2. Applicable law for qualification

The question of whether a foreign judgment is a civil judgment or otherwise is decided in accordance with Swiss law.[3] The criteria developed by Swiss doctrine must be applied to unknown institutions of foreign law.[4]

3. Qualification as criminal judgments

In Swiss doctrine, punitive damages judgments are regarded not as civil judgments, but rather as criminal judgments.

In his analysis of judicial assistance, for example, Honegger takes the position that actions for punitive and treble damages have such a strong punitive character that they are more like actions under criminal law.[5]

Kaufmann-Kohler believes that treble damages judgments cannot be enforced in Switzerland because they have lost their civil-law character; she regards the tripling of the amount as a punitive attribute.[6]

In their reproduction of excerpts from a Sargans judgment on clearance to proceed, Drolshammer/Schärer emphasize the criminal-law character of the institution:

> "Their purpose [i.e., that of treble damages] is on the one hand to make up for immaterial inequity and on the other hand to punish, instruct, and deter the injuring party and keep third parties from repeating the act in question. These latter functions are clearly of a criminal-law character. They correspond to the objectives of the state's right to punish."[7]

In Germany too, the prevailing doctrine regards punitive damages judgments not as civil judgments, but rather as criminal judgments. The justification given for this position is the punitive primary functions of the institution: punishment and deterrence. For this reason, it is said that judicial assistance should not be given to a punitive damages action in Germany, and a punitive damages judgment is not enforceable as a civil ruling.[8]

The view that punitive damages judgments must be regarded as criminal judgments is also shared by part of the American doctrine. From that it derives fundamental misgivings of a constitutional nature regarding the institution.[9]

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3 BJM 1991, 32; Kaufmann-Kohler 218 in note 37; Stojan 61 in note 9 with further references. - In German law, the question of how to qualify claims that invoke foreign law is a contentious one. Part of the doctrine favors exclusive qualification according to the law of the first state (Martens 731 in note 45; Schütze 394 note 13), while another part qualifies only according to the law of the recognizing state (Martiny N 500; Junker 258/59 in note 25) or according to the law of both states (Schütze 394 in note 13). Hollmann favors in principle qualification according to the law of the recognizing state, so as to prevent abuses by the first state (Hollmann 785/86 (c)); he qualifies according to the law of the first state only if the asserted claim has no equivalent in or point of contact with the law of the recognizing state (Hollmann 786 (d)).

4 Stojan 61 in note 10.

5 Honegger 213 in note 32, 219 in notes 68/69, 220 in note 74.

6 Kaufmann-Kohler 243 in note 228; see Stojan 74 in note 87.

7 Drolshammer/Schärer 310.

8 Detailed discussion in Schütze 395-397; see Hollmann 785 in note 13, 786 in note 20; Stiefel 512 (III e); Hans-Viggo von Hülsen, Kanadische und Europäische Reaktionen auf die US "pre-trial discovery" [Canadian and European reactions to U.S. "pretrial discovery"], Recht der Internationalen Wirtschaft (RIW) 1982, 537, 550; Christoph Wölki, Das Haager Zustellungsabkommen und die USA [The Hague Service Convention and the U.S.], Recht der Internationalen Wirtschaft (RIW) 1985, 530, 533 in note 39 with further references.

9 See § 7 B 2 above (pp. 7 5-79).