The idea of punitive damages is perhaps one of the major differences in the legal theories of civil law and common law. In civil law countries the concept of punitive damages is scarcely known, whether in breach of contract cases or otherwise, with a limited exception in some countries where there has been a willful intention to harm the claimant, amounting
effect to fraud. Of the common law countries, only in the United States are punitive damages awarded in what are essentially breach of contract cases. The use of civil damages to punish and deter is common in the American system. Punitive damages serve a public policy function, and the award of punitive damages is entrusted to American civil juries on a daily basis.

Such difference on the understanding of punitive damages between civil law and common law will certainly cause reasonable concern in the context of international enforcement. Even in the United States, it is not without question as to whether the arbitrators have the power to award punitive damages. The American jurisdictions have different answers and attitudes. Thus, there is a question mark here. Would the exercise of such power jeopardize the enforceability of the award?

1. THE FUNCTION OF PUNITIVE DAMAGES

In common law, punitive damages has the function of punishment and deterrence as well as the function of compensation.

As expressed in the case of Wilkes v. Wood, “[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.” Although the common law concept of punitive damages was first developed in England, it only had limited application in the U.K. In contrast, the U.S. courts have long endorsed the practice. The function of punishment and deterrence was iterated by the Supreme Court as the primary justification for the award of punitive damages.

“Punitive damages are awarded in the jury’s discretion ‘to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.’ Restatement (Second) of Torts

4 Id.
5 Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).
6 Id. at 18-19, 98 Eng. Rep. 498-499.
Sec. 908(1) (1979). The focus is on the character of the tortfeasor’s conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages … To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.”

Indeed, punishment and deterrence are the primary purposes of punitive damages, and exactly what have been criticized and attracted arguments. Consequently, this is certainly a big concern in the enforcement of arbitration awards granting punitive damages in foreign countries that may have different opinions about punitive damages.

Another function of punitive damages is compensation. Under English law and laws of some civil law countries, the prevailing party in litigation is entitled to recover the legal fees and some costs in prosecuting or defending the case. This is not the case in the United States. The compensation of attorney’s fees is regarded as a penalty to the other party. Unlike the function of punishment, this compensation function of punitive damages will not likely cause any problem in international arbitration, where to compensate the winning party for the reasonable attorney’s fees and some costs is generally accepted practice. Many institutional rules have clear provisions allowing such compensation, at least to some extent. In other words, compensation of legal fees is not viewed as punitive damages in most parts of the world.

2. WHETHER THE ARBITRATORS HAVE THE POWER TO AWARD PUNITIVE DAMAGES?

Punitive damages have long been recoverable in court jurisdiction in maritime and other cases in America where the defendant is guilty of willful, malicious or wanton conduct. However, the arbitrators were hesitant to grant punitive damages in their awards. Under New York State law, as expressed by the New York Court of Appeals in Garrity v. Lyle Stuart, Inc. (1976), the imposition of punitive damages is a sanction which may only

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8 Id. at 54-55.
9 For example, the arbitration rules of UNCITRAL, AAA, LCIA, SCC and CIETAC, all have certain provisions concerning the tribunal’s discretion in awarding the legal fees.
be imposed by the State.\textsuperscript{11} In \textit{Garrity v. Lyle Stuart, Inc.},\textsuperscript{12} the court vacated a portion of an award assessing punitive damages. Even though the \textit{Garrity} rule has not been followed much and in fact almost abandoned, it indicates that awarding punitive damages by arbitrators may cause problems, even in the United States.

The question of whether an arbitral tribunal has the power to impose penal sanctions will depend on the law of the place of arbitration (the \textit{lex arbitri}), and on the terms of the arbitration agreement.

2.1. Attitudes of U.S. Courts Towards Awards of Punitive Damages

In international arbitration, party autonomy is very much respected. Generally, the principle of party autonomy would apply where the parties have, by their agreement, expressly empowered the arbitral tribunal to award punitive damages. Several jurisdictions applying various state laws have held that arbitrators have the authority to award punitive damages where the parties’ agreement so provides.\textsuperscript{13}

However, certain states like New York have held that even when the parties have empowered the arbitrators to award punitive damages, the arbitrators cannot legally make such an award. The rationale is the public policy concern expressed in \textit{Garrity}:

“Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. Since enforcement of an award of punitive damages as a purely remedy would violate strong public policy, an arbitrator’s award which imposes punitive damages should be vacated.”\textsuperscript{14}

The federal courts have generally taken the opposite view. In \textit{Willis v. Shearson/ American Express Inc.},\textsuperscript{15} a federal district court held that a claim for punitive damages under a broad arbitration clause was arbitrable, and there

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\textsuperscript{11} Id, at p. 18.
\textsuperscript{12} 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).
\textsuperscript{13} Donahey, footnote 3, \textit{supra}, at 71. \textit{Ex parte Costa and Head (Atrium) Ltd.}, 486 So.2d 1272 (Ala. 1986); \textit{Belko v. AVX Corp.}, 204 Cal. App.3d 870, 251 Cal. Rptr. 557 (1988); \textit{Rgina Construction Corp. v. Envirmech Contracting Corp.}, 565 A.2d 693 (Md. 1989); \textit{Rogers Builders, Inc. v. McQueen}, 331 S.E.2d 726 (N.C. 1985); \textit{USX Corp. v. West}, 781 S.W.2d 453 (Tex. 1989).
\textsuperscript{14} 40 N.Y.2d at 356, 386 N.Y.S.2d at 832, 353 N.E.2d at 794.
\textsuperscript{15} 569 F.Supp. 821 (M.D.N.C. 1983).
\end{flushright}
was no “public policy reason persuasive enough to justify prohibiting arbitrators from resolving issues of punitive damages submitted by the parties.”16 And in 1985, in *Willoughby Roofing & Supply Co. v. Kajimia International*,17 the United States Court of Appeals for the Eleventh Circuit upheld an award of punitive damages on a claim of “willful fraud.” “In light of the federal policy favoring arbitration …, our task is to resolve all doubt in favor of the arbitrator’s authority to award a particular remedy.”18

The U.S. Supreme Court has expressly held that the “parties are generally free to structure their arbitration agreement as they see fit.”19 Thus, party autonomy is confirmed by the U.S. Supreme Court. Further, the issue is made clear by the U.S. Supreme Court in its decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*20 The question in *Mastrobuono* was whether a contract containing both a New York choice-of-law provision and an arbitration clause should be interpreted to preclude the award of punitive damages because the contractual dispute was to be governed by New York law. The Court held that the arbitral tribunal had the power to award punitive damages despite the so-called *Garrity* rule of New York law. In reaching this result, the Supreme Court was not troubled by the prospect of arbitrators awarding punitive damages. The Court made it clear that, in the absence of a contractual provision to the contrary, the Federal Arbitration Act (FAA) pre-empts any state law which purports to prohibit arbitrators from awarding punitive damages.21 The Court also recognized, however, that if the parties’ choice of New York law was intended to incorporate the *Garrity* rule, then nothing in the FAA would require disregarding this intent. The Court noted that: “… we have previously held that the FAA’s pro-arbitration policy does not operate without regard to the wishes of the contracting parties.” The Court found that the rules incorporated in the contract allowed punitive damages, thus at most, the New York choice-of-law provision introduced an ambiguity into the contract, which should be resolved in favour of arbitrating the punitive damages issue.22

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16 Id, at 824.
18 Id.
21 Id, at 4197.
22 Mark Augenblick, Michael Stern, *U.S. Supreme Court Upholds Arbitral Authority to Award Punitive Damages*, 12 J. Int’l Arb. 149, at 151.
Although the Supreme Court’s decision in *Mastrobuono* deals primarily with the interpretation of the choice-of-law clause, several important principles are confirmed:

- first, the Court affirmed that arbitrators may award punitive damages;
- second, any state law purporting to preclude arbitrators from awarding such damages would be pre-empted by the FAA;
- third, contractual parties may validly preclude arbitrators from awarding punitive damages; however, such intent must be made explicit.

Therefore, it is no longer a question whether an arbitrator can award punitive damages. Arbitrators have the power to do so if they find it proper and if the language of neither the contract nor the rules of arbitration chosen by the parties bears contrary provisions. This is the case where the parties have given express authorization for awarding punitive damages by the arbitrators, as well as where the parties have given implied authorization by adopting a broad arbitration agreement allowing arbitrators to arbitrate all the disputes, by agreeing on arbitration rules which give the arbitrators the right to award punitive damages, or by choosing the governing law or jurisdiction.

### 2.2. Applicable Law and the Power to Award Punitive Damages

When deciding the power of arbitrators to award punitive damages, the question of applicable law is often unavoidable. Whether the issue of punitive damages is a matter of substantive law or a matter of procedural law, i.e. arbitration law? Whether FAA pre-empts state arbitration law? Probably the answer is yes as we can see from the *Mastrobuono* case. Then how about the state substantive law?

Very often parties will write an applicable-law or governing-law clause in their contract in addition to dispute resolution clause. The general understanding is that such separate choice-of-law clause dictates only the substantive law to be applied to the disputes, not the procedural law for arbitration. Unless the parties have expressly agreed on the procedural law in the arbitration clause, the arbitration law of the arbitration situs (*lex arbitri*) will govern the arbitration proceedings. Certain U.S. courts have held that a choice-of-law provision of New York law calls only for the application of New York substantive law to the question of what conduct would justify the award of punitive damages, and does not affect the power
of an arbitral tribunal to award punitive damages.\textsuperscript{23} Thus, the procedural law shall decide whether the arbitrators have the power to award punitive damages or not, while the substantive law shall be applied to justify whether certain circumstances are proper for granting such remedy. For example, in an international commercial arbitration case with the situs of New York and with a governing-law clause providing for New York law, New York law is the substantive law for the disputes, and the FAA is the procedural law governing the arbitration (obviously the FAA applies since it is an international commercial case). According to the FAA, the arbitrators are given broad authority as to the remedies to be granted in the absence of parties’ opposite agreement. Here, even we assume that \textit{Garrity} is still good law in New York, it does not apply. Whether arbitrators have the power to award punitive damages is a power derived from procedural law. \textit{Garrity} rule prohibiting arbitrators from awarding punitive damages is part of the New York procedural rule for arbitration. However, New York procedural rule is not the proper procedural law for the case. The FAA pre-empts the New York state arbitration law. As substantive law for the case, New York law is to be applied to justify the grant of punitive damages.

Thus, it is quite clear that the FAA pre-empts state arbitration law. An immediate question will be whether the FAA pre-empts state substantive law where there is conflict between the federal law and the state law. The FAA provides a liberal scheme of enforcement of arbitration agreements in “\textit{a contract evidencing a transaction involving commerce}”\textsuperscript{24} (emphasis added). The FAA clearly pre-empts state substantive law when it is inconsistent with federal law. In the case of \textit{Perry v. Thomas},\textsuperscript{25} the Supreme Court held a provision of the California Labor Code “in unmistakable conflict” with the federal law holding that “the state must give way.”\textsuperscript{26} “The act [FAA] reflects a liberal federal policy favoring arbitration and, where applicable, preempts California law governing the validity of an arbitration clause.”\textsuperscript{27} Of course, such preemption by the federal law is limited to the extent of obvious conflicts. But what if the state substantive law clearly has no provision delineating the proper circumstances for punitive damages, or in other words, the applicable substantive law does not allow punitive damages.


\textsuperscript{24} \textit{9} U.S.C. §2.

\textsuperscript{25} 482 U.S. 483 (1987).

\textsuperscript{26} \textit{Id.} at 491.

while the FAA gives arbitrators discretion in choosing appropriate relief? Prof. Hans Smit also raised this question in one of his articles: whether arbitrators can formulate their own law of remedies, without reference to any system of municipal law.\(^{28}\) I believe this is an issue far to be settled. The case law has not furnished an answer yet. The reason might be that arbitrators seldom, if ever, award punitive damages where they cannot find support from the substantive governing law.

Although the power to award punitive damages is from procedural law, once awarded by the arbitrators, such award of punitive damages becomes part of the merit of the final award, thus not subject to court re-evaluation. In international arbitration, misapplication of law is not a ground for non-enforcement. The New York Convention only provides for limited procedural grounds for refusal of enforcement.

Generally, the relationship between parties’ agreement and applicable law with respect to the arbitrator’s power to award punitive damages can be summed up into the following situations:

i) Where contracting parties expressly or impliedly agree that the arbitrators may grant punitive damages, and the applicable law allows or does not prohibit doing so, the answer should definitely be “yes”. The arbitrators can award punitive damages when they see appropriate.

ii) Where parties expressly or impliedly agree to give the arbitrators the power of awarding punitive damages, but the applicable law prohibits so doing and such provision is mandatory (no matter whether it is the applicable procedural law or substantive law), the answer should probably be “no”. If the mandatory provision of the applicable procedural law is against punitive damages, it is decisive even with parties’ express consent, simply because violation of mandatory law will very likely result in the setting-aside of the award according to the arbitration law of the arbitration situs. If it is the applicable substantive law instead of the procedural law that imposes mandatory prohibition, again it is preferable not to try to challenge it.

iii) Where parties preclude by agreement the remedy of punitive damages, but the applicable law has mandatory provision to include punitive damages for certain conducts, the proper answer should probably be “yes” – the arbitrators can award punitive damages even though the parties try to opt out. Otherwise, parties would be

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tempted to avoid the mandatory law by agreement. Parties may not displace by agreement otherwise applicable mandatory law in such a fashion. If the arbitrators find the situation is severe enough to qualify punitive damages under the applicable law, they should be allowed to do so.

iv) Where parties preclude punitive damages as a remedy, and the applicable law is either silent or discretionary in that issue, the answer should basically be “no” – the arbitrators shall respect the intent of the parties, unless exceptional circumstances such like fraudulent conduct by one party can be proved. If parties just want to opt out the possible consequence of being imposed surprisingly high damages and no frauds attached to it, they should be allowed to get what they have bargained for.

3. SHOULD ARBITRATORS AWARD PUNITIVE DAMAGES?

In fact, the arbitration legislations adopted by many countries share the same broad authority to arbitrators as for possible remedies to be granted as the FAA, and the institutional rules usually allow the arbitrators to grant whatever remedies they deem proper. So we may assume that the arbitrators have the power to award punitive damages, or at least in theory. The question whether the arbitrators should award punitive damages mainly involves two aspects: the justification of an award of punitive damages, and the enforceability issue related, a very important practical factor. Discussion here will focus on the second aspect, that is, under the condition that the arbitrators believe the case is proper for punitive damages, whether they should in deed grant such relief. If an arbitral award cannot be enforced, it is not much more than a piece of paper to the parties. Parties attach great importance to the enforceability of an award, so should the arbitrators. Arbitrators should not only pay attention to the application of law in their awards, but also the realization of the parties' rights awarded.

3.1. Risk of Non-Enforcement by National Courts

As mentioned earlier, punitive damages is not familiar in civil law concepts. Even in the United States where punitive damages is widely accepted and practiced, some courts may not enforce an award of punitive

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30 No doubt a well-drafted and reasoned award for punitive damages does have great value at least in academic study, but parties are not so much concerned about the development of law as a whole, rather their economic interests involved. This is the reality.
damages. For example, in the case of Laminiers – Trefilerie – Cableries de Lens, S.A. v. Southwire Co., a Georgia state corporation opposed a motion to confirm an arbitral award brought by a French company. The award included a provision for interest pursuant to a French statute, namely 5% more will be added after two months from the date of notification of the award. The court held that this 5% extra interest is a penalty, hence refused to enforce that portion of the award citing Article V 2 (b) of the New York Convention. “A foreign law will not be enforced if it is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries.” The problem goes back to the very nature of punitive damages and arbitration. Normally penal sanctions are instruments of the State and reflect a national public policy. Arbitration is a private process created by the agreement of the parties to refer their dispute to private individuals for resolution. Arbitrators are not officials of the state. This basic distinction between arbitration and court proceedings is always a concern to bear in mind. And the courts, almost in all the countries, have been known to have a historical hostility towards arbitration. Though the situation has changed a lot in the past 20 years, it is still too early to neglect the risk caused by such tendency.

Besides, the enforcement place is most likely to be the country of the award debtor or the country where the award debtor has property. The so-called local protectionism is a common phenomenon. The national courts tend to sympathize with their own nationals. Even though the courts have to implement the obligation under the New York Convention, they may turn to the public policy check under Article V of the Convention. One thing we all know is that if the courts really want to find an excuse, they can always do, particularly when something quite disputable as punitive damages is involved in an award.

3.2. Public Policy Concern

The major and perhaps the only obstacle to enforcing a punitive damage award is the “public policy exception” provided in Article V(2) of the New York Convention.
York Convention. The enforcement framework set up by the Convention has limited the grounds for refusal of enforcement of Convention awards to the exclusive procedural defects enumerated in Article V(1), while leaving the exception to non-arbitrability and public policy.\(^{35}\) Since non-arbitrability can be included in the category of public policy, public policy is the only possibility that may allow the courts to review the merits of an award. It is contended that public policy check must be reserved for it involves the sovereignty of a state as well as for the exercise of supervision by the courts in certain circumstances to serve the function of ‘safety valve.’ On the other hand, this is exactly the most vulnerable part where manipulation can find its way. Some say that the public policy exception in the Convention is a big failure for the drafters.\(^{36}\) However, I do not think it is ever possible to get rid of that provision and it is not necessary to do that. What should be done is the careful application of public policy by the national courts.

There have been unceasing arguments about the appropriateness for arbitrators to grant punitive damages in the context of public policy concern. The 1989 Report on Punitive Damages in Commercial Arbitration of the New York State Bar Association, found “compelling arguments in support of both the position that punitive damages should not be allowed in arbitration and the position that punitive damages should be allowed under appropriate conditions.”\(^{37}\)

Professor Farnsworth has summarized the common arguments against and in favor of allowing arbitrators to award punitive damages in his article of Punitive Damages in Arbitration from the court decisions in Garrity and Willoughby as follows: \(^{38}\)

The opposing arguments as showed in Garrity are these:

i) The power to impose penalties is by its nature a power of the State and cannot be conferred on an arbitral tribunal by private agreement.

\(^{35}\) Article V of the New York Convention.


\(^{38}\) See Farnsworth, supra note no. 2, p. 10.
ii) Arbitrators, who do not necessarily have legal training, are not qualified to impose punitive damages, and their imposition of such damages raises questions of fairness since judicial review is limited.

iii) Allowing arbitrators to impose punitive damages will have an undesirable impact on the selection of arbitrators and perhaps on the willingness of persons to serve as arbitrators.

iv) Allowing arbitrators to impose punitive damages will either frighten parties away from arbitration or invite closer judicial scrutiny of awards.

v) In any event, there are few situations in which the law permits punitive damages.

The supporting arguments as shown in Willoughby are:

i) The reluctance to allow arbitrators to award punitive damages is simply a manifestation of the historical mistrust of arbitration, a mistrust that has generally been rejected.

ii) The agreement of parties who use a broad arbitration clause should be respected, particularly since the parties are always free to exclude punitive damages by express provision if they choose to do so.

iii) Fears of abuse by arbitrators of a power to award punitive damages have not been borne out in practice.

iv) Arbitrators have traditionally been accorded broad powers as to remedies.

v) Denying the parties the power to award punitive damages where a court could do so may either result in the duplication of proceeding, (with a separate claim for punitive damages being brought in a court) or a loss of a substantive right to punitive damages (if a separate claim would be rejected by a court).

In fact, the dominant view is that “public policy” under the Convention should be interpreted as to mean the international standard public policy as opposed to national public policy. According to the Restatement (III) of Foreign Relations Law, “United States courts have construed the public policy exception to the enforcement of foreign arbitral awards narrowly.” The international public policy shall be those principles of basic fairness, and include a limited category such as abhorrence of slavery, discrimination,


40 Restatement (Third) of Foreign Relations Law § 488, Comment 2.
murder, piracy, and the like. In Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier, the court stated that “[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility.” However, the fact is that different countries may have inconsistent definitions of public policy under which the validity of the punitive damage award are tested. Punitive damages, due to its very nature and different opinions attached thereto, is among the most possible occasions for invalidation on the basis of public policy.

3.3. Enforceability of Punitive Damage Award

In the past twenty years also, arbitration as a means of dispute resolution has become more acceptable to both the business circle and the courts. Many subject matters that were not able to be arbitrated are now arbitrable. For instance, the U.S. courts have agreed that punitive-damage claims and claims for multiple damages in antitrust, securities transaction, or RICO actions are arbitrable. The U.S. Supreme Court’s decisions in several cases concerning arbitration have demonstrated a strong public policy now favoring arbitration as a means of dispute resolution. The extension of arbitrability to various claims is an international tendency.

It seems that the United States federal courts agree and uphold the pro-arbitration policy. However, even in the U.S., we cannot be sure of the consistent application by the state courts. And international arbitrators’ opinions differ about whether punitive damage awards could be enforced in their jurisdiction. Some believe international comity and the New York Convention strongly support enforcement of foreign awards, even where the enforcing state’s domestic laws or policies would not permit enforcement. Other arbitrators believe that because punitive damages

42 508 F.2d 969, 974 (2d Cir. 1974).
43 Racketeer Influenced Corrupt Organizations Act, 18 USC § 1961 et seq. RICO actions allow treble damages.
45 This is demonstrated by many late legislations and decided court cases of different countries, such as paragraph 1 of Section 91 of the German Implementing Law on Restrictive Trade, which allows arbitration to resolve certain issues related to restrictive trade; Attorney- General NZ v. Mobil Oil NZ Ltd., (1989) 2 N.Z.L.R. 629, which allows issues of competition law be arbitrated; also see above note 44.
46 See Tolson, supra note 39, at 255.
penalize a wrongdoer, and ‘penal’ judgments are generally unenforceable in a foreign state, such an award should be rendered invalid. This, from another point of view, demonstrates the uncertainty of validity for punitive-damage awards.\textsuperscript{47}

Therefore, the arbitrators should be careful in considering the award of punitive damages. First, it must be totally justifiable under the applicable substantive law. Second, punitive damages shall only be used in extreme cases when there are such elements as fraud, bad faith and the alike proved by evidence. Apart from that punitive damages itself is an exceptional measure, arbitrators should keep in mind the potential risk in enforcement. And even if the arbitrators decide to give such remedy, it is preferable to make that part separable from other parts of the award, so that the whole award may not be vacated completely.\textsuperscript{48}

On September 17, 1987, a New York arbitrator issued a maritime arbitration award involving the \textit{Octonia Sun}, S.M.A. 2424 (1987).\textsuperscript{49} He concluded that the vessel’s conduct of converting oil cargo to fuel during the chartered voyage through a permanent connection between the cargo spaces and bunker tanks “should not be considered acceptable practice and, in fact, should be vigorously condemned.”\textsuperscript{50} He noted that no punitive damage award had ever been granted in New York maritime arbitrations, and stated:

“I have reflected on this apparent reluctance and seriously considered the implications of breaking new ground. Although the decision is a difficult and painful one, I must admit it has been made somewhat easier by the gross nature of the vessel’s conduct. I award punitive damages in the sum of $100,000.”\textsuperscript{51}

Both the obvious reluctance of arbitrators to award punitive damages and the decision in this maritime case indicate that punitive damages should be limited in substantial and severe fact patterns.

On the side of the arbitrators, they should be extremely careful in awarding punitive damages, while on the other side of the courts when

\textsuperscript{47} Id.

\textsuperscript{48} New York Convention requires the national courts enforce the award partially in case they deem the invalid part is separable.

\textsuperscript{49} Zubrod, supra note 10, at 18-19.

\textsuperscript{50} Id.

\textsuperscript{51} Id.
facing the motion for either vacatur or non-enforcement, a different path
should be taken. Can a court where the award is rendered vacate the award
on the ground that the arbitrators have misapplied the substantive
governing law? Can such court set aside the award on the ground that
arbitrators have no power to award punitive damages or have exceeded
their power by awarding punitive damages? Or can a court in another
jurisdiction where enforcement is sought refuse enforcement of punitive-
damage award?

For the first question, the answer is definitely negative pursuant to the
arbitration laws of the U.S. and many other countries. Even if the
arbitrators have misapplied the substantive law in granting punitive
damages, the award could not be upset for this reason. In the United States,
only ‘manifest disregard of the law,’ not simply misapplication, can
constitute a legal ground for setting-aside (which only applies to domestic
arbitration cases). “The error must have been obvious and capable of being
readily and instantly perceived by the average person qualified to serve as
arbtrator”, and “the term ‘disregard’ implies that the arbitrator appreciates
the existence of a clearly governing legal principles but decides to ignore or
pay no attention to it.”

The answer to the second question is very likely to be negative again. As
discussed earlier in this paper, the U.S. Supreme Court affirmed in
Mastrobuono the power of arbitrators to award punitive damages. And as
pointed out by Professor Hans Smit in his comment on the Mastrobuono
case, the FAA provision for vacatur “[w]here the arbitrators exceeded their
powers,” only envisages the case of an arbitral tribunal acting beyond its
competence, which is generally understood as adjudging matters not within
the scope of the arbitration clause and the submissions by the parties.
Punitive damages is only a manner of resolving a controversy. If this would
constitute a ground for vacatur, it would permit the courts to re-evaluate
any and all rulings made by the arbitrators and to vacate the award upon the
findings of any error.

The criterion for refusal of enforcement in another country is ‘public
policy.’ The public policy defense shall be examined narrowly, and shall not
be applied broadly. Although it opens a door for national courts to examine
the merits of the awards, this door should be not too wide. The existence

52 Merrill Lynch, Pierce, Fenner & Smith Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.
1986).
53 See Smit, supra note 28, at 59.
54 Id.
of punitive damages in an award is not itself a ground for non-enforcement. The courts should construe the public policy defense in a very constrained manner and only apply it in extreme instances. Otherwise, the entire regime of international arbitration that is largely based on the certainty of enforcement created by the New York Convention will be severely undermined.
"Those are the books I never had a chance to finish, and those are the books I never had a chance to start."