

Awarding Punitive Damages in  
International Commercial Arbitrations in  
the Wake of *Mastrobuono v. Shearson  
Lehman Hutton, Inc.*

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I. INTRODUCTION

Arbitration has become the preferred method for resolving disputes between transnational contracting parties.<sup>1</sup> This popularity has led to an increase in the number of cases submitted for arbitration as well as the different types of claims raised.<sup>2</sup> Indeed, today it is not uncommon for arbitrators to decide claims concerning the validity of patents and trademarks,<sup>3</sup>

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1. JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 540 (1978); Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, 49 DISP. RESOL. J. 12, 12 (June 1994); Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 868 (1996).

2. See generally GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 11-16 (1994); W. LAURENCE CRAIG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION § 1.02-.05, at 4-10 (2d ed. 1990); Gerald Asken, *International Arbitration—Its Time Has Arrived!*, 14 CASE W. RES. J. INT'L L. 247 (1982); Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983).

The stakes also have become high in international arbitrations. In 1988, 45% of the cases submitted to the International Chamber of Commerce for arbitration "involved amounts in excess of U.S. \$1 million; 6.6% of these in excess of U.S. \$10 million." W. LAURENCE CRAIG ET AL., *supra*, § 1.03, at 6. See *Kuwait v. American Independence Oil Co.*, 21 I.L.M. 976, 1042 (1982) (awarding \$179,750,764); *American Bell Int'l Inc. v. Islamic Republic of Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 231-32 (1986) (awarding approximately \$78 million); *KCA Drilling Ltd. v. Sonatrach*, International Chamber of Commerce [ICC] No. 5651 (awarding approximately \$46 million), summarized in David J. Branson & Richard E. Wallace, Jr., *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 VA. J. INT'L L. 919, 920 (1988).

3. See 35 U.S.C. § 294 (1994) (providing for arbitrability of patent disputes); see also *Rhone-Poulenc Specialities Chimiques v. SCM Corp.*, 769 F.2d 1569 (Fed. Cir. 1985) (holding patent infringement claim arbitrable); *Saucy Susan Prod., Inc. v. Allied Old English*, 200 F. Supp. 724 (S.D.N.Y. 1961) (ruling trademark infringement and unfair competition issues arbitrable).

antitrust violations,<sup>4</sup> and employment matters.<sup>5</sup> The expansion of the scope of arbitral claims has generated marked debate in the international community over the question of whether arbitral tribunals should have the authority to award punitive damages.<sup>6</sup> While most countries prohibit awards of punitive damages in civil actions, including commercial arbitrations, the trend in the United States has been to allow such awards of relief.<sup>7</sup> This trend is likely to continue as a result of the United States Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>8</sup> in which the Court held that an arbitrator has the authority to award punitive damages where an arbitration clause either explicitly or implicitly gives an arbitrator that authority, or if the clause is otherwise ambiguous on the issue.<sup>9</sup>

The *Mastrobuono* decision, while arising in the context of a domestic securities arbitration, is likely to have a significant impact on international commercial arbitrations. Many transnational contracting parties do not explicitly address in their arbitration agreement the issue of arbitrator-awarded punitive damages.<sup>10</sup> In addition, the rules of many international arbitral institutions are silent on this issue.<sup>11</sup> Under a mechanical application of *Mastrobuono*, when neither the contract nor the applicable arbitral rules prohibit punitive damages, an arbitrator sitting in the United States would have the authority to award such relief, even if the governing law prohibits awards of punitive damages.

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4. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ruling that treble damage claim under U.S. antitrust laws was arbitrable in Japan); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that arbitrator may award treble damages under Racketeer Influenced and Corrupt Organizations Act (RICO)).

5. See, e.g., *Spellman v. Securities, Annuities & Ins. Serv., Inc.*, 8 Cal.App.4th 452 (1992) (holding race discrimination claim arbitrable); *Singer v. Salomon Bros.*, 593 N.Y.S.2d 927 (1992) (ruling wrongful discharge claims arbitrable); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (ruling Title VII sex discrimination claim arbitrable).

6. See generally M. Scott Donahey, *Punitive Damages in International Commercial Arbitration*, 10 J. INT'L ARB. 67 (Sept. 1993); E. Allan Farnsworth, *Punitive Damages in Arbitration*, 7 ARB. INT'L 3 (1991); Clifford Larsen, *Punitive Damages in International Commercial Arbitration: Adapting U.S. Policy to International Norms*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?: THE TWELFTH SOKOL COLLOQUIUM 245, 274 (Richard B. Lillich & Charles N. Brower eds., 1994) [hereinafter TWELFTH SOKOL COLLOQUIUM]; Glower W. Jones, *Punitive Damages as an Arbitration Remedy*, 4 J. INT'L ARB. 35 (June 1987); Int'l. Dispute Resolution Committee, N.Y.S. Bar Assn., *Report on Punitive Damages in International Commercial Arbitration* (1992) [hereinafter *Report on Punitive Damages*]; Andrew B. Koslow, Note, *The Arbitrator's Power to Award Punitive Damages in International Contract Actions*, 19 N.Y.U. J. INT'L L. & POL. 203 (1986); Karen J. Tolson, Comment, *Punitive Damages Awards in International Arbitration: Does the "Safety Valve" of Public Policy Render Them Unenforceable in Foreign States?*, 20 LOY. L.A. L. REV. 455 (1987).

7. See *infra* notes 18-59, and accompanying text; see also Appendix I, III.

8. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995).

9. *Id.* at 1214-18.

10. Farnsworth, *supra* note 6, at 15.

11. See *infra* text accompanying notes 106-117.

Applying the *Mastrobuono* decision to establish a presumption in favor of awarding punitive damages in international commercial arbitrations could be extremely problematic. Most countries do not allow punitive damages and may consider such relief to violate public policy. As a result, arbitrators sitting in these countries may be prohibited from awarding punitive damages even if applicable foreign law would permit such relief. Furthermore, courts in other countries may refuse to enforce foreign awards of punitive damages. Because non-United States tribunals are unlikely to embrace the *Mastrobuono* decision and unlikely to interpret arbitration agreements and arbitral rules as authorizing punitive damages awards, similarly situated parties could receive vastly different results. Diversity on this issue also could result in uncertainty and increased litigation over the interpretation of standard arbitration clauses and arbitral rules on this issue. Mechanically applying *Mastrobuono* to international arbitrations thus could undermine the goals of international commercial arbitration to provide a neutral, efficient, and predictable forum for resolving disputes between transnational contracting parties.

This Article examines the awarding of punitive damages in international commercial arbitrations in light of *Mastrobuono*. It determines that, because special considerations are due in international disputes, it would be inappropriate for the holding in *Mastrobuono* to be applied to international commercial arbitrations in the same manner as to domestic arbitrations. The Article concludes by proposing a framework for analyzing claims for punitive damages in international arbitrations. Under the proposal, if the agreement contains an express provision either including or excluding punitive damages from the issues to be arbitrated, that clause should be enforced unless it violates an applicable mandatory rule of law. If the contract contains no provision on punitive damages and there exists no applicable mandatory rule prohibiting punitive relief, the terms of the contract and relevant trade usage must be examined to determine whether the parties intended the arbitrator to have the authority to award such relief. Finally, even if the parties have agreed to arbitrate claims for punitive damages, the arbitrator may nevertheless decline to grant such relief where to do so would jeopardize the enforceability of the award.

## II. OVERVIEW

### A. *Punitive Damages Defined*

Punitive damages, also called exemplary damages, have been defined as "sums awarded apart from any compensatory or nominal damages, usually . . . because of particularly aggravated misconduct on the part

of the defendant."<sup>12</sup> These damages date back to the Code of Hammurabi, which provided that if a person stole an animal from the temple, that person would have to repay the temple thirtyfold.<sup>13</sup>

Punitive damages were originally levied to punish and deter certain conduct<sup>14</sup> and not to vindicate a party's contractual bargain.<sup>15</sup> As a result, they were awarded only when one party's misconduct was

12. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 204 (1973) [hereinafter DOBBS, HANDBOOK] (citing RESTATEMENT OF TORTS § 908 (1939)). See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275 (1935) ("Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff."). Multiple damages are a form of exemplary relief. These damages are defined by statute and are calculated by multiplying the amount of the compensatory damages by a designated number. Unlike traditional punitive damages, multiple damages have a fixed limit and do not hinge on the defendant's wealth. See 1 DAN B. DOBBS, LAW OF REMEDIES 453-54 (2d ed. 1993) [hereinafter DOBBS, REMEDIES]. The most common form of multiple damages is treble damages. While multiple damages serve to punish and deter wrongdoing, in some cases they may be designed primarily to compensate the injured party. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-36 (1985). Some courts have allowed recovery of both multiple damages and common law punitive damages. Compare *Com-Tech Assoc. v. Computer Assoc. Int'l, Inc.*, 753 F. Supp. 1078 (E.D.N.Y. 1990), *aff'd*, 938 F.2d 1574 (1991) (holding that a claim for punitive damages could be asserted in civil action under RICO, even though treble damages are available) with *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232 (D. Del. 1992) (holding punitive damages are not proper under RICO, since statute already provides treble damages).

13. CODE OF HAMMURABI § 8, reprinted in 1 ALBERT KOCOUREK & JOHN WIGORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 391 (1915). Examples of exemplary damages also can be found in the Bible. See *Exodus* 22:1, 4, 9 (King James). For a discussion of the history of punitive damages, see 1 JAMES D. GHIARDI ET AL., PUNITIVE DAMAGES LAW AND PRACTICE § 1, at 1-8 (1996). See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (providing history of punitive damages).

14. See *Smith v. Wade*, 461 U.S. 30, 54 (1983) ("Punitive damages are awarded . . . 'to punish [the defendant] for his outrageous conduct and to deter others like him from similar conduct in the future.'" (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)); see also 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1), at 28 (1995) ("The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.").

15. Marilyn B. Cane, *Punitive Damages in Securities Arbitration: The Interplay of State and Federal Law (Or a Smaller Bite of the Big Apple)*, 1993 J. DISP. RESOL. 153, 154 n.5 (1993) ("Until fairly recently, it was a common sentiment in the courts that 'punitive damages are designed to serve the societal functions of punishment and deterrence; unlike contract remedies, they are not designed to vindicate the parties contractual bargain.'" (citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1389 (11th Cir. 1988) (Tjoflat, J., concurring)). See also Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 5-7 (1980) (citing four purposes for awarding punitive damages: (1) revenge, (2) public justice, (3) compensation, and (4) punishment and deterrence); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 647-50 (1980) (stating that punitive damages are to "[express] society's disapproval of outrageous conduct," "[deter] such acts in the future," and "[provide] incentives for private civil enforcement"); Charles T. McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. REV. 129, 131 (1929-30) (explaining that punitive damages allow "oppressive conduct . . . which is theoretically criminally punishable, but . . . goes unnoticed by prosecutors occupied with more serious crimes" to be punished through civil punitive action, and that punitive damages remedy "one of the glaring defects in our system, which is the denial of compensation for actual expenses of litigation" by providing reimbursement to successful plaintiffs).

willful or malicious.<sup>16</sup> Over the years, the purposes for awarding punitive damages have expanded to include four additional functions: deterring others from committing the same act, discouraging the injured party from engaging in self-help remedies, compensating victims for otherwise uncompensable losses, and reimbursing the plaintiff for litigation expenses which are not otherwise recoverable.<sup>17</sup>

## B. Availability of Punitive Damages

### 1. Common Law Systems

Punitive damages have been an institution of the common law for over 200 years.<sup>18</sup> In England, Canada, and New Zealand, for example, exemplary relief is typically awarded in tort actions—such as defamation,<sup>19</sup>

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16. DOBBS, HANDBOOK, *supra* note 12, at 205 (noting that “the defendant must be ‘malicious,’ ‘reckless,’ ‘oppressive,’ ‘evil,’ ‘wicked,’ or guilty of ‘wanton misconduct,’ or ‘morally culpable’ conduct”); MCCORMICK, *supra* note 12, at 280 (“To subject a wrongdoer to liability for exemplary damages, it must be found that he acted with actual malice, ill will, or conscious disregard of consequences to others.”); I GHIARDI ET AL., *supra* note 13, § 1.02, at 3 (stating that punitive damages may be awarded when “the injury was attended with malice, oppression, or gross fraud”); Mallor & Roberts, *supra* note 15, at 648 (explaining that exemplary damages are appropriate “[w]hen the defendant’s conduct can be characterized as malicious, oppressive, or otherwise outrageous”); Jones, *supra* note 6, at 37 (“Where the wrong done was aggravated by violence, oppression, malice, fraud or wanton and wicked conduct, punitive damages . . . may be awarded in many jurisdictions.”).

17. See Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3–9 (1982). Many commentators have been critical of punitive damages. Opponents of such relief argue that punitive damages are fundamentally unfair because they constitute a windfall to the plaintiff. In addition, they argue that the punitive damages award may far exceed the maximum criminal penalty for the same behavior. They also claim that, in certain situations, punitive damages subject the defendant to double jeopardy or violate the defendant’s right to due process. See generally Bob Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1976); James D. Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972); John Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. U. L. REV. 205 (1988); John C. Jefferies, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 147–58 (1986); William E. Mooney, *A Proposal to Abolish Exemplary, Punitive and Vindictive Damages*, 1961 INS. L.J. 254; James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984).

18. See generally HARVEY MCGREGOR, MCGREGOR ON DAMAGES §§ 309–311, at 226–27 (1980); F.H. LAWSON & HARVEY TEFF, REMEDIES OF ENGLISH LAW 133 (1980); HARRY STREET, PRINCIPLES OF THE LAW OF DAMAGES 28–32 (1962); Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of Rationale*, 40 ALA. L. REV. 741, 745–50 (1989); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518–20 (1957); 12 HALSBURY’S LAWS OF ENGLAND ¶ 978–1009 (4th ed. 1975); I GHIARDI ET AL., *supra* note 13, § 1.01–.03, at 1–9; I SCHLUETER & REDDEN, *supra* note 14, § 22.0–.1(A), at 633–37. The following common law countries permit awards of punitive damages: Australia, Canada, England, New Zealand, Northern Ireland, the Republic of Ireland, and the United States. See Appendix III.

19. See, e.g., *Cassell & Co. v. Broome*, 1 All E.R. 801 (H.L. 1972) (upholding award of exemplary damages in defamation action); *Goodman v. Kidd* [1986] N.W.T.R. 94 (Can.) (holding that exemplary damages were properly awarded because defendant’s libel was clearly vindictive, insolent and high-handed); *Kolewaski v. Island Properties, Ltd.* [1983] 56 N.S.R.2d 475 (Can.) (awarding Canadian \$45,000 in exemplary damages for “high-handed, reckless and persistent”

assault,<sup>20</sup> and false imprisonment<sup>21</sup>—but only where the defendant has engaged in exceptionally objectionable conduct.<sup>22</sup> They are rarely awarded in breach of contract cases.<sup>23</sup>

The most widespread use of punitive damages is in the United States, where the award of exemplary relief is governed both by state and federal law.<sup>24</sup> Most states allow punitive damages,<sup>25</sup> although the circumstances under which such relief may be awarded vary greatly.<sup>26</sup>

conduct); Taylor v. Beere [1982] 1 N.Z.L.R. 81 (holding exemplary damages are recoverable in New Zealand in defamation actions under certain circumstances).

20. See, e.g., Scullion v. Chief Constable, Royal Ulster Constabulary ("RUC"), [Jun. 10, 1988] (Q.B.) (LEXIS, NI Law Library, Cases File) (awarding exemplary damages to man beaten by RUC); Moore v. Slater, [1979] 101 D.L.R.3d 176 (B.C.S.C.) (ruling punitive damages were appropriate because defendant's conduct was clearly "high-handed and malicious"); Karpow v. Shave, [1975] 2 W.W.R. 159 (Alta. S.C.T.D.) (upholding award of punitive damages for assault on ice-hockey player); Kingsmith v. Denton, [1977] 3 A.R. 315 (S.C.T.D.) (awarding Canadian \$1,500 in punitive damages because defendant's conduct was "reprehensible and offensive to the ordinary standards of morality").

21. See, e.g., Lackerteen v. Jones, [1988] 92 F.L.R. 6 (awarding Australian \$15,000 in exemplary damages for, *inter alia*, false imprisonment); Lang v. Burch, [1982] 140 D.L.R.3d 325 (Sask.Ct.App.) (awarding Canadian \$1,000 in punitive damages in false imprisonment claim); Dalsin v. T. Eaton Co. of Canada, [1975] 63 D.L.R.3d 565 (Alta. Dist. Ct.) (awarding exemplary damages for defamation, battery and false imprisonment of shoppers); Hayward v. F.W. Woolworth Co., [1979] 98 D.L.R.3d 345 (Nfld. S.C.T.D.) (awarding Can. \$1,000 in exemplary damages for false imprisonment).

22. See, e.g., Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 1104-05 (Can.) (ruling that punitive damages may be awarded when defendant's conduct has been harsh, vindictive, reprehensible or malicious); Rookes v. Barnard, [1964] All E.R. 367 (H.L.) (stating *inter alia* that punitive damages are appropriate in cases of "oppressive, arbitrary or unconstitutional action by servants of the government[.]" and where the defendant, "with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk"); Taylor, 1 N.Z.L.R. at 93 (noting exemplary damages may be awarded only when conduct is wanton, fraudulent, malicious, violent, or insolent (citing MAYNE & MCGREGOR ON DAMAGES 196 (12th ed. 1961)); see also F.A. TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 243 (1985) (stating that exemplary damages are awarded when defendant's conduct is in "contumelious disregard of the plaintiff's rights"); STEPHEN M.D. TODD, THE LAW OF TORTS IN NEW ZEALAND 872 (1991) ("Exemplary damages have been awarded in a number of cases where the conduct has been regarded as outrageous.").

23. See Baltic Shipping Co. v. Dillon, [1996] 176 C.L.R. 344 (stating that punitive damages for breach of contract generally are not available); A v. B, [1972] 1 N.Z.L.R. 673 (holding that exemplary damages could not be awarded for breach of contract to marry because the "object is compensation; not retribution"); Fouillard Implement Exch. Ltd. v. Kello-Bilt Indus. Ltd., [1985] 6 W.W.R. 548, *aff'd*, [1986] 2 W.W.R. 93 (Man.Ct.App.) (stating that punitive damages are not recoverable for breach of contract).

24. See generally 1 GHIARDI ET AL., *supra* note 13, at § 4.01.

25. The following states permit awards of punitive damages: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming. See Appendix III.

26. See generally 1 GHIARDI ET AL., *supra* note 13, at § 5.15-31. A handful of states either prohibit punitive damages altogether or severely restrict their use. For example, Nebraska does not allow for the awarding of punitive damages. See Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975). Louisiana, Massachusetts and Washington only allow punitive damages when such

Punitive damages have been permitted in actions involving torts, contracts, property, admiralty, employment, and family law.<sup>27</sup>

On the federal level, a number of statutes explicitly authorize the award of punitive relief for specific violations.<sup>28</sup> The Fair Credit Reporting Act, for example, provides that a court may award punitive damages when a consumer reporting agency willfully fails to comply with the requirements imposed by the Act.<sup>29</sup> In addition, various other statutes, such as the Clayton Act,<sup>30</sup> the Racketeer Influenced and Corrupt Organization Act ("RICO"),<sup>31</sup> and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),<sup>32</sup> provide for the recovery of treble damages.<sup>33</sup>

damages are expressly authorized by statute. See *McCoy v. Arkansas Natural Gas Co.*, 143 So. 383, 385-86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932); *Karavokiros v. Indiana Motor Bus Co.*, 524 F. Supp. 385, 387 (E.D. La. 1981); *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1284 (Mass. 1984); *Maki v. Aluminum Building Products*, 436 P.2d 186, 187 (Wash. 1968).

27. See 1 SCHLUETER & REDDEN, *supra* note 14, at 369-742 (discussing punitive damages in contract, property and tort actions); 2 SCHLUETER & REDDEN, *supra* note 14, at 1-184 (discussing punitive damages in actions involving admiralty, employment, and family law).

28. See Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1994) ("Any creditor . . . who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000 . . ."); Fair Housing Act, 42 U.S.C. § 3613(c)(1) (1994) ("[t]he court may award to the plaintiff actual and punitive damages . . ."). Some courts have implied a remedy of punitive damages for violations of federal statutes. See *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 581-82 (5th Cir. 1982) (holding treble damages are available if plaintiff can prove violation of the antitrust laws, cognizable injury caused by violation, and approximate amount of damage caused by violation), *cert. denied*, 459 U.S. 908 (1982); *Riley v. Empire Airlines*, 823 F. Supp. 1016, 1023 (N.D.N.Y. 1993) (permitting punitive damages in action for wrongful discharge under Railway Labor Act if plaintiff shows a pattern of harassment by the employer against union organizers, including deliberate and malicious conduct by employer intended to curb union activity); *Woods v. New Jersey Dep't of Educ.*, 796 F. Supp. 767, 776 (D.N.J. 1992) (ruling that language in Individual with Disabilities Education Act permitting court to "grant such relief as [it] determines appropriate" authorizes claim for punitive damages in suit alleging that school board had wrongfully denied residential placement of disabled student). Conversely, a number of federal statutes, such as the Foreign Sovereign Immunities Act and the Federal Tort Claims Act, expressly preclude awards of punitive damages. See Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) ("The United States shall be liable, respecting the provisions of this title to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable . . . for punitive damages"); Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (1994) (stating that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages").

29. See Fair Credit Reporting Act, 15 U.S.C. § 1681n (1994).

30. See § 4, 15 U.S.C. § 15(a) (1994) (providing for treble damages for injury to one's business or property by reason of violation of antitrust laws).

31. See 18 U.S.C. § 1964(c) (1994) (awarding treble damages for injury to one's business or property resulting from RICO violations).

32. See 42 U.S.C. § 9607(c)(3) (1994) (imposing treble damages as a minimum for failing to provide proper removal or remedial action upon release or threat of release of hazardous substance).

33. See *supra* note 12 (discussing treble and multiple damages).

## 2. Civil Law Systems

Civil law legal systems generally limit recovery of damages in private actions to an amount that restores a party to its pre-injury condition.<sup>34</sup> Accordingly, punitive relief is not available.

In France, Germany, and Switzerland, for example, damages for tort and contract claims are limited to restoring the parties to the position they would have been in had the damaging event not occurred, or placing the parties into the position they would have been in had the contract been properly performed.<sup>35</sup> These countries allow recovery for non-pecuniary loss, which includes damages for pain and suffering, emotional distress, and moral harm, as well as reimbursement for legal fees.<sup>36</sup> Such non-pecuniary damages, however, are not considered to be punitive in nature, because these damages are not imposed to deter or punish the wrongdoer, but rather to fully compensate the victim.<sup>37</sup> In most civil law countries, sanctions that are penal in nature may be awarded only in criminal proceedings.<sup>38</sup>

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34. The following civil law countries permit recovery of only compensatory damages in private actions: Argentina, Belgium, Bolivia, Costa Rica, Czech Republic, Ecuador, Egypt, Finland, France, Guatemala, Germany, Greece, Libya, Honduras, Iran, Iraq, Italy, Japan, Korea, Mexico, Netherlands, Panama, Russia, Spain, Switzerland, Taiwan, and Venezuela. See Appendix I. A few civil law countries, such as Norway and Brazil, allow punitive damages. See Appendix II. Even where permitted, punitive relief usually is available only in very limited circumstances, such as cases involving invasion of privacy or false imprisonment. See Introductory Law to the Penal Code § 19, summarized in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 10, at 93 (1986) [hereinafter INTERNATIONAL ENCYCLOPEDIA] (noting that in Norway punitive damages are limited to claims involving infringement of liberty, violation of sexual integrity and honor, or invasion of privacy); Código Civil [C.C.] art. 1547 (Braz.) (Joseph Wheless trans., 1920) (providing that "indemnization for libel or slander . . . shall consist in the reparation of the injury," and if material damage cannot be proved then defendant "shall pay . . . double the fine in the maximum grade of the respective criminal penalty"); *Id.* art. 1550 (indemnifying offense to personal liberty "shall consist in the payment of the losses and damages suffered . . . and in a sum calculated in . . . Art. 1547").

35. Code civil [C. CIV.] art. 1382 (Fr.) (J.H. Crabb trans., 1995); Bürgerliches Gesetzbuch [BGB] art. 249 (Ger.) (Simon L. Goren trans., 1994); Schweizerisches Obligationenrecht [OR] art. 48 (Switz.) (Simon L. Goren trans., 1987).

36. See MAURICE S. AMOS & FREDERICK WALTON, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 209 (F.H. Lawson et al. eds., 3d ed. 1967) (discussing concept of awarding moral damages in France for mental suffering, invasion of privacy, pain and suffering and other damage that cannot be measured monetarily); 11 INTERNATIONAL ENCYCLOPEDIA, *supra* note 34, ch. 10, at 96 (explaining that concept of moral harm is widely accepted in French law); BGB, *supra* note 35, at art. 847 (Ger.) (providing that "the injured person may also demand fair compensation in money for damage which is not damage to property"); Carl Burckhardt, *Die Revision des schweizerischen Obligationenrechts in Hinsicht auf das Schadensersatzrecht*, summarized in 11 INTERNATIONAL ENCYCLOPEDIA, *supra* note 34, ch. 8, at 9 (distinguishing non-pecuniary damages from punitive damages, in that non-pecuniary damages are directed at injured party, whereas punitive damages are directed at punishing wrongdoer).

37. See 11 INTERNATIONAL ENCYCLOPEDIA, *supra* note 34, ch. 8, at 10.

38. Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 325-26 (1989). See Wolfgang Kühn, *RICO Claims in International Arbitration and Their Recognition in Germany*, 11 J. INT'L ARB. 37, 42 (June



There appears to be no definitive historical reason why punitive damages were never allowed in civil law countries while they proliferated in common law countries. The difference can perhaps best be explained by examining how juries in common law countries and judges in civil law countries award damages.

Originally, in England, juries consisting of local citizens familiar with the controversy determined both the outcome of the trial and the amount of damages awarded.<sup>39</sup> These juries were more likely than judges to award injured parties for intangible harms such as hurt feelings, wounded dignity, or insult when there were aggravating circumstances.<sup>40</sup> This practice also occasionally led to damage awards that exceeded the actual amount of harm suffered.<sup>41</sup> Although non-pecuniary forms of loss such as hurt feelings, wounded dignity, or insult were not compensable under common law, English courts were reluctant to overturn these awards.<sup>42</sup> These courts viewed the jury as being more familiar with the controversy and, therefore, in a better position than the judge to determine the amount of damages.<sup>43</sup> Over the years, this practice became so well entrenched that punitive damages became a well established remedy in common law jurisprudence.<sup>44</sup>

By contrast, in civil law countries, judges, not juries, decide controversies. Traditionally, the former have been bound to cite a statutory provision as the basis of their decision.<sup>45</sup> Indeed, in civil law systems, the primary source of law is codified legislation,<sup>46</sup> which does not allow awards of exemplary relief. Because judges in civil law countries were never given broad powers to fashion remedies not provided for by statute, punitive damages were never awarded.

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1994) (noting that penal sanctions are reserved for criminal courts in Germany and that State, not injured party, receives fine which wrongdoer pays); 11 INTERNATIONAL ENCYCLOPEDIA, *supra* note 34, ch. 8, at 9 (providing that punishment must take place exclusively in context of criminal law).

39. See 1 GHIARDI ET AL., *supra* note 13, § 1.01; 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 349 (9th ed. 1912).

40. See 1 SCHLUETER & REDDEN, *supra* note 14, § 1.3(D).

41. See Belli, *supra* note 15, at 3.

42. See 1 SCHLUETER & REDDEN, *supra* note 14, § 1.3(D).

43. See THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 126-35 (5th ed. 1956); 1 GHIARDI ET AL., *supra* note 13, § 1.02.

44. Cf. 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 347, at 687 (9th ed. 1912) (attributing the rise of exemplary damages as the product of juries departing from "the strict line of compensation").

45. See JOHN MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985).

46. See ARTHUR VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM 1139-41 (2d ed. 1977).

### C. Arbitral Awards of Punitive Damages

Countries that permit awards of punitive damages are divided over whether they may be awarded only by courts or whether they may also be awarded by private parties, such as arbitrators.<sup>47</sup> In the United States, there are three different views on whether an arbitrator has the authority to award punitive damages.

The first view is that arbitrators do not have the power to award punitive damages.<sup>48</sup> This view has become known as the "Garrity rule" after being first set forth in the decision of the New York Court of Appeals in *Garrity v. Lyle Stuart, Inc.*<sup>49</sup> The rationale is that punitive

47. Compare *Ontario Hydro v. Canadian Union of Public Employees, Local 1000*, [1990] 16 L.A.C.4th 264 (Ont.) (holding that labor arbitration board may award, in appropriate circumstances, either aggravated or punitive damages); *Berryland Foods v. United Foods & Commercial Workers, Local 430P*, [1987] 29 L.A.C.3d 311 (B.C.) (stating that arbitration board has jurisdiction to award punitive damages when facts show deliberate breach of collective agreement by employer); *Reliable Printing Ltd. v. G.C.I.U., Local 255-C*, [1994] 39 L.A.C.4th 212 (Alta.) (stating that arbitration board has jurisdiction to award severance pay in excess of employment standards minimum) *ujib Rexwood Prod. Ltd.*, [1981] 3 L.A.C.3d 83, 88 (Ont.) (stating "board of arbitration established by a collective agreement does not have inherent authority to award punitive damages"); *Kellogg Salada Canada, Inc.*, [1981] 2 L.A.C.3d 19 (Ont.) (stating that arbitration board has no authority to award punitive damages). See DONALD J.M. BROWN & DAVID M. BEATTY, *CANADIAN LABOUR ARBITRATION* § 2:1410 (2d ed. 1984) (providing that, absent language in agreement, arbitrators have used the same common law principles applied in breach of contract cases, and thus "arbitrators have generally held that they do not have the authority to assess punitive damages"); Larsen, *supra* note 6, at 263 (noting that English law does not recognize "the power of arbitrators to award punitive damages").

48. See *Shahmirzadi v. Smith Barney, Harris Upham & Co.*, 636 F. Supp. 49, 56 (D.D.C. 1985); *McLeroy v. Waller*, 731 S.W.2d 789, 792 (Ark. Ct. App. 1987); *Shaw v. Kuhnel & Assoc., Inc.*, 698 P.2d 880, 882 (N.M. 1985); *United States Fidelity & Guar. Co. v. DeFluiter*, 456 N.E.2d 429, 432 (Ind. Ct. App. 1983); *School City of East Chicago, Ind. v. East Chicago Fed'n of Teachers*, 422 N.E.2d 656, 667 (Ind. Ct. App. 1981).

49. 353 N.E.2d 793 (N.Y. 1976). In *Garrity*, an author sought to confirm an arbitration award of \$45,000 in compensatory damages and \$7,500 in punitive damages against a publishing company for gross underpayment of royalties and harassment. *Id.* at 794. New York Court of Appeals held that "[a]n arbitrator has no power to award punitive damages, even if agreed upon by the parties." *Id.* The court stated that "the usefulness of arbitration would be destroyed" if arbitrators were allowed to award punitive damages, as well as the party who selects the arbitrator would bias the arbitrator's findings. *Id.* at 796. Further, the court stated that granting the power to award punitive damages to arbitrators would make the arbitrator's scope of determination "both unpredictable and uncontrollable," and arbitration "would become a trap for the unwary." *Id.* The court held that the "freedom of contract does not embrace the freedom to punish, even by contract." *Id.* at 797. Instead, "punitive damages is a sanction reserved to the State." *Id.* at 794. For a further discussion of the *Garrity* rule, see Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 62-65 (1994) [hereinafter Davis, *Proposed Framework*]; Stephen P. Bedell, *Punitive Damages in Arbitration*, 21 J. MARSHALL L. REV. 21, 33 (1987); G. Richard Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorney's Fees*, 72 MASS. L. REV. 26, 29 (1987); Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953, 959-63 (1986); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 545 n.63 (1994); Richard P. Hackett, Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272, 295-99 (1978); Rachael Wonsverver, Note, *Arbitration: The Award*

damages is a socially exemplary remedy that can be imposed *only* by a judicial authority that is an instrumentality of the state.<sup>50</sup>

Under the second view, arbitrators may not award punitive damages absent an express provision in the arbitration agreement authorizing this relief.<sup>51</sup> Courts following this view argue that, because punitive damages are an extraordinary remedy, the authority to award such damages cannot be implied from broad language providing for the arbitration of all disputes.<sup>52</sup> If the parties expressly provide for exemplary relief in the arbitration agreement, these courts will give effect to the intent of the parties and permit the award.<sup>53</sup>

The third view provides that arbitrators may award punitive damages unless the parties expressly prohibit the award of this relief in the arbitration agreement.<sup>54</sup> Courts adopting this view reject the premise that

*of Punitive Damages as a Public Policy Question: Garrity v. Lyle Stuart, Inc.*, 43 BROOK. L. REV. 546, 550 (1976).

50. 353 N.E.2d at 794. Other reasons for prohibiting arbitral awards of punitive damages include: (1) "since most arbitration awards go unpublished, the deterrent effect is practically nonexistent," (2) commercial arbitration lacks the safeguards of litigation, such as appellate review and, as a result, such awards would be fundamentally unfair, and (3) exemplary relief constitutes a windfall for the prevailing party. Aaron J. Polack, *Punitive Damages in Commercial Arbitration—Still an Issue After All These Years*, 10 OHIO ST. J. ON DISP. RESOL. 41, 54–55 (1994). See Michael S. Wilson, Note, *Punitive Damages in the Arbitration of Securities Churning Cases*, 11 REV. LITIG. 137, 148 (Winter 1991) ("By removing suits from the courts and resolving them in arbitration . . . the community's interest is no longer represented in the suit, and the court no longer controls the punitive sanction." (citing discussion in *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 795 (NY 1976)); see also Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damages Sanction*, 45 DEPAUL L. REV. 341, 364–76 (1996) (discussing necessity of publication of punitive damages awards for such damages to have greatest effect in deterring unwanted behavior); Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono*, 144 U. PA. L. REV. 197, 220 (1995) ("Publicizing a punitive award is crucial to its function as a general deterrent.").

51. See *Baltimore Regional Joint Bd., Amalgamated Clothing Workers of America v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979); *International Ass'n of Heat Workers Local 34 v. General Pipe Covering, Inc.*, 792 F.2d 96, 100 (8th Cir. 1986); *Howard P. Foley Co. v. Int'l Bhd. of Elec. Workers Local 639*, 789 F.2d 1421, 1424 (9th Cir. 1986); *Westmoreland Coal Co. v. United Mine Workers Dist. 28*, 550 F. Supp. 1044, 1048 (W.D. Va. 1982); *International Union of Operating Engineers Local No. 450 v. Mid-Valley, Inc.*, 347 F. Supp. 1104, 1109 (S.D. Tex. 1972); *Complete Interiors, Inc. v. Behan*, 558 So.2d 48, 51 (Fla. Dist. Ct. App. 1990); *Belko v. AVX Corp.*, 251 Cal. Rptr. 557, 563 (Cal. App. 1988); *Kennewick Educ. Ass'n v. Kennewick Sch. Dist.*, 666 P.2d 928, 930 (Wash. Ct. App. 1983).

52. See *Belko*, 251 Cal. Rptr. at 561–62; *International Union of Operating Engineers, Local No. 450*, 347 F. Supp. at 1109; *College Hall Fashions v. Philadelphia Joint Bd., Amalgamated Clothing Workers*, 408 F. Supp. 722, 727–28 (E.D. Pa. 1976).

53. See *Belko*, 251 Cal. Rptr. at 561–62; *International Union of Operating Engineers, Local No. 450*, 347 F. Supp. at 1109.

54. See *Bonar v. Dean Witter Reynolds Inc.*, 835 F.2d 1378, 1386–87 (11th Cir. 1988); *Raytheon Co. v. Automated Business Sys.*, 882 F.2d 6, 12 (1st Cir. 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063 (9th Cir. 1991); *Lee v. Chica*, 983 F.2d 883, 887–88 (8th Cir.), cert. denied, 114 S. Ct. 287 (1993); *Willoughby Roofing and Supply Co. v. Kajima Int'l*, 598 F. Supp. 353, 358–65 (N.D. Ala. 1984), aff'd per curiam, 776 F.2d 269 (11th Cir. 1985); *Ehrlich v. A.G. Edwards & Sons, Inc.*, 675 F. Supp. 559, 563–65 (D.S.D. 1987); *Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821, 823–24 (M.D.N.C. 1983); *Rogers Builders*,

an arbitrator has no power to award punitive damages; they presume that the scope of arbitral issues includes claims for exemplary relief.<sup>55</sup>

A federal statute has been interpreted by the Supreme Court as to provide arbitrators with the power to award punitive damages if the arbitration agreement authorizes such an award.<sup>56</sup> The controlling legislation is the Federal Arbitration Act ("FAA")<sup>57</sup> which applies to actions involving interstate commerce and international arbitrations.<sup>58</sup>

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*Inc. v. McQueen*, 331 S.E.2d 726, 731-32 (N.C. Ct. App. 1985); *Baker v. Sadick*, 162 Cal. App. 3d 618, 631 (4th Dist. 1984); *Grissom v. Greener & Summer Constr., Inc.*, 676 S.W.2d 709, 711 (Tex. App. 1984); *Bishop v. Holy Cross Hosp.*, 410 A.2d 630 (Md. Ct. Spec. App. 1980) (involving medical malpractice arbitration).

55. See Ehrich, 675 F. Supp. at 563-65; Willoughby Roofing and Supply Co., 598 F. Supp. at 358; Willis, 569 F. Supp. at 823-24; *Rogers Builders, Inc.*, 331 S.E.2d at 731-32. Arguments favoring arbitrator-awarded punitive damages include:

(1) Arbitrators are better equipped than judges to determine what behavior is unacceptable in a specific context, and to determine the amount needed to punish and deter the unacceptable behavior. See Willoughby Roofing & Supply Co., 598 F. Supp. at 363.

(2) Denying arbitrators the power to award punitive damages would undermine the value and sufficiency of the arbitral process as a method of dispute resolution. *Id.*

(3) Prohibiting arbitrators from awarding punitive damages would totally frustrate the public policies and purposes served by punitive damages. *Id.*

(4) Arbitrators must be given a great deal of flexibility in fashioning relief. *Id.* at 361.

(5) Preventing arbitrators from awarding punitive damages is just a manifestation of the historical mistrust of arbitration, a view that has been soundly rejected. See Farnsworth, *supra* note 6, at 10.

56. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1215-19 (1995). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Supreme Court indirectly upheld the authority of arbitrators to award treble damages in an international commercial arbitration. There, Mitsubishi, an automobile manufacturer, and Soler, an automobile distributor, entered into a distribution agreement which contained a provision stating, "[a]ll disputes . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.* at 617. A dispute arose between the parties and Mitsubishi filed an action to compel Soler to submit to arbitration of various breach of contract claims. *Id.* at 618-19. Soler argued that arbitration was inappropriate because its own counterclaims alleging antitrust violations, which would incur a treble damage remedy, were not arbitrable. *Id.* at 620, 628. The Supreme Court disagreed, holding that the antitrust claims could be arbitrated by a foreign arbitral tribunal. *Id.* at 639-40. The Court explained:

There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intent of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.

*Id.* at 636-37. For further discussion of *Mitsubishi*, see Hans Smit, *Mitsubishi: It is Not What it Seems To Be*, 4 J. INT'L ARB. 7 (Sept. 1987); William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629 (1986); Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT'L L. 583 (1986); Andreas F. Lowenfeld, *The Mitsubishi Case: Another View*, 2 ARB. INT'L 178 (1986).

57. 9 U.S.C. §§ 1-3 (1994).

58. In general, domestic disputes are governed by chapter 1 of the FAA, 9 U.S.C. § 1, and

A conflict between federal and state law arises when a contract governed by the FAA contains both an arbitration clause broad enough to permit punitive damages and a choice-of-law clause designating the application of state law in a state that prohibits arbitrators from awarding exemplary relief. The United States Supreme Court ultimately resolved this issue in favor of the arbitration clause in *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>59</sup>

### III. MASTROBUONO V. SHEARSON LEHMAN HUTTON, INC.

The issue before the Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>60</sup> was whether "a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper."<sup>61</sup> Antonio and Diana Mastrobuono had opened a securities trading account with Shearson Lehman Hutton, Inc., by executing Shearson's standard-form securities trading agreement.<sup>62</sup> The contract contained (1) a clause providing that the agreement would be governed by New York law and (2) a provision stating that any disputes between the parties were to be resolved through arbitration in accordance with rules of the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc. ("NYSE"), or the American Stock Exchange, Inc. ("AMEX").<sup>63</sup> Several years later, the Mastrobuonos closed the account.<sup>64</sup> They later filed suit against Shearson in the United

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non-domestic disputes are governed by chapter 2, 9 U.S.C. § 202. Additionally, the New York Convention, as ratified by the United States, is incorporated into the FAA via chapter 2, 9 U.S.C. § 201. Chapter 2 also incorporates chapter 1 to the extent that it does not conflict with either chapter 2 or the New York Convention. 9 U.S.C. § 208. None of these provisions expressly addresses the issue of arbitrator awarded punitive damages.

59. 115 S. Ct. at 1215-19.

60. 115 S. Ct. 1212 (1995).

61. *Id.* at 1215.

62. *Id.*

63. *Id.* at 1217 & n.2. The contract provided:

This agreement shall inure to the benefit of your [Shearson's] successors and assigns[,] shall be binding on the undersigned, my [petitioners'] heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, to transactions with you, your officers, directors, agents and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. This agreement to arbitrate does not apply to future disputes arising under certain of the federal securities laws to the extent it has been determined as a matter of law that I cannot be compelled to arbitrate such claims.

App. to Pet. for Cert. at 44.

64. 115 S. Ct. at 1214.

States District Court for the Northern District of Illinois, alleging that the securities company mishandled their account.<sup>65</sup> The district court ordered the matter to be submitted to arbitration pursuant to the NASD Code of Arbitration Procedure.<sup>66</sup>

A three-member arbitration panel awarded the Mastrobuonos \$159,327 in compensatory damages based on their claims for unauthorized trading, churning, and margin exposure,<sup>67</sup> and \$400,000 in punitive damages.<sup>68</sup> Shearson paid the compensatory portion of the award, but sought to vacate the punitive damage award in federal district court, arguing that the arbitrators had no authority to award punitive damages under the *Garrity* rule.<sup>69</sup>

The district court and Seventh Circuit agreed with Shearson, ruling that the New York choice-of-law clause precluded the arbitrators from awarding punitive damages.<sup>70</sup> The Supreme Court reversed.<sup>71</sup>

The Supreme Court initially noted that the FAA ensures "that private agreements to arbitrate are enforced according to their terms"<sup>72</sup> and withdraws "the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."<sup>73</sup> Accordingly, if contracting parties agree to give arbitrators the authority to award punitive damages, that provision would be enforced even if a rule of state law would otherwise exclude such claims from arbitration.<sup>74</sup> The Court added that "in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule."<sup>75</sup> It therefore looked to the contract between the Mastrobuonos and Shearson to determine whether the parties intended to

65. *Id.*

66. *Id.* at 1214-15.

67. 20 F.3d 713, 715 (7th Cir. 1994), *rev'd*, 115 S. Ct. 1212 (1995).

68. Mastrobuono, 115 S. Ct. at 1215.

69. *Id.* See *supra* note 49 (discussing the *Garrity* rule).

70. 115 S. Ct. at 1215 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994)).

71. The Court "granted certiorari . . . because the Courts of Appeals ha[d] expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper." 115 S. Ct. at 1215.

72. *Id.* at 1214 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

73. 115 S. Ct. at 1216 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

74. 115 S. Ct. at 1215-16. Concomitantly, the parties could "limit by contract the issues which they will arbitrate . . ." *Id.* at 1216 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

75. 115 S. Ct. at 1217. See Allied-Bruce Terminix Cos., Inc. v. Dobson, 115 S. Ct. 834, 838-39 (1995) (enforcing pre-dispute arbitration agreement governed by Alabama law, notwithstanding Alabama statute providing that arbitration agreements are unenforceable); Perry v. Thomas, 482 U.S. 483, 491 (1987) (FAA pre-empted California state labor statute requiring judicial resolution of wage collection actions making such claims arbitrable); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (ruling that the FAA "declared a national policy favoring arbitration" and "withdrew [from the states] the power . . . to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

include claims for punitive damages within the issues to be arbitrated.<sup>76</sup>

The arbitration agreement did not explicitly address the issue of punitive damages.<sup>77</sup> The Court thus turned to the New York choice-of-law clause and the arbitration provision to determine the intent of the parties on this issue.<sup>78</sup> With respect to the New York choice-of-law clause, the Court stated that on its face the provision did not evince an intent to exclude punitive damage claims.<sup>79</sup> Rather, the Court determined that the provision was ambiguous; it could be read to include all New York law or only New York substantive law and not court decisions which allocate power between courts and arbitrators.<sup>80</sup> By contrast, the Court saw the arbitration clause, which provided that any controversy shall be settled by arbitration according to rules that gave the arbitrator the authority to "award damages and other relief,"<sup>81</sup> as broad enough to allow for an award of punitive damages.<sup>82</sup>

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76. 115 S. Ct. at 1216–17.

77. *Id.* at 1217.

78. *Id.* at 1216. The Court also noted that when the contract is silent or does not contain a choice-of-law clause, an arbitrator will have the authority to award punitive damages because, "in such event, there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims" even if New York law were deemed to apply under a conflicts of law analysis. *Id.* at 1217. As a result, "punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA" would give effect to the arbitration agreement which contemplates punitive damages by "pre-empt[ing] the *Garrity* rule." *Id.* Thus, if the governing law is not determined expressly by the parties through a choice-of-law clause, but rather by ordinary conflict-of-laws rules, an arbitrator will have the authority to award punitive damages notwithstanding any state rule to the contrary.

79. *Id.* at 1217.

80. *Id.*

81. *Id.* at 1221. NASD Code of Arbitration Procedure § 41(e) (1985) provides:

The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.

82. *Id.* at 1218. In addition, the Court found persuasive a manual available to NASD arbitrators containing the following provision: "The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy." *Id.* The Court added:

Were we to confine our analysis to the plain language of the arbitration clause, we would have little trouble concluding that a contract clause which bound the parties to "settle" "all disputes" through arbitration conducted according to rules which allow any form of "just and equitable" "remedy or relief" was sufficiently broad to encompass the award of punitive damages. Inasmuch as agreements to arbitrate are "generously construed," . . . it would seem sensible to interpret the "all disputes" and "any remedy or relief" phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award.

115 S. Ct. at 1218 n.7 (quoting *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 10 (1st Cir. 1989)). Also, nothing in the NYSE or AMEX rules expressly limited an arbitrator's ability to award punitive damages. *Id.* at 1218 n.5.

Viewing the choice-of-law clause and the arbitration clause separately, the Court opined that neither provision expressed an intent to preclude an award of punitive damages.<sup>83</sup> At most, these two clauses taken together created an ambiguity as to the parties' intent with regard to punitive damages.<sup>84</sup> The Court subsequently interpreted the New York choice-of-law clause narrowly so that such clause applied only to substantive principles of New York law and did not incorporate the state's arbitration law and policy which prohibited arbitrator-awarded punitive damages.<sup>85</sup> The Court explained that this reading enables both provisions to be given effect,<sup>86</sup> furthers the policy that "ambiguities as to the scope of the arbitration clause itself [are to be] resolved in favor of arbitration,"<sup>87</sup> and is consistent with the well-settled principle of contract interpretation that all ambiguities are to be resolved against the drafter of the document—in this case, Shearson.<sup>88</sup> The Court additionally noted that, under the circumstances, it would be unfair to presume that the Mastrobuenos "were actually aware of New York's bifurcated approach to punitive damages or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right."<sup>89</sup>

In a dissenting opinion, Justice Thomas rejected the majority's ruling that the choice-of-law provision was ambiguous with respect to the issue of punitive damages.<sup>90</sup> He argued that the parties, by designating New York law to govern disputes, intended to preclude arbitrators from awarding punitive damages.<sup>91</sup>

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83. *Id.* at 1218.

84. *Id.* Although the Court notes that "ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration." *Id.* (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

85. *Id.* at 1217–19. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989), the United States Supreme Court upheld a California Court of Appeals ruling that a California choice-of-law clause incorporated both substantive principles of California law as well as the state's arbitration law and policy. The *Mastrobuono* Court distinguished the *Volt* decision by noting that, in *Volt*, the California arbitration law and policy incorporated into the contract encouraged resort to the arbitral process and thus furthered the Federal pro-arbitration policy. 115 S. Ct. at 1216. The *Mastrobuono* Court apparently saw the *Garrity* rule as being hostile to this pro-arbitration policy.

86. *Id.* at 1219.

87. *Id.* at 1218 (quoting *Volt*, 489 U.S. at 476). See *id.* at 1218 n.8 (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

88. 115 S. Ct. at 1219.

89. *Id.*

90. *Id.* at 1221 (Thomas, J., dissenting).

91. *Id.* at 1220 (Thomas, J., dissenting). Justice Thomas also disagreed that the NASD Code in any way addressed the issue of an arbitrator's authority to award punitive damages. *Id.* at 1221 (Thomas, J., dissenting). He noted that NASD Code § 41(e), which the majority relied upon as being broad enough to encompass an award of punitive damages, simply provided that "[t]he award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief



The impact of the *Mastrobuono* decision on domestic arbitrations is unclear.<sup>92</sup> Justice Thomas saw the majority's decision as being a limited and narrow interpretation of an ambiguous contract.<sup>93</sup> It amounts to nothing more, he stated, than "the understanding of a single federal court regarding the requirements imposed by state law."<sup>94</sup> Indeed, a number of New York courts have adopted this restrictive view of *Mastrobuono*, holding that, under their interpretation of New York law, when a securities arbitration takes place in New York the *Garrity* rule prohibits an arbitrator from awarding punitive damages.<sup>95</sup> Others,

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requested, the damages and other relief awarded, [and] a statement of any other issues resolved . . . ." *Id.* (quoting NASD Code of Arbitration Procedure § 41(e) (1985)). This provision, Justice Thomas asserted, "does not define or limit the powers of the arbitrators [but] merely describes the form in which the arbitrators must announce their decision." 115 S. Ct. at 1221 (Thomas, J., dissenting). Justice Thomas concluded that because the New York choice-of-law provision specifically addressed the issue of arbitrator-awarded punitive damages and the NASD Code did not, there was no conflict between the choice-of-law clause and the arbitration provision. *Id.* at 1223. He argued that the Court should have upheld the lower court rulings vacating the punitive damage award because the law applicable to the agreement precluded such an award. *Id.* See Kenneth R. Davis, *Protected Right or Sacred Rite: The Paradox of Federal Arbitration Policy*, 45 DEPAUL L. REV. 65, 83 (1995) (arguing that Justice Thomas' reading of NASD Code is more reasonable) [hereinafter Davis, *Protected Right or Sacred Rite*]; see also Richard A. Booth, *Punitive Damages and Securities Arbitration in the Wake of Mastrobuono*, 9 INSIGHTS 20, 23 (1995) (arguing that "to view arbitration law as substantive gives organizations such as NASD and the American Arbitration Association the powers of Congress or a state").

92. See Constantine N. Katsoris, *Mastrobuono Not the Last Word on Punitives*, 13 ALTERNATIVES TO HIGH COST LITIG. 144 (Nov. 1995) (noting some industry observers believe *Mastrobuono* signals Supreme Court's broad acceptance of punitive damages in arbitration, while others view it as being narrowly limited to its facts); Franklin D. Ormsten, *Garrity and Mastrobuono: A Continuing Tale of Two Cases*, 67 N.Y. ST. B.J. 32 (Dec. 1995) (stating that effect of *Mastrobuono* decision will remain unclear until further litigation clears up its ambiguities).

93. 115 S. Ct. at 1223 (Thomas, J. dissenting).

94. *Id.* See Booth, *supra* note 91, at 20 ("The decision in *Mastrobuono* holds nothing more than that the arbitration agreement in that case is ambiguous."); Mundheim, *supra* note 50, at 215 ("By restricting its decision to a critique of Shearson's drafting, the Court's 'opinion has applicability only to this specific contract [or one just like it] and to no other.'" (quoting Thomas J., dissenting)); Jordan L. Resnick, Note, *Beyond Mastrobuono: A Practitioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 935 (1995) (noting that "although the Supreme Court's decision in *Mastrobuono* may appear to direct the courts on how to resolve conflicts between state law and the FAA, such a conclusion overstates the breadth of the Court's decision"); Carroll E. Neeseman & Maren E. Nelson, *Securities Arbitration Damages*, 900 PLI/Corp. 417, 457 (1995) (arguing that "*Mastrobuono* is less far-reaching" because (1) "[t]he decision places ultimate power to determine the availability of punitive damages in the individual court (or arbitral panel) that interprets the parties' agreement[.]" and (2) "the Court's construction of the agreement is not binding on a state court interpreting a contract governed by state law").

95. See *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc. 2d 40, 631 N.Y.S.2d 215 (N.Y. Sup. Ct. 1995) (finding *Mastrobuono* inapplicable and holding that arbitrator lacked authority to award punitive damages under *Garrity* rule when the arbitration was to take place in New York, be conducted under AMEX rules, and be governed by New York law); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Levine*, No. 100129/95 (N.Y. Sup. Ct. July 3, 1995), discussed in *New York Choice of Law Controlling to Bar Punitive Damages*, 6 WORLD ARB. & MEDIATION REPORT 179 (1995) (ruling that arbitrators were barred from awarding punitive damages in a securities arbitration, notwithstanding *Mastrobuono*, where there existed a New York choice-of-law clause

however, view *Mastrobuono* as a far-reaching decision that effectively abolishes state limits on the power of an arbitrator to award punitive damages.<sup>96</sup>

The import of the Court's decision is likely somewhere between these two views. *Mastrobuono* sets forth three principles.

First, parties are generally free to define the scope of their arbitration agreement and federal law ensures that such agreement will be enforced according to its terms.<sup>97</sup> Thus, when the parties expressly provide in the arbitration agreement that the arbitrator shall have, or shall not have, the authority to award punitive damages, that express provision shall be conclusive on the availability of such relief.<sup>98</sup>

Second, "ambiguities as to the scope of the arbitration clause itself [will be] resolved in favor of arbitration."<sup>99</sup> In the absence of an express provision regarding the availability of punitive damages, the arbitrator will be deemed to have the authority to award such damages, unless the contract evinces an intent by the parties to foreclose punitive relief.<sup>100</sup>

and where claimant requested that proceeding take place in New York City); *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Cornell* (N.Y. Sup. Ct. 1996), reported in N.Y.L.J., Feb. 15, 1996, at 28 (distinguishing *Mastrobuono* and ruling that arbitrator lacked authority to award punitive damages because New York choice-of-law clause incorporated *Garrity* rule). *But see* In the Matter of the Arbitration between Prudential Securities Inc. and Pesce, 642 N.Y.S.2d 466 (N.Y.S.Ct. 1996) (following *Mastrobuono* and upholding arbitrator's authority to award punitive damages notwithstanding New York choice-of-law clause); *Lester Schwab Katz & Dwyer v. Yukevich*, 167 Misc. 2d 1004 (N.Y.S.Ct. 1996) (ruling that under *Mastrobuono* FAA pre-empts *Garrity* rule and thus arbitrator has authority to award punitive damages in AAA arbitration governed by New York law).

96. Neeseman & Nelson, *supra* note 94, at 456 ("Understood most broadly, the [*Mastrobuono*] decision all but eradicates the chief obstacle to arbitral awards of punitive damages."); Mark Augenblick & Michael Stern, *U.S. Supreme Court Upholds Arbitral Authority to Award Punitive Damages*, 12 J. INT'L ARB. 149, 152 (June 1995) (stating that *Mastrobuono* decision is not limited to a contract for brokerage services and seems "applicable to any type of contract, so long as neither the language of the contract itself nor the rules of the type of arbitration chosen prohibit the award of punitive damages").

97. 115 S. Ct. at 1216.

98. *See* *Mundheim*, *supra* note 50, at 213 (noting that in a case such as *Mastrobuono* where "the FAA applies, the intent of the parties, not state law, shall govern the authority of the arbitrators"); Darren C. Blum, Note & Comment, *Punitive Power: Securities Arbitrators Need It*, 19 NOVA L. REV. 1063, 1073 (1995) (recognizing that, under *Mastrobuono*, "parties can structure their arbitration agreements as they see fit and specify by contract the rules under which that arbitration will be conducted"); Ormsten, *supra* note 92, at 34 (stating that, because *Volt* mandated that private agreements to arbitrate are enforced according to their terms, "the main thrust of the Supreme Court in its *Mastrobuono* decision was one of contract interpretation").

99. 115 S. Ct. at 1218.

100. To ascertain whether the parties' agreement expressed an intent to include or exclude punitive damages, the Supreme Court relied on the well-settled principle of contract law that "[a] writing is interpreted as a whole." *Mastrobuono*, 115 S. Ct. at 1217 (citing RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1979)). The Court did not explicitly state what language would show an intent to exclude punitive damages. As noted earlier, however, it did determine that the New York choice-of-law clause did not in-and-of-itself show such an intent. *See* *Mastrobuono*, 115 S. Ct. at 1218. But this does not mean that a choice-of-law clause could never evidence the

Third, a choice-of-law clause typically incorporates only substantive principles of state law, and not state arbitration law and policy.<sup>101</sup> Consequently, a New York choice-of-law clause will be read to encompass substantive principles that New York courts would apply, but not to include the state's procedural arbitration law.<sup>102</sup>

#### IV. INTERNATIONAL ARBITRATION IN THE POST-MASTROBUONO ERA

The Supreme Court's decision in *Mastrobuono*, while arising in the context of a purely domestic arbitration, may have a significant impact on international commercial arbitrations.<sup>103</sup> Like the parties in *Mastrobuono*, transnational contracting parties generally do not address in their agreement the issue of punitive damages; they simply agree to arbitrate disputes, designate the law to be applied, and state the rules under which the arbitration is to be conducted.<sup>104</sup> Since the rules used

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parties' intent to exclude punitive damage claims. The Court explained that the choice-of-law clause in *Mastrobuono* was ambiguous: it could be interpreted to include "only New York substantive rights and obligations," or it could also include "the State's allocation of power between alternative tribunals [i.e., the *Garrity* rule]." *Id.* at 1217. The Court concluded that, because the choice-of-law clause was susceptible to various interpretations on the issue of arbitrator-awarded punitive damages and the other provisions of the agreement either contemplated or did not prohibit such an award, the agreement as a whole did not express an intent to exclude punitive relief. *Id.* at 1218.

101. 115 S. Ct. at 1217-19.

102. It should be noted that it is not at all clear whether New York courts consider the *Garrity* rule as substantive or procedural. *See id.* at 1221 (Thomas, J. dissenting); *see also* Heather J. Haase, Note, *In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act: Mastrobuono v. Shearson Lehman Hutton, Inc.*, 31 WAKE FOREST L. REV. 309, 333-34 (1996) (stating that New York courts have treated the *Garrity* rule as a substantive rule of law).

103. *Mastrobuono* was decided under chapter 1 of the FAA, which governs domestic arbitrations. 9 U.S.C. § 202 (1994). Non-domestic arbitral awards and agreements are governed by chapter 2, which incorporates the New York Convention (as ratified by the United States), and FAA chapter 1 to the extent that it does not conflict with either the provisions of chapter 2 or the New York Convention. 9 U.S.C. § 208 (1994). Because FAA chapter 2 incorporates chapter 1, courts often rely on domestic arbitral decisions arising under chapter 1 when deciding international arbitrations. *See* BORN, *supra* note 2, at 32. The Supreme Court, however, has advised that special considerations are due in international disputes and that courts should proceed with caution before utilizing a purely domestic decision in an international matter. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-18 (1974).

104. The American Arbitration Association suggests the following clause for transnational parties wishing to arbitrate disputes:

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association.

The parties may wish to consider adding:

- (a) the number of arbitrators shall be (one or three);
- (b) the place of arbitration shall be (city and/or country);
- (c) the language(s) of the arbitration shall be (specify).

American Arbitration Association International Arbitration Rules, *reprinted in* 17 Y.B. COM. ARB.

in international arbitrations typically regulate only procedures resolving disputes and remain silent on the issue of an arbitrator's authority to award punitive damages, a mechanical application of the principles set forth in *Mastrobuono* could arguably give arbitrators sitting in the United States and deciding a transnational commercial matter the authority to award exemplary relief. But a careful application of the principles in *Mastrobuono* to most international commercial arbitration agreements should in fact lead to a different result.

Unlike domestic arbitral rules which often confer broad remedial powers upon arbitrators, the rules of the most widely used international arbitral institutions are silent on such powers and cannot be read as authorizing an arbitrator to award punitive damages. Coupled with the arbitration clause, those rules are likely to lead to the conclusion that in most international commercial arbitrations an arbitrator would not have the authority to award punitive damages. A different result in international arbitration also is mandated because, in such disputes, the parties' choice of law to govern the dispute may restrict the tribunal's ability to award exemplary relief. Furthermore, the public policy goal of protecting the investor, which influenced the Court in *Mastrobuono* to construe the arbitration agreement as authorizing arbitrator-awarded punitive damages, would not be served by applying the holding to international arbitrations.

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310, 310 (1992) [hereinafter AAA International Rules]. The International Chamber of Commerce advises that contracts between parties desiring to arbitrate under its rules contain a provision stating:

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

INTERNATIONAL COURT OF ARBITRATION, INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION 10 (1994). See generally International Chamber of Commerce Rules of Conciliation and Arbitration, reprinted in 28 I.L.M. 231 (1989) [hereinafter ICC Rules]. It also notes that "[further details may be added, relating to such matters as the place of arbitration, the number of arbitrators, the law applicable, and the language to be used." *Id.* The London Court of International Arbitration recommends the use of the following clause:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.

Rules of the London Court of International Arbitration, reprinted in 10 Y.B. COM. ARB. 157, 166 (1985) [hereinafter LCIA Rules]. It notes that the following provisions may be added:

The governing law of this contract shall be the substantive law of . . . .

The tribunal shall be comprised of . . . (a sole or three) arbitrator(s) . . . .

The place of the arbitration shall be . . . (city).

The language of the arbitration shall be . . . .

*Id.*

*A. International Arbitral Rules and the Authority to Award Punitive Damages*

The Supreme Court in *Mastrobuono* ruled that the parties authorized the awarding of punitive damages by providing in the arbitration agreement that disputes would be settled under the NASD Code, which states that the arbitrator's decision shall contain damages and other relief.<sup>105</sup> Other courts have interpreted the domestic rules of the American Arbitration Association ("AAA") in a similar manner.<sup>106</sup> While no AAA rule expressly grants arbitrators the authority to award punitive damages, AAA Rule 43 states that "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties including, but not limited to, specific performance of the contract."<sup>107</sup> Since this provision gives an arbitrator broad remedial powers, it has been read to authorize the awarding of exemplary relief.<sup>108</sup> Neither the rules of the most

105. See *Mastrobuono*, 115 S. Ct. at 1217-18 (citing the NASD Code of Arbitration Procedure § 3741(e) (1993)).

106. See *Lee v. Chica*, 983 F.2d 883, 887 (8th Cir. 1993) (stating "when the choice of law provision in an arbitral clause incorporates the rules of the AAA, some circuits have held, and we agree, that AAA arbitrators may grant any remedy or relief including punitive damages" (citing *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056, 1063 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 287 (1993)); *Raytheon Cov. Automated Business Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989) (stating "it would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award"); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1386-87 (11th Cir. 1988) (ruling that notwithstanding New York choice-of-law clause, "the appellees' customer agreement, by incorporating Rule 42 of the Arbitration Rules [now AAA Rule 43], authorized the arbitrators to award punitive damages"); *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353, 357 (N.D. Ala. 1984), *aff'd per curiam*, 76 F.2d 269 (11th Cir. 1985) (stating that "when the extremely broad arbitration clause is read in light of the equally broad grant of remedial power in Rule 43, it is clear that the parties by their contract have authorized the arbitrators to award punitive damages").

107. American Arbitration Association Commercial Arbitration Rule 43 (1993), reprinted in 2 GABRIEL M. WILNER, *DOMESTIC AND COMMERCIAL ARBITRATION* app. 7(A) (rev. ed. 1995). AAA Rule 43 is much broader than NASD Code section 41 in addressing the remedial powers of an arbitrator. See Ormsten, *supra* note 92, at 33. AAA Rule 43 explicitly gives the arbitrator the power to "grant any remedy or relief the arbitrator deems just and equitable." Ormsten, *id.* at 33. By contrast, NASD Code section 41 only states that the arbitrator's decision contain "the damages and other relief awarded." Ormsten, *id.* at 33. One commentator has argued that "[w]here the parties have agreed that the law of a particular state will govern their disputes, any remedies prohibited by the law of that state are not 'within the scope of the agreement'" as contemplated by Rule 43. Davis, *Proposed Framework*, *supra* note 49, at 74. This interpretation attempts to reconcile AAA Rule 43 with a choice-of-law clause (or an express provision limiting the remedial powers of an arbitrator). See *id.*

108. See *supra* note 106 (citing cases); see also Davis, *Proposed Framework*, *supra* note 49, at 66-67, n.99 ("Though no AAA rule expressly empowers arbitrators to award punitive damages, rule 43, entitled 'Scope of Award,' grants them broad authority to fashion remedies."); *Report on Punitive Damages*, *supra* note 6, at 106 ("In the United States, a broad arbitration clause, such as the model clause proposed by the [AAA], is increasingly considered to constitute acceptance of

widely used international arbitral institutions nor the detailed ad hoc arbitration rules set forth by the United Nations Commission on International Trade Law ("UNCITRAL") can be interpreted to give an arbitrator such broad remedial power.

In contrast to Rule 43 of the AAA domestic arbitration rules, which grants the arbitrator the authority to render "any remedy or relief," the award provisions of the AAA International Rules do not give the arbitrator such broad remedial powers.<sup>109</sup> Article 28 of the AAA International Rules (entitled "Form and Effect of the Awards") requires only that the award be in writing, timely, dated, copied, signed by a majority of the arbitrators, kept confidential, registered if necessary, and that it includes the arbitrator's reasons for the award.<sup>110</sup>

Similarly, article 16 of the Rules of the London Court of International Arbitration ("LCIA"), dealing with arbitral awards,<sup>111</sup> specifically grants the arbitrator the authority to award interest, but does not mention the awarding of any other remedies, such as punitive damages.<sup>112</sup> Further, there is nothing in article 16(5) that appears to confer upon the arbitrator the authority to award any and all remedies.<sup>113</sup>

The Rules of Arbitration of the International Chamber of Commerce ("ICC") do not have a specific section dealing with the form or matters to be addressed in the arbitral award.<sup>114</sup> Rather, the ICC rules address issues concerning the arbitral award in a manner similar to the LCIA Rules and AAA International Rules.<sup>115</sup> None of the ICC provisions states the scope of the arbitrator's remedial power, nor does any contain language which could be interpreted as giving the arbitrator the authority to award punitive damages.

Additionally, the UNCITRAL Arbitration Rules do not expressly address the arbitrator's power to award punitive damages.<sup>116</sup> While article 32(1) grants the arbitrator the authority to make an award which is final, interim, interlocutory, or partial,<sup>117</sup> it, as well as the rest of the rules, is silent on the scope of an arbitrator's remedial authority.

[arbitrator awarded punitive damages], especially since the AAA Rules seem to contemplate such awards.".)

109. See AAA International Rules, *supra* note 104.

110. *Id.* art. 28, at 319. In addition, Article 27 (entitled "Awards, Decisions and Rulings") simply provides that the award, decision, or ruling be made by a majority of the arbitrators. See *id.* art. 27, at 319.

111. LCIA Rules, *supra* note 104, art. 16, at 163-64.

112. See *id.* art. 16(5), at 164 (stating "the Tribunal may award that simple or compound interest shall be paid by any party on any sum").

113. See *id.*

114. See ICC Rules, *supra* note 104.

115. See *id.* arts. 18, 19, 21-25, at 240-41.

116. See United Nations Commission on International Trade Law Arbitration Rules, reprinted in 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Arbitration Rules].

117. *Id.* art. 32(1), at 713.

Another important difference between domestic and international arbitration rules is that the international rules typically require an arbitrator to consider trade usage in resolving the dispute.<sup>118</sup> This requirement mitigates against the conclusion that an arbitrator deciding a transnational dispute would have the authority to award punitive damages. Because the vast majority of countries prohibit exemplary relief altogether,<sup>119</sup> there is no way that parties can claim that punitive damages are customary in the trade. This is even more true if the argument is confined to contract cases. Even in common law countries which allow punitive damages, exemplary relief is rarely awarded in those cases.<sup>120</sup>

Moreover, interpreting international arbitral rules as authorizing awards of punitive damages could undermine uniformity and predictability in international commercial arbitrations. Because most countries do not recognize punitive damages in civil actions or prohibit arbitrators from awarding exemplary relief, it is doubtful that non-United States tribunals would broadly interpret arbitral rules as authorizing arbitrator-awarded punitive damages. Thus, extending the holding in *Mastrobuono* to international arbitration could result in the same set of international arbitral rules being interpreted in a radically different manner, depending upon where the arbitration takes place. This would lead to similarly situated parties receiving inconsistent results, compromising the legitimacy of international arbitration as a viable means of alternative dispute resolution.<sup>121</sup>

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118. See ICC Rules, *supra* note 104, art. 13(5), at 240 ("In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."); UNCITRAL Arbitration Rules, *supra* note 116, art. 33(3), at 714 ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."); AAA International Rules, *supra* note 104, art. 29, at 320 ("[T]he tribunal shall decide in accordance with the terms of the contract and shall take into account usages of trade applicable to the contract."). See also European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 349 (1961), at art. VII (providing an arbitrator "shall take account of the terms of the contract and trade usages" in determining the law applicable to the contract); UNCITRAL Model Law at art. 28, reprinted in HOWARD M. HOLTZMAN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 764 (1989) ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.") [hereinafter UNCITRAL Model Law].

119. See *supra* notes 34–38 and accompanying text; Appendix I. See also Larsen, *supra* note 6, at 258 (illustrating that it is not customary to award punitive damages in international arbitration because a vast majority of countries do not allow for punitive damages domestically).

120. See *supra* note 23 and accompanying text.

121. See BORN, *supra* note 2, at 5–8 (noting neutrality and predictability are significant advantages of arbitration). Extending *Mastrobuono* to international commercial arbitrations also seems to advance a domestic oriented approach to international arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court specifically rejected a "parochial" domestic approach to international arbitration requiring resolution of disputes according to "our laws" and "in our courts." *Id.* at 629 (quoting *Bremen v. Zapata Off Shore Co.*, 407

In short, while the NASD and domestic AAA rules have been interpreted to grant arbitrators the authority to award punitive damages, the same interpretation is unwarranted with respect to rules that generally govern international arbitrations.<sup>122</sup> The latter rules are devoid of any language that would give an arbitrator the authority to award such relief. Furthermore, such result would be contrary to trade usage, which an arbitrator is bound to follow in international commercial arbitrations, and would lead to inconsistent decisions.

*B. Impact of a Choice-of-Law Clause on Punitive Damages Claims in International Arbitrations*

Another reason why the holding in *Mastrobuono* should not apply to international commercial arbitrations is that the consequences of a choice-of-law clause on the availability of exemplary relief in the international disputes is markedly different than in domestic arbitrations.

In *Mastrobuono*, the Court ruled that a choice-of-law clause designates only the substantive law, and not the procedural or arbitration law, to be applied to the dispute.<sup>123</sup> The Court subsequently held that the New York choice-of-law clause did not evidence the parties' intention to exclude claims for punitive damages from the issues to be arbitrated. They based this decision on the fact that the *Garrity* rule, which prohibits arbitrators from awarding punitive damages, was part of New York arbitration law and was not a substantive principle of New York law.<sup>124</sup>

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U.S. 1, 9 (1972)). Instead, the Court noted that "orderliness and predictability [in international arbitration] are essential to any international business transaction." *Id.* at 631 (quoting *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 516 (1974)). Thus, the Court refused to require that U.S. antitrust claims be litigated in U.S. courts and upheld their arbitrability to avoid "damag[ing] the fabric of international commerce and trade." *Id.* Following the same logic, international arbitration rules should be interpreted with consistency by the courts of individual sovereigns to provide the stability and predictability necessary for international commerce and trade. *See also* Brief for the International Chamber of Commerce, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (Nos. 83-1569, 83-1733) (arguing that deliberate designation of substantive law and forum for dispute resolution by parties to international contracts "ensure[s] the neutrality, certainty and predictability that are essential to the continued growth of international trade"); Larsen, *supra* note 6, at 271-74 (arguing that awards of punitive damages in international arbitration run counter to essential objectives of international arbitration by possibly causing problems at enforcement stage).

122. *See Report on Punitive Damages*, *supra* note 6, at 106 (noting that, because international rules do not "contain any such broad statement on the availability of remedies . . . a broad arbitration clause cannot necessarily be considered as permitting arbitrators recourse to a sanction such as punitive damages"); *see also* Larsen, *supra* note 6, at 258 (noting a substantially similar view); Donahy, *supra* note 6, at 72 n.25 (illustrating the difference between international and domestic arbitration rules with regard to provisions on remedies or relief).

123. *Mastrobuono*, 115 S. Ct. at 1219.

124. *Id.* Some commentators have criticized the Supreme Court for characterizing the *Garrity*



While the Supreme Court's view is consistent with the generally accepted principle of international arbitration law to the extent that a choice-of-law clause only designates the substantive law to be applied and does not identify the procedural or arbitration law to be applied,<sup>125</sup> the application of this view in the international arena should lead to a very different result. This is because, outside the United States, the prohibition on awards of punitive damages are clearly part of a country's substantive law.<sup>126</sup> Indeed, many civil law countries, such as Germany, consider awards of such damages in private actions to violate domestic public policy.<sup>127</sup> Thus, in international commercial arbitrations, if the parties designate that a dispute be governed by the law of

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rule as procedural because they believe it is substantive principle of New York law and thus should have precluded the tribunal from awarding punitive damages. See Booth, *supra* note 91, at 22; Davis, *Protected Right or Sacred Rite*, *supra* note 91, at 82. Similarly, some New York courts have held, notwithstanding *Mastrobuono*, that the *Garrity* rule is a substantive principle of law that prohibits arbitrator awarded punitive damages. See Dean Witter Reynolds, Inc. v. Trimble, 166 Misc. 2d 40, 631 N.Y.S. 2d 215 (N.Y. Sup. Ct. 1995); Merrill Lynch, Pierce, Fenner & Smith v. Cornell (N.Y. Sup. Ct. 1996), reported in N.Y.L.J., Feb. 15, 1996, at 28.

125. See BORN, *supra* note 2, at 131 (noting that choice of law clauses are generally limited to matters of "substance," not procedure"); Interim ICC Award in Case No. 5029, reported in 12 Y.B. COM. ARB. 113, 115 (1987) (holding that choice of law clause selected law applicable to the merits and did not include procedural law); Preliminary Award in ICC Case No. 5505, reported in 13 Y.B. COM. ARB. 110, 116 (1988) (holding that choice of law clause selected law applicable to the merits and did not include procedural law). It is well established in international arbitration that the procedural law or *lex arbitri* is supplied by the situs. See Donahy, *supra* note 6, at 73 ("[T]he international commercial arbitration doctrine of *lex arbitri* [which provides that] an arbitral tribunal must follow the arbitral law of the *situs* of the arbitration . . .").

126. Most civil law countries consider punitive damages to be a penal sanction that may be imposed only in criminal proceedings. See *supra* note 38 and accompanying text. They do not have a "bifurcated system" like New York, which allows courts, but not arbitrators, to award punitive damages. Instead, most civil law countries prohibit any tribunal, irrespective of its private or public character, to award punitive damages in private actions. *Id.*

127. See Judgment of the June 4, 1992 BGHZ, [1992] *Wertpapiermitteilungen* 1451 (refusing to enforce an U.S. court judgment which included exemplary damages on ground that it violated German *ordre public*), summarized in pertinent part in Peter Hay, *The Recognition of American Money Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 730-49 (1992) [hereinafter Judgment of the BGHZ]; Ottoarndt Glossner, *Federal Republic of Germany*, reprinted in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION supp.17, at 15 (Jan. 1994) ("The application of foreign law must not violate German public policy, as do, for example, punitive damages."); see also ICC Award in Case No. 5946 (1990), reprinted in 16 Y.B. COM. ARB. 97, 113 (1991) (providing that arbitral tribunal sitting in Switzerland and applying New York law could not decide punitive damages claim because such relief is contrary to Swiss public policy); Jens Rostock-Jensen & Anne-Mette Elkjær Andersen, *Denmark*, ENFORCEMENT OF FOREIGN JUDGMENTS: DENMARK at 6 (Louis Garb & Julian Lew eds., 1995) (stating that because Danish law "is not familiar with" the concept of punitive damages, it is likely that foreign award of such damages would violate Danish public policy and would be unenforceable); Masayuki Yoshida & Nobuyuki Taji, *Japan*, ENFORCEMENT OF FOREIGN JUDGMENTS: JAPAN, *supra*, at 4 (stating that foreign award of punitive damages "contravenes the public order of Japan") (quoting the Tokyo High Court); Kim, Shin & Yu, *Korea*, ENFORCEMENT OF FOREIGN JUDGMENTS: KOREA, *supra*, at 4 (noting that because "Korea does not award punitive damages[,] foreign award of such damages "may be against public policy").

a country that prohibits exemplary damages, that designation may in fact preclude an award of punitive damages.<sup>128</sup>

*C. Public Policy Reasons for Imposing Punitive Damages in Domestic Securities Arbitrations Compared with International Commercial Arbitrations*

The Court in *Mastrobuono*, concerned about unequal bargaining power between the securities company and private investors, had sought to protect investors from abusive practices by ruling that in signing a standard-form securities agreement containing a New York choice-of-law clause the investor does not relinquish the right to seek punitive damages.<sup>129</sup> The need to protect unsophisticated and unrepresented parties from an "unintended or unfair result,"<sup>130</sup> however, is significantly diminished in transnational contracts.

Contracts between securities brokers and investors are often so one-sided that some courts and commentators have characterized them as being adhesive.<sup>131</sup> These agreements usually are non-negotiable and include a mandatory arbitration provision and a New York choice-of-law clause.<sup>132</sup> In addition, individual investors typically are unknowledgeable about investment matters, are not represented by counsel,<sup>133</sup> and have little power to negotiate another form of dispute resolu-

128. For example, because Germany's prohibition on awards of punitive damages is part of its substantive law, an agreement containing a German choice-of-law clause will include Germany's laws prohibiting such awards. Under these circumstances, it is most likely that the arbitrator would not have the authority to award punitive damages notwithstanding a broad arbitration clause in the agreement.

129. *Mastrobuono*, 115 S. Ct. at 1219 (noting that it is unlikely that the *Mastrobuonos* were even aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right). See also *Cane*, *supra* note 15, at 171 ("It is implausible that brokerage customers realize that by signing a customer agreement with a New York governing choice-of-law clause they may have abandoned any claim they may have to punitive damages.")

130. 115 S. Ct. at 1219.

131. See *Ormsten*, *supra* note 92, at 34; *Mundheim*, *supra* note 50, at 226-32. Cf. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1388 (11th Cir. 1988); *J. Alexander Securities, Inc. v. Mendez*, 21 Cal. Rptr. 2d 826, 830-32 (1993), *cert. denied*, 114 S. Ct. 20 (1994);

132. See John F. Cooney et al., *Pre-Dispute Arbitration Agreement*, 63 FORDHAM L. REV. 1511, 1519 (1995) (noting that investors cannot negotiate the terms of the arbitration agreement); *Davis*, *Proposed Framework*, *supra* note 49, at 67 n.101 ("In addition to requiring customers to consent to arbitrate, many brokerage firms include New York choice-of-law clauses in their customer account agreements."); *Cane*, *supra* note 15, at 158 ("New York law on the issue of punitive damages, as outlined by the *Garrity* rules on preclusion, is particularly significant in securities arbitration since many brokerage firms' customer agreements provide that New York law governs."); GENERAL ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE 29 (1992) (noting that the nine largest brokerage firms, which combined handle about 75% of all individual accounts, require their customers to sign predispute arbitration clauses when they open margin or option accounts).

133. Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095, 1096 (1993); *Cane*, *supra* note 15, at 171.

tion.<sup>134</sup> Considering these circumstances, it is not surprising that the Supreme Court was unwilling to rule that a brokerage customer knows or should know that he or she is waiving the ability to seek punitive damages simply by signing a standard-form investment agreement which includes a mandatory arbitration provision with a New York choice-of-law clause.

By contrast, agreements between parties located in different countries often involve sophisticated business entities represented by counsel.<sup>135</sup> These agreements tend to involve substantial sums of money<sup>136</sup> and are likely to be more comprehensive and more complicated than domestic contracts. Thus, transnational contracts usually are a product of extensive negotiations and are tailored to the specific deal.<sup>137</sup> Presumably, the parties understand the terms and implications of the dispute resolution provisions of the contract. It is therefore proper in transnational contracts to consider the choice-of-law clause as a valid indicator of whether the parties intend punitive damages to be an available remedy.<sup>138</sup>

It could further be argued that a particular need exists for the remedy of punitive damages in customer-broker securities arbitration.<sup>139</sup> In addition to the waiver concerns noted above, securities disputes are also different from traditional commercial disputes in a number of ways. First, the brokerage house and broker act as agents for the investor and are relied upon by the investor, who is much less knowledgeable in securities matters.<sup>140</sup> Second, because securities are an intangible product, they are particularly susceptible to abuse.<sup>141</sup>

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134. See Cooney et al., *supra* note 132, at 1519 (observing that customers cannot negotiate the terms of arbitration agreements with brokerage firms). It is argued that NASD Rule 21(f)(4) was designed to address this problem. NASD Rule 21(f)(4) impliedly addresses the scope of the arbitrator's power to award punitive damages. See also Mundheim, *supra* note 50, at 226-30. See Davis, *Proposed Framework*, *supra* note 49, at 69 n.111. It reads: "[N]o agreement [between a member and a customer] shall include any condition which limits . . . the ability of the arbitrators to make any award." *Mastrobuono*, 115 S. Ct. at 1218 n.6 (noting that the rule is only applicable to contracts signed after September 7, 1989, and, as a result, did not apply to the *Mastrobuonos'* contract with Shearson, which was executed in 1985). The Securities and Exchange Commission (SEC), as *amicus curiae* in support of the *Mastrobuonos*, argued before the Supreme Court that Rule 21(f)(4) would preclude enforcement of contractual provisions which prevent arbitrators from awarding punitive damages, if such damages would be available in a judicial proceeding in the relevant state. Brief for United States and the Securities and Exchange Commission as *Amici Curiae* in Support of Petitioners, *Mastrobuono v. Shearson Lehman Hutton*, 115 S. Ct. 1212 (1995) (No. 94-18).

135. See WILLIAM F. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS* 14 (2d ed. 1992).

136. See *id.* at 14; CRAIG ET AL., *supra* note 2, § 1.03 at 6-7.

137. FOX, *supra* note 135, at 14.

138. See *infra* notes 189-191 and accompanying text.

139. See Poser, *supra* note 133, at 1096-97; Blum, *supra* note 98, at 1074-75. See also Cane, *supra* note 15, at 171 (though noting that "punitive damages should be available only where there has been particularly egregious conduct").

140. Poser, *supra* note 133, at 1096.

141. *Id.*

Third, brokerage firms operate on a commission basis in which a broker is paid only if the investor buys or sells a security.<sup>142</sup> These three circumstances create a fertile breeding ground "for fraud and breaches of fiduciary duty which are equally not present in many other commercial settings."<sup>143</sup> In light of "the special nature of securities and the potential for abuse,"<sup>144</sup> many believe that the remedy of punitive damages is needed to reduce and deter "the amount of unscrupulous and malicious conduct that plagues this otherwise professional field."<sup>145</sup>

The factors which have been advanced to justify arbitrator-awarded punitive damages in domestic securities disputes do not exist in the typical transnational commercial arbitration.<sup>146</sup> As noted, transnational commercial contracts generally involve sophisticated parties that have the ability to protect themselves from sharp practices. Indeed, it is unlikely in such a transaction that either party will be unaware of, or will be unable to negotiate the terms of, an arbitration agreement, including the choice-of-law clause. Further, the incentives for fraud and breaches of fiduciary duty present in domestic securities transactions between a broker and private-individual investor generally do not exist on the same scale in a transnational commercial transaction.<sup>147</sup> The latter typically involves contracts for the sale of goods, the sale of services, franchises, transfers of technology, and joint ventures.<sup>148</sup> Given the nature of transnational commercial contracts and the relationship between the parties to such agreements, the need for punitive damages to deter unscrupulous and malicious conduct is significantly diminished.<sup>149</sup>

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142. *Id.*

143. *Id.*

144. *Id.* at 1097.

145. Blum, *supra* note 98, at 1074.

146. Indeed, Professor Poser writes that "[i]t is a mistake . . . to think of customer-broker arbitration as just another form of commercial arbitration[;] it is something significantly different . . ." Poser, *supra* note 133, at 1097.

147. During the period from 1982 to 1988, over half of the cases submitted for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce involved foreign trade or construction. See CRAIG ET AL., *supra* note 2, § 1.05, at 9. In those cases issues of fraud and breach of fiduciary duty do not frequently come up.

148. See FOX, *supra* note 135, at 67-81.

149. If arbitrators do not have the authority to award punitive damages, the question arises whether the claimant is precluded from asserting this claim in a judicial proceeding. To date, there is no consensus among courts that have addressed this issue. A wrongdoer may escape the monetary sanction of punitive damages that the law may otherwise provide for gross and malicious conduct, merely by agreeing to arbitrate. See Jones, *supra* note 6, at 42. See also Booth, *supra* note 91, at 24. Some courts have ruled that because only judges are equipped to hear punitive damages claims, a party should be allowed to pursue that claim in a proceeding separate from arbitrable claims. See Resnick, *supra* note 94, at 950 & n.223. In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), the Supreme Court held that arbitration proceedings could be bifurcated from judicial proceedings where both arbitrable and non-arbitrable claims were involved. *Id.* at 216-17. Moreover, the Court approved of the bifurcation even though holding

In sum, it is inappropriate to apply the *Mastrobuono* decision in the same manner in an international commercial arbitration as in a domestic arbitration when evaluating whether an arbitrator has the authority to award punitive damages. The rules used in international commercial arbitrations, unlike domestic arbitration rules, do not give arbitrators broad remedial powers authorizing awards of exemplary relief. In addition, in international disputes, the parties' selection of a substantive law to govern disputes that either permits or precludes punitive damages should evidence the parties' intention to include or exclude claims for exemplary relief from the issues to be arbitrated. Further, the public policy reasons for imposing punitive damages in *Mastrobuono* generally do not exist in international commercial disputes.

#### V. FRAMEWORK FOR ANALYZING CLAIMS FOR PUNITIVE DAMAGES IN INTERNATIONAL COMMERCIAL ARBITRATION

Applying the principles set forth in *Mastrobuono* to international commercial arbitrations in the same manner as in domestic arbitrations could undermine uniformity and predictability in international commercial arbitrations. This does not mean, however, that the principles in *Mastrobuono* should not apply at all to international commercial arbitrations. Rather, it means that a separate framework is needed for analyzing claims for punitive damages in international commercial arbitrations; this framework must take into account the special characteristics of transnational disputes. An arbitrator deciding a transnational dispute should first examine the parties' agreement to determine if it contains an express clause either including or excluding punitive damages from the issues to be arbitrated. If it does, that clause should be enforced unless it violates an applicable mandatory rule of law. In

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two separate hearings on similar issues was recognized as inefficient. *Id.* at 217. As a result, courts following this view have compelled the arbitration of all claims except for the punitive damages claim, which the court reserves the right to rule on separately. *See, e.g.,* *Mulder v. Donaldson, Lufkin & Jenrette*, 611 N.Y.S.2d 1019 (1994) (subsequent suit for punitive damages, based on egregious tortious conduct, permitted after arbitration of employment contract dispute); *Janmott Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282, 1291 (E.D.N.Y. 1979) (separate judicial trial allowed on punitive damages issue following arbitration of other claims).

Other courts, however, have held that the doctrine of *res judicata* precludes a separate proceeding on the punitive damages issue because punitive damages alone are insufficient to establish an independent cause of action. *See* *Donahey*, *supra* note 6, at 76. Moreover, allowing punitive damages to be litigated separately defeats the purposes of arbitration, namely an efficient and expeditious resolution of disputes. *See* *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985).

Alternatively, an agreement to arbitrate disputes may constitute a "waiver" of the right to punitive damages. *See* *Neeseman & Nelson*, *supra* note 94, at 462-64. This argument presumes that a plaintiff has knowledge of the fact that the arbitrator is without authority to award such damages.

the absence of an express provision on punitive damages or an applicable mandatory rule of law prohibiting such damages, the arbitrator must determine whether the parties intended to give him or her the authority to award exemplary relief. In ascertaining the parties' intent on the issue, the arbitrator should consider: (1) whether the parties have explicitly chosen a law to govern the dispute that either prohibits or permits awards of punitive damages, (2) whether awards of punitive damages are customary in the particular trade, and (3) whether other contractual provisions demonstrate the parties' intent to include or exclude arbitral awards of punitive damages. Finally, even if the arbitrator is satisfied that the tribunal legitimately possesses the authority to award punitive damages, there may be circumstances under which such authority should not be exercised because to do so would jeopardize the enforceability of the entire award.

#### A. Express Provision on the Availability of Punitive Damages

The Supreme Court ruled in *Mastrobuono* that if the parties explicitly agree to include or exclude claims for punitive damages within the issues to be arbitrated, then the agreement will be conclusive on the availability of such relief. This principle should apply to international arbitration with one caveat. In international arbitrations, an arbitrator should give effect to the express intent of parties concerning the availability of punitive damages unless enforcing this agreement would violate an applicable mandatory rule of law.

The cornerstone of international arbitration is the principle of party autonomy.<sup>150</sup> Through consensual agreement, parties to an international contract have the power to define the process by which any future contractual disputes will be settled.<sup>151</sup> The parties have the

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150. See LEW, *supra* note 1, at 71-75 (noting that concept of party autonomy is respected in majority of countries especially in international as opposed to domestic arbitration); BORN, *supra* note 2, at 118 (stating that "international arbitration conventions, national laws, and the rules of international arbitral institutions" and published decisions by international arbitrators all "vigorously affirm" concept of party autonomy); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 280-81 (1986) ("[T]he principle of party autonomy in contractual matters is universally recognized."); Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 177, 178 (Pieter Sanders ed., 1986) (stating that party autonomy is a "well known condition[] for international commercial arbitration"); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 72 (1986) (stating that principle of party autonomy is generally accepted and "directs international commercial arbitrators to the correct choice of the law applicable" to the dispute).

151. See LEW, *supra* note 1, at 69 ("The determination by the parties of the applicable law is known as 'party autonomy.'"); Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 512 (1988) (stating that in international arbitrations "[t]he parties determine the content of the contractual agreement, and any requirement to arbitrate is dependent upon and subject to the will of the parties in almost all respects."); Yves Derains,

authority to designate the substantive law applicable to any dispute,<sup>152</sup> the procedural rules to be followed,<sup>153</sup> the place of arbitration (or "situs"),<sup>154</sup> and, in some instances, the curial law to govern the dispute.<sup>155</sup> Moreover, the parties have virtually unlimited power to define the scope of the issues for arbitration.<sup>156</sup> Unlike a national court, an arbitrator presiding over a transnational dispute has no independent

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*Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 227, 254 (Pieter Sanders ed., 1986) ("[T]he arbitrator is bound to give effect (except where there is an infringement of truly international public policy) to the will of the parties . . .").

152. BORN, *supra* note 2, at 128 ("The freedom of the parties to agree upon the substantive law governing their relations is the foundation of international commercial arbitration."); Derains, *supra* note 151, at 238 ("The arbitrator does not have to evaluate whether the parties' choice of the applicable law is well founded; he simply has to respect it."); LEW, *supra* note 1, at 71 ("most national conflict of laws systems do provide that where the parties to a contract with multi-national contacts expressly provide for a particular law . . . that choice is to be respected and upheld"). Furthermore, the rules of the major international arbitration institutions and some of the major conventions all affirm the power of the parties to designate the law applicable to any dispute in their agreement. See UNCITRAL Model Law, *supra* note 118, art. 28(1) ("The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."); UNCITRAL Arbitration Rules, *supra* note 116, art. 33(1), at 714 ("The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."); AAA International Rules, *supra* note 104, art. 29(1), at 320 ("The tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute."); ICC Rules, *supra* note 104, art. 13(3), at 240 ("The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute."); LCIA Rules, *supra* note 104, art. 13.1(a), at 162 (providing that arbitrator has power to determine law applicable to any dispute "[u]nless the parties at any time agree otherwise."); European Convention on International Commercial Arbitration, 484 U.N.T.S. 349, 374, April 21, 1961, art. VII, ("The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute."); REDFERN & HUNTER, *supra* note 150, at 92 ("[T]he parties have the right to choose for themselves the law applicable to their dispute.")

153. As discussed previously, many arbitral institutions, such as the ICC, AAA and LCIA, have promulgated a set of arbitral rules. Parties may also choose to arbitrate under the UNCITRAL Arbitration Rules. See *supra* notes 104, 107-117, and accompanying text.

154. See BORN, *supra* note 2, at 72 (noting that "[t]he parties to an international arbitration are generally free to select the arbitral situs." Further, "[t]hat freedom is guaranteed by the leading institutional arbitration rules and recognized by most national laws.")

155. See generally BORN, *supra* note 2, at 161-81. In most cases, the situs has provided the curial law in international arbitration. *Id.* at 162. While this rule is still the majority view, some countries have extended the concept of party autonomy to include the power to select the procedural or curial law applicable to the arbitral proceedings. *Id.* at 164. For example, article 182(1) of the Swiss Private International Law Statute provides that the parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit to a procedural law of their choice. SR 291 art. 182(1) (Switz.) (Pierre A. Karrer & Karl W. Arnold trans., 1987). Thus, the respect for party autonomy in Switzerland could result in an arbitration taking place in Geneva, applying United States substantive law and German procedural law. See BORN, *supra* note 2, at 164-67. In sharp contrast, some countries not only follow the majority rule, but go one step farther by imposing a mandatory application of their own procedural law to all arbitrations taking place within their country. *Id.* at 165-66 (discussing articles 287 and 288 of Guatemala Code of Civil and Commercial Procedure appropriately entitled "Mandatory Nature of the Proceedings").

156. See Bernard G. Poznanski, *The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration*, 4 J. INT'L ARB. 71, 84 (Sept. 1987).

authority or jurisdiction over the parties. Instead, the arbitrator's authority is derived directly and almost exclusively from the parties' agreement.<sup>157</sup> Since most countries will enforce private arbitration agreements according to their terms, it seems logical that they will give effect to agreements that authorize or prohibit awards of punitive damages.<sup>158</sup>

An express provision authorizing punitive damages may conflict with a choice-of-law clause when the substantive law chosen by the parties prohibits exemplary relief. For example, suppose that a United States and a French company enter into a distribution agreement. The contract contains an arbitration clause, which expressly permits awards of punitive damages, and a choice-of-law clause designating French law as governing any future dispute. Since French law does not allow exemplary relief,<sup>159</sup> the choice-of-law clause and the arbitration provi-

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157. While the arbitration agreement is the source of the arbitrator's powers, it is also the primary source of restrictions upon that power. *See id.* at 84. To the extent that the arbitration agreement creates the arbitrator's authority, it also defines and restricts it. *See id.* As a result, the parties are able to exercise control over the subject matter which the arbitrator may deal with, as well as the law which the arbitrator may apply. *Id.* Further, an arbitrator does not have the power to go beyond the limits of the authority as defined by the parties' arbitration agreement. *Id.* If the arbitrator exceeds the scope of the arbitrator's authority, the award may not be enforceable. This is because, under article V(1)(c) of the New York Convention, national courts may refuse to recognize and enforce an arbitral award if it contains decisions on matters beyond the scope of the issues submitted to arbitration by the parties. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-08 (1988)) [hereinafter New York Convention]. Moreover, the award could be set aside if the law of the arbitral situs contains a similar limitation. *See* Buchanan, *supra* note 151, at 511. *See also* Pierre Mayer, *Le mythe de l'ordre juridique de base*, translated in Derains, *supra* note 151, at 254 ("The arbitrator falls within a system created by the contract and therefore has no heteronomous power in relation to the parties."); Böckstiegel, *supra* note 150, at 178 ("[T]he jurisdiction of the arbitrators can only go as far as the parties by agreement have authorized them."); DOBBS, HANDBOOK, *supra* note 12, at 939 ("The remedies available to the arbitrator are, of course, limited first of all by the arbitration contract, which governs the arbitrator's authority."); CRAIG ET AL., *supra* note 2, § 17.01, at 285 ("The international arbitrator's powers . . . are derived from an arbitration agreement, and an arbitrator does not exercise public or institutional powers in the name of the State.").

158. *See* Donahey, *supra* note 6, at 71 ("Generally, the principle of party autonomy would be thought to apply where the parties have, by their agreement, expressly empowered the arbitral tribunal to award punitive damages."); Davis, *Protected Right or Sacred Rite*, *supra* note 91, at 92 (stating that in *Mastrobuono* an express provision granting power to award punitive damages was conclusive notwithstanding a choice-of-law clause to the contrary); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, reported in William E. Huth, *International Decisions*, 89 AM. J. INT'L L. 601, 603 (1995) (advocating in light of *Mastrobuono* that parties to "international contracts subject to the FAA who do not wish to be subject to [punitive] damages should limit the jurisdiction and authority of the arbitrator in their contracts"); *Report on Punitive Damages*, *supra* note 6, at 103 (arguing that international arbitrators should refrain from awarding punitive damages except where contractually or statutorily empowered to make such award); Larsen, *supra* note 6, at 273 (arguing that as general rule international arbitrators should not award punitive damages, but explicitly recognizing that such award can be made where parties expressly provide for such damages in their agreement).

159. *See* Code civil [C. Crv.] art. 1382 (Fr.) (J.H. Crabb trans., 1995).



sion appear to be in conflict on the issue of the availability of exemplary relief. The arbitrator here should have the authority to award punitive damages even though French law prohibits such award. This is because, in applying the law applicable to the dispute, the arbitrator must take into account all of the terms of the contract and must read the choice-of-law clause in conjunction with other contractual provisions.<sup>160</sup> Accordingly, the express language authorizing punitive damages would be read as modifying the choice-of-law clause.<sup>161</sup>

This result is consistent with the Supreme Court's ruling in *Mastrobuono* that arbitration agreements are to be enforced according to their terms, even when those terms are contrary to an applicable rule of law.<sup>162</sup> This principle is also recognized by civil law countries.<sup>163</sup> Indeed, many civil law countries, such as France, allow the parties to expressly grant an arbitrator the power of *amiable compositeur*, which authorizes the arbitrator to make awards without applying the designated substantive law.<sup>164</sup> If an arbitrator is given the power of *amiable*

160. See AAA International Rules, *supra* note 104, art. 29(2), at 320; ICC Rules, *supra* note 104, art. 13(5), at 240; UNCITRAL Arbitration Rules, *supra* note 116, art. 33(3), at 714. See also Derains, *supra* note 151, at 239 (stating parties have unrestricted discretion to choose applicable law and they may also "exclude from the applicable law selected those provisions that would make certain contractual clauses void"); REDFERN & HUNTER, *supra* note 150, at 74 ("Parties are usually free to vary the terms of their contract by agreement" and therefore may designate "the law applicable to a dispute arising out of that contract.").

161. See Derains, *supra* note 151, at 240 (stating that "a law is only applied if the parties have chosen it and within the bounds of that will, [and] if the parties have expressly excluded certain rules of that law, the arbitrators may not enforce the application of those rules"). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985) (stating that an "international arbitral tribunal owes no prior allegiance to the legal norms of particular states . . . however, [it] is bound to effectuate the intentions of the parties"); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT'L* 274, 281 (1986) (suggesting that parties may exclude application of public policies of chosen law as long as those policies are not mandatory rules of law governing contract); Buchanan, *supra* note 151, at 518 ("The [international] arbitrator derives his authority from the contractual agreement of the parties and is, arguably, solely responsible to the parties and subject to their intents and expectations.").

162. See *supra* notes 97-98 and accompanying text. While the Court's decisions in *Mastrobuono* and *Volt* arose in a purely domestic context, the policy of enforcing arbitration agreements according to their terms would operate precisely the same in an international context. Indeed, the Court has demonstrated an even more liberal attitude toward the enforcement of international agreements by allowing international arbitration of claims that were not domestically arbitrable. See *Mitsubishi*, 473 U.S. at 620-37; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). See also Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea of Change*, 31 *WAKE FOREST L. REV.* 1, 33 (1996) (explaining that *Mitsubishi* and *Volt* create a "double whammy" because they show that there is an even stronger presumption favoring arbitration internationally and that international arbitration agreements will be enforced even when the same result would not have been reached domestically).

163. In fact, the principle of party autonomy is almost universally accepted. See *supra* notes 150-151 and accompanying text.

164. Under the principle of *amiable compositeur*, arbitrators are not obliged to decide the parties' dispute in accordance with a strict application of legal rules; rather, the arbitrators are expected to decide in light of general notions of fairness, equity and justice. See BORN, *supra* note 2, at 135. The concept of *amiable compositeur* was developed in France and is widely accepted among

*compositeur*, it is arguable that the arbitrator would have the authority to award punitive damages notwithstanding the fact that the law designated to govern the dispute prohibits exemplary relief.

It is important to note, however, that the principle of party autonomy is not unlimited.<sup>165</sup> Party autonomy, and consequently arbitral authority, may be directly circumscribed by applicable mandatory rules of substantive law governing the dispute or applicable mandatory rules of the situs.<sup>166</sup>

In general, the principle of party autonomy allows the parties to designate the law to govern the dispute and to exclude certain provisions of that law from applying. It does not, however, permit the parties to exclude the application of the mandatory rules of the sub-

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civil law countries. See REDFERN & HUNTER, *supra* note 150, at 23 n.88 (listing Argentina, Brazil, Chile, Egypt, France, Iraq, Lebanon, Mexico, Panama, Peru, Switzerland, Syria and former Yugoslavia as examples of countries recognizing arbitration by *amiable compositeur*). International arbitration rules typically require that the parties expressly authorize a decision by *amiable compositeur* in order for the arbitrator to exercise such power. See, e.g., UNCITRAL Arbitration Rules, *supra* note 116, art. 33(2), at 714 ("The arbitral tribunal shall decide as 'amiable compositeur' or 'ex aequo et bono' only if the parties have expressly authorized the tribunal to do so."); ICC Rules, *supra* note 104, art. 13(4), at 240 ("The arbitrators shall assume the powers of *amiable compositeur* if the parties have agreed to give him such powers."). While the power of *amiable compositeur* is a broad grant of power it is still subject to limitation. REDFERN & HUNTER, *supra* note 150, at 22-23. However, the limitations imposed are narrow, essentially involving only applicable mandatory rules and international public policy such as due process. *Id.* See also Karyn S. Weinberg, Note, *Equity in International Arbitration: How Fair is "Fair"?*, A Study of *Lex Mercatoria* and *Amiable Composition*, 12 B.U. INT'L L.J. 227 (1994) (discussing generally the concept of *amiable compositeur* and relating it to a trend in international arbitration away from national rules of law).

165. See Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 INT'L TAX & BUS. L. 59, 63 (1992) (stating that although party autonomy is a general principle which arbitrators should respect, it is limited by mandatory rules). See also Buchanan, *supra* note 151, at 512 (noting that party autonomy is of paramount importance in international arbitration "however, arbitration is not without limitations [because] States retain considerable power to intervene").

166. A mandatory rule of law is "an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship." Mayer, *supra* note 161, at 275. Mandatory rules are a subset of public policy. *Id.* Moreover, they reflect a public policy so commanding and imperative in nature that they "create an obligation to apply such a rule, or indeed, simply a possibility of doing so, despite the fact that the parties have expressly or implicitly subjected their contract to the law of another country." *Id.* Generally, mandatory rules protect the social and economic interests of a society, common examples of which include: competition laws, currency controls, environmental legislation, state embargoes and boycotts, and laws designed to protect parties in an inferior bargaining position. See Baniassadi, *supra* note 165, at 62. See also Derains, *supra* note 151, at 228 (describing mandatory rules as "laws whose observation is essential for safeguarding the political, social, and economic organization of the country"). There are also mandatory rules belonging to all other systems of law foreign to the substantive law and the arbitration proceedings. These include, for example, the mandatory rules of the states where enforcement of the award is likely to be sought, and the mandatory rules of the place where the contract was, or is to be performed. The mandatory rules foreign to the proceedings do not have the same imperative and direct effect upon arbitral authority as the first category, but nevertheless, they have a significant impact upon the arbitrator's exercise of that authority.

stantive law.<sup>167</sup> By way of example, suppose that a German company and a United States business enter a distribution contract which is to be performed substantially in the United States. The contract contains an arbitration agreement and a New York choice-of-law clause, but it expressly excludes the application of United States antitrust laws. If a dispute later arises concerning the anti-competitive activities by one party, the arbitrator may be obliged to apply the United States antitrust laws because such laws are mandatory in nature notwithstanding the parties' attempt to exclude them from the arbitration.<sup>168</sup>

It is unclear whether in civil law countries the prohibition on awards of punitive damages is considered to be a mandatory rule. If it is, any attempt to avoid the application of such rule by agreement will have no effect.<sup>169</sup> If it is not, the parties would be able to authorize the arbitrator to award punitive damages even though applicable substantive law may not permit such relief.<sup>170</sup>

The laws of the situs also may directly limit the exercise of party autonomy and hence an arbitrator's authority to award punitive damages.<sup>171</sup> There are basically two ways by which situs may prevent an arbitrator from awarding punitive damages even if the arbitrator is authorized to do so by the arbitration agreement.

167. See Derains, *supra* note 151, at 244 (distinguishing effect of mere domestic public policy which parties can contract to exclude from chosen law as opposed to mandatory rules which parties cannot exclude from application); Baniassadi, *supra* note 165, at 71-72 ("There is no real difficulty when the mandatory rules are part of the substantive law chosen by the parties because an arbitrator . . . must apply such substantive law including its mandatory rules, even if they run contrary to the contractual stipulations of the parties."); BORN, *supra* note 2, at 137-38 (noting that many conflict of laws systems "recognize that mandatory rules of public policy or statutory law will in some circumstances override a private choice of law agreement or otherwise applicable national law"); LEW, *supra* note 1, at 77 ("The intentions expressed by the parties as to the performance of the contract, will however prevail over all but the mandatory provisions of the applicable law and [supranational] public policy."); Buchanan, *supra* note 151, at 516 ("The parties may vary the provision of the law to a certain extent but they will still be bound by mandatory provisions.")

168. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

169. See, e.g., Derains, *supra* note 151, at 244 (posing hypothetical where Italian and German firms enter commercial contract with arbitration clause selecting German law to govern dispute, but excluding application of European competition law, and concluding, since European competition law is mandatory in Germany, it cannot be contracted out of by parties).

170. See *id.* at 241 (posing a hypothetical where a Norwegian and Peruvian party enter an agreement selecting French substantive law and expressly limiting seller's liability for latent defects in a manner directly in conflict with French law, and concluding that, since French rule is a part of domestic public policy, and not a mandatory rule, it may be excluded from application by parties in their agreement).

171. See Danilowicz, *supra* note 150, at 281 (stating an arbitrator attempting to determine applicable law "should ensure that mandatory rules of the seat of arbitration are not violated . . . [o]therwise the award may be unenforceable"). For instance, Saudi Arabia's arbitration law is extremely restrictive and contains a mandatory rule which completely rejects the principle of party autonomy by requiring that Saudi Arabian law must govern any dispute in an arbitration taking place in Saudi Arabia. See Nancy B., *Arbitration in Saudi Arabia*, 6 *ARB. INT'L* 281 (1990) ("Moreover, there is no freedom to choose governing law (Saudi law must govern) . . .").

First, the situs may limit the availability of exemplary relief through the application of its choice-of-law rules.<sup>172</sup> An arbitrator must resort to a choice-of-law analysis even where there is an express choice of law by the parties.<sup>173</sup> The traditional rule, particularly in the United States, requires that the arbitrator apply the choice-of-law rules of the situs.<sup>174</sup> As noted previously, the majority of countries recognize the principle of party autonomy and thus will invariably respect the parties' express choice-of-law provision.<sup>175</sup> A common exception to the enforcement of a choice-of-law clause, however, is that the designated law will only be applied in so far as it does not violate the public policy of the situs.<sup>176</sup> Thus, under most choice-of-law rules, if the public policy of the situs prohibits awards of punitive damages, an arbitrator would be precluded from awarding punitive relief even if the contract expressly permits such awards.

Second, the situs also may limit party autonomy by allowing for the vacatur of arbitral awards that violate the public policy of the situs. In general, an action to vacate an arbitral award may be maintained in the national courts of the situs.<sup>177</sup> While the grounds for appealing an arbitrator's decision are usually very narrow, an arbitral award typically may be vacated if it is contrary to the public policy of

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172. BORN, *supra* note 2, at 149–50.

173. *Id.* at 127 (“[E]ven where the parties have agreed upon a choice-of-law clause, arbitrators will be required to select conflicts rules.”).

174. *Id.* at 103. See also Ole Lando, *The Law Applicable to the Merits of the Dispute*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 101, 102 (Julian D.M. Lew ed., 1986) (noting that in many countries “[i]t is generally understood that the arbitrator will apply the choice-of-law rules of the forum country”). A growing modern trend does not recognize the obligation to apply the conflict of laws rule of the situs. See BORN, *supra* note 2, at 114. This is partially the result of the international institutional rules which appear to give the arbitrator a great deal of discretion in selecting the conflict of laws rule. See, e.g., UNCITRAL Arbitration Rules, *supra* note 116, art. 33(1), at 714 (“[T]he arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”); ICC Rules, *supra* note 104, art. 13(3), at 240 (“[T]he arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.”). See also CRAIG ET AL., *supra* note 2, § 17.01, at 285–87 (arguing that under ICC rules arbitrator has a great deal of discretion and is not bound to follow situs' conflict of laws rule); Lando, *supra*, at 132 (stating that under many rules above an arbitrator is “his own legislator” and is “not bound to apply choice-of-law rules of forum”). Nonetheless, even under the modern approach the conflicts rules of the situs are often applied by the arbitrator especially where the parties have designated the situs and a lack of strong connecting factors to any other nations. See BORN, *supra* note 2, at 114.

175. See *supra* notes 150–151; Lando, *supra* note 174, at 104 (“arbitrators invariably apply the law selected by the parties”).

176. See BORN, *supra* note 2, at 149 (“Under most conflict of laws systems, private choice-of-law agreements are unenforceable when they result in application of a rule that violates the forum's public policies.”). See also LEW, *supra* note 1, at 536 (stating arbitrator must “keep a wary eye on the national public policy of the place of arbitration” and must give effect to certain provisions of situs' law notwithstanding express agreement of parties to contrary).

177. See New York Convention, *supra* note 157, at art. V(1)(e) (providing that recognition and enforcement of award may be denied if “the award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”).

the situs.<sup>178</sup> It is therefore possible that an arbitral award of punitive damages could be set aside if the exemplary relief violates the public policy of the situs.

The arbitral tribunal's decision in ICC Case No. 5946 illustrates how the public policy of the situs may limit arbitral authority to award punitive damages.<sup>179</sup> In that case, the parties entered an exclusive agency agreement for the distribution and sale of wine.<sup>180</sup> The agreement contained an arbitration provision which designated Geneva, Switzerland as the arbitral situs and a New York choice-of-law clause.<sup>181</sup> The claimant alleged that respondent breached the agreement.<sup>182</sup> The respondent counterclaimed that the claimant unilaterally and improperly terminated the agreement, and requested, *inter alia*, an award of punitive damages.<sup>183</sup> The tribunal denied the claim for punitive damages without reaching the merits of that claim.<sup>184</sup> The tribunal explained that, even assuming that New York law authorized the awarding of exemplary relief, it did not have the power to award such relief because punitive damages "are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland . . . ."<sup>185</sup>

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178. See, e.g., SR 291, *supra* note 155, art. 190(2)(e) ("An award may . . . be challenged . . . [w]hen the award is contrary to public policy."); UNCITRAL Model Law, *supra* note 118, art. 34(2)(b)(ii) (providing that court may set aside arbitral awards resulting from arbitrations taking place in this state if "the award is in conflict with the public policy of this State"). See also BORN, *supra* note 2, at 655 ("Most national laws provide for judicial review, through an action to vacate, of arbitral awards made within national borders.").

179. Final Award in Case No. 5946 (ICC 1990), *reprinted in* 16 Y.B. COM. ARB. 97 (1991).

180. *Id.*

181. *Id.* at 98.

182. *Id.* at 97-98.

183. *Id.* at 98, 110, and 113.

184. *Id.*

185. *Id.* Cf. Klaus J. Beucher & John Byron Sandage, *United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement*, 23 VAND. J. TRANSNAT'L L. 967, 985-86 n.83 (1991) (noting that a Swiss court refused to recognize "a United States judgment on the grounds that punitive damages are contrary to the public policy of Switzerland" (citing *Bezirksgericht Sargans*, 1 Oct. 1982)); ANNE-CATHERINE IMHOFF-SCHIEFER & PAOLO MICHELE PATOCCHI, TORTS AND UNJUST ENRICHMENT IN THE NEW SWISS CONFLICT OF LAWS 72 & n.109 (1990) (same). *But cf.* Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETHERLANDS INT'L L. REV. 143, 169-70 (1996) (noting that the Civil Court of Basel has ruled that "the cumulation of compensatory and punitive damages . . . [does] not . . . violate Swiss *ordre public*"). One commentator has suggested that an arbitrator sitting in Mexico would not be able to award punitive damages even if the applicable substantive law allows for exemplary relief because such an award would violate Mexico's public policy. See Symposium, *Arbitration of Commercial Disputes in Mexico and the United States: Panel Discussion*, 2 U.S.-MEX. L.J. 111, 122-23 (1994) (comments of José Luis Siqueiros). The Swedish Arbitration Act expressly prohibits an arbitrator from awarding penalties or fines. See Swedish Arbitration Act of 1929 § 15, in STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN app. 1 (1984) ("The arbitrators may not make orders on penalty of a fine, nor use other means of constraint, nor may they administer oaths or truth affirmations."). See also Glossner, *supra* note 127, *supp.* 17, at 15

### B. Absent an Express Provision in the Arbitration Agreement

While some international contracts may contain an express provision regarding the availability of punitive damages, others most certainly will not.<sup>186</sup> In the absence of an express provision, the Court in *Mastrobuono* ruled that it is necessary to ascertain the intent of the parties as to the availability of such relief from the contract as a whole.<sup>187</sup> This principle should apply to international arbitrations.<sup>188</sup> Nevertheless, in determining the intent of the parties, an arbitrator deciding a dispute between transnational parties should carefully consider (1) the effect of a choice-of-law clause, if any, (2) international trade usage, and (3) the other contractual provisions of the agreement. None of these factors alone is controlling as to the availability of punitive damages. Rather, these three factors must be weighed together, taking into account all of the circumstances surrounding the particular agreement.

#### 1. Choice-of-Law Clause

In international arbitrations, a choice-of-law clause should evidence whether the parties intended the arbitrator to have the authority to award punitive damages. As explained in Part IV, transnational commercial contracts typically involve substantial sums of money and sophisticated parties who are often represented by counsel. They also are usually the product of extensive negotiations.<sup>189</sup> Accordingly, parties to such contracts often select the substantive law to govern the dispute with a high degree of conscious deliberation.<sup>190</sup> In these circumstances, if the parties choose to have disputes governed by a law that does not permit awards of punitive damages, such as German law, that choice should demonstrate that the parties did not intend the arbitrator to have the authority to award exemplary relief.<sup>191</sup> Concomi-

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("The application of foreign law must not violate German public policy, as do, for example, punitive damages.")

186. See Farnsworth, *supra* note 6, at 15.

187. Booth, *supra* note 91, at 20 (noting that "arbitration is a matter of contract" and because few arbitration agreements expressly address punitive damages courts look "to the whole of the agreement to arbitrate for clues as to what the parties intended . . .").

188. It is assumed that there exists no applicable mandatory rule of law prohibiting punitive damages.

189. Cf. Fox, *supra* note 135, at 14.

190. See *supra* notes 137-138, and accompanying text.

191. Buchanan, *supra* note 151, at 517 (noting that parties dealing internationally are aware that chosen law will be used to fill gaps in their agreement and that whether or not their expectations are realized may depend to a great extent upon law that will be applied to contract in event of dispute). The Supreme Court has recognized the deliberation with which parties to an international arbitration agreement select the substantive law applicable to a future dispute. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). There the Court endorsed contractual choice-of-law clauses as "an almost indispensable precondition to achievement of the orderliness

rantly, if the parties designate, as the governing substantive law, the law of a jurisdiction that allows awards of exemplary relief, such as California law, that choice should indicate that the parties intended to permit awards of punitive damages.

## 2. Trade Usage

Another factor that an arbitrator deciding a transnational dispute must weigh in determining whether the parties intended to confer upon the arbitrator the authority to award punitive damages is trade usage. As noted above, the rules most commonly used in international arbitrations require an arbitrator to take trade usage into account when determining the law applicable to the merits of the dispute.<sup>192</sup> Unlike in the United States where most jurisdictions permit awards of punitive damages, almost all civil law countries prohibit exemplary relief in private actions.<sup>193</sup> Furthermore, most common law countries do not permit awards of punitive damages in breach of contract cases.<sup>194</sup> As a result, the general practice is not to allow awards of punitive damages in transnational commercial disputes.<sup>195</sup> Indeed, it is unlikely that a non-United States party would ever contemplate that punitive damages could be awarded in an arbitration because they simply are not available in most legal systems.<sup>196</sup> Trade usage thus weighs against arbitral awards of punitive damages.

## 3. Other Contract Terms and Relevant Facts

The arbitrator also must weigh other relevant provisions of the agreement in deciding whether the parties intended to allow awards of punitive damages. It is a well established principle of contract law that an agreement should be interpreted as a whole.<sup>197</sup> In fact, the ICC, AAA, and UNCITRAL rules expressly require an arbitrator attempting to determine the applicable law to consider all provisions of the arbi-

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and predictability essential to any international business transaction." *Id.* at 516. The Court acknowledged that if courts did not enforce such agreements, parties to international commercial contracts would find themselves in "the dicey atmosphere of . . . a legal no-man's-land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517.

192. See *supra* note 118 and accompanying text.

193. See *supra* notes 34–38 and accompanying text; compare Appendix I with Appendix II.

194. See *supra* note 23 and accompanying text.

195. See *id.* See also Larsen, *supra* note 6, at 260 (stating that in case of arbitrator awarded punitive damages "U.S. practice . . . [is] at variance with that of much of the international trading world . . .").

196. See Larsen, *supra* note 6, at 258 (concluding that for non-U.S. parties "there is a general presumption that arbitrators have no power to award punitive damages.").

197. See RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1979) ("A writing is interpreted as a whole . . .").

tration agreement.<sup>198</sup> Thus, a broad arbitration clause requiring arbitration of any disputes arising out of the contract and giving the tribunal the power to grant any relief which it deems just and equitable could be interpreted—as the Court did in *Mastrobuono*—as authorizing an arbitral award of punitive damages.<sup>199</sup> The arbitrator also should consider any other relevant circumstances that may show the parties' intent to include or exclude claims for punitive damages from the issues to be arbitrated.

#### 4. Weighing the Factors

None of the above factors alone is conclusive as to the availability of punitive damages in arbitration; they must be weighed together. The following examples illustrate the interplay between the three factors.

Suppose that a German company and a United States business enter into a distribution agreement which is to be performed substantially in Germany. The contract contains a clause providing that any disputes are to be settled by arbitration and conferring upon the arbitrator the power to grant any relief deemed just and equitable. It also designates German law to govern any disputes between the parties. The United States party later files for arbitration, asserting that the German party willfully breached the agreement, and requests, among other things, punitive damages.

The arbitrator should deny the claim for exemplary relief on the ground that the parties did not intend for the arbitrator to have the authority to award punitive damages. Here, the broad language giving the arbitrator the authority to grant any relief deemed just and equitable evidences the parties' intent to permit arbitrator-awarded punitive damages. By stating, however, that any disputes will be governed by German law, which prohibits awards of punitive damages, the

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198. See ICC Rules, *supra* note 104, art. 13(5), at 240 ("In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."); UNCITRAL Arbitration Rules, *supra* note 116, art. 33(3), at 714 ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."); AAA International Rules, *supra* note 104, art. 29(2), at 320 ("[T]he tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."); UNCITRAL Model Law, *supra* note 118, at art. 28(4) ("In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.").

199. For example, in ICC Award No. 2699 the parties' agreement authorized the tribunal to settle "any and all differences and disputes of whatsoever nature arising out of this charter" and gave the arbitrators the power to "grant any relief which they, or a majority of them, deem just and equitable and within the scope of the agreement of the parties." Final Award No. 2699 (ICC 1990), reprinted in 18 Y.B. COM. ARB. 124, 129 (1993) (quoting clause 29 of the arbitration agreement). The tribunal interpreted this broad language as granting them the power to award punitive damages. *Id.*



parties expressed an intent not to include claims for exemplary relief within the issues to be arbitrated. Trade usage also weighs against awards of punitive damages because exemplary relief generally is not available in transnational commercial disputes.

If the agreement contained instead a California choice-of-law clause, it is arguable that the arbitrator would have the authority to award punitive damages. In this situation, both the choice-of-law clause and the broad arbitration clause favor giving the arbitrator the power to award punitive damages. While trade usage weighs against such a result, the contract, viewed as a whole, evinces an intent by the parties to confer upon the arbitrator the authority to award punitive damages.

The arbitrator's task becomes much more difficult if the agreement between the United States business and the German company contains no choice-of-law clause. Here, the arbitrator must perform a choice-of-law analysis to determine the substantive law applicable to the dispute.<sup>200</sup> Since the national law applicable to the merits of the dispute is selected by the arbitrator and not the parties, the fact that the governing law permits or prohibits exemplary relief should not be viewed as evidence that the parties intended to include or exclude punitive damages claims.<sup>201</sup> Nevertheless, if the arbitrator determines that German law (or the law of any country that prohibits exemplary relief) is applicable to the merits of the dispute, the arbitrator arguably should not have the authority to award punitive damages. Although the arbitration clause gives the arbitrator broad remedial powers, trade usage weighs against the arbitrator having the authority to award punitive damages. Further, while the fact that the dispute is governed by German law does not show that the parties intended to exclude from arbitration the claim for punitive damages, it nevertheless weighs against the arbitrability of such claim. This is because an award of punitive damages to the United States business would violate German law. Moreover, in view of the fact that a substantial portion of the contract is to be performed in Germany, it seems reasonable to assume that the German company believed that German law would ultimately apply to any disputes and thus punitive damages would not be available. Similarly, the United States business arguably should not have

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200. The choice-of-law analysis may be particularly complex. The arbitrator's choice can be governed by the choice-of-law rules of "(1) the seat of arbitration, (2) the arbitrator's home country, (3) the country where the award will be enforced, (4) all states having a connection with the parties' dispute, (5) an international treaty, or (6) an international arbitral institution." John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L ARB. 40, 51-52 (1996). For a detailed discussion of the process of selecting a national law to govern the merits of a dispute, see Lando, *supra* note 174, at 101; Danilowicz, *supra* note 150; Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613 (1982).

201. See *Mastrobuono*, 115 S. Ct. at 1217.

anticipated that its country's law would be applied to the dispute. Accordingly, the language in the contract giving the arbitrator broad remedial powers is simply not enough to be the sole basis for the arbitrator to award exemplary relief, thereby ignoring applicable law, trade usage and the circumstances surrounding the parties' agreement.<sup>202</sup>

*C. Arbitral Obligations and Enforcement Constraints upon the Exercise of Arbitral Authority*

Once the arbitrator concludes that there exists the authority to award punitive damages, the arbitrator must determine whether or not to exercise the power to grant exemplary relief. In certain circumstances, an arbitrator may decline to award punitive damages because to do so would jeopardize the enforceability of the entire award.

Arbitrators in international arbitrations are under an obligation to the parties to render an enforceable award.<sup>203</sup> Consequently, even if an arbitrator is confident that the tribunal has the authority to award punitive damages, it must nonetheless consider whether such an award would ultimately be enforceable.

Determining whether an arbitral award may be enforced in a country other than where it was made is a complex process that frequently is

202. On the other hand, if the conflicts analysis designated California law (or the law of a jurisdiction that allowed exemplary relief in commercial arbitrations), it is arguable that punitive damages might perhaps be available through the combined effect of a substantive law and the broad arbitration clause which seems to contemplate such relief.

203. See LCIA Rules, *supra* note 104, art. 20(2), at 165 ("In all matters not expressly provided for in these Rules, the Court and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure that the award is legally enforceable."); see ICC Rules, *supra* note 104, art. 26, at 242 ("In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law."); see also Final Award in Case No. 5485 (ICC 1987), reported in 14 Y.B. COM. ARB. 156, 162 (1989) (stating that article 26 of the ICC Rules "establishes that the arbitrators shall make every effort to make sure that the award is enforceable at law"); Preliminary Award in Case No. 5505 (ICC 1987), reported in 13 Y.B. COM. ARB. 110, 112 (1988) (holding that in order to fulfill obligation imposed by article 26 of the ICC Rules arbitrator "should probably also deviate from the law chosen by the parties if it would appear that such a choice, if applied by the arbitral tribunal, could prevent that the award be implemented"); Interim Award in Case 4131, reported in 9 Y.B. COM. ARB. 131, 134 (1984) (noting that in view of article 26 of the ICC Rules "the tribunal will . . . make every effort to make sure that the award is enforceable at law"); Farnsworth, *supra* note 6, at 7 (stating that "prudent arbitrator[s]" may decline to render an award of punitive damages if it would not be enforceable); Larsen, *supra* note 6, at 257 (discussing arbitral authority to award punitive damages and stating "an arbitrator's power to fashion broad remedies must be balanced against his obligation to render an enforceable award"); Baniassadi, *supra* note 165, at 61 ("[T]he arbitrator must ensure that his award is ultimately enforceable.") (citation omitted); Derains, *supra* note 151, at 255 (stating that the arbitrator "is always concerned about the effectiveness of his decision"); Böckstiegel, *supra* note 150, at 185 ("[T]he arbitrator has at least a moral obligation to give the parties an award which can be expected to stand, both in case of setting aside procedures and in case of enforcement procedures, before national courts.").

governed by treaties, the most important of which is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award ("the New York Convention").<sup>204</sup> Under the New York Convention, which has been adopted by over ninety countries,<sup>205</sup> arbitral awards rendered in signatory countries are enforceable in all other signatory countries, subject to a narrow list of defenses.<sup>206</sup>

Under article V(2)(b) of the New York Convention, a court may refuse to recognize and enforce a foreign arbitral award if it "would be contrary to the public policy of that country."<sup>207</sup> It is unclear whether this means that arbitral awards of punitive damages would be against the public policy of countries that do not allow for such relief domestically.

A few civil law countries have refused to enforce foreign court judgments of exemplary relief on the ground that awards of punitive damages are against public policy.<sup>208</sup> For example, in a widely publicized case, the German Federal Court of Justice (the German Supreme Court) refused to enforce a portion of a United States state court judgment which contained an award of punitive damages because it violated German public policy.<sup>209</sup> The German Federal Court of Justice explained that "enforcement of the judgment would be contrary to the

204. New York Convention, *supra* note 157.

205. See Signatories to the 1958 New York Convention, 12 J. INT'L ARB. 113 (Mar. 1995).

206. For a discussion of the New York Convention, see ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981); Peter D. Trooboff & Corinne A. Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts*, 17 VA. J. INT'L L. 469 (1977); Robert B. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORD. 343 (1983).

207. New York Convention, *supra* note 157, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

208. See Judgment of the BGHZ, *supra* note 127, at 730-49; *Bryant v. Mansei Kogyo Co.*, summarized in Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused By Private Corporate Japanese Defendants*, 5 TRANSNAT'L LAW. 131, 174 (1992); see also *supra* note 127. It also should be noted that Canada and England have enacted statutes that bar their respective courts from enforcing certain foreign judgments of multiple damages. See Foreign Extraterritorial Measures Act, ch. 49, § 8 (1984) (giving the Attorney General of Canada discretion to refuse to recognize or enforce foreign judgments of treble damages in antitrust cases if they (1) adversely affect significant Canadian interests in businesses engaged in international trade or commerce in Canada, or (2) either infringe or are likely to infringe on Canadian sovereignty); Protection of Trading Interests Act 1980, § 4, in 18 HALSBURY'S LAWS OF ENGLAND ¶ 1531A (4th ed. Supp. 1996) (providing that "[a] judgment for multiple damages . . . may not be registered under the Administration of Justice Act 1920, Pt II or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Pt I and no United Kingdom court may entertain proceedings at common law for the recovery of any sum payable under such a judgment.").

209. Judgment of the BGHZ, *supra* note 127. In that case, the plaintiff brought an action in the California Superior Court alleging the defendant, a citizen of both the United States and Germany, had sexually abused the plaintiff. *Id.* at 730. The California court awarded the plaintiff \$400,000 in punitive damages, which the plaintiff sought to enforce in Germany. See *id.* at 731; see also 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, 644-59 (1992); Patrick

'compensation idea underlying damages,' which stems from the constitutional principle of reasonableness, and also contrary to the 'penal monopoly of the State' to impose punitive sanctions."<sup>210</sup> While this decision involved a foreign court's judgment, it seems that the Court's reasoning would also prohibit foreign arbitral awards of punitive damages from being enforced in Germany.

It is important to note that the New York Convention's public policy exception has been interpreted by some countries, such as France, Lebanon and Italy, as referring to international public policy, not national public policy.<sup>211</sup> Unlike domestic public policy, which includes all of the imperative rules of the state in which enforcement is sought,<sup>212</sup> international public policy encompasses only those basic notions of morality and justice accepted by civilized countries.<sup>213</sup>

J. Nettesheim & Henning Stahl, *Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award*, 28 TEX. INT'L L.J. 415, 416-25 (1993).

210. Kühn, *supra* note 38, at 45 (quoting the German Supreme Court in the Judgment of the BGHZ). For a further discussion of the enforceability of U.S. court judgments in Germany, see Hartwin Bungert, *Enforcing U.S. Excessive Punitive Damages Awards in Germany*, 27 INT'L LAW. 1075 (1993); Ernst C. Stiefel et al., *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany*, 39 AM. J. COMP. L. 779 (1991); Klaus J. Beucher & John Byron 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); Dieter Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721 (1987).

211. See, e.g., CODE DE PROCÉDURE CIVILE [C. PR. CIV.] art. 1502 (Fr.), reprinted in 7 Y.B. COM. ARR. 281-82 (1982) ("An appeal against a decision granting recognition or enforcement of an award may be brought . . . [i]f the recognition or enforcement is contrary to international public policy."); NEW CODE OF CIVIL PROCEDURE art. 814 (Leb.), reprinted in Adel Nassar, *International Arbitration in Lebanon*, 10 ARB. INT'L 295, 301 (1994) ("Arbitral awards are recognized and enforceable if . . . they are not manifestly contrary to international public policy."); Mauro Rubino-Sammartano, *New International Arbitration Legislation in Italy*, 11 J. INT'L ARB. 77, 85 (Sept. 1994) (summarizing changes to Italian international arbitration law in 1994, the author states that awards will be enforced if there is no "conflict between the award and Italian international public policy"). See also Buchanan, *supra* note 151; Bückstiegel, *supra* note 150, at 179-80.

212. See Buchanan, *supra* note 151, at 513 ("[Domestic] public policy represents those local standards or rules that are not subject to alternation or derogation by the parties and stand as an outside limit to the parties' freedom to contract."); Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 260 (Pieter Sanders, ed. 1986) (noting that "the concept of [domestic] public policy is often used to designate 'imperative' or mandatory rules, from which the parties cannot derogate").

213. Lew, *supra* note 1, at 534-35. Lew writes that "[t]his doctrine of international public policy includes an abhorrence of slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; opposes any effort to subvert or evade the imperative laws of a sovereign State; upholds fundamental human rights (as declared in the U.N. *Universal Declaration on Human Rights*) and the basic standards of honesty and *bona fides*; and endorses certain rules and practices contained in the major and widely accepted uniform laws and international codes of practice." *Id.* at 535 (emphasis in original). Cf. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974) (construing New York Convention's public policy exception narrowly to apply only where enforcement violates "most basic notions of morality and justice"). For a detailed discussion of the distinction between "domestic" and "international" public policy in the context of article V(2)(b) of the New York Convention, see

Because international public policy is much narrower in scope than the domestic public policy of the enforcing state,<sup>214</sup> some commentators have argued that civil law countries applying an international public policy standard to New York Convention article V(2)(b) would recognize and enforce arbitral awards of exemplary damages. According to these commentators, while such damages may violate a mandatory rule of the enforcing state, they arguably would not be contrary to generally accepted principles of morality and justice.<sup>215</sup>

In view of the above, an arbitrator deciding whether to grant punitive damages must examine carefully the public policy of the countries in which enforcement is likely to be sought to determine if an award of punitive damages is likely to be enforced. If granting punitive damages will jeopardize the enforceability of the entire award, then the arbitrator has the discretion to deny such relief even if the application of the governing law to the facts would otherwise warrant punitive damages.<sup>216</sup>

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Lalive, *supra* note 212, at 257–318; Buchanan, *supra* note 151, at 511–31; Robert A.J. Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal*, 51 TEMP. L.Q. 832 (1978); Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661 (1991). Some commentators have suggested the existence of a third standard, known as “transnational public policy” or a “truly international public policy.” See Lalive, *supra* note 212, at 257–318. Transnational public policy differs from the commonly known concept of international public policy because of its source. See BORN, *supra* note 2, at 538–39. While the traditional concept of international public policy is still based upon domestic public policy, transnational public policy originates in “substantive norms derived from international sources and not from [domestic] ones” thus making it “truly” international. *Id.* See also LEW, *supra* note 1, at 534 (discussing existence of international norms such as abhorrence of slavery, racial, religious and sexual discrimination as examples of “really international” public policy); Böckstiegel, *supra* note 150, at 180 (discussing the development of truly international public policy as comprised only of the “common denominators in values and standards” of the international community despite the fact that these may “obviously differ from [the public policy] of individual member states”); Sever, *supra*, at 1687 (“Transnational public policy essentially refers to a system of rules and principles, including standards, norms and custom, that are accepted and commonly followed by the world community.”); Buchanan, *supra* note 151, at 514 (“The concept of transnational public policy, a much debated notion itself, is said to represent the existence of an international consensus as to universal standards or accepted norms of conduct that must always apply . . .”).

214. See Lalive, *supra* note 212, at 257–318; Buchanan, *supra* note 151, at 511–31.

215. See Letter from Philippe Durand to the New York State Bar Association (Nov. 25, 1991), reprinted in pertinent part in TWELFTH SOKOL COLLOQUIUM, *supra* note 6, at 264–65 n.68; Kühn, *supra* note 38, at 48–49; Cf. Christopher B. Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, 7 J. INT’L ARB. 71, 86 (Dec. 1990) (arguing that foreign arbitral awards of penal interest should be enforced under the New York Convention, and that such enforcement does not violate “basic notions of morality and justice”).

216. LEW, *supra* note 1, at 537 (“[A]n arbitrator must ensure that his award does not offend the national public policy of the place where enforcement is sought.”); Baniassadi, *supra* note 165, at 81 (stating that “an arbitrator must pay special attention to the public policy of the country where the parties are likely to seek enforcement of the award” and “ensure that his award is ultimately enforceable.”); Derains, *supra* note 151, at 256 (stating that an arbitrator must “temper

A hypothetical is most useful in illustrating the competing interests facing an arbitrator contemplating whether or not to award punitive damages in an international arbitration. Suppose that a United States business and a German company whose assets are located wholly in Germany enter into a distribution agreement. The agreement states that all disputes are to be settled by arbitration, designates Los Angeles as the arbitral situs, includes a California choice-of-law clause, and expressly provides that the arbitrator shall have the authority to award punitive damages. Sometime later, the German company willfully breaches the agreement. The United States business files for arbitration, asserting, among other things, a claim for punitive damages.

Under the terms of the agreement, the arbitrator clearly would have the authority to award punitive damages. Further, neither California law nor federal law would prohibit an arbitral award of exemplary relief.<sup>217</sup> Nonetheless, the arbitrator should still consider whether or not to exercise the authority to award punitive damages because such an award may prevent the entire decision from being enforced in Germany.<sup>218</sup>

The arbitrator has two options. The arbitrator could simply award punitive damages to the United States business notwithstanding the fact that by doing so the entire award may not be enforceable in Germany.<sup>219</sup> Alternatively, the arbitrator may decide to give effect to German public policy and decline to exercise his authority under the contract because to do so would be an act of futility and would violate the arbitrator's obligation to render an enforceable award.<sup>220</sup> If the arbitrator chooses the former approach and awards punitive damages, the arbitrator should specifically denote what amounts of the award represent compensatory damages, punitive relief, attorney's fees, and litigation costs. This gives a foreign court the ability to enforce those portions of the award that are consistent with its public policy and to

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the results of a purely legal analysis" by taking into account the public policy of probable place of enforcement).

217. See *supra* notes 24–33 and accompanying text.

218. See *supra* notes 208–210 and accompanying text.

219. Derains, *supra* note 151, at 248 ("The principle whereby arbitrators are bound to apply the law chosen by the parties is sometimes all that is needed for them to set aside a mandatory rule foreign to that law."); Peter F. Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4 J. INT'L ARB. 27, 32 (Mar. 1987) (stating "to some degree . . . parties may stipulate punitive damages even under German law").

220. See Farnsworth, *supra* note 6, at 7 (stating that "prudent arbitrators may decline to render an award of punitive damages if it would not be enforceable."). It is completely consistent with the principle of party autonomy for the arbitrator to give effect to the public policy of German law which is otherwise not competent of application in the proceedings. This is because the arbitrator does not apply German law out of an allegiance to the German legal system, rather, the arbitrator does so pursuant to the arbitrator's obligation to the parties to render an enforceable award.

deny recognition and enforcement of the portions that violate it.<sup>221</sup> By breaking out the award in this way the arbitrator can award punitive damages without jeopardizing the enforceability of the entire award and, at least partially, fulfill the obligation to render an enforceable award.

## VI. CONCLUSION

International commercial arbitrations involve considerations and policies significantly different from those found in domestic arbitrations. As a result, an arbitrator deciding a claim for punitive damages in a transnational dispute should not simply apply the principles set forth in *Mastrobuono* in the manner that the Supreme Court did in the context of a domestic securities arbitration.

In transnational disputes, arbitrators should enforce express provisions by parties either including or excluding punitive damages from arbitration unless to do so would violate an applicable mandatory rule. Where the agreement is silent on the availability of punitive damages and there exists no applicable mandatory rule prohibiting punitive relief, an arbitrator should ascertain whether the parties intended the tribunal to have the authority to award exemplary relief by considering the presence or absence of a choice-of-law clause, international trade usage, other contract terms, and relevant facts. If the arbitrator concludes that the parties have authorized awards of punitive damages, the arbitrator may nevertheless decline to grant exemplary relief where doing so would jeopardize the enforceability of the entire award. Finally, if exemplary relief is granted, the arbitrator should specifically denote what amounts of the award represent punitive as opposed to compensatory damages, in order to reduce the possibility of the entire award being deemed unenforceable.

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221. Some countries allow for partial recognition and enforcement of foreign judgments and arbitral awards. See, e.g., Stiefel et al., *supra* note 210, at 799 (noting that "prevailing opinion in German law allows the judgment creditor" to restrict legal action for enforcement to enforceable portion of award). Moreover, attorney's fees, which are not recoverable in the United States, are recoverable in most civil law countries. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 119 (2d ed. 1985); Lawrence D. Rose, Note, *Attorney's Fee Recovery in Bad Faith Cases: New Directions for Change*, 57 S. CAL. L. REV. 503, 504 (1984).

## APPENDIX I

CIVIL LAW COUNTRIES PERMITTING RECOVERY OF ONLY  
COMPENSATORY DAMAGES IN PRIVATE ACTION

## A. Europe

BELGIUM. Belgium Civil Code art. 1382 (John H. Crabb trans., 1982).

CZECH REPUBLIC. Civil Code § 442 (Trade Links trans., 1995).

FINLAND. Finland Damages Act of 1974, *summarized in THE FINNISH LEGAL SYSTEM* 134 (Jaakko Uotila ed., 2d ed. 1985).

FRANCE. Code civil [C. Civ.] art. 1382 (Fr.) (J.H. Crabb trans., 1995).<sup>222</sup>

GERMANY. Bürgerliches Gesetzbuch [BGB] § 249 (Ger.) (Simon L. Goren trans., 1994).

GREECE. Greek Civil Code §§ 297–299 (Constantine Taliadoros trans., 1982).

ITALY. Codice civile [C.C.] art. 1223 (Italy) (Mario Beltramo et al. trans., 1969).

NETHERLANDS. Burgerlijk Wetboek [BW] Book 6 arts. 74, 95, 96, 162 (Neth.) (P.P.C. Haanappel & Ejan Mackaay trans., 1990).

RUSSIA. Grazhdanskii Kodeks RF [GK RF] art. 15 (Russ.) (1994) *available in* 1994 WL 738474 (RUSLEGISLINE).

SPAIN. Código Civil [C. Civ.] arts. 1106, 1902 (Spain) (Julio Romanach, Jr. trans., 1994).

SWITZERLAND. Schweizerisches Obligationenrecht [OR] art. 48 (Switz.) (Simon L. Goren trans., Supp. 1988).

## B. Latin America

ARGENTINA. Código Civil [CÓD. CIV.] arts. 554, 1143 (Arg.) (Frank L. Joannini trans., 1917).

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222. One commentator argues that *astreinte* under French law and the *dwangsom* under Dutch law are civil penalties having a punitive nature. See Karen J. Tolson, Comment, *Punitive Damages Awards in International Arbitration: Does the "Safety Valve" of Public Policy Render Them Unenforceable in Foreign States?*, 20 LOY. L.A. L. REV. 455, 506 (1987). *Astreinte* and *dwangsom* are civil fines imposed by courts in cases where a party fails to comply with the court's judgment. See 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 8, §§ 117–118, Supp. to ch. 8, § 21 (1986). However, neither the *astreinte* nor the *dwangsom* can be considered punitive damages because these penalties are not imposed for the purpose of deterring the type of conduct for which the initial claim was brought, but rather to punish for noncompliance with a court judgment.



BOLIVIA. CARLOS WALTER URQUIDI, A STATEMENT OF THE LAWS OF BOLIVIA IN MATTERS AFFECTING BUSINESS 109 (4th ed. 1974).  
 COSTA RICA. Civil Code of the Republic of Costa Rica arts. 704, 1045 (United Fruit Co. trans., 1907); HARRY A. ZÜRCHER ET AL., A STATEMENT OF THE LAWS OF COSTA RICA IN MATTERS AFFECTING BUSINESS 88 (5th ed. 1988).  
 ECUADOR. JORGE O. VELA & JUAN LARREA HOLGUIN, A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS 42 (3d ed. 1975).  
 GUATEMALA. DR. JULIO GÓMEZ PADILLA, A STATEMENT OF THE LAWS OF GUATEMALA IN MATTERS AFFECTING BUSINESS 75 (3d ed. 1975).  
 HONDURAS. DANTE GABRIEL RAMIREZ & ROBERTO RAMIREZ, A STATEMENT OF THE LAWS OF HONDURAS IN MATTERS AFFECTING BUSINESS 52 (4th ed. 1981).  
 MEXICO. Código Civil para el Distrito Federal [C.C.D.F.] arts. 1910, 2110 (Mex.) (Michael W. Gordon trans., 1980).  
 PANAMA. Civil Code art. 1616 (Pan.) (Frank L. Joannini trans., 1905).  
 VENEZUELA. PEDRO SILVEIRA BARRIOS, A STATEMENT OF THE LAWS OF VENEZUELA IN MATTERS AFFECTING BUSINESS 85-86 (4th ed. 1977).

*C. Middle East*

EGYPT. Civil Code art. 221 (Egypt), *reprinted in* 2 MICHAEL H. DAVIES, BUSINESS LAW IN EGYPT 199 (1985).  
 IRAN. Civil Code art. 328 (Iran) (M.A.R. Taleghany trans., 1995).  
 IRAQ. Civil Code arts. 169, 205 (Iraq), *translated in* 3 BUSINESS LAWS OF IRAQ 55, 65 (Nicola H. Karam trans., 1990).  
 LIBYA. Civil Code art. 224 (Libya), *in* 18 Y.B. COM. ARB. 34, 40 (1993).

*D. Asia*

JAPAN. Civil Code [MINPO] arts. 416(1), 709 (Japan), *translated in* DOING BUSINESS IN JAPAN at app. 4A-103, 4A-167 (Zenitaro Kitagawa ed., 1995).  
 KOREA. Civil Code arts. 393, 750, 751 (Korea), *translated in* LAWS OF THE REPUBLIC OF KOREA 309 (1964).  
 REPUBLIC OF CHINA. GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA arts. 106, 112, 134, *in* 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (1949-1990) 344-46 (Bureau of Legislative Affairs of the State Council of the People's Republic of China 1991); LAW OF

THE PEOPLE'S REPUBLIC OF CHINA ON ECONOMIC CONTRACTS INVOLVING FOREIGN INTEREST art. 19, in 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (1949-1990) 486 (Bureau of Legislative Affairs of the State Council of the People's Republic of China 1991); ECONOMIC CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 35, in 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 228 (Legislative Affairs Comm'n of the Standing Comm. of the Nat'l People's Congress of the People's Republic of China 1991).<sup>223</sup>

TAIWAN, LAWS OF THE REPUBLIC OF CHINA arts. 184, 213 (Taiwan) (Law Revision Planning Group et al. eds., 1961).

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223. While the official translation of Economic Contract Law article 35 does not appear to permit awards of punitive damages, the unofficial translation of this same provision seems to contemplate such relief. See CHINA: ECONOMIC CONTRACT LAW art. 35, translated in 22 I.L.M. 330 (1983) (reproduced with permission from 2 CHINA L. REP., Spring 1982, at 61-82). At least one commentator believes that the Economic Contract Law permits the award of exemplary relief in breach of contract actions. See HENRY R. ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 79 (1988). Others have viewed this provision as not authorizing such relief. See THE CHINA INVESTMENT GUIDE 708-12 (China International Economic Consultants, Inc. ed., 4th ed. 1989); Mark Sidel, *The Acceptance of Emerging American Law Abroad: Could "Maritime RICO" Work in the People's Republic of China?*, 12 TUL. MAR. L.J. 99, 109 n.30 (1987).

APPENDIX II

CIVIL LAW COUNTRIES PERMITTING AWARDS OF PUNITIVE DAMAGES

*A. Europe*

NORWAY. Introductory Law to the Penal Code § 19, *summarized in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 10, § 93, at 86 (1986).

POLAND. Civil Code of the Polish People's Republic art. 448 (Polish Academy of Sciences Institute of State and Law trans., 1981).

*B. Latin America*

BRAZIL. Código Civil [C.C.] arts. 1547, 1550 (Braz.) (Joseph Wheless trans., 1920).

*C. Middle East*

ISRAEL. THE LAW OF ISRAEL: GENERAL SURVEYS 474 (Itzhak Zamir & Sylviane Colombo eds., 1995).

*D. Asia*

PHILIPPINES. Civil Code art. 2197 (Phil.), *reprinted in* 5 CIVIL CODE OF THE PHILIPPINES ANNOTATED 1031 (Edgardo L. Paras ed., 12th ed. 1990). Civil Code arts. 2216, 2229, 2233–35 (Phil.), *reprinted in* 5 CIVIL CODE OF THE PHILIPPINES ANNOTATED 869, 883, 886–87 (Edgardo L. Paras ed., 6th ed. 1969).

## APPENDIX III

## COMMON LAW JURISDICTIONS PERMITTING AWARDS OF PUNITIVE DAMAGES

*A. Europe*

ENGLAND. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Rookes v. Barnard*, 1 All E.R. 367 (H.L. 1964); *Cassell & Co., Ltd. v. Broome*, 1 All E.R. 801 (H.L. 1972); *Branchett v. Beaney*, 3 All E.R. 910 (C.A. 1992); *Drane v. Evangelou*, 2 All E.R. 437 (C.A. 1978); HARVEY MCGREGOR, MCGREGOR ON DAMAGES §§ 3309–3311, at 226–27 (14th ed. 1980).

NORTHERN IRELAND. *Scullion v. Chief Constable, Royal Ulster Constabulary* ("RUC"), [Jun. 10, 1988] (Q.B.) (LEXIS, NI Law library, cases file); *Carlisle v. Chief Constable, Royal Ulster Constabulary* [1988] N. Ir. 307 (C.A.); *Pettigrew v. N. Ir. Office* [1988] 3 N. Ir. J.B. 86 (Q.B.).

REPUBLIC OF IRELAND. *Whelan v. Madigan* [1978] I.L.R.M. 136 (Ir. H. Ct.); *Garvey v. Ireland* [1979] 113 I.L.T.R. 61 (Ir. H. Ct.); *Kearney v. Minister for Justice* [1986] I.R. 116 (Ir. H. Ct.); BRYAN M.E. MCMAHON & WILLIAM BINCHY, IRISH LAW OF TORTS 774 (2d ed. 1990).

WALES. Michael Napier, *European Perspectives for Practitioners, in DAMAGES FOR PERSONAL INJURIES: A EUROPEAN PERSPECTIVE* 29 (Frederick J. Holding & Peter Kaye eds., 1993).

*B. North America*

CANADA. *Alberta*, *Hedding v. Calgary* [1992] 2 Alta. L.R.3d 224 (Q.B.); *British Columbia*, *Parkes v. Howard Johnson Restaurants Ltd.* [1970] 74 W.W.R. 255 (B.C.S.C.); *Epstein v. Cressey Dev. Corp.* [1992] 65 B.C.L.R.2d 52 (C.A.); *Manitoba*, *Mount Baker Enter. Ltd. v. Big Rig Collision, Inc.* [1990] 64 Man. R.2d 180 (Q.B.), *aff'd*, [1991] 68 Man. R.2d 269 (C.A.); *New Brunswick*, *G.E. Cox Ltd. v. Adams* [1979] 26 N.B.R.2d 49 (S.C. App. Div.); *Ontario*, *H.S. v. Mundy* [1969] 9 D.L.R.3d 446 (Ont. Co. Ct.); *Québec*, Code Civil of Québec, S.Q., art. 1621 (Que.); *Saskatchewan*, *Thompson v. Celebration Saloons Ltd.* [1992] 104 Sask. R. 138 (Q.B.); *see generally* S.M. WADDAMS, THE LAW OF DAMAGES ¶ 11.190 (2d ed. 1991); JOHN W. MORRISON, THE INSURABILITY OF PUNITIVE DAMAGES 53–64 (1985); Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J. 793 (1995).

UNITED STATES. *Alabama*, Heil Co. v. Crowley, 659 So.2d 105, 108 (Ala. 1995); *Alaska*, Alaskan Village Inc. v. Smalley, 720 P.2d 945, 948 (Alaska 1986); *Arizona*, Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119, 1123 (Ariz. 1974); *Arkansas*, Harold McLaughlin Reliable Home Sales, Inc. v. Cox, 922 S.W.2d 327, 333 (Ark. 1996); *California*, Cal. Civ. Code § 3294 (West 1970 & Supp. 1996); *Colorado*, Palmer v. A.H. Robins, Inc., 684 P.2d 187, 213 (Colo. 1984); *Delaware*, Cummings v. Pinder, 574 A.2d 843, 845 (Del. 1990); *Florida*, W.R. Grace & Co. v. Waters, 638 So. 2d 502, 504 (Fla. 1994); *Georgia*, Banks v. ICI Americas, Inc., 469 S.E.2d 171, 174 (Ga. 1996); *Hawaii*, Masaki v. General Motors Corp., 780 P.2d 566, 570 (Haw. 1989); *Idaho*, J.T. Anderson v. Anderson, Kaufman, Ringert and Clark, 775 P.2d 1201, 1207 (Idaho 1989); *Illinois*, Wiemer v. Havana Nat'l Bank, 385 N.E.2d 340, 344 (Ill. 1979); *Indiana*, Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 136 (Ind. 1988); *Iowa*, Claus v. Whyte, 526 N.W.2d 519, 526 (Iowa 1994); *Kansas*, Cerecchi v. Flint Hills Rural Elec. Coop. Assoc., 837 P.2d 330, 345 (Kan. 1992); *Kentucky*, Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 389 (Ky. 1985); *Maine*, Fitzgerald v. Gamester, 658 A.2d 1065, 1070 (Me. 1995); *Maryland*, Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 647 (Md. 1992); *Minnesota*, Bucko v. First Minnesota Sav. Bank, F.B.S., 471 N.W.2d 95, 98 (Minn. 1991); *Mississippi*, Ross-King-Walker, Inc. v. Henson, 672 So.2d 1188, 1192 (Miss. 1996); *Missouri*, Stojkovic v. Weller, 802 S.W.2d 152, 155 (Mo. 1991); *Montana*, Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 428 (Mont. 1995); *Nevada*, Granite Constr. Co. v. Rhyne, 817 P.2d 711, 713 (Nev. 1991); *New Jersey*, Herman v. Sunshine Chem. Specialties, Inc., 627 A.2d 1081, 1085 (N.J. 1993); *New Mexico*, Gonzalez v. Surgidev Corp., 899 P.2d 594, 597 (N.M. 1995); *New York*, Beverley v. Choices Women's Medical Center, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); *North Carolina*, United Lab, Inc. v. Kuykendall, 437 S.E.2d 374, 379 (N.C. 1993); *North Dakota*, N.D. CENT. CODE § 32-03.2-11 (1996); *Ohio*, Digital & Analog Design Corp. v. North Supply Co., 540 N.E.2d 1358, 1365 (Ohio 1989); *Oklahoma*, LeFlore v. Reflections of Tulsa, Inc., 708 P.2d 1068, 1077 (Okla. 1985); *Oregon*, Huffman and Wright Logging Co. v. Wade, 857 P.2d 101, 106 (Or. 1993); *Pennsylvania*, SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 704 (Pa. 1991); *Rhode Island*, Peckham v. Hirschfeld, 570 A.2d 663, 669 (R.I. 1990); *South Carolina*, McGee v. Bruce Hospital System, 468 S.E.2d 633, 637 (S.C. 1996); *South Dakota*, S.D. CODIFIED LAWS § 21-3-2 (Michie 1987 & Supp. 1996); *Tennessee*, Headrick v. Carter, 897 S.W.2d 256, 261 (Tenn. 1995); *Texas*, Aluminum Co. of America v. Alm, 785 S.W.2d 137, 140 (Tex. 1990); *Utah*, Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985); *Vermont*, Staruski v. Continental Telephone Co. of Vermont, 581

A.2d 266, 273 (Vt. 1990); *Virginia*, Hamilton Dev. Co. v. Broad Rock Club, Inc., 445 S.E.2d 140, 143 (Va. 1994); *West Virginia*, TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 886 (W.Va. 1992), *aff'd*, 509 U.S. 443 (1993); *Wisconsin*, Radford v. J.J.B. Enter., Ltd., 472 N.W.2d 790, 796 (Wis. 1991); *Wyoming*, Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979).

### C. Oceania

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