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German Federal Court of Justice, Judgment of 4 June 1992, Case IX ZR 149/91 (BGHZ 118, 312) (1992)

German Law's Dilemma with Punitive Damages

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I. INTRODUCTION

German law faces a dilemma when it comes to punitive damages, which potentially exposes it to the criticism of hypocrisy. On the one hand, doctrinally, the German law of damages is intended to be strictly compensatory and free from punitive damages. In order to protect its domestic system, the German Federal Court of Justice (*Bundesgerichtshof*) held in its 1992 landmark decision that German law does not recognise and enforce foreign judgments awarding punitive damages.[1] Yet, on the other hand, developments in German law both before and after this landmark decision have possibly watered down the doctrinal insistence on damages being solely compensatory. These domestic developments might have made it difficult for German law to maintain the refusal to recognise and enforce foreign judgments in which punitive damages have been awarded. Thus, the question to be answered is: can German law confidently claim that punitive damages are still sufficiently foreign to the domestic system and that punitive damages awarded by foreign courts can thus be rejected without self-contradiction?

To respond, the chapter will, after a short explanation of the doctrinal situation in German law, analyse the landmark case. The discussion will afterwards

[1] BGH (*Bundesgerichtshof*), 4 June 1992, case IX ZR 149/91, BGHZ (*Entscheidungen des Bundesgerichtshofs in Zivilsachen*) 118, 312. The case is sometimes referred to in English as *John Doe* (a pseudonym for the claimant) *v Eckhard Schmitz*, although this is not an official German citation due to anonymity of German court reports.

address the caveats that have been made by German courts for dealing with punitive damages. Finally, and changing the perspective slightly from the issue of recognition to applicable law, consideration will be given to how German courts handle claims that are governed by foreign law which allows awarding the remedy of punitive damages.

II. THE STATUTORY FRAMEWORK OF THE GERMAN LAW OF DAMAGES IN A NUTSHELL

Before diving into the case law and discussing the landmark case, it is necessary to address the doctrinal framework for damages in German statutory law. In the German Civil Code, the general provisions on the law of damages, which apply to both contract and tort, set out a strict compensatory principle. According to that principle, the person who is liable in damages must restore the position that would have existed if no harm had been done.[2] As has been refined by further principles, this means that there must be full compensation, that overcompensation/enrichment is impermissible, and that only actual losses can be the subject of compensation.[3] Pecuniary compensation can also be claimed for intangible losses, but only in expressly enumerated cases, such as bodily harm or the violation of the right to sexual self-determination.[4]

These general provisions on damages in the Civil Code do not include the award of punitive or exemplary damages. At the time of enactment at the end of the nineteenth century, it was clear that there should be no punitive aspect to damages.[5] The Civil Code only deals with punishment in the context of damages in a few specific provisions which allow private parties to agree on contractual penalty clauses. An interesting contrast can be drawn in this regard with the position in English law, which is a point to which this chapter returns below.[6] Apart from where contractually agreed, though, damages of penal character are unavailable under German law, especially for torts.

III. THE NON-RECOGNITION OF US PUNITIVE DAMAGES JUDGMENTS IN GERMANY

In its 1992 landmark decision, the German Federal Court of Justice established the general position in German law that US judgments are not to be recognised

[2] s 249 of the Civil Code (*Bürgerliches Gesetzbuch/BGB*) and subsequent provisions.

[3] O Brand, *Schadensersatzrecht*, 3rd edn (Munich, CH Beck, 2021) sec 2 paras 32ff.

[4] s 253 of the Civil Code. 'Intangible' seems the more appropriate translation than 'immaterial' as suggested by U Magnus, 'Sec 254' in G Dannemann and R Schulze (eds), *German Civil Code: Bürgerliches Gesetzbuch (BGB)*, vol 1 (Munich, CH Beck, 2020).

[5] B Mugdan, *Die gesammelten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol 2 (Heidelberg, R v Decker's Verlag, 1899) 'Motive' 10ff.

[6] See section IV.D.

insofar as those judgments award punitive damages. The following discussion summarises the facts of the case and engages with the Court's reasoning. Light will also be shed on subsequent case law.

A. The Facts and Development of the Case

As restated by the German Federal Court of Justice, the claimant sought recognition and enforcement in Germany of a Californian judgment according to which he was entitled to damages of US$750,260 from the defendant. Although the facts of the original case had not been reported in the Californian judgment,[7] it was apparent from the German Court's record that the damages had been granted because of sexual abuse committed by the defendant against the claimant in California. The total amount comprised, in addition to US$150,260 for costs of medical treatment and placement and US$200,000 for pain and suffering, the sum of US$400,000 for exemplary and punitive damages.

In Germany, the Court of First Instance (*Landgericht*) in Düsseldorf initially approved the recognition and enforcement in full.[8] On appeal by the defendant, the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf modified the recognition and enforcement decision insofar as it only permitted it up to the total amount of US$275,325, which included an amount for punitive damages of US$55,065, ie roughly an eighth of the original judgment's punitive damages amount.[9] Both the claimant and the defendant appealed, and they both partly succeeded. The Federal Court of Justice held that only the amount of US$350,260 for the medical treatment and placement as well as pain and suffering can be recognised and enforced in Germany, whereas recognition and enforcement of the US$400,000 of punitive damages must be rejected completely.

B. The Reasoning of the Federal Court of Justice

In its reasoning,[10] the Federal Court of Justice appreciated that the amount of punitive damages awarded by US courts is discretionary and usually many times higher than the actual damage suffered because punitive damages aim to fulfil four main purposes. Firstly, punitive damages are intended to punish the defendant and to assuage a desire for revenge by the claimant. Secondly, they are also awarded in order to deter the defendant as well as the general public from engaging in the behaviour concerned in the future. Thirdly, the claimant is to be

[7] It was handed down by the Superior Court of California at Stockton for the County of San Joaquin, 24 April 1985, case 168-588, which is a first-instance trial court. It has remained unpublished and has apparently not been appealed.

[8] LG Düsseldorf, 12 April 1990, case 13 O 456/89, unpublished.

[9] OLG Düsseldorf, 28 May 1991, case 4 U 119/90, published in [1991] *Versicherungsrecht* 1161.

[10] BGH (n 1) 334ff.

rewarded for enforcing the law and for thereby strengthening the legal system in general. Fourthly, punitive damages are to supplement the compensation of the claimant where it is inadequate otherwise, for instance due to the lack of social security. This depiction of punitive damages can largely be considered to be fair and accurate.

What has however been criticised about the understanding by the Federal Court of Justice is the element and degree of discretion which the US courts are said to have over the amount of punitive damages to be awarded. Since the Federal Court of Justice only referred to the 'free' discretion of the US court, it has been contended that this neglects the fact that the discretion is limited to some extent by statutes and case law in the US.[11] Most notably the US Supreme Court later held in *BMW of North America Inc v Gore* that 'grossly excessive' punitive damages 'transcend the constitutional limit' of the Due Process Clause of the Fourteenth Amendment.[12] Although the discretion over awarding punitive damages is indeed (increasingly) limited,[13] these limitations still leave considerable leeway to the individual court. In any case, punitive damages are awarded *above and beyond* the actual damage suffered at the (albeit somewhat limited) discretion of the court in order to punish the defendant, which is the relevant aspect for explaining Germany's refusal to recognise the Californian judgment.

The central point for the rejection of recognition in the reasoning of the Federal Court of Justice was the declared violation of German public policy.[14] According to German civil procedure rules, recognition and enforcement of a foreign judgment is to be rejected if the recognition would yield a result which is incompatible with the fundamental principles of German law (public policy), especially if incompatible with the fundamental rights of the German constitution.[15]

Restating the relevant fundamental principles of the German law of damages in its decision, the Federal Court of Justice confirmed that the German law of damages is governed by the principle of compensation outlined above.[16] This, in turn, is based on the proportionality principle, which also applies in private law and is said to be rooted ultimately in the rule of law. Any enrichment on the part of the claimant would be incompatible with this principle, which also precludes any private prosecution.

[11] AR Fiebig, 'The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments' (1992) 22 *Georgia Journal of International and Comparative Law* 635, 650–51.

[12] *BMW of North America Inc v Gore*, 517 US 559 (1996), 585–86. Also see the further restrictions in *State Farm Mutual Automobile Insurance Co v Campbell*, 538 US 408 (2003) discussed in Sharkey, ch 13 of this volume.

[13] See further C Vanleenhove, *Punitive Damages in Private International Law* (Cambridge, Intersentia, 2016) 29ff.

[14] BGH (n 1) 338ff.

[15] s 328(1)(4), 723(2) sentence 2 of the Code of Civil Procedure (*Zivilprozessordnung/ZPO*).

[16] See section II.

Punishment of the defendant was considered to be the exclusive domain of criminal law, where notably any fine is payable to the state instead of to an individual. In civil proceedings, by contrast, claimants must not receive any rewards for acting like a private attorney general, which would be incompatible with the state's monopoly over prosecution, for which special constitutional protection is in place.[17] Although German law recognises contractual penalty clauses, it does not accept punitive damages for torts. With regard to the compensation for intangible losses, German law only permits damages which are adequate in the light of the degree of the suffering and impairment, whilst wider aims of punishment and deterrence are not pursued.

In the case at hand, the Californian court had awarded a distinct amount for intangible damages for the sexual abuse, which was recognisable under German law pursuant to the equivalent rule on damages for intangible harm due to violation of sexual self-determination. Yet this meant that the separate amount for punitive damages going above and beyond the compensatory amount could not be recognised.

Ultimately, the Federal Court of Justice reasoned that if foreign judgments awarding extra-compensatory punitive damages were to be recognised and enforced in Germany, this could lead to instances of liability which would be unimaginable in the domestic legal system. Such liability would not only be incalculable and non-insurable, it could lead to inequality and undermine the domestic liability framework. The reason given for this was that claimants from abroad ought not be permitted to enforce much higher judgments against assets in Germany than claimants from Germany ever could, who might however have suffered much greater losses but are restrained by the German domestic limitations.

C. Subsequent Case Law

Since 1992, the Federal Court of Justice has not amended or changed its view on the recognition of punitive damages. Several decisions by the Federal Constitutional Court on the issue of the service of foreign claims for punitive damages in Germany will be discussed below separately.[18] It is worth mentioning that the Federal Court of Justice clarified in a subsequent decision that German courts must not easily assume that high foreign damages awards are punitive.[19] In a case concerning the law of Panama, a Higher Regional Court

[17] See, eg, Art 103(2)–(3) of the German Federal Constitution (*Grundgesetz/GG*), which stipulates that 'an act may be punished only if it was defined by a law as a criminal offence before the act was committed' and 'no person may be punished for the same act more than once under the general criminal laws' (translation by C Tomuschat et al for the German Federal Ministry of Justice, <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 7 May 2023).

[18] See section V.B.

[19] BGH, 8 May 2000, case II ZR 182/98, [2000] *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 1372, 1373.

distinguished the Spanish and French origins of that law from US legal traditions. The damages were eventually not considered punitive and, thus, there was no reason to reject recognition due to a public policy violation.[20] The same was found in a subsequent case concerning damages under Dutch law.[21]

It is understandable that the lower German courts and, therefore, ultimately the Federal Court of Justice have not had to deal more often with requests for the recognition of foreign punitive damages judgments given the determination and forcefulness of the 1992 decision. What can be observed as a consequence of this situation is that claimants have rather adjusted their behaviour and strategy when it comes to recognition requests in Germany.[22] An example is the case of a claimant who was awarded punitive damages of US$1 million in addition to compensatory damages in Wisconsin. When applying for recognition of the US judgment in Germany, she confined her request to the compensatory part, so that the Federal Court of Justice did not have to address the issue of punitive damages at all.[23]

On a related note, it should be said that there does not seem to be any German case law published on a situation where recognition of an English judgment awarding exemplary damages was sought in Germany.[24] This is understandable given the narrow categories of cases in which exemplary damages are available in English law after *Rookes v Barnard*.[25] Also, the first category in *Rookes* concerns cases of abuse of executive power by state officials (eg, malicious prosecution by the police), which makes it unlikely that enforcement of resulting judgments would be sought abroad since this would only be desirable if the UK had assets abroad into which enforcement could be sought.

IV. REVIEWING AND CONTEXTUALISING THE PUBLIC POLICY REASONING

The reasoning of the Federal Court of Justice in its 1992 decision is, in itself, consistent and convincing because it explains why punitive damages are seen as inconsistent with ideas in the German law of damages.[26] Shielding the German system from foreign punitive damages awards by holding them to contradict German public policy also shows that this inconsistency is perceived as a serious matter.

[20] OLG Hamburg, 25 January 2008, case 1 U 176/95, para 103 (available in the juris database).

[21] OLG Düsseldorf, 4 April 2011, case I-3 W 292/10, [2013] *Praxis des Internationalen Privat- und Verfahrensrechts* 349, 350–51.

[22] M Lendermann, *Strafschadensersatz im internationalen Rechtsverkehr* (Tübingen, Mohr Siebeck, 2019) 157.

[23] BGH, 29 April 1999, case IX ZR 263/97, BGHZ 141, 286.

[24] Search conducted by the author in the German comprehensive database 'juris', September 2022.

[25] *Rookes v Barnard* [1964] AC 1129 (HL).

[26] Similarly, U Magnus, 'Punitive Damages and German Law' in L Meurkens and E Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Cambridge, Intersentia, 2012) 248ff.

Yet the rejection of recognition on public policy grounds can only remain tenable and avoid the criticism of hypocrisy if, considering wider domestic developments, German law has not permitted any significant inroads into its supposedly firm fundamental principle of solely compensatory damages. Several potential deviations from the fundamental principle will be explored in the following sections in order to ascertain whether their domestic acceptance in fact undermines the refusal to recognise foreign judgments awarding punitive damages.

A. Penance and Satisfaction as Relevant Factors for Awarding Damages for Pain and Suffering

In German law, as already mentioned, damages can be claimed for intangible losses in cases of, for instance, bodily harm or violation of the right to sexual self-determination that are enumerated in the Civil Code.[27] Given this domestic approval of damages for pain and suffering, the question is whether they fulfil the sole purpose of compensation or whether their purpose goes above and beyond compensation, which might suggest that German law endorses further purposes of damages in such cases of intangible losses, possibly including the purpose of punishment.

Prior to the enactment of the Civil Code and its entry into force in 1900, awarding damages for pain and suffering was explicitly considered to be a form of private punishment.[28] The logic was that, although not always consistently followed in practice,[29] pain and suffering were then believed to be incommensurable with compensation in money.[30] It was not until the end of nineteenth century, and hence close to the enactment of the Civil Code, that this view changed and it was accepted that money can be an adequate compensation for pain and suffering,[31] which meant that these damages were no longer considered to be punitive.

Under the newly enacted Civil Code and during the early period of the Federal Court of Justice after the Second World War, damages for pain and

[27] s 253 of the Civil Code.

[28] See, eg, GF Puchta, *Pandekten*, 8th edn (Munich, Barth, 1856) 559 (sec 388); B Windscheid, *Lehrbuch des Pandektenrechts*, vol II/2 (Düsseldorf, Buddeus, 1866) 302–03 (sec 455).

[29] Court of Justice of the German Reich (*Reichsgericht*), 17 November 1882, case III 321/82, RGZ (*Entscheidungen des Reichsgerichts in Zivilsachen*) 8, 117.

[30] Degenkolb, 'Der spezifische Inhalt des Schadenersatzes' (1890) 76 *Archiv für die civilistische Praxis* 1, 22ff, esp 24; F Mommsen, *Beiträge zum Obligationenrecht*, vol 2 (Halle, Schwetschke, 1855) 122.

[31] C von Wächter, *Die Busse bei Beleidigungen und Körperverletzungen* (Leipzig, Edelmann, 1874) 72ff with criticism of Windscheid. In consequence, B Windscheid, *Lehrbuch des Pandektenrechts*, vol II, 5th edn (Stuttgart, Ebner & Suebert, 1879) 715–16 changed his view (see esp fn 31).

suffering were awarded on a strictly compensatory basis,[32] hence without, for instance, taking account of the degree of fault or the financial situation of the tortfeasor when assessing the amount of damages.[33] However, by 1955 the Federal Court of Justice changed its view on the matter drastically and found in a remarkable decision by the Court's Joint Senates for Civil Matters that the notion of penance was intrinsic to damages for pain and suffering. In order to be able to take account of the degree of fault and the financial situation of the tortfeasor, the Court established that damages for pain and suffering fulfilled two functions: compensation and satisfaction for the victim.[34] The award of damages for pain and suffering is in principle compensatory, but the amount cannot simply be arithmetically calculated; the award may be larger because, in short, the tortfeasor made life difficult for the victim and the award is meant to make the situation more bearable by also providing some sort of satisfaction.[35] The amount of money therefore depends primarily on the extent of the pain and suffering;[36] yet, since the Civil Code provision entitles the claimant to what can be translated as fair, equitable or reasonable damages (*billige Entschädigung*),[37] an additional element of penance or, in Swiss German terminology, satisfaction is necessary.[38] This remains the position of German law in this regard to the present day.[39] Yet it has remained difficult to say whether the notion of penance on the part of the tortfeasor and the function of providing satisfaction for the victim suggest that damages for pain and suffering are punitive after all.

Against this background, the Federal Court of Justice struggled to distinguish US punitive damages from the German developments regarding punishment in the law of damages in its 1992 decision when making two related arguments. First, the Court suggested that damages for pain and suffering are to be awarded in relation to the degree of impairment caused by the tortfeasor in order that they are not awarded out of proportion to it. Secondly, the Court argued that the function of satisfaction is inseparably connected with the compensatory function. These arguments are not entirely convincing: they try to explain that making the tortfeasor do penance and seeking satisfaction are not comparable to ideas underlying punishment because penance and satisfaction are not ordered and awarded in a manner disproportionate to the compensation due.

[32] J Köndgen, *Haftpflichtfunktionen und Immaterialschaden am Beispiel von Schmerzensgeld bei Gefährdungshaftung* (Berlin, Duncker & Humblot, 1976) 49ff.

[33] eg, BGH, 29 September 1952, case III ZR 340/51, BGHZ 7, 223.

[34] BGH (Joint Senates for Civil Matters), 6 July 1955, case GSZ 1/55, BGHZ 18, 149. This differed from the earlier use of the word *Satisfaktion* at the end of the 19th century when it had rather denoted compensation: H Dernburg, *Pandekten*, vol 2 (Berlin, H W Müller, 1886) 119 (sec 45).

[35] BGH (n 34) 154.

[36] BGH (n 33) 226–27.

[37] See, eg, the translation as 'reasonable' by Magnus (n 4).

[38] BGH (n 34) 155.

[39] In particular, the most recent major statutory law reform of the law of damages acknowledged and did not intend to change this position, *Entwurf eines Zweiten Gesetzes zur Änderung schadensersatzrechtlicher Vorschriften*, 7 December 2001, BT-Drs 14/7752, 14–15.

Yet punishment does not have to be, and in fact ought not to be, disproportionate either. Thus, these two arguments may represent necessary conditions of justice, but they are not sufficient conditions for distinguishing the domestic position concerning damages for pain and suffering from the rejection of recognition of foreign punitive damages judgments.

The Federal Court of Justice continued its reasoning with another attempt at explaining the difference in approach. The argument is based on the understanding that any overlap between German damages, which aim for penance and satisfaction for intangible losses, and US punitive damages can only matter insofar as the comparison with punitive damages equally concerns intangible losses. Since the Californian court had however awarded a separate amount for intangible losses, the Federal Court of Justice deduced that the amount for punitive damages did not cover any intangible losses and hence ruled out that any overlap between the German law of damages for pain and suffering could be established with the US punitive damages awarded in this case. This was true in the case at hand, and might work well, too, in many other cases, but it is not completely convincing. Just because punitive damages are explicitly punitive does not guarantee that damages for pain and suffering – on their own (under German law) or as a separate amount (under US law) – are completely free from notions of punishment. Therefore, this additional argument put forward by the Federal Court of Justice does not succeed, either in explaining the significant difference between the domestic law concerning damages for pain and suffering, and the approach taken with regard to the recognition of foreign judgments in which punitive damages are awarded.

Ultimately, though, it would be equally difficult to find that the existence of some elements of penance and satisfaction in the German law concerning damages for pain and suffering means that it is untenable for German law to maintain that its own domestic law does not provide for punishment through damages awards. When put in perspective, especially quantitatively, German awards of damages for pain and suffering are not comparable with awards of punitive damages under US law.[40] In consequence, it can be regarded as justifiably consistent that German law provides domestically for very moderate amounts of damages giving satisfaction in addition to compensation for intangible losses while at the same time rejecting recognition of foreign judgments awarding punitive damages which greatly exceed any compensatory amount and even exceed any amount necessary for the victim's own satisfaction. Indeed, in contrast to the German law of damages, punitive damages fulfil

[40] eg, comparing damages for pain and suffering due to sexual abuse in the 1980s, German courts awarded the equivalent of up to €5,000 (eg, OLG Düsseldorf, 12 October 1989, case 8 U 10/88), which is far lower than the amount of US$200,000 plus US$400,000 awarded by the Californian judgment in 1985 whose recognition was sought in Germany. In recent years, the Federal Court of Justice sanctioned a settlement of €70,000 (judgment of 29 April 2021, case 5 StR 498/20), but this was in an ancillary proceeding to the criminal prosecution of the defendant.

additional purposes regarding the public at large by strengthening the enforcement of the legal system generally, by creating a deterrent from future socially harmful behaviour generally, and by supplementing the lack of social security generally. These additional purposes in US law require, and equally justify, that punitive damages awards are significantly and distinctly higher than any amount of damages available under German law, where damages only fulfil the two functions of compensation and satisfaction for the individual victim in response to the specific past behaviour of the individual tortfeasor and where additionally an extensive social security system is available. Therefore, domestic damages for pain and suffering are not inconsistent with the rejection of foreign punitive damages awards.

B. Damages for the Infringement of Personality Rights

The dilemma of whether satisfaction might amount to punishment becomes even more critical when one considers the position of German law on damages for the infringement of personality rights. Initially, in the absence of statutory law providing for damages in such cases, the Federal Court of Justice awarded damages by analogy to damages for pain and suffering. The Court emphasised that, in cases of infringed personality rights, satisfaction for the victim,[41] and also sanctioning the tortfeasor,[42] was of greater relevance than actual compensation. This case law development was approved by the Federal Constitutional Court (*Bundesverfassungsgericht*) in view of the importance of the victims' underlying fundamental rights protected by the constitution.[43] Yet approving satisfaction and especially sanctioning as primary purposes of damages in cases of infringed personality rights might have made it untenable for German law to sustain its doctrinal insistence that damages awarded domestically are primarily compensatory.

Particularly remarkable are the amounts which damages for infringement of personality rights have reached for claims brought by prominent figures of public life against tabloid newspapers.[44] The awards first peaked at DM180,000 in 1996, which corresponds to roughly €150,000 today.[45] This amount was awarded to Princess Caroline of Monaco against tabloid journals that had published untrue stories and photographs of her without her consent.[46] When upholding a previous appeal, the Federal Court of Justice had established that satisfaction for the

[41] BGH, 14 February 1958, case I ZR 151/56, BGHZ 26, 349 (case pseudonym 'Herrenreiter').
[42] BGH, 19 September 1961, case VI ZR 259/60, BGHZ 35, 363 ('Ginseng').
[43] BVerfG (*Bundesverfassungsgericht*), 14 February 1973, case 1 BvR 112/65, BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*) 34, 269 ('Soraya').
[44] For an overview in English, see B Markesinis, J Bell and A Janssen, *Markesinis's German Law of Torts: A Comparative Treatise*, 5th edn (Oxford, Hart Publishing, 2019) 43ff.
[45] Allowing for currency conversion and index developments.
[46] OLG Hamburg, 25 July 1996, case 3 U 60/93, [1996] *Neue Juristische Wochenschrift* 2870.

victim had to be the paramount consideration and required that the publisher's intention to profit from intentionally infringing personality rights had to be counteracted by assessing damages on a basis similar to the disgorgement of profits.[47] This latter consideration resembles the statement by Lord Devlin in the House of Lords in the English exemplary damages case of *Rookes v Barnard* that, in the context of damages for libel, 'one man should not be allowed to sell another man's reputation for profit',[48] and it demonstrates that German case law bears a concerning similarity to this English authority on exemplary damages.

Strikingly, the Federal Court of Justice made no reference to the 1992 decision on the non-recognition of the Californian punitive damages judgment in the case of Princess Caroline of Monaco, which was decided only a few years after, and did not even attempt to distinguish the domestic award of extremely high damages from the rejection of foreign punitive damages. Struggling to distinguish punitive damages in a later case, which concerned several unauthorised tabloid publications of photos of the baby daughter of Princess Caroline and Prince Ernst August of Hanover, for which €150,000 of damages were awarded, the Federal Court of Justice stated tersely that the non-recognition of the Californian punitive damages award had concerned a 'completely different set of facts without any parallels to the case at hand'.[49]

German courts have continued awarding high(er) amounts within German law, and the probably highest amount of damages for infringement of personality rights so far was €400,000 in 2009, which was awarded after numerous photograph montages of the Swedish Princess Madeleine had been illegitimately published by tabloids.[50] Very close to this was the total amount of €395,000 awarded in 2016 to the TV weather presenter Jörg Kachelmann for the unauthorised publication of photos of him that were taken when he was charged with rape but eventually acquitted.[51] Given the comparability of these amounts with the US$400,000 of punitive damages in the Californian judgment, and also the comparability to some extent of the underlying reasons for awarding the respective damages, it is not easy to convincingly distinguish the German damages for personality rights infringement from foreign punitive damages awards.

The only justification for treating punitive damages differently might be seen in the conceptual consideration that punitive damages in foreign jurisdictions are awarded *in addition* to damages for intangible losses. This means in turn that, although totalling very high amounts, the German domestic awards for pain and suffering and particularly for infringements of personality rights still observe a compensatory relation and limitation to the actual suffering of the victim and the actual profit of the tortfeasor, above and beyond which *no further*

[47] BGH, 15 November 1994, case VI ZR 56/94, BGHZ 128, 1 ('Caroline I').
[48] *Rookes* (n 25) 1227.
[49] BGH, 5 October 2004, case VI ZR 255/03, BGHZ 160, 298, 303 (translation by author).
[50] OLG Hamburg, 30 July 2009, case 7 U 4/08, [2009] *Archiv für Presserecht* 509.
[51] OLG Cologne, 12 July 2016, cases 15 U 175/15 and 15 U 176/15.

damages are awarded. This can be confirmed, for instance, by comparison with the English law on exemplary damages in libel cases against newspapers: the Court of Appeal held in *John v MGN Ltd* that compensatory damages were insufficient to punish the newspaper and deter it and others, and that therefore – in addition – exemplary damages were necessary to adequately reflect the gravity of the newspaper's conduct and to create an effective deterrent for the future.[52] In German law, in turn, the dilemma can thus be resolved by emphasising the compensatory intention of the amounts awarded as damages for intangible losses, in addition to which no punitive damage are awarded.

C. Damages for Infringement of Rights in Other Areas of Statutory Law

Besides these developments in German case law, there are a few statutory rules worth reviewing because they are sometimes said to be coming close to punitive damages. However, this allegation does not hold up on closer examination.

First, the German General Equality Act (*Allgemeines Gleichbehandlungsgesetz*) provides for damages for both tangible and intangible losses in cases of unjustified discrimination due to race, ethnicity, gender, sex, religion, disability or age in the employment context, or in any mass transaction in private law, such as grocery shopping in a supermarket or taking out insurance.[53] This is a special statutory rule for compensation outside the Civil Code,[54] but it shares the conceptional basis and method for the calculation of damages in all regards. Following jurisprudence of the Court of Justice of the European Union on the underlying Antidiscrimination Directives in the employment context, the damages must be effective and not fault-based in order to achieve both compensation and deterrence.[55] It has to be noted that, insofar as EU law as a supranational legal order requires deterrence, it does not provoke a contradiction within German law where damages are not awarded in order to punish. Indeed, the EU Directives neither require nor result in punitive damages,[56] in contrast to US law where punitive damages are available in employment discrimination cases according to the specific statutes.[57]

Secondly, moving on to the very different area of infringement of intellectual property rights, several statutes permit three methods for calculating

[52] *John v MGN Ltd* [1997] QB 586 (CA) 626. Nowadays, statute provides in England for exemplary damages against certain news providers who have committed libel or misuse of private information, s 34 of the Crime and Courts Act 2013.

[53] ss 15(1)–(2) and 21(2) of the General Equality Act (*Allgemeines Gleichbehandlungsgesetz*).

[54] Some of the provisions were previously enacted in s 611a of the Civil Code.

[55] CJEU, Case C-180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I-2195. See also more recently BAG (German Federal Labour Law Court/*Bundesarbeitsgericht*), 28 May 2020, case 8 AZR 170/19 [2020] *Neue Zeitschrift für Arbeitsrecht* 1392.

[56] CJEU, Case C-407/14 *Arjona Camacho v Securitas Seguridad España* ECLI:EU:C:2015:831.

[57] See, eg, 42 USC, s 1981a(a)(1), (b)(1) and Title VII of the Civil Rights Act 1964, as amended.

damages, which codify prior case law.[58] This does however not result in 'threefold' over-compensatory damages; the methods are just three different ways to make the calculation and proof easier for the claimant. One of these methods is, for instance, to claim damages equivalent to the hypothetical licencing costs, which confirms that the damages are very much of compensatory and not punitive nature. The idea is comparable to English 'negotiating damages'[59] (formerly '*Wrotham Park* damages'[60]), which are hypothetical bargain damages because they are assessed at the amount that the claimant might reasonably have demanded as a fee for permitting the behaviour in question, such as an agreement for using intellectual property.[61] Suggestions for introducing US-like treble damages into German law have not borne fruit.[62]

Thirdly, in cartel cases, German competition law clarifies that judges are permitted to estimate the loss of the claimant and that they may, in doing so, take account of the profit made by the defendant.[63] While estimations are by definition not always accurate, they are the most practicable way of at least getting close to the actual loss which is to be compensated. Not overcompensating the claimant in German law also corresponds with the unavailability of exemplary damages under English competition law,[64] because it is believed that courts can award sufficiently effective compensatory damages.[65]

Fourthly, in the German Civil Code itself,[66] but due to the EU influence of the Late Payment Directives, the rules on legislatively liquidated damages for late payment are considered by some to be of punitive nature, especially regarding the lump sum of €40 for enforcement costs in certain commercial cases.[67] This can however be rebutted because the amount of damages is a default rule

[58] s 97(2) of the Copyright Act (*Urheberrechtsgesetz*); s 42(2) of the Design Act (*Geschmacksmustergesetz*); s 24(2) of the Inventions Act (*Gebrauchsmustergesetz*); s 139(2) of the Patent Act (*Patentgesetz*); s 14(6) of the Trademark Act (*Markengesetz*). *cf* K Ernicke, *Die dreifache Schadensberechnung* (Tübingen, Mohr Siebeck, 2020).

[59] *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 EGLR 29 [22] (Neuberger LJ).

[60] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

[61] *One Step (Support) Ltd v Morris Garner* [2018] UKSC 20, [2019] AC 649.

[62] See, eg, suggestions by HD Assmann, 'Schadensersatz in mehrfacher Höhe des Schadens' [1985] *Betriebs-Berater* 15.

[63] s 33a(3) of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*) with reference to s 287 of the Code of Civil Procedure.

[64] Sch 8A, para 36 of the Competition Act 1998, as introduced by Sch 1, para 4 of the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations (SI 2017/385). In the past, exemplary damages were awarded in competition law cases in England (see, eg, *2 Travel Group plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19, [2012] Comp AR 211 [448]–[598]).

[65] *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637 [56]–[74]. The issue of exemplary damages was not appealed in [2008] EWCA Civ 1086, [2009] Ch 390 [21].

[66] s 288 of the Civil Code.

[67] W Ernst, 'Section 288 BGB' in W Krüger (ed), *Münchener Kommentar zum BGB*, vol 2, 9th edn (Munich, CH Beck, 2022) para 32.

only which the parties may adjust and because it is intended to compensate the typical pre-estimated loss.[68] The same is true for the equivalent rules in English law.[69] Also with regard to another instance of legislatively liquidated damages, although outside the national realm of German statutes, the EU's Air Passenger Regulation provides for lump sum compensation in cases of denied boarding, etc.[70] The amounts of €250, €400 and €600 are certainly higher, but they are not punitive damages because they compensate the typical loss of valuable time of the air passengers.[71] The Air Passenger Regulation has likewise been retained in the UK post-Brexit.[72]

Lastly, the EU's General Data Protection Regulation (GDPR) provides for a claim to compensation for tangible and intangible losses in cases of data protection violations. The Regulation only stipulates in its Recitals that claimants 'should receive full and effective compensation for the damage they have suffered',[73] but it does not contain any further detail on the calculation of damages, which means that this is largely left to national law. It has yet to be clarified whether the Regulation requires that the amount of damages ought to have a distinctly deterrent effect,[74] given the CJEU's jurisprudence on the Antidiscrimination Directives referenced above. Insofar as German law applies, damages for data protection violations would however not come anywhere near punitive damages.

D. Penalty Clauses in Contract Law

While German law does not recognise punitive damages in contrast to Anglo-American tort law, German law but not Anglo-American law recognises penalty clauses in contracts, which might be perceived as illogical and yet another potential dilemma. Looking at English law, the rule against penalty clauses originated in equity[75] and has been adopted in the common law based on the disapproval of contracting parties agreeing on unconscionable and extravagant

[68] J Ungerer, *Gesetzlich pauschalierter Schadensersatz* (Berlin, Duncker & Humblot, 2022) 56ff, 89ff, 205ff.

[69] Late Payment of Commercial Debts (Interest) Act 1998.

[70] Art 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1.

[71] Ungerer (n 68) 124, 155ff, 205ff.

[72] s 3 of the European Union (Withdrawal) Act 2018. See also reg 8 of The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278).

[73] Recital 146 GDPR.

[74] A preliminary ruling request has been made by BAG, reference of 26 August 2021, case 8 AZR 253/20 (A) (available in the juris database), which is pending as CJEU, Case C-667/21 *ZQ v Krankenversicherung Nordrhein*. Case C-300/21 *UI v Österreichische Post AG* ECLI:EU:C:2023:370 did not resolve the question.

[75] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, OUP, 1999) 213–14, 255–56.

sums as remedies.[76] It essentially intends to limit the parties' ability to agree on overcompensation. According to the most recent modification of the test for distinguishing impermissible penalty clauses from permissible liquidated damages,[77] genuine pre-estimation of loss is no longer the most decisive factor. Rather, permissibility depends on whether a legitimate interest of the claimant in the performance of the contract is being protected and whether the protection is proportionate to that end. It is impermissible to impose a secondary obligation as a detriment out of proportion to any interest of the innocent party.

These factors used in English law to identify permissible liquidated damages clauses correspond perfectly well to the German statutory criteria for the enforceability of penalty clauses. If a penalty clause requires a disproportionately high payment,[78] the obligor can request from a German court to lower the amount to what is proportionate; when deciding on the proportionality, the court ought to take account of all legitimate interests of the innocent party.[79] Therefore, there is little difference in substance between English and German contract law on the matter, and the supposedly inconsistent positions mainly pertain to the labels used for the different clauses. This means that it is not (any more) illogical for German law, in comparison with English law, to permit that contractual parties can agree on proportionate amounts as remedies whilst rejecting punitive and exemplary damages in tort law; if anything, it is (more) illogical for English law to permit exemplary damages in tort law whilst being very strict on contractual agreements of overcompensatory remedies.

E. Interim Conclusions

To sum up, refusing to recognise foreign punitive damages awards in Germany is not undermined by the domestic situation of German damages law, which in all critical instances can be seen to sufficiently observe the compensatory principle. German law has developed towards accepting damages for pain and suffering because the courts have approved of the functions of penance and satisfaction in the law of damages domestically, but this does not make these damages punitive, especially with regard to the amounts usually awarded. Particularly high amounts are only awarded for the infringement of personality rights, yet

[76] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 (HL).

[77] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172.

[78] All circumstances of the individual case have to be considered with regard to the performance interest of the innocent party as well as deterrence, the severity and extent of the breach, and the degree of fault of the party breaching the clause; see further C Chasapis, *Die Herabsetzung der unverhältnismäßig hohen Vertragsstrafe* (Berlin, Duncker & Humblot, 2014) 161ff.

[79] s 343(1) of the Civil Code. In the commercial context see s 348 of the Commercial Code (*Handelsgesetzbuch/HGB*).

those damages are still compensatory in nature because they primarily reflect the actual suffering of the victim, even if account is also taken of the profit of the tortfeasor. Where German statutory law provides for damages in special circumstances, such as for discrimination, the prima facie impression that they could be punitive has been equally rebutted. Also, whilst German law enforces contractual penalty clauses, this is limited to proportionate amounts. Therefore, the public policy reasoning of the Federal Court of Justice in its 1992 decision is consistent with the domestic position of the law, and it is not hypocritical of German law to refuse to recognise foreign punitive damages awards.

V. PUBLIC POLICY CAVEATS

Both in the 1992 decision of the Federal Court of Justice about the recognition of the Californian punitive damages judgment and in several subsequent decisions of the Federal Constitutional Court, these highest German courts have created certain public policy caveats for dealing with foreign punitive damages. These are important qualifications to the restrictiveness of the German legal position on the matter, and limit the rejection of punitive damages both in material and procedural terms as will be elucidated in the following two subsections.

A. Recognition of Damages Compensating Actual Losses

The Federal Court of Justice acknowledged in its 1992 decision[80] that foreign punitive damages awards could be recognised in Germany *insofar as* they were awarded to compensate for actual losses, especially for intangible losses. The same would be true for the victim's litigation costs or losses caused by default of the tortfeasor. There is indeed no need for German law to refuse recognition of foreign judgments *to the extent* that the awarded amounts correspond with compensatory damages permissible under German domestic law, even if the foreign damages are in fact termed 'punitive' and in total exceed amounts that would be awarded in similar cases governed by German law.

In the case at hand of the recognition of the Californian judgment, however, the Californian court had – in addition to the punitive damages of US$400,000 – awarded US$200,000 as compensation for pain and suffering. This meant in turn that the punitive damages were not intended to cover such losses. Moreover, the Californian court had ordered that the claimant's attorney in the US was entitled to 40 per cent of all monies awarded to the claimant as a contingent fee, so that the claimant's litigation costs were also covered.

[80] BGH (n 1) 340.

In a different but related regard, the Federal Court of Justice held further that, if a foreign judgment contains both punitive and compensatory damages *detailed separately* in the foreign judgment, recognition of the compensatory part without the punitive part is permissible. As explained above, the Californian judgment had indeed listed the individual amounts for the various compensatory damages separate from the amount of punitive damages. In contrast to the French position,[81] German law separates the individually detailed claims awarded in the foreign judgment because it is not believed to be necessary to decide about recognition holistically. The Federal Court of Justice found that partial recognition, as far as permissible for compensatory damages, ought to be granted as a limited fallback solution instead of the impermissible full recognition.[82] This can be understood to mean that complete rejection of recognition of the entire foreign judgment would, in the eyes of German law, violate the principle of proportionality; in other words, complete rejection is unnecessary when partial rejection suffices in order to achieve the public policy aims regarding punitive damages. Interestingly, this also shows that the French position of completely rejecting the recognition of foreign judgments containing punitive damages due to the disproportionality of the amount awarded as punishment is in itself disproportionate because it ignores the option to act proportionately and recognise the part of the foreign judgment which does not violate the French public order.[83]

B. Service of Foreign Claims for Punitive Damages in Germany

Although the Federal Court of Justice declared in its 1992 decision that foreign punitive damages judgments can in principle not be recognised and enforced in Germany, German courts have nonetheless complied with requests by foreign courts for the service of foreign claim forms which contained punitive damages claims against defendants in Germany. Following appeals against the decisions permitting service of punitive damages claims, the Federal Constitutional Court had to decide only a couple of years later, in 1994, on an alleged violation of fundamental rights and of the rule of law. It was argued in the Federal Constitutional Court that there would equally be a public policy violation when claims for punitive damages would be served onto German defendants.

[81] *cf* Rowan, ch 16 of this volume, p 314.

[82] BGH (n 1) 345–46.

[83] BW Janke and FX Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) 60 *American Journal of Comparative Law* 775, 803 suggest that, in the French case, the claimants did not request partial recognition and therefore the court was prevented from granting it. However, this is not a problem of prohibited *révision au fond*. The relevant limitation is *ne ultra petita*, but this would not be infringed when less would be awarded than requested (ie, *infra petita*). *cf* H Gaudemet-Tallon, 'Cour de Cassation (1re Ch Civ) 1er Décembre 2010' [2011] *Revue critique de droit international privé* 93, 101–02.

Service of claim forms issued by US courts in Germany is governed by the 1965 Hague Convention,[84] which contains a public policy provision which differs somewhat from the national rule outlined above because the Hague Convention stipulates that a request for service may only be denied if service would be deemed to infringe the requested state's sovereignty or security.[85] The German lower courts had not found that there would be such a public policy violation. They had argued that, even if the claim succeeded in the US court after permitting service in Germany, the US judgment would only be enforced against the assets of the defendant in the US, ie outside Germany; it would be a separate issue then whether the US judgment would be enforceable in Germany against assets located in Germany, and a request for recognition and enforcement of the US judgment would most likely be denied in Germany in line with the 1992 decision of the Federal Court of Justice. German courts had, on the one hand, found it unnecessary and impossible at the stage of service of claim forms to protect German defendants from punitive damages enforcement actions that might or might not take place in the US. On the other hand, at the stage of service of claim forms, it was equally unnecessary and impossible to decide already whether the US judgment yet to be rendered would later be recognised in Germany. Since service and recognition concerned different procedural stages of a lawsuit, they could be decided independently and in different ways.

The Federal Constitutional Court affirmed the lower courts' practice permitting service of foreign claims for punitive damages in the absence of a public policy violation under the 1965 Hague Convention, and it denied violations of fundamental rights and the rule of law. It drew on the reasoning of the Federal Court of Justice that punitive damages can, to some extent, cover intangible losses and litigation costs, which can be recognised in Germany, too.[86] Additionally, the Federal Constitutional Court argued that service as the initial procedural step had at best the sole potential of endangering the defendant's financial position, but the defendant was still well protected from any real financial harm due to the national public policy defence against any subsequent request for recognition of the foreign judgment.[87] This decision by the Federal Constitutional Court, which was handed down by its First Senate, was also reaffirmed by the Second Senate more recently in 2013, when a similar issue about service of a punitive damages claim had to be decided.[88]

This demonstrates that punitive damages are not rejected by German law under all circumstances and at all times, which mitigates the harshness of the

[84] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

[85] Art 13(1) of the 1965 Hague Convention.

[86] BVerfG, 7 December 1994, case 1 BvR 1279/94, BVerfGE 91, 335, 344.

[87] ibid 344–45.

[88] BVerfG, 9 January 2013, case 2 BvR 2805/12 [2013] *Neue Juristische Wochenschrift* 990. The Second Senate thereby gave up its previously deviating position that originated from temporary injunctions which it had granted in the years 2003–2005, case 2 BvR 1198/03.

1992 decision of the Federal Court of Justice. Equally, the decisions by the Constitutional Court do not undermine the findings of the Federal Court of Justice since both concern different procedural stages. It also matters that, insofar as slightly different public policy criteria apply in national law and international conventions, German courts come to different conclusions about the various issues pertaining to punitive damages. Thus, the different treatment is justified due to factual and legal differences.

VI. THE COHERENT PROTECTION OF THE GERMAN DOMESTIC LIABILITY SYSTEM AGAINST PUNITIVE DAMAGES: FOREIGN PUNITIVE DAMAGES LAWS IN GERMAN COURTS

Finally, looking beyond the issues of service of foreign claims and recognition of foreign judgments in Germany, a coherent domestic protection against punitive damages has to deal as well with the issue of the potential applicability of foreign tort law, which provides for punitive damages, to a claim heard in a German court. To illustrate this with a scenario, instead of suing and winning in a foreign court and subsequently seeking recognition of the foreign judgment in Germany, a tort victim might sue a German tortfeasor in a German court and might try to argue that, for instance, Californian tort law applies to the case because the damage occurred in California. This is not a purely hypothetical scenario because, in the case of the sexual abuse committed by the defendant against the claimant in California, the claimant might have been able to sue in Germany.

Applicability of Californian or any other foreign tort law in a German court depends on the conflict of laws rules of Germany. Insofar as the claim could result in an award of punitive damages, this would undermine the ultimate argument made by the Federal Court of Justice in its 1992 decision against the recognition of foreign punitive damages judgments, as mentioned above, that giving effect to foreign punitive damages awards in Germany must not disrupt the German domestic liability system.[89] In other words, it would throw the domestic system off balance if, by applying foreign law in German courts, German debtors could be exposed to liability which was unavailable to German creditors. It shows that fending off foreign judgments which award punitive damages to foreign creditors against German debtors does help protect the German liability system, but it would – as a procedural measure – be insufficient on its own. As a logical corollary, non-recognition of foreign punitive damages judgments has to be complemented by equal measures in the conflict of laws regarding the applicability of foreign law and the availability of foreign remedies in German courts.

[89] BGH (n 1) 344–45.

The relevant rules for German courts on the conflict of laws for torts have been harmonised by the EU in the Rome II Regulation.[90] The application of the foreign governing law may be refused 'if such application is manifestly incompatible with the public policy *(ordre public)* of the forum'.[91] The wording of this public policy exception is, on the one hand, much closer to the rule in German civil procedural law for the rejection of recognition of a foreign judgment.[92] In this regard, it differs from the 1965 Hague Convention's phrase of 'sovereignty or security'.[93] On the other hand, the Rome II Regulation requires that the incompatibility with the forum's public policy is 'manifest'. In the legislative process leading to the Regulation's enactment, it had been proposed by the European Commission to illustrate the manifest incompatibility with a reference to punitive damages.[94] Upon objection by the UK, fearing for the availability of English exemplary damages when English law is applied in other European courts, this illustration, however, was not adopted in the end.[95] Only in the non-operative Recitals of the Rome II Regulation it is stated somewhat cryptically that:[96]

> In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy *(ordre public)* of the forum.

In the absence of a European harmonised standard for the public policy exception, especially with regard to punitive damages, it is thus left to the national legal perceptions of the forum states to decide about the incompatibility.[97] This enables German courts to draw on their national public policy conceptions in the conflict of laws for torts as expressed in the German rules.[98] These national rules are also applied directly to cases outside the scope of the European harmonisation, especially in cases of 'violations of privacy and rights relating to personality', which are excluded from the Regulation.[99]

[90] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[91] Art 26 of the Rome II Regulation.

[92] See the text to n 15.

[93] See the text to n 85.

[94] Art 24 of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM (2003) 427 final.

[95] T Petch, 'The Rome II Regulation: An Update (Part 2)' (2006) 21 *Journal of International Banking Law and Regulation* 509, 516.

[96] Recital 32 of the Rome II Regulation.

[97] A Fuchs, 'Art. 26 Rome II' in P Huber (ed), *Rome II Regulation* (Munich, Sellier, 2011) para 18.

[98] Art 40(3) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche/EGBGB*). In the 1992 decision, BGH (n 1) 328ff addressed Art 38 at length, which was the predecessor of Art 40(3) until a reform in 1999 but differed in substance. Art 40(3) is more specific than the general public policy rule in Art 6 and therefore takes precedence.

[99] Art 1(2)(g) of the Rome II Regulation.

According to the German rules, as far as relevant here, claims governed by foreign law will not be granted in a German court insofar as they significantly exceed the necessary amounts for adequate compensation or obviously serve other purposes than adequate compensation. This makes it perfectly clear that, insofar as punitive damages exceed and pursue non-compensatory objectives, German courts do not apply foreign law to that extent. It is interesting to note that this is not an absolute rejection of punitive damages but a limitation of the amount to the necessary compensation. The public policy caveat in the Federal Court of Justice's 1992 decision reflects this notion that recognition of a foreign punitive damages judgment can be permissible to the extent that the amount covers intangible losses or litigation costs insofar as they would be recoverable, too, under German law. Excessive punitive damages claims can however not be pursued successfully against German debtors in German courts.

The coherence with which punitive damages are fended off by German courts is also supported on additional grounds when considering who, ultimately, picks up punitive damages awards. For instance, in the English legal system, it is likely that punitive damages are awarded in cases of vicarious liability or where the defendant is indemnified by other means, for instance by the Crown, depending on the case category. By contrast, similar indemnity is not available in the German legal system to a comparable extent because, although insurance is also widely available, German law does not ordinarily provide for amounts of damages which cannot possibly be paid by an individual, and thus does not need to provide for legal structures which can channel and absorb such amounts instead of an individual. German law is not prepared for punitive damages in any regard, and it is thus necessary and coherent in all regards that they are excluded insofar as they exceed compensatory damages.

VII. CONCLUSION AND OUTLOOK

Contrary to the fear of being exposed to criticism for hypocrisy, German law has been able to resolve the dilemma of how to handle punitive damages without self-contradiction. It has proved tenable to differentiate sufficiently clearly between damages available domestically and foreign punitive damages. Although domestic legal developments have led to damages awards which are not strictly limited anymore to purely compensatory purposes and amounts, compensation is still the guiding principle. It is therefore consistent to reject recognition of foreign judgments insofar as they award punitive damages which go above and beyond what is necessary for compensation, as it was established in the 1992 landmark decision by the Federal Court of Justice. Yet, as much as the rigidity of strict compensation has worn off domestically, caveats have been made to mitigate the rigidity of the rejection of foreign punitive damages in material and procedural terms. Consistency regarding punitive damages is nonetheless ensured between how foreign judgments are treated and how foreign law is applied in Germany.

Looking ahead, the German position regarding the recognition of punitive damages judgments is unlikely to change under the 2019 Hague Judgments Convention,[100] which will enter into force for Germany and almost all other EU Member States in September 2023. The US have signed but not yet ratified the Convention, and the UK has not even signed it, so that it will not have any effect for the recognition of Anglo-American judgments in the EU.[101] In any case, the Convention provides that 'recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered'.[102] This would allow German courts to keep rejecting punitive damages judgments insofar as they go above and beyond compensatory awards.

[100] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

[101] On a related note, the 2005 Hague Convention on Choice of Court Agreements has been ratified by both the EU and the UK, but it will rarely apply in the tort context. The US has signed but not ratified it.

[102] Art 10(1) of the 2019 Hague Convention; and similarly Art 11(1) of the 2005 Hague Convention.