP section 328, every type of damages awarded has to be examined under the lenient standard within the context of the individual case and its national contacts to determine any obvious infringement of fundamental German tort law principles.<sup>33</sup> In this author's opinion, the test of each damages award is twofold, comprising (1) a primary basis of claim control, which only damages that do not run completely counter to German tort law standards will pass, followed by (2) a proportionality control, which checks whether the amount of damages is excessive, that is, violates the proportionality principle. These two perspectives may also be inferred from the discussions of the FCJ.

## 2. Punitive Damages

### a. Basis of Claim Control

Punitive damages are most frequently debated in the context of the types of U.S. damages awards generally viewed as excessive. German tort law does not recognize punitive damages. However, whether a German court would have awarded the same damages is irrelevant since ILGCC article 38 is not applicable. Instead, one must ask whether granting this kind of damages would violate fundamental German tort principles. The FCJ identified three main purposes of the U.S. punitive damages doctrine: (1) punishment, predominantly deterrence;<sup>34</sup> (2) complementing compensation of actual losses the plaintiff is unable to prove or for which the rules of damages do not provide relief (including expenses of bringing suit); and (3) revenge and satisfaction for the tort victim.<sup>35</sup> Sometimes the extraction of the tortfeasor's ill-gotten gains is considered a further partial purpose of punitive damages,<sup>36</sup> comparable to a claim of unjust enrichment in

33. The FCJ also discusses at some length the question of whether the future medical expenses awarded as part of compensatory damages can be recognized. Although under German law "fictitious" damages can only be recovered as to things, not as to persons, since the victim may not dispose of the physical integrity (i.e., decide whether to "repair" physical damages or instead keep the money); this is not presumed to be a fundamental principle of German tort law, thus avoiding an infringement of German public policy. See Judgment of June 4, 1992, 13 ZIP 1256, 1264 (1992).

34. Deterrence is sometimes counted as an additional fourth function of punitive damages.

35. Hans Stoll, *Penal Purposes in the Law of Tort*, 18 AM. J. COMP. L. 3, 10-13 (1970); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520-24 (1957); 22 AM. JUR. 2D *Damages* §§ 733-735 (1988 & 1992 Supp.); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 9 (5th ed. 1984); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1277-99 (1976); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989); David G. Owen, Comment, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1982); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages—A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1126-30 (1984); see also 2 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY § 29.08 (2d ed. 1990) (deterrence, ineffective public regulation). For a definition of punitive damages in connection with the Federal Tort Claims Act (FTCA), see *Molzof v. United States*, 112 S. Ct. 711, 715-17 (1992).

36. Toy, *supra* note 15, at 320-23.

German law.<sup>37</sup> However, the prevailing function of punishment and deterrence<sup>38</sup> is obviously contrary to the strictly compensatory German tort law principles that are grounded on restitution in kind (*Naturalrestitution*), combined with a limited restitution of nonmaterial losses. The concept of compensation guides German law, which is oriented towards the interest of the victim rather than the behavior of the tortfeasor.<sup>39</sup> Furthermore, German law vests the authority to punish exclusively in the government.<sup>40</sup>

Three steps may be distinguished for recognizing punitive damages according to the FCJ's holding. First, punitive damages awards are not automatically refused recognition because of their generally prevailing penal and deterrent purposes.<sup>41</sup> Instead, the award of the individual case has to be checked for its concrete functions and purposes. Second, as far as punitive damages awards are based on penal or deterrent principles, they are contrary to fundamental German tort principles and are nonenforceable. However, as far as the award serves to provide additional compensation for items left uncompensated, such as satisfaction or unjust enrichment, in that respect the award is enforceable due to a partial equivalent with German law principles and functions. Third, for a partial recognition of "nonpunitive" parts of a punitive damages award, the U.S. court must explicitly identify those functions. Due to the prohibited *révision au fond* principle, the German court may not second guess the implicit motives of the U.S. court.<sup>42</sup> The FCJ did not accept a proposal by commentators Stiefel & Stürmer<sup>43</sup> to generally and abstractly imply a partial compensatory function of punitive damages of a certain percentage as fictitious attorney fees. The holding seems to imply that U.S. attorneys should ask the U.S. court to explicitly identify those parts of the award that address purposes other than punishment and deterrence,<sup>44</sup> thereby rendering a punitive damages award partially enforceable in Germany, provided it passes the proportionality test as well.<sup>45</sup>

Furthermore, consideration could be given to whether a judgment relying on

37. See also Siehr, *supra* note 1, at 705.

38. For a comparative analysis of penal purposes in tort law, see Stoll *supra* note 35; Hans Stoll, *Consequences of Liability: Remedies*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 94-119 (André Tunc ed., 1972).

39. 1 KARL LARENZ, *LEHRBUCH DES SCHULDRECHTS* § 27, at 412-25 (14th ed. 1987); HERMANN LANGE, *SCHADENSERSATZ* 8-13 (2d ed. 1990); HANS STOLL, *BEGRIFF UND GRENZEN DES VERMÖGENSSCHADENS* (1973).

40. See also Judgment of June 4, 1992, 13 ZIP 1256, 1268 (1992).

41. Martiny, *supra* note 12, at 747-48; Zekoll, *supra* note 12, at 323-30; Hoechst, *Zur Versicherbarkeit von punitive damages*, 34 VERSR 13, 17 (1983); Hoechst, *supra* note 22, at 122.

42. Judgment of June 4, 1992, 13 ZIP 1256, 1267-68 (1992).

43. Stiefel et al., *supra* note 1, at 796-97; Stiefel & Stürmer, *supra* note 1, at 837, 840-41.

44. Zekoll thinks that this exception of nonrecognition of U.S. punitive damage awards is of minor importance, since general jury verdicts do not lay down the basis for the award and jury instructions probably would not be acknowledged as sufficiently probative. Zekoll, *supra* note 5, at 657-58.

45. See *infra* part II.B.2.b.

a statute that explicitly spells out nonpenal functions of punitive damages (among others) would suffice. However, such statutes do not appear to set apart specific percentages of the award. In the case at stake, the California court made no explicit findings, and separately awarded damages for pain and suffering had already assumed the function of satisfaction. Therefore, punitive damages were completely unenforceable.<sup>46</sup>

#### b. Proportionality Control

On a second level, fundamental German law standards should control the extent of the damages. The principle of proportionality (*Verhältnismäßigkeitsgrundsatz*), with its three elements that the means must (1) be appropriate (*geeignet*), (2) have the least restrictive effect (*erforderlich*) to achieve the legitimate end, and (3) bear a reasonable relationship to the ends (*verhältnismässig im engeren Sinne*), is fundamental in all areas of German law and of constitutional ranking.<sup>47</sup> Although the FCJ had already refused recognition of punitive damages as counter to German public policy on the basis of claim control, it nevertheless discussed the proportionality aspect.<sup>48</sup>

The FCJ did not address the question of whether it is advisable and sufficient to accept the judgment state's standards for proportionality review or whether the recognition state's (i.e. German) standards should be relied on. Because U.S. punitive damages are reaching extraordinary amounts, much critical debate in the United States has addressed the advisability of curbing the amounts. Some states have placed a cap on the amount of recovery in various forms: such as an absolute dollar cap, a fixed ratio cap, or a profit extraction cap.<sup>49</sup> Although several, if not most, states lack a relationship formula for compensatory damages versus punitive damages, although the Supreme Court in the *Browning-Ferris* case refused to see in exorbitant punitive damages a violation of the excessive fines clause of the Eighth Amendment,<sup>50</sup> and although in the nine months after *Browning-Ferris* no

46. The FCJ explicitly did not take sides in a law review debate where some commentators suggested a violation of the prohibition of double jeopardy of German constitutional law (*GRUNDGESETZ* [Constitution] [GG] art. 103(2)(F.R.G.)) by recognizing a punitive damage award. See Zekoll, *supra* note 1, at 325-26, 329; Hoechst, *supra* note 41, at 17. These attempts are not persuasive from a viewpoint of conflicts of constitutional law and as compared to the U.S. Supreme Court holdings concerning the double jeopardy clause of the Fifth Amendment (discussed *supra* note 17); for further discussion see *Vollstreckbarkeit*, *supra* note 5, at 1719-20.

47. See also DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 53 (1989); Matthias Herdegen, *The Relation Between the Principles of Equality and Proportionality*, 22 *COMMON MKT. L. REV.* 683 (1985).

48. Judgment of June 4, 1992, 13 *ZIP* 1256, 1268-69 (1992).

49. For a discussion, see Toy, *supra* note 15, at 331-40. See, e.g., GA. CODE ANN. § 51-12-5.1(g) (1992); see also *Proposed Civil Justice Reform Legislation: Proposed Legislation: Model State Punitive Damages Act*, 60 U. CIN. L. REV. 1077 (1992). Much more rigid than U.S. law are the prerequisites for awarding punitive damages in New Zealand law, which requires "high-handed contumelious conduct." See Richard Mahoney, *New Zealand's Accident Compensation Scheme: A Reassessment*, 40 *AM. J. COMP. L.* 159, 167-68 (1992).

50. 492 U.S. 257 (1989).

less than six punitive damages awards have exceeded \$20 million,<sup>51</sup> hope of "judicial self-restraint" still exists. Some jurisdictions have court-created or statutory reasonable proportion requirements, often numerically limiting punitive damages to three times the amount of compensatory damages.<sup>52</sup> Furthermore, on November 30, 1992, the U.S. Supreme Court accepted for review the *TXO Production Corp.* case<sup>53</sup> under the due process clause.<sup>54</sup> In this author's opinion, the unusual profile (punitive damages 526 times the amount of compensatory damages) of the case had made it highly probable that the Supreme Court would set up some kind of a restriction formula, especially by way of a reasonableness control.<sup>55</sup>

A proposal in a U.S. student comment for a proportionality standard under the Eighth Amendment takes into consideration three factors that vary in intensity: (1) the degree of affluency of the tortfeasor, (2) the degree of culpability of the tortfeasor, and (3) the extent of the compensatory damages awarded.<sup>56</sup> Therefore,

51. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting).

52. Cases that require a reasonable proportion between compensatory damages and punitive damages are, e.g., *Magma Copper Co. v. Shuster*, 575 P.2d 350 (Ariz. App. Ct. 1978) (U.S. \$30,000 punitive damages; U.S. \$1 compensatory damages); *Luke v. Mercantile Acceptance Corp.*, 244 P.2d 764 (Cal. Ct. App. 1952) (reasonable proportion); further cases at 22 AM. JUR. 2D *Damages* § 811 (1988 & 1992 Supp.); see also Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978). The three-times rule is in force, e.g., in Florida, FLA. STAT. ch. 786.73(1)(a) (1991); see also COLO. REV. STAT. § 13-21-102(1)(a) (1992). The newest proposals are proffered in Jonathon Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753 (1993).

53. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 594 (1992); see also *High Court to Take Up Case on Large Punitive Damages*, N.Y. TIMES, Dec. 1, 1992, at A2.

54. For discussions of the constitutionality of punitive damages, in particular after *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), and *United States v. Halper*, 490 U.S. 435 (1989), see Alan Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991); Note, *Pacific Mutual Life Insurance Co. v. Haslip: Punitive Damages and the Modern Meaning of Procedural Due Process*, 70 N.C. L. REV. 1362 (1992); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976); Elizabeth S. Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112 (1991); Nicholas K. Kile, Note, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 IND. L.J. 141 (1989); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859 (1991); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

55. After completion of this manuscript, the U.S. Supreme Court in its decision of June 25, 1993, unfortunately declined once again to curb punitive damages by a specific formula under the Due Process Clause. Relying on *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), Justice Stevens emphasized for the plurality opinion that the court "need not, and indeed . . . cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case." *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993).

56. Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1448-70 (1987).

instead of unconditionally rushing to a German reasonableness standard, as the FCJ did, the structure of CCP section 328(1) and the concept of recognition seem to require first an examination of the law of the judgment state. Thus, a judgment of a U.S. state with a reasonable proportion statute or court ruling should pass untouched. However, applying proportionality to punitive damages might result in a conflict between the German standard and the U.S. standard. The German proportionality standard looks to an appropriate, necessary, and reasonable relation between means (the intensity of the impairment of the victim) and ends (the sum of compensation); whereas the U.S. rules seem to require a reasonable proportion between the amounts of compensatory damages and punitive damages.

Stiefel & Stürner emphasize the decisive fact that the debtor's act touched foreign territory, and thus they are in principal prepared to accept an excess of foreign law damages; however, they propose to curb recognition to an amount double the maximum allowed under German law, with a correction for any difference in purchasing power.<sup>57</sup> The FCJ seems to take a different approach by refusing recognition when the amount of punitive damages exceeds the sum of all compensatory damages.<sup>58</sup>

### 3. *Damages for Pain and Suffering*

#### a. Basis of Claim Control

On the basis of claim control, damages for pain and suffering are enforceable because German tort law recognizes a functionally equivalent claim, known as *Schmerzensgeld*.<sup>59</sup> A claim for *Schmerzensgeld* relates to compensation and satisfaction, including mild forms of sanction and prevention.<sup>60</sup>

#### b. Proportionality Control

With regard to proportionality control of the amount of damages awarded, the FCJ emphasizes the function of national contacts (*Inlandsbezug*). The more intense the contacts of the case are to the German legal order in number and intensity, the less deviation from the German legal system is tolerated under the *ordre public* approach. On the other hand, in cases with weak contacts to Germany, the standard is relaxed, particularly under the proportionality test.

In the case before the FCJ both parties were—at least also—U.S. citizens, the defendant had a U.S. residence until the U.S. proceeding, and the place of the wrong was in the United States. Consequently, the court accepted the full extent of damages for pain and suffering.<sup>61</sup> The appellate court had held that a German

57. Stiefel & Stürner, *supra* note 1, at 840; Stiefel et al., *supra* note 1, at 790.

58. Judgment of June 4, 1992, 13 ZIP 1256, 1268 (1992).

59. German Civil Code (GCC) § 847.

60. FCJ Judgment of June 7, 1955, 18 BGHZ 149, 154-57; LANGE, *supra* note 39, at 435-39; JOHANNES KÖNDGEN, HAFTPFLICHTFUNKTIONEN UND IMMATERIALSCHADEN § 54-104 (1976); Erwin Deutsch, *Haftungsrecht und Strafrecht*, in Festschrift Eduard Wahl 339 (1973).

61. Judgment of June 4, 1992, 13 ZIP 1256, 1270 (1992).

court faced with a similar set of circumstances would have awarded about DM 30,000 and, under the doctrine of proportionality control, held enforceable four times that amount (DM 120,000 = approximately \$75,000).<sup>62</sup> In addition, the FCJ came up with a very strange proposition: the victim's interest in receiving compensation and satisfaction under his or her domestic standards should set the primary evaluation for a case with weak forum contacts to Germany.<sup>63</sup> From this seems to follow that an obvious and voluntary subjection to a jurisdiction leads to a protection of the reliance on that law. This subjectivization of the national contacts requirement, however, is contrary to the objective concept of public policy and should be abandoned immediately. The FCJ did not address whether the affluence of the defendant should be a relevant factor in the proportionality review.<sup>64</sup> Considering the affluence of a defendant, however, would be contrary to the principles of German tort law.

#### 4. Contingency Fees

German professional ethics law forbids agreements that make reimbursement of attorney fees contingent on the outcome of the case. Attorney fees are set up by law as a certain percentage of the amount in controversy and are to be reimbursed by the parties besides the amount awarded according to the outcome of the case. In previous decisions the FCJ had held that contingency fees violated the public policy exception of German conflicts of law.<sup>65</sup> The court either did not allow contingency fees at all or reduced them.<sup>66</sup> In the new decision the FCJ did not view the concept of contingency fees as a violation of German substantive public policy under CCP section 328(1)(4) and did not place the voidness of German contingency fee agreements under GCC section 138(1) among the fundamental German legal principles.<sup>67</sup>

The FCJ, then, views proportionality control expansively. It bars recognition only when, due to the anticipated calculation of the quota of the contingency fee, the sum awarded by the jury widely exceeds the sum necessary for restitution in kind.<sup>68</sup> This generosity shows the weaker effect of the public policy exception in recognition of judgments as compared to the conflicts of law public policy exception. In the view of this author, as already proposed in the context of the nonpenal function part of punitive damages,<sup>69</sup> a U.S. proportionality or reasonableness

62. Judgment of May 28, 1991, 37 RIW 594, 596 (1991).

63. Judgment of June 4, 1992, 13 ZIP 1256, 1270 (1992).

64. *Id.*

65. ILGCC art. 30, now art. 6.

66. Judgment of Oct. 18, 1965, 44 BGHZ 183, 188-90; Judgment of Jan. 9, 1969, 51 BGHZ 290, 292-94. However, in the Judgment of Nov. 15, 1956, 22 BGHZ 162, an infringement of German public policy was denied, but the contingency fees had amounted only to 1.5%.

67. Judgment of June 4, 1992, 13 ZIP 1256, 1264-65 (1992).

68. *Id.* at 1265.

69. See *supra* part II.B.2.b.

review of the attorney fees as practiced in a few U.S. states<sup>70</sup> should be given priority. Absent a U.S. proportionality or reasonableness review, Stiefel & Stürner propose a progressive scale of enforceable attorney fees ranging from 30 percent for small amounts in controversy, to 20 percent for moderate amounts in controversy, to 10 percent for large amounts in controversy.<sup>71</sup> However, instead of concentrating on the extent of the amount in controversy, making enforceable contingent fees dependent upon the extent of national contacts would be more consistent with the structure of the public policy exception. In cases establishing very strong national contacts—probably not yet the typical German-U.S. product liability case<sup>72</sup>—the upper limit should be approximately 30 percent.

### III. Partial Recognition

On the procedural side, partial recognition of judgments for different claims or types of damages awarded (for example, damages for pain and suffering, but not punitive damages) have been generally allowed, although some courts or commentators have refused partial recognition of judgments for amounts within a category of damages (for example, 35 percent of damages for pain and suffering).<sup>73</sup> The FCJ explicitly refrained from deciding the question, but some passages of the decision imply acceptance of this kind of partial recognition.<sup>74</sup>

This kind of partial recognition should definitely be allowed, since it may be deduced from the principle of proportionality and its element of the least possible intervention.<sup>75</sup> Partial recognition should be assessed *ex officio*, with no motion necessary.<sup>76</sup> Otherwise, the plaintiff would have to take a chance as to which percentage of the claim or award to make a motion for.

### IV. Conclusion and Outlook

Although the case before the FCJ concerned an atypical situation, the court cleared the ground for recognition and enforcement of the much more important U.S.-German product liability cases. Whether the outcome of the FCJ judgment will be transferable to those cases will probably depend on the national contacts criteria,<sup>77</sup> which show strongest effects at the level of proportionality control.

70. See cases in 7 AM. JUR. 2D *Attorneys at Law* § 295 (1980 & 1992 Supp.).

71. Stiefel et al., *supra* note 1, at 796-97.

72. See also *infra* part IV.

73. E.g. SCHÜTZE, *supra* note 13, at 171; LG Berlin, Judgment of June 13, 1989, 35 RIW 988, 990 (1989); Franz Matscher, *Zur Teilanerkennung und zur Teilvollstreckung ausländischer Urteile*, in Festschrift O. REIMER 33, 38-39 (1976) (at least in the absence of a respective motion by the plaintiff).

74. Judgment of June 4, 1992, 13 ZIP 1256, 1267 (1992).

75. For further arguments, see *Vollstreckbarkeit*, *supra* note 5, at 1724.

76. See also Judgment of June 4, 1992, 13 ZIP 1256, 1269 (1992).

77. Hopefully not the approach of its subjectization, i.e., the reliance of the victim on his or her domestic law.

Among the relevant contacts are the nationality of the plaintiff and the defendant (in case of corporations the place of incorporation<sup>78</sup> or seat), the situs of assets, the place of the legal transaction (especially the *lex loci contractus*), the place of performance or the place of committing, and the place of the effects of the tort. The concept of national contacts resembles the U.S. concept of the most significant relationship of the *Restatement (Second) of Conflicts of Laws*,<sup>79</sup> the minimum contacts standard under the due process clause of the Fourteenth Amendment developed in *International Shoe*,<sup>80</sup> and the interest balancing approach of *Timberlane* <sup>81</sup> transferred into the so-called "rule of reason" in the *Restatement (Third) of the Foreign Relations Law of the United States*.<sup>82</sup> The FCJ recently introduced a similar concept of sufficient national contacts as a restrictive interpretation for jurisdiction based on the presence of property in Germany according to CCP section 23.<sup>83</sup>

The typical German-American product liability case, an American consumer injured in the United States by a product manufactured in Germany and sold directly or via a U.S. subsidiary by the German manufacturer, has more national (German) contacts than the rather unusual facts of the FCJ case under discussion here. On the basis of claim control, however, different outcomes are not likely. On the proportionality control, on the other hand, due to the intensified national contacts, German courts should be less willing to accept exorbitant sums of

78. Article XXV(5) of the German-U.S. Treaty of Friendship, Commerce and Navigation (FCN Treaty) of Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3943, is probably relevant in German-American cases, although German national conflicts of law follow the seat rule. See Carsten T. Ebenroth, *Gaining Access to Fortress Europe—Recognition of U.S. Corporations in Germany and the Revision of the Seat Rule*, 24 INT'L LAW. 459 (1990). However, despite its concept of national treatment, the FCN Treaty does not set explicit or implicit standards for the recognition of judgments. See also *Inlandesbezug*, *supra* note 5, at 816.

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1969). As to this concept, see, e.g., Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 552-62 (1983); LEA BRILMAYER, CONFLICT OF LAWS—FOUNDATIONS AND FUTURE DIRECTIONS 67-69 (1991); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 90, at 264-67 (4th ed. 1986).

80. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and *Shaffer v. Heitner*, 433 U.S. 186 (1977), as well as *Burnham v. Superior Ct.*, 110 S. Ct. 2105 (1990). See also HAIMO SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED 32-74 (1983); LEFLAR ET AL., *supra* note 79, § 21, at 49-58; EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS §§ 3.20-23, at 78-88 (2d ed. 1992); compare also Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

81. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). See also the application in *Timberlane II*, *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 749 F.2d 1378 (9th Cir. 1984), of the seven-factor test developed in *Timberlane I*.

82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986).

83. Judgment of July 2, 1991, 44 NJW 3092 (1991); compare Reinhold Geimer, *Rechtsschutz in Deutschland künftig nur bei Inlandsbezug?*, 44 NJW 3072 (1991); Gerhard Dannemann, *Jurisdiction Based on the Presence of Assets in Germany: A Case Note*, [1992] 41 INT'L & COMP. L.Q. 632; Jürgen Mark & Hans-Jörg Ziegenhain, *Der Gerichtsstand des Vermögens im Spannungsfeld zwischen Völkerrecht und deutschem internationalen Prozessrecht*, 45 NJW 3062 (1992); Martin Fricke, *Neues vom Vermögensgerichtsstand?*, 45 NJW 3066 (1992).



damages. Particularly in products liability cases, a specific concretization of the proportionality principle and a fundamental rule of German law are to be found in the Products Liability Act<sup>84</sup> section 10(1), which limits damages for personal injuries per product defect to DM 160 million. Of course, this restriction, particularly for several judgments against the same German manufacturer, will only come into effect in cases approaching the magnitude of the Bhopal catastrophe. Finally, this author hopes that the FCJ will accept the priority of a reasonable proportion test of the judgment state as proposed in this article.<sup>85</sup>

The recognition and enforcement of a products liability case awarding excessive punitive damages might come soon. A recent decision of the Oberlandesgericht Munchen (Munich Court of Appeals) held unfounded a complaint of BMW AG against the service of summons in accordance with the Hague Service Convention, BMW AG having argued an infringement of public policy. In the underlying proceedings the Circuit Court of Jefferson County, Alabama, meanwhile ordered BMW AG to pay compensatory damages of \$4,000 due to a defect in the coating of a BMW 535i, as well as punitive damages of \$4 million.<sup>86</sup>

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84. Act Concerning Liability for Defective Products of Dec. 15, 1989, 1989 Bundesgesetzblatt [BGBI] I 2198, implementing the Council of the European Community's Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products of July 25, 1985, 1985 O.J. (L 210) 28. For a comparison of German and U.S. products liability law, see, e.g., Hartwin Bungert, *Compensating Harm to the Defective Product Itself—A Comparative Analysis of American and German Products Liability Law*, 66 TUL. L. REV. 1179 (1992).

85. *Supra* part II.B.2.b. and part II.B.4.

86. Judgment of July 15, 1992, 13 ZIP 1271 (1992). Probably the U.S. judgment is not yet final.