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Abubakri Yekini and Adeola Adedeji-Adeyemi, 'Enforcement of Punitive Damages in Commonwealth Africa', in Cedric Vanleenhove and Lotte Meurkens (eds), The Recognition and Enforcement of Punitive Damages Judgments Across the Globe: *Insights from Various Continents* (The Hague, Eleven International Publishing, 2023) pp113-128

ENFORCEMENT OF PUNITIVE DAMAGES IN COMMONWEALTH AFRICA

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1 INTRODUCTION

The concept of punitive damages is part of the common law legacy in Commonwealth Africa. Punitive damages are awarded to a plaintiff over and above what will compensate him for his loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant. The purpose of punitive damages is twofold: to provide solace to the plaintiff for the mental anguish, humiliation, degradation, and other aggravations caused by the wrongdoing, and to punish the defendant for their reprehensible behaviour. In this way, punitive damages serve as a deterrent to others who may consider engaging in similar conduct in the future.[1]

The award of punitive damages has been controversial.[2] Per Lord Foster in *Fay v Parker* "[t]he idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, defying the symmetry of the body of law".[3] Their availability in civil claims does not enjoy universal acceptance.[4] The same is true for Commonwealth Africa. While some States such as

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[1] *Guardian Newspapers Ltd v Ajeh* (2005)12 NWLR at pp. 229-230, paras. G-A. In jurisdictions such as Nigeria and Kenya, the availability of punitive damages is indisputable. See *Elochin v Mbadiwe* (1986) I NWLR(Pt) 47, *Kabo Air Ltd v Mohammed* (2014) LPELR 23614 (Nigeria). For Kenya, see *D K Njagi Marete v Teachers Service Commission* [2020] eKLR (Civil Appeal 316 of 2013)*; Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR (Civil Appeal 55 of 2012); *Leonard Gethoi Kamweti v National Bank of Kenya Limited* [2020] eKLR (Cause 237 of 2014). However, in South Africa, it seems the courts are very reluctant in recognising their availability. See *Fose v The Minister of Safety and Security* 1997 3 SA 786 (CC) 823-828; See also *Innes v Visser* (1936) WLD 44; *Lynch v Agnew* (1929) TPD 974 978; *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771.

[2] E. Weinrib, 'Punishment and Disgorgement as Contract Remedies', *Chicago-Kent Law Review*, Vol. 78, No. 1, 2003, p. 84.

[3] Per Foster J in *Fay v Parker* (1872) 53 NH 342 at p. 382.

[4] See C. I. Nagy, 'Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe', *Nederlands Internationaal Privaatrecht*, Vol. 30, 2012, p. 11 (where he states that "the recognition and enforcement of US punitive judgments has been a highly controversial issue, both globally and in Europe").

Nigeria award punitive damages,[5] it is restrictively applied in other States such as Kenya.[6] Yet, it is disputed whether they are available to claimants in South Africa.[7]

In today's interconnected world, the propriety of punitive damages will continue to be an issue in courts across various jurisdictions, either under the forum law or in enforcement proceedings. The focus of this chapter is to explore the topic of punitive damages to gain a deeper understanding of the legal intricacies surrounding the enforcement of punitive damages, particularly United States (hereafter: US) punitive judgments, in Commonwealth Africa. Part 2 of the chapter examines the composition of Commonwealth Africa, its legal landscape, the diversity of its legal systems and the theoretical basis for enforcing foreign judgments in the area. Part 3 discusses the enforcement of US punitive judgments in Commonwealth African states under the common law action and statutory enforcement schemes. The section further looks at the prospect of US punitive damages under the 2017 Commonwealth Model Law on Recognition and Enforcement of Foreign Judgments. Part 4 concludes the chapter.

2. COMMONWEALTH AFRICA: THE LEGAL LANDSCAPE

2.1 Commonwealth Africa

The Commonwealth originally represents a friendly association of former British colonies. It started as "the British Commonwealth of Nations" in the late nineteenth century comprising the dominions of Canada, Australia, New Zealand and South Africa. In the early to mid-twentieth century, other British colonies in Asia and Africa – India, Pakistan, Nigeria, Ghana, Cameroon, and Malaysia amongst others – joined the association after gaining independence from Great Britain.[8] Thus, the association changed its name from the British Commonwealth of Nations to 'the Commonwealth'.

Commonwealth Africa comprises the members of the association from Africa. Although it used to represent the former British colonies from Africa and mainly the common law jurisdictions of Africa, the same may not be true today. Commonwealth Africa now represents a diverse group of independent states in Africa bound together by certain shared goals and

[5] See *Guardian Newspapers Ltd v Ajeh* (2005)12 NWLR at 229-230, paras. G-A; *Elochin v Mbadiwe* (1986) I NWLR(Pt) 47; *Kabo Air Ltd v Mohammed* (2014) LPELR 23614.
[6] *Leonard Gethoi Kamweti v National Bank of Kenya Limited* [2020] eKLR, *D K Njagi Marete v Teachers Service Commission*, [2020] eKLR, Godfrey *Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR.
[7] See *Fose v The Minister of Safety and Security* 1997 3 SA 786 (CC) 823-828; See also *Innes v Visser* (1936) WLD 44; *Lynch v Agnew* (1929) TPD 974 978; *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771.
[8] A. Yekini, *The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective,* London, Hart Publishing, 2021, pp. 78-79.

values.[9] Geographically, it consists of 21 African states from sub-Saharan Africa. These countries are Botswana, Cameroon, Gabon, The Gambia, Ghana, Kenya, the Kingdom of Eswatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Africa, Togo, Uganda, the United Republic of Tanzania and Zambia.

Commonwealth Africa is a highly diverse region. As against the popular assumption that Commonwealth Africa comprises common law jurisdictions because of their erstwhile affiliation with Great Britain, what is apparent today is that there is increasing visibility of civil law tradition. The admission of Mozambique to the Commonwealth in 1995, Rwanda in 2009, and Gabon and Togo in June 2022 further strengthens the presence of the civil law system in Commonwealth Africa.[10] Yet, there are other states with a combination of common, and civil law traditions (e.g. Seychelles), or common/civil law together with customary and Islamic law (e.g. Mozambique and Tanzania).

2.2 Legal landscape

The diverse legal traditions of Commonwealth Africa and invariably the judgments recognition and enforcement laws and policies are rooted in the colonial history of the region. Before the advent of colonialism, the various countries were controlled and governed by several kingdoms and empires. Indigenous laws regulated cross-border trading activities amongst the peoples of the various kingdoms of sub-Saharan Africa.[11]

Another layer of legal diversity was added when Europe came in contact with Africa. The reformation of the traditional legal systems and the introduction of European legal traditions are some of the lasting legacies of colonialism. The States colonised by Great Britain – Anglophone Africa – inherited the common law of England, the doctrines of Equity and the English statutes of general application. The French pursued a policy of assimilation in their colonies and the Napoleonic Code was either introduced to the Francophone states or the Code became the inspiration for national laws.[12] In most of these states, the legal system is still a

[9] 'The Commonwealth Charter (2013) https://thecommonwealth.org/charter#:~:text=The%20Commonwealth%20Charter%20is%20a,the%20people%20of%20the%20Commonwealth (accessed 22 October 2022).

[10] Commonwealth Secretariat, 'Togo's flag raised at Marlborough House to mark admission into the Commonwealth', https://thecommonwealth.org/news/togos-flag-raised-marlborough-house-mark-admission-commonwealth (accessed 22 October 2022).

[11] I.O. Ojo & E. O. Ekhator, 'Precolonial Legal System in Africa: An Assessment of Indigenous Laws of Benin before 1897', *Journal of Benin and Edo Studies*, Vol. 5, 2020, pp. 38-73.

[12] M. Sesay, *Domination Through Law: The Internationalization of Legal Norms in Postcolonial Africa*, Maryland, Rowman & Littlefield Publishers, 2021, p. 66; L.M Arguelles, 'Mixed Jurisdictions: The Road Ahead' in V.V. Palmer, and M.Y. Mattar (Eds.), *Mixed Legal Systems, East and West*, London, Taylor & Francis, 2016, pp. 34-35.

reflection of the inherited colonial laws and legal traditions with some modifications to reflect indigenous circumstances.[13]

The extant judgments recognition systems in Commonwealth Africa are built on theoretical foundations like those of western states. A few Anglophone countries in Commonwealth Africa recognise and enforce foreign judgments based on the doctrine of comity.[14] Theoretically, judgments from any foreign country, including the United States, are enforceable provided such judgments do not offend the sovereignty and fundamental policy of the receiving state. Kenya and Uganda seem to be the only countries in Commonwealth Africa whose courts have applied comity as a basis for recognition of judgments. Coincidentally, in the Ugandan case of *Christopher Sales v Attorney General*,[15] a US judgment was sought to be enforced despite the absence of any bilateral judgments' recognition scheme between the two countries. The receiving court heavily relied on the US case of *Hilton v Guyot*[16] in arriving at its conclusion. Similarly, comity was cited in the Kenyan case of *Jayesh Hasmukh Shah vs Navin Haria & Anor.*[17] Scholars like Roodt have suggested that foreign judgments may be enforced in South Africa based on comity.[18] However, this opinion is open to question as there is no reported case backing such a position.

The theory of obligation is the prominent theoretical basis for the recognition of foreign judgments in most common law jurisdictions in Commonwealth Africa. Foreign judgments are seen as creating an obligation which can be enforced by the judgment creditor in the receiving state. It is a common law action on debt which is available for liquidated judgment sums. A judgment creditor files a fresh action pleading the foreign judgment as evidence of the debt. Through a summary judgments procedure, judgment creditors can quickly get judgments enforced as foreign judgments constitute proof of issues or claims decided in the judgments. The inherent value in the doctrines of comity and obligation is that receiving courts are open and disposed to recognise most foreign judgments save those that violate the public policy of the receiving state.

Foreign judgments are also enforceable in Commonwealth Africa on a reciprocal basis. This entails the existence of bilateral or multilateral treaties or some form of international judicial cooperation (e.g. court-to-court agreements). Most common law jurisdictions have statutory reciprocal regimes for the recognition and enforcement of judgments. The statutory schemes provide a simple registration process for the enforcement of foreign judgments from reciprocating states. It should be noted that no such reciprocal arrangement exists between any

[13] F. Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', *The Journal of Modern African Studies*, Vol. 39, 2001, p. 576; M. Berinzon & R.C. Briggs 'Legal Families Without the Laws', *The American Journal of Comparative Law*, Vol. 64, 2016, p. 345.

[14] Comity has been described as a principle of deference and recognition of acts of foreign states. See *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.

[15] [2013] UGHCCD 15.

[16] 159 US 113 (1895).

[17] Civil Appeal 147 of 2009.

[18] C. Roodt, 'Recognition and enforcement of foreign judgments: still a Hobson's choice among competing theories?', *The Comparative and International Law Journal of Southern Africa*, Vol. 38, No. 1, 2005, pp. 20-21; C.F. Forsyth, *Private International Law*, 4th ed, Cape Town, Juta & Co Ltd., 2003, p. 409.

country in Commonwealth Africa and the United States. However, Nigeria enforces judgments from the United States under a reciprocal framework even though the US is not listed under the statute.[19]

Reciprocity forms the basis for the enforcement of judgments in the civil law jurisdictions of Commonwealth Africa. In the absence of treaties, foreign judgments are subjected to exequatur proceedings as provided in the respective Codes. A typical illustration of the enforcement framework is provided in Article 204 of the Rwandan Code of Procedure:

> "Except where international agreements provide otherwise, judgements ruled by foreign courts and foreign deeds issued by foreign officials shall not be subject to execution in Rwanda, unless they are rendered enforceable by the competent Court."[20]

The conditions for the grant of exequatur vary from one jurisdiction to the other. For instance, section 7 of the Cameroonian Law No. 2007/001 of 2007[21] simply requires the receiving court to ensure that the foreign court had jurisdiction, parties were duly served or represented, and the decision was not contrary to public policy or a final decision of the receiving court. This Law, just like some other Codes, is silent on whether reciprocal enforcement of judgments of the receiving state is a requirement for the grant of exequatur.

3. ENFORCEMENT OF FOREIGN PUNITIVE JUDGMENTS IN COMMONWEALTH AFRICA

3.1 Anglophone Commonwealth Africa – common law action

As discussed in the preceding section, common law is the predominant legal tradition in the Anglophone region of Commonwealth Africa. Not only is common law predominant, but their courts are also greatly influenced by the developments of the common law by the English courts. This is not to say the English common law is binding on these courts. Since independence, these countries have become republics, and English decisions are only of persuasive effect. Nevertheless, the courts are accustomed to following the English common law. The United States has no reciprocal enforcement regime with any African state, and neither is there any treaty relation. Apart from Nigeria, where US foreign judgments can be enforced

[19] This emanated from an erroneous interpretation of the reciprocal statutes. The error travelled through to the Supreme Court and was confirmed by the apex court. See A. Yekini, 'Foreign judgments in Nigerian courts in the last decade: a dawn of liberalization', *Nederlands Internationaal Privaatrecht,* No. 2, 2017, p. 205.

[20] Law No. 21/2012 of 14 June 2012, Law relating to the civil, commercial, labour and administrative procedure, Official Gazette no. 29 of 16 July 2012.

[21] Law No. 2007/001 of 19 April 2007 to institute a Judge in charge of Litigation related to the execution of judgements and lay down conditions for the enforcement in Cameroon of foreign court decisions.

under the statutory reciprocal regime, in most states, such judgments can only be enforced by common law action.

The requirements for enforcement of judgments via common law action are similar in most Anglophone states. These requirements are derived from the common law rules developed by the common law courts in England in cases such as *Schibsby v Westenholz*,[22] *Godard v Gray*,[23] and *Emanuel v Symon*[24] amongst others.[25] In an enforcement action, common law courts would rarely disturb the findings of foreign courts or review the merits of the judgment under any guide. This is a well-established principle across the common law jurisdictions in Africa from South Africa,[26] to Nigeria,[27] Kenya,[28] and others. A corollary of this principle is that a foreign court might arrive at a decision contrary to that which the court addressed would have reached. Thus, common law courts would ordinarily not be moved by the fact that a judgment creditor was awarded a judgment sum far above what he would have obtained if the matter was litigated in the forum.

The major obstacles to enforcing foreign judgments under common law action are lack of international jurisdiction, breach of a right to a fair trial and public policy.[29] Of these obstacles, public policy seems to be engaged with punitive damages. Unlike civil law jurisdictions where punitive damages are largely unknown in their laws and thus deemed contrary to public policy, such is not the case in most common law jurisdictions. The common law courts do award punitive damages in deserving cases and there is nothing inherently against public policy in awarding punitive damages.[30] In *SA Consortium Textiles v Sun & Sand*

[22] (1870) LR 6 QB 155.
[23] (1870) LR 6 QB 288.
[24] [1908] 1 KB 302 (CA).
[25] For a restatement of the common law rules, see *Adams & Ors v Cape Industrials Plc* (1990) Ch. 433.
[26] See *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd and Other*s [2018] ZASCA 165; *Jones v Krok* [1995] 2 All SA 30.
[27] *Overseas Union Insurance Ltd & Ors v Marine & General Assurance Co Ltd* (2001) 9 NWLR (Pt. 717) 92; *Teleglobe America Inc. v. Twenty First Century Tech. Ltd*. (2008) 17 NWLR (Pt. 1115) 108; *WittBusch Ltd. v. Dale Power Systems Plc.* (2007) 17 NWLR (Pt. 1062) 1; *Conoil v. Vitol S.A.* (2018) 9 NWLR (Pt. 1625) 463.
[28] See *Jayesh Hasmukh Shah v Navin Haria & another* [2016] eKLR (Civil Appeal 147 of 2009); *Raw Bank PLC v Yusuf Shaa Mohamed Omar & another* [2020] eKLR (Civil Suit 10 of 2014); *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC* [2021] KEHC 14 (KLR); *Ssebagala & Sons Electric Ltd v Kenya National Shipping Lines Ltd* [2002] eKLR (civ case 1723 of 2000).
[29] A. Yekini, *The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective,* London, Hart Publishing, 2021, p. 186; T.J. Monestier, 'Foreign Judgments at Common Law: Rethinking the Enforcement Rules', *Dalhousie Law Journal*, Vol. 28, No. 1, 2005, pp. 174-178.
[30] In the United Kingdom, the House of Lords limited the award of punitive damages to cases where it is provided by statutes, or where the defendant's conduct is calculated to make a profit for himself "which might well exceed the compensation payable to the plaintiff". See *Rookes v Barnard and Others* [1964] A.C. 1129. Kenyan courts seem to have restricted the award of punitive damages to the categories allowed in the *dicta* of Lord Devlin in *Rookes v Barnard.* See *D K Njagi Marete v Teachers Service Commission* [2020] eKLR (Civil Appeal 316 of 2013)*; Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR (Civil Appeal 55 of 2012); *Leonard Gethoi Kamweti v National Bank of Kenya Limited* [2020] eKLR (Cause 237 of 2014). In *Elochin v Mbadiwe* (1986) N.W.L.R (Pt. 14) 47, the Nigerian Supreme Court pronounced that *Rookes v Barnard* was only a persuasive authority. The apex court rejected the limitations introduced by the English House of Lords.

Agencies Limited, Lord Denning also wondered whether English courts could describe foreign punitive judgments as contrary to public policy when English courts equally award such judgments.[31] To the best of the writers' knowledge, there are no known foreign judgments from the United States or elsewhere that have been denied recognition and enforcement in England strictly under common law principles.[32]

The common law courts do not sit on appeals over foreign judgments. They also take cognisance of the diversity of procedural laws and the outcomes of civil litigation. The recognition rules prioritise the connection between a foreign court and the subject matter. A judgment rendered by a foreign court that had international jurisdiction would hardly be disturbed simply because the outcome or award would be different if the matter were to be decided by the court addressed. While it can be safely assumed that foreign punitive judgments may not necessarily be contrary to public policy in most Anglophone states based on the reasoning of Lord Denning cited above, it would not be out of place to argue that, if the size of the award is outrageous, public policy concerns may be triggered.

The law in South Africa deserves special attention. The question of whether a punitive foreign judgment is contrary to public policy has been debated in South Africa. Most South African private international law scholars agree that South African courts should decline to enforce foreign punitive judgments on public policy grounds.[33] There, however, appears to be no convincing and authoritative position from the courts. In *Jones v Krok*, a judgment creditor sought to enforce a US judgment awarding the sum of USD 13.670.987 as compensatory damages and USD 12.000.000 as punitive damages.[34] The trial court ruled that the judgment was unenforceable because it was contrary to South African public policy. The lower court did not only reject the punitive damages, it further held that the purportedly compensatory part was also not enforceable because it "rested upon the same foundations as those which support the assessment and award of punitive damages". On appeal to the Supreme Court, Corbett CJ held that:

> "In my view, there was no valid basis on the papers for these findings by the Court a quo; and, in any event, they seem to involve entering into the merits of the case adjudicated upon by the US Court, which as I have pointed out is not permissible. Accordingly, public policy afforded no ground for denying the appellant relief in respect of the amount of US $13.670.987. The award of US $12.000.000 does pertinently raise the question of whether or not our courts will enforce an award of punitive damages made by a foreign court, but in all the circumstances I prefer not to deal with this question at this stage."[35]

[31] [1978] QB 279 at 309.
[32] Potter LJ in *Lewis v Eliades* (No 2) [2004] 1 W.L.R. 692 indeed raised this question. His Lordship wondered whether punitive judgments would be enforceable under common law.
[33] South African Law Reform Commission, 'Project 121: Consolidated Legislation Relating to International Judicial Cooperation in Civil Matters: Report', December 2006, pp. 74-75.
[34] [1995] 2 All SA 30 (A).
[35] *Ibid*, para 53.

This case presented the Supreme Court with a golden opportunity to rule on whether foreign punitive judgments are contrary to public policy but the Court declined to take a stance. At the rehearing of the case, Kirk-Cohen J enforced the compensatory part and rejected the punitive part.[36] The court reasoned that punitive damages are not inherently unconscionable. However, the court found that in this instance the amount was exorbitant and therefore contrary to public policy.[37]

In the more recent case of *Danielson v Human and Another*, the sum of USD 859.595,51 which was trebled to USD 2.578.786,53 was awarded by a US court for breach of certain provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). [38] In an application to enforce the US judgment before a South African court, the question of public policy was also presented to the court. In a reasoned judgment, Cloete J held thus:

> "It seems to me that the treble damage provision is designed to compensate a plaintiff for his entire loss suffered (including those components which of their nature are difficult to quantify). It is not strictly punitive in the sense that its purpose is to, in addition, punish the defendant because of his reprehensible behaviour. As was held by Kirk-Cohen J in *Jones v Krok* supra, the mere fact that awards are made by a foreign court on a basis not recognised in South Africa does not mean that they are necessarily contrary to public policy. Put differently, that a particular formula to fully compensate a plaintiff for actual loss suffered is not familiar to South African legal practice is not for that reason alone justification for the conclusion that the damages are impermissibly punitive in nature. I thus find that the recognition and enforcement of the judgment of the American court is not precluded by public policy."[39]

It does appear that Cloete J was persuaded by the expert opinion of Blakey who distinguished between RICO treble damages which are remedial in nature (aimed at fully compensating a victim for harm suffered), limited to three times the actual damage, and assessed by the court and punitive/exemplary damages which are often assessed by a jury and often awarded under state laws.[40] The takeaway from these cases is that the question of whether foreign punitive judgments are contrary to public policy and therefore unenforceable appears not to be settled under South African law. The answer would likely depend on the characterisation of the foreign punitive judgments (whether remedial or punitive) and the reasonableness of the value.

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[36] *Jones v Krok* 1996 1 SA 504 (T).
[37] *Ibid*, 516.
[38] [2016] ZAWCHC 92.
[39] [2016] ZAWCHC 92, paras 37-38.
[40] *Ibid*, paras 29-34.

Apart from public policy grounds, foreign judgments are also unenforceable under common law action if the foreign judgments border on the enforcement of foreign penal law. The question to be asked is whether US punitive judgments fall under the "foreign penal laws" ground. Treble damages are punitive in nature. In the words of the Nigerian Court of Appeal in *U.B.N. Ltd. v. Oredein*:[41]

> "Exemplary damages convey a punitive element because its object is to punish the defendant. A plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. Because of the punitive nature of the damages, courts of law do not award exemplary damages unless in clearly deserving cases."[42]

It may be argued that punitive damages are not enforceable because their objective sits well within the general framework of criminal law. This argument seems unsustainable considering how common law courts have interpreted "foreign penal laws".[43] US punitive damages awarded to private litigants in purely private law actions would not be considered as foreign penal law notwithstanding that punitive damages are penal in nature. This view is supported by English court decisions. In *SA Consortium General Textiles v Sun and Sand Agencies Ltd*, Lord Denning concluded that punitive damages awarded to a private litigant, and not the state, cannot be characterised as a penalty.[44] Potter LJ came to the same conclusion in *Lewis v Eliades (No 2)*.[45]

Many countries in Commonwealth Africa are accustomed to following English court decisions even though those decisions are only persuasive. In the absence of any clear-cut common law principle or rule barring the enforcement of foreign punitive judgments, one can conclude that US treble/punitive damages may be enforceable in Anglophone Commonwealth Africa if the judgment meets the conditions for recognition and enforcement of foreign judgments under common law. At the risk of sounding repetitive, the key conditions include the existence of international jurisdiction, a fair trial, and the non-violation of the public policy of the forum or some overriding mandatory rules.[46] Only South Africa has a rule concerning overriding mandatory rules in place. US punitive judgments may be treated differently in South Africa because of a statute blocking the enforcement of foreign punitive damages. As mentioned in the preceding paragraph, even though US judgments can only be enforced through a common law action (because there is no bilateral/multilateral relationship

[41] (1992) 6 NWLR (Pt. 247) 355.
[42] *Ibid*, p. 379.
[43] See the rule in *Huntington v Attrill* [1893] AC 150.
[44] [1978] QB 279 at 309.
[45] [2004] 1 W.L.R. 692 at para 50.
[46] See *Jones v Krok* [1994] ZASCA 177; 1995 (1) SA 677 (A) at 685B-D; *Purser v Sales* [2000] ZASCA 135; 2001 (3) SA 445 (SCA) paras 11-12; Elan Boulevard (Pty) Limited v Mahomed (12451/2014) [2016] ZAKZDHC 49.

in place), an overriding mandatory statute prohibiting the enforcement of such judgments is a potent defence for judgments debtors.

In 1978, the South African parliament passed the Protection of Businesses Act.[47] It has been suggested the Act was enacted during the Apartheid era to protect South African businesses from the reach of US antitrust laws and other foreign laws and judgments awarding multiple damages.[48] However, the scope of this Act is limited to foreign judgments concerning "the production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material". In other words, the underlying transaction must be connected with mining and minerals. In 1984 the Act was amended to prohibit the enforcement of foreign multiple or punitive judgments (damages) in South Africa.[49] Section 1A (2) of the 1984 amendment states that:

> "'multiple or punitive damages' means that part of the amount awarded as damages which exceeds the amount determined by the court as compensation for the damage or loss actually sustained by the person to whom the damages have been awarded."

There have been different attempts at invoking the Protection of Businesses Act to deny recognition to foreign judgments in South Africa, including US punitive judgments. However, judgments debtors were not successful because of the limited scope of the Act. *Danielson v Human and Another* was one such case. [50] One of the issues argued in the enforcement proceeding was whether the enforcement of the US punitive judgment was barred by the statute. The court had no difficulty in concluding that the subject matter falls outside the scope of the Act and as such the Act does not apply.[51] *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* and other decisions further reiterate that the scope of the Act is limited to transactions bothering on only raw materials.[52] As other scholars have noted, there has not been any successful attempt at blocking the enforcement of foreign punitive judgments under this Act.[53] This can be contrasted with a similar blocking statute in the United Kingdom – the Protection of Trading Interests Act 1980 – but with no such restriction in material scope. The UK Act was

[47] No. 99 of 1978.
[48] See *Trademore (Pty) Ltd v Minister of Trade and Industry and Another* (49321/2017) [2019] ZAGPPHC 591, para 42; *International Fruit Genetics LLC v Redelinghuys* [2017] ZAWCHC 6. See also South African Law Reform Commission, 'Project 121: Consolidated Legislation Relating to International Judicial Cooperation in Civil Matters: Report', December 2006.
[49] Protection of Businesses Amendment Act 71 of 1984.
[50] [2016] ZAWCHC 92 ; 2017 (1) SA 141 (WCC).
[51] *Ibid*., paras 20-21.
[52] [2018] ZASCA 165. See also *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)* 1994 (4) SA 119; *Richman v Ben Tovim* 2007 (2) SA 283 (SCA).
[53] R. Oppong, *Private International Law in Africa*, London, Cambridge University Press, 2015, p. 342; S. Khanderia, 'The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse it?', *Journal of African Law*, Vol. 63, No. 3, 2019, p. 422.

successfully used to deny recognition and enforcement to US punitive judgments in *Service Temps Inc v MacLeod*[54] and *SAS Institute Inc v World Programming Ltd.*[55]

3.2 Anglophone Commonwealth Africa – statutory schemes

There are two statutory reciprocal regimes for the recognition and enforcement of foreign judgments. These statutes are modelled after the UK's Administration of Justice Act 1920 (AJA) and Foreign Judgments (Reciprocal Enforcement) Act 1933. These frameworks were aimed at facilitating the liberalisation of foreign judgments within the Commonwealth. The first variant applies to judgments between the United Kingdom and respective Commonwealth states. The 1933 variant was meant to replace the 1920 version and is potentially applicable to any non-Commonwealth states. While some states have just one statute in place, several Commonwealth African states maintain both statutes. Be that as it may, most states have extended the statutory reciprocal schemes to only a handful of states. None of the Commonwealth African states have extended the reciprocal scheme to the United States. Therefore, US punitive judgments would hardly be governed by the statutory schemes.

Nigerian stands as an exception. While the reciprocal statute has not been extended to the United States, the Nigerian Court of Appeal has ruled that US judgments can be registered under the statutory scheme.[56] In *Overseas Union Insurance Ltd & Ors v Marine & General Assurance Co Ltd* the Nigerian Court of Appeal noted that when an application for enforcement is brought under the statute, courts should be guided by the provisions of the statute.[57] The same position was reiterated in *Hyppolite v. Egharevba* where it was emphasised that the grounds for setting aside foreign judgments are those provided under section 6(l)(a)(i) to (vi) of the Act.[58] Under this section, the award of multiple damages is not one of the grounds for denial of recognition and enforcement of foreign judgments. In *Witt & Busch Ltd. v. Dale Power Systems Plc*, the Supreme Court re-echoed the well-known principle that Nigerian courts will not sit as appellate courts over judgments of foreign courts.[59] The apex court further noted that a judgment creditor is entitled to have its judgment enforced once it meets the requirements of the statute. Thus, the position under the Act may not be different from that of common law action.

It should be mentioned that while both variants of the Commonwealth statutory reciprocal regimes do prohibit recognition of punitive judgments, the Kenyan Foreign Judgments (Reciprocal Enforcement) Act 1984 was amended by Act No. 18 of 2018 to prohibit the enforcement of exemplary, multiple or punitive damages.[60] Section 1 of the Act defines multiple damages as an 'amount payable under a judgment which has been arrived at by

[54] 2014 S.L.T. 375.
[55] [2018] EWHC 3452 (Comm).
[56] *Teleglobe America Inc. v. Twenty First Century Tech. Ltd*. (2008) 17 NWLR (Pt. 1115) 108.
[57] (2001) 9 NWLR (Pt. 717) 92.
[58] (1998) 11 NWLR (Pt. 575) 598.
[59] (2007) 17 NWLR (Pt. 1062) 1.
[60] See s.3(b) Act No 18 of 2018.

multiplying by any factor a sum assessed as compensation for loss or damage sustained by a person in whose favour the judgment was given'.

3.3 Francophone Commonwealth Africa - exequatur

Most civil law jurisdictions do not accept the philosophical basis of punitive damages. Damages are meant to redress the actual loss or harm suffered by a victim and nothing more. Although scholars have identified some traces of what can be described as punitive damages in some of the civil law countries,[61] treble, multiple and other similar forms of punitive damages as commonly awarded in the United States may be considered a violation of public policy especially when the value of the award is disproportionate to the harm suffered.[62]

The law and practice of judgments recognition and enforcement in francophone Commonwealth countries are derived from Continental legal traditions, especially the French legal tradition. US punitive judgments may be viewed as contrary to public policy since their courts rarely award such judgments. Indeed, such is the case in Cameroon where one commentator suggested that US punitive damages would hardly be awarded by Cameroonian courts except in intentional tort cases.[63] While the Cameroonian judgments enforcement statute does not include punitive damages as one of the refusal grounds for recognition, section 7(b) provides the public policy exception.[64] It is highly unlikely that exequatur would be granted to US punitive judgments because of this public policy ground.

Article 44 of the Rwandan Law No. 30 of 2018 which deals with the enforcement of foreign judgments contains similar provisions as those of Cameroon. The first condition for the grant of exequatur is an inquiry into whether the foreign judgment contravenes Rwandan public policy or any Rwandan law principle. While the position of the French courts on US punitive damages, especially those that are proportionate, appears to have changed recently,[65] it is doubtful whether these recent developments in judicial practice in France would be followed in francophone Commonwealth Africa.

3.4 Prospect under the Commonwealth Model Law?

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[61] For instance, see C. Vanleenhove, *Punitive Damages in Private International Law,* Cambridge-Antwerp-Portland, Intersentia, 2016, pp. 147-206.

[62] See A. Sprengel, 'Enforcement of Foreign Judgments: France' in M. Moedritzer & K.C. Whittaker (Eds.), *Enforcement of Foreign Judgments in 29 jurisdictions worldwide*, London, Law Business Research Ltd, 2014, p. 48 (citing Court of Cassation, First Civil Chamber decision of 1 December 2010 in Appeal No. 09-13303). See further Court of Cassation, Criminal Chamber decision in Appeal No. 13-83.884 (2014); Court of Cassation, First Civil Chamber decision in Appeal No 16-26.012 (2018).

[63] S.D. Galega, 'Strict Liability for Defective Products in Cameroon? Some Illuminating Lessons from Abroad', *Journal of African Law*, Vol. 48, No. 2, 2004, p. 239.

[64] Law No. 2007/001 of 19 April 2007 to institute a Judge in charge of Litigation related to the execution of judgements and lay down conditions for the enforcement in Cameroon of foreign court decisions.

[65] C. Vanleenhove, *Punitive Damages in Private International Law*, Cambridge-Antwerp-Portland, Intersentia, 2016, pp. 130-139 (discussing the French Supreme Court decision in S*chlenzka & Langhorne v. Fountaine Pajot S.A* and other relevant cases).

Judgment recognition and enforcement frameworks in the Commonwealth have stagnated for decades. There have been various calls and attempts geared toward modernising the subject matter. After failed attempts,[66] Commonwealth Law Ministers met in The Bahamas in 2017 to consider and adopt a brand-new Model Law on the enforcement of foreign judgments. While no Commonwealth state in Africa has thus far adopted this model law, it is important to take note of the improvements introduced in the Model Law, especially as it affects the enforcement of foreign punitive damages, since the model law can potentially apply in the Commonwealth states in the nearest future.

The drafters of the Model Law intend that it should be applied to all foreign judgments without the need for establishing reciprocity. This is a significant departure from the extant statutory frameworks. The Law seeks to promote justice for private citizens instead of concerns of state interest and policy. Therefore, if this Model Law is adopted by any Commonwealth state in Africa, US judgments will become registrable under the statutory framework.

Section 3 of the Law deals with punitive judgments. Under this section, a court addressed can sever the punitive part of a foreign judgment and enforce the compensatory part in the circumstance that punitive damages are contrary to the forum's public policy. This development aligns with what is obtainable under the Hague and EU frameworks. This can potentially settle the controversy surrounding the enforcement of US punitive damages, especially where the judgment contains different heads for compensatory and punitive damages. The Model Law may be of little or no help where there is no differentiation between compensatory and punitive damages as it is practically impossible to apply the severance provision since the court addressed would have no clue as to how the US court arrived at the lump sum. A practical application of section 3 of the Model Law can be seen under the Australian statutory enforcement scheme. Under section 6(13) of the Australian Foreign Judgments Act 1991, a court addressed has the discretion to sever an unenforceable part of a foreign judgment and grant recognition to the enforceable part.[67] In *Schnabel v Lui*, the court addressed was asked to enforce a US judgment which included both compensatory and punitive damages.[68] The court severed the punitive part and enforced the compensatory part.

It is also worth mentioning that section 14 of the Model Law has an interesting provision which empowers the court addressed to limit the enforcement of multiple or punitive damages to a comparable value under the forum law. This is a pragmatic solution to the conundrum arising out of the enforcement of punitive damages, especially in cases where the compensatory and punitive parts are not separated. Rather than rejecting the foreign judgment in its entirety, the court addressed can reduce the award up to the amount that is awardable in the forum. Read

[66] See generally J.D. McClean & K.W Patchett, *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth,* London*,* Commonwealth Secretariat, 1977.

[67] Although, section 1 of the Act defines a judgment to include any award or damages awarded in criminal proceedings.

[68] [2002] NSWSC 15.

together with section 3, US punitive judgments should hardly be denied recognition under the Model Law.

4. CONCLUSION

There are divergent approaches to the question of the availability of punitive damages. The divergence is not unconnected with the understanding of legal scholars, judges and policymakers on the fundamental objective of damages on the one hand and of the distinction between civil and criminal law on the other hand. While the objective of criminal law is to punish offenders and deter them from repeating reprehensible conduct, civil law seeks to compensate victims for the harm suffered and to put them back in the position they were before the harm suffered.

Over the years, courts have awarded damages in civil claims to punish the defendant. This led to the award of exemplary and punitive damages in purely civil actions. While this is a common practice in several Commonwealth jurisdictions, the same is considered contrary to public policy in most civil law jurisdictions because the award of punitive damages blurs the distinction between the objectives of civil and criminal law. The award of punitive damages is not the only problematic issue. In Commonwealth jurisdictions that award this kind of damages, there is considerable debate about what should be the appropriate and reasonable value.

With such divergence under national laws, the question of whether foreign punitive damages judgments are enforceable becomes trickier. In the absence of specific precedents, the answer can only be speculative. In the common law jurisdictions of Commonwealth Africa such as Ghana, Nigeria, and Kenya, US punitive judgments are potentially enforceable under common law action on judgment debt if the US judgment meets the conditions for recognition. The potential refusal ground is public policy. It has been argued that since the courts in these states do award punitive damages in civil claims, foreign judgments rendered on foundations recognised under the laws of these states should hardly be refused recognition. It is however open to question whether the court addressed would be willing to enforce US punitive damages whose value appears to be unreasonably too high. This is certainly the case for South Africa where a trebled US RICO judgment was enforced in one case and non-RICO punitive damages were not recognised in another case.

Punitive damages are hardly available in the civil law jurisdictions in Commonwealth Africa. Highly influenced by Continental legal traditions, punitive damages are considered to be contrary to public policy irrespective of the value of the judgment. Since public policy is engaged, a court addressed would hardly grant an exequatur to enforcement requests.

Probably, the solutions brought by the Commonwealth Model Law on the Recognition and Enforcement of Foreign Judgments may be adopted by the courts in the nearest future. The Model Law allows courts to sever punitive awards from other compensatory damages where these awards are distinct. The decision in *Jones v Krok* reflects this approach. Alternatively, in cases where the court addressed is only concerned about the reasonableness of the value of the

award, the Model Law permits the court addressed to enforce the foreign judgments to the extent of the value considered reasonable under the forum law.