Punitive Damages and Private International Law: State of the Art and Future Developments, edited by Stefania Bariatti, Luigi Fumagalli, Zeno Crespi Reghizzi

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PUNITIVE DAMAGES AND PRIVATE INTERNATIONAL LAW: STATE OF THE ART AND FUTURE DEVELOPMENTS

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FOREWORD

The relationship between punitive damages and civil law has always been a delicate one.

In the US and other common law systems which contemplate them, punitive damages are a remedy aimed at deterring and punishing a wrongdoer for his/her outrageous conduct, enabling the victim of a tort to be awarded with damages in excess of the prejudice suffered. As such, punitive damages involve a potential conflict with some of the tenets of tort law in civil law jurisdictions. Indeed, the functions of this remedy – deterrence and punishment – have been considered incompatible with the purely compensatory function traditionally ascribed to civil liability in civil law systems. Further potential grounds of clash stem from the excessive amount of punitive damages and the procedural context in which they are awarded.

For long time, these elements of friction have negatively affected the possibility of recognising punitive damages in Europe. In particular, due to their conflict with fundamental principles of the *lex fori*, the courts of some European States have found punitive damages to be in breach of public policy, which in turn has prevented the recognition and enforcement of a foreign judgment awarding them, or (more rarely) the application of a foreign law providing for these damages.

More recently, the negative attitude of European courts vis-à-vis punitive damages has been replaced, at least in some States, by a more open approach.

This new trend can be explained by several factors, which have taken place both in the US and in Europe. In the US, since the 1990s, the Supreme Court (and in some States, also the legislator) has set precise limits to punitive damages, which may no longer be disproportionate or unpredictable. In Europe, the case law has progressively acknowledged the evolution of the functions of tort liability in civil law systems, by gradually recognising that deterrence and sanction are also part of such form of

liability. These concurring circumstances have led certain European national courts to accept that punitive damages are not *per se* incompatible with public policy, provided that they comply with certain requirements among which is the principle of proportionality. The latest example of this shift in trend is offered by the case law of the Italian Supreme Court which, in a judgment of 5 July 2017, no 16601, declared, at least in principle, the compatibility of punitive damages with public policy, thus abandoning the opposite conclusion adopted since 2007.

Far from settling the problem in its entirety, however, this result raises a series of issues. The uncertainties concern, in particular, the object and limits of the court assessment as to the compatibility of punitive damages awards with public policy, the criteria to be followed for such assessment, and the consequences of a potential breach. Given the variety of the sources of private international law, the answer may depend on the applicable instrument (national law, EU Regulation, international convention) and the (wider or narrower) concept of public policy adopted in a specific national system. Furthermore, although public policy is determined by States according to their own conception, the result may also be influenced by rules and principles of supra-national systems, such as EU law and the ECHR.

Having in mind such complex scenario, this book intends to explore the various facets of the relationship between punitive damages and European private international law.

This book is divided into twelve chapters.

Chapters I and II examine punitive damages from a comparative law perspective. Chapter I, by Renée Charlotte Meurkens, analyses the characteristics of such damages in US law and the reasons for their rejection in civil law systems. Chapter II, by Giulio Ponzanelli, discusses the relationship between punitive damages and the evolution of the functions of civil liability in light of the above mentioned judgment no 16601 of 2017 of the Italian Supreme Court.

Chapter III, by Pietro Franzina, focuses on the the purpose and operation of the public policy defence as applied to punitive damages. This chapter addresses key issues such as: the *raison d'être* of public policy and its place within the rules of private international law, the object and nature of the assessment relating to public policy, the standards guiding courts in ruling on a public policy defence, and the consequences of such defence on the decision of a dispute.

Chapter IV and V, by Amelie Skierka and Sonya Ebermann, and by Antonio Leandro, respectively, examine punitive damages in the perspective of international commercial arbitration. These chapters investigate, in particular, the conditions under which arbitral tribunals may award punitive damages, the remedies available against such awards, and their recognition and enforcement in other States.

Chapters VI to X explore the position of various European States as to the recognition and enforcement of foreign judgments awarding punitive damages. These States include Germany and Switzerland (Chapter VI, by Astrid Stadler), France (Chapter VII, by Olivera Boskovic), the United Kingdom (Chapter VIII, by Alex Mills), and Italy (Chapter IX, by Giacomo Biagioni). Chapter X, by Cedric Vanleenhove, completes the picture by addressing the position of Spain and providing a comparative overview of the national systems considered.

Building on the above analysis, Chapters XI and XII, by Wolfgang Wurmnest and Ornella Feraci, respectively, address the issue whether and to what extent a common European concept of public policy regarding the recognition and enforcement of punitive damages judgments is emerging.

The contributions of this book are based on papers presented at a conference that took place on 11 May 2018 at the Department of Italian and Supranational Public Law of the State University of Milan, with the support of the SIDI Interest Group on Private International Law and the Rivista italiana di diritto internazionale privato e processuale.

The editors are indebted to Giulia M. Vallar, Michele Grassi and Chiara Lunetti for their help in the organisation of the conference and editing of this book.

Milan, 9 May 2019

S.B. – L.F. – Z.C.R.

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Abbreviations

AcP	Archiv für die civilistische Praxis
AEDIPR	Anuario Español de Derecho Internacional Privado
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
Alabama L Rev	Alabama Law Review
Arbitration Intl	Arbitration International
American J Juris	American Journal of Jurisprudence
American Rev Intl Arbitration	American Review of International Arbitration
Buffalo L Rev	Buffalo Law Review
Bull civ	Bulletin des arrêts de la Cour de cassation : Chambres civiles
California L Rev	California Law Review
Cardozo J Intl Comp L	Cardozo Journal of International and Comparative Law
Chicago-Kent L Rev	Chicago-Kent Law Review
Cleveland State L Rev	Cleveland State Law Review
Columbia J Transnational L	Columbia Journal of Transnational Law
Common Market L Rev	Common Market Law Review
Contr impr/ Eur	Contratto e impresa/Europa
Cornell L R	Cornell Law Review
D	Recueil Dalloz
Danno resp	Danno e responsabilità
Dir comm int	Diritto del commercio internazionale
DUDI	Diritti umani e diritto internazionale
Edinburgh L Rev	Edinburgh Law Review
ELR	European Law Review
Emory L J	Emory Law Journal

ERPL	European Review of Private Law
Europa dir priv	Europa e diritto privato
Foro it	Foro italiano
Georgia J Intl & Comp L	Georgia Journal of International and Comparative Law
Georgia L J	Georgia Law Journal
Harvard L Rev	Harvard Law Review
Human Rights Q	Human Rights Quarterly
Human Rights L Rev	Human Rights Law Review
ILSA J Intl & Comp L	ILSA Journal of International and Comparative Law
Intl Arbitration L Rev	International Arbitration Law Review
Intl L Materials	International Legal Materials
Intl Lawyer	International Lawyer
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
Italian LJ	Italian Law Journal
J Intl Dispute Settlement	Journal of International Dispute Settlement
J L Comm	Journal of Law and Commerce
JLS	Journal of Legal Studies
JCP	Juris-Classeur périodique
JDI	Journal du droit international
JETL	Vanderbilt Journal of Entertainment & Technology Law
JELS	Journal of Empirical Legal Studies
JLH	Journal of Legal History
JPIL	Journal of Private International Law
JZ	Juristenzeitung
Louisiana L Rev	Louisiana Law Review
LQR	Law Quarterly Review
Minnesota JIL	Minnesota Journal of International Law
MLR	Modern Law Review
NIP	Nederlands Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJF	Nederlandse Jurisprudentie Feitenrechtspraak

NJW	Neue Juristische Wochenschrift
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
Nuova giur civ comm	Nuova giurisprudenza civile commentata
Nuove leggi civ comm	Nuove leggi civili commentate
ODCC	Osservatorio del diritto civile e commerciale
Oregon L Rev	Oregon Law Review
PYBIL	Polish Yearbook of International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCDIP	Revue critique de droit international privé
RDI	Rivista di diritto internazionale
Rev dr int lég comp	Revue de droit international et législation comparée
RDIPP	Rivista di diritto internazionale privato e processuale
Recueil des Cours	Recueil des Cours de l'Académie de Droit International de la Haye
Resp civ prev	Responsabilità civile e previdenza
Rev of Litigation	The Review of Litigation
Rev arb	Revue de l'Arbitrage
Riv dir civ	Rivista di diritto civile
Riv dir proc	Rivista di diritto processuale
RTD civ	Revue trimestrielle de droit civil
RIW	Recht der Internationalen Wirtschaft
SJZ	Schweizerische Juristenzeitschrift
Southern California L Rev	Southern California Law Review
Spanish YBIL	Spanish Yearbook of International Law
U Mich J L Ref	University of Michigan Journal of Law Reform
U Pa J Intl Business L	University of Pennsylvania Journal of International Business Law
U St Thomas LJ	University of St. Thomas Law Journal
USLW	United States Law Week

Vermont L Rev	Vermont Law Review
VersR	Versicherungsrecht
Washburn LJ	Washburn Law Journal
Wisconsin L Rev	Wisconsin Law Review
WM	Wertpapier-Mitteilungen
ZEuP	Zeitschrift für europäisches privatrecht
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

Chapter I

PUNITIVE DAMAGES: FOUNDATIONS TO START WITH

RENÉE CHARLOTTE MEURKENS *

Contents: 1. Introduction. – 2. Characteristics of the civil sanction in American law. – 2.1. Powerful civil sanction in a civil justice system. – 2.2. The truth about excessiveness. – 2.3. Punitive damages are generally awarded with great caution. – 2.4. Insurability of punitive damages, cause for concern? – 3. Reasons for the non-existence of punitive damages: prohibitive objections or not? – 3.1. Problems relating to the traditional functions of tort law. – 3.2. Problems relating to the public-private divide. – 3.3. Problems relating to the role of government. – 4. The increased interest in punitive damages. – 4.1. Shifts from public to private law enforcement. – 4.2. Calls for powerful civil sanctions. – 5. The *status quo* of punitive damages rejection. – 5.1. The European Court of Human Rights (ECtHR). – 5.2. The legislator of the European Union. – 5.3. The Court of Justice of the European Union (CJEU). – 6. Recommendations for the introduction of punitive damages. – 7. Conclusion.

1. Introduction

When discussing punitive damages and European private international law, it is essential to start with some foundations of the civil sanction as such. This chapter explores the question whether the sanction has a future in continental Europe, which was also the general theme of my dissertation. [1] During my re-

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[1] Cf Renée Charlotte Meurkens, *Punitive Damages: the Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (Wolters Kluwer 2014). I especially refer to the entire bibliography of my dissertation (ibid 391-445).

search, I found that important lessons can be drawn from American punitive damages law because the Americans have a long experience with the sanction. Moreover, I found that the European punitive damages debate was, and still is, governed by an incorrect perception of American reality. This misperception has led to a lot of resistance: many participants in the European debate have a negative opinion of (the introduction of) punitive damages, which is also caused by several obstacles that are intrinsic to the civil law tradition. But one nowadays sees that the resistance is slowly eroding, whereas the interest in the sanction is further increasing. As there is more attention for private enforcement and for powerful civil sanctions, it could be useful to have an open and positive attitude towards punitive damages.

The following aspects relating to punitive damages will be highlighted in this chapter. Paragraph 2 describes some essential characteristics of the civil sanction in American law. In paragraph 3, the underlying reasons for the non-existence of punitive damages in continental Europe will be provided. Paragraph 4 then explains the causes of the increased interest, whereas the *status quo* of punitive damages rejection will be reflected upon in paragraph 5. In paragraph 6, a number of recommendations will be given that should help participants in the European debate to get the theory right and to overcome difficulties in respect of the introduction of punitive damages. My main findings will be summarized in the concluding paragraph 7.

2. CHARACTERISTICS OF THE CIVIL SANCTION IN AMERICAN LAW

In my view, the European resistance to punitive damages is partly based on inaccurate arguments relating to US law. At the same time, certain indications support the idea that the introduction of punitive damages is worth considering. In line with the American approach, it is interesting to think about positive results that the sanction might have on law enforcement and dealing with aggravated tortious behaviour, such as intentional, calculative and grave misconduct. Although certain aspects of the sanction are also considered controversial in the US, it is essential for the European debate to be aware of certain characteristics. What can we learn from American punitive damages law in order to safeguard that this debate is continued properly?

2.1. *Powerful civil sanction in a civil justice system*

The following definition of punitive damages can be found in US law: [2]

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Punitive damages are monetary damages that may be awarded to the plaintiff in a civil lawsuit apart from and in addition to compensatory damages. Several purposes have been attributed to such damages, most importantly punishment and deterrence of the defendant for wrongfully harming the plaintiff. [3] This explains why this form of damages is seen as a sanction in private law. The punitive damages doctrine, traditionally a common law doctrine that originates in England and the US, is nowadays merely accepted in common law countries and therefore alien to continental European legal systems. [4]

Participants in the European debate should judge the punitive damages sanction in consideration of the American legal context. The sanction forms part of the so called civil justice system, in which the citizen and civil claims play a vital role dealing with everyday problems. This system functions rather well because of the reserved role for other compensatory and

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[2] Restatement (Second) of Torts 1979, s 908.

[3] Dean D. Ellis, 'Fairness and Efficiency in the Law of Punitive Damages' [1982] Southern California L Rev 1, 3.

[4] The only countries that accept a restricted form of punitive damages are England and Wales, Ireland and Cyprus, which are not situated on the European continent and have a common law or mixed legal system. See Helmut Koziol, 'Punitive Damages – A European Perspective' [2008] Louisiana L Rev 741, 748.

regulatory mechanisms, such as public enforcement, social security and private insurance. It performs functions that in other modern legal systems, such as those in continental Europe, are primarily dealt with by governmental institutions. [5] This explains why public policy is mostly privately enforced in the US. [6] Civil litigation plays an important role in American policy-making, and the punitive damages sanction fits well into that. The law enforcement function is considered a valuable aspect of the sanction, which allegedly gives an incentive to private litigants to start civil lawsuits as private attorneys general. [7] The sanction thereby relieves the pressures on the criminal justice system and forms a useful complement to public enforcement mechanisms. [8] Other accepted functions of punitive damages in view of interests of society in general and of the harmed party in particular are, as said, punishment and deterrence of (potential) tortfeasors, as well as compensation of the victim. This latter function is mentioned in light of the victim's right to seek vindication and redress for his injuries. [9]

The sanction is not the only available legal instrument that gives incentives to private litigants to start a lawsuit. It forms part of a larger array of elements that facilitate the civil justice system, such as adversarial legalism, juries, contingency fees, and class actions. These elements create a legal climate in which civil litigation is made accessible and give a central position to the right to sue, an essential right in American society. [10] Consis-

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[5] Robert A. Kagan, 'American and European Ways of Laws: Six Entrenched Differences' in Volkmar Gessner and David Nelken (eds), *European Ways of Law – Towards a European Sociology of Law* (Hart Publishing 2007) 43.

[6] Arthur T. von Mehren and Peter L. Murray, *Law in the United States* (Cambridge University Press 2007) 163; Robert A. Kagan, *Adversarial Legalism – The American Way of Law* (Harvard University Press 2001) 99.

[7] Benjamin C. Zipursky, '*Palsgraf*, Punitive Damages, and Preemption' [2012] Harvard L Rev 1757, 1771; Peter Hay, *Law of the United States – An Overview* (CH Beck 2005) 70.

[8] Samuel D. Freifeld, 'The Rationale of Punitive Damages' [1935] L J Student B Ass'n Ohio St U 5; *Kemezy v Peters* [1996] 64 USLW 2578 [35] (Posner).

[9] David G. Owen, 'Punitive Damages as Restitution' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 120.

[10] Terence J. Centner, *America's Blame Culture. Pointing Fingers and Shunning Restitution* (Carolina Academic Press 2008) 4.

tent with the US constitution, each citizen can hold a wrongdoer who hurts him and thereby causes damage accountable in a civil lawsuit, which may even lead to the imposition of punitive damages. [11] Of course, Europeans are also aware of their rights in this respect, but the right to sue and trying to hold others responsible for your loss is given more emphasis in the US than in Europe.

Moreover, the imposition of punitive damages in the US legal system is a choice of policy that cannot be impeded by the division between public and private law (hereafter: public-private divide). [12] One aspect relating to this divide that is often put forward by opponents is that the sanction is imposed without criminal procedural safeguards, such as the requirement of proof beyond a reasonable doubt, protection against self-incrimination, and the double jeopardy principle (the common law equivalent of *ne bis in idem*). The fact that the public-private divide does not have much practical value for the imposition of punitive damages in the US can be illustrated by the example that a criminal conviction in principle does not bar the imposition of punitive damages for the same act in a civil lawsuit. [13] To be precise: the criminal sanction is mainly imposed for the wrong done to society, whereas the civil sanction is primarily imposed for the wrong done to the individual plaintiff. [14] The double jeopardy principle cannot prevent the imposition of additional civil sanctions, as this principle protects only against multiple criminal punishments for the same offence that occur in successive proceedings. [15] Because of this general rule, the civil sanction can function as a complement to criminal sanctions. With regard to the lack of safeguards relating to the requirement of proof beyond a reasonable doubt, most American states require clear and convincing evidence for punitive damages to be awarded. [16] Furthermore, the punitive damages defendant, who is also charged with a crime, is usually protected from

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[11] Martin H. Redish and Andrew L. Mathews, 'Why Punitive Damages are Unconstitutional' [2004] Emory L J 1, 38.

[12] Redish and Mathews (n 11) 21.

[13] John J. Kircher and Christine M. Wiseman, *Punitive Damages Law and Practice. Volume 1* (Thomson/West 2000) 5-136.

[14] Kircher and Wiseman (n 13) ibidem.

[15] *United States v Halper* [1989] 490 U.S. 435, 109 S. Ct. 1892.

[16] David G. Owen, *Products Liability Law* (Thomson/West 2005) 1203.

self-incrimination by a suspension of the civil procedure. This obliges the plaintiff to wait until the criminal procedure is closed. [17]

The American approach to civil litigation thus differs from the European approach, which also explains the conflicting perception of the use of punitive damages.

2.2. *The truth about excessiveness*

The civil justice system plays an important role in American society, especially when compared to other legal systems, but this does not automatically make it an excessive and for that reason a malfunctioning system. Although the US is known as a compensation culture, this terminology does not necessarily have a negative connotation. The idea that many Europeans have of the American civil justice system is unrepresentative. Urban legends concerning US tort cases that are rife but unreal, such as the case concerning the pet in the microwave, do not contribute to a positive picture. [18] While tort reformers have put emphasis on these civil litigation horror stories, empirical research shows that the number of tort actions is not as excessive as is often believed: tort cases form a relatively small percentage of civil lawsuits and tort damages are generally modest in amount, whereas the majority of tort claims are settled. [19]

On the basis of other empirical research, it is also safe to state that the criticism relating to the incidence and size of punitive damages awards is exaggerated. American legislators and courts have taken the position that punitive damages should be awarded with great caution and that largely disproportionate awards should be avoided. [20] Misunderstandings and misleading information brought forward by media and anti-punitive dam-

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[17] Doug Rendleman, 'Common Law Punitive Damages: Something for Everyone?' [2009] U St Thomas LJ 1, 3.

[18] Patrick S. Ryan, 'Revisiting the United States Application of Punitive Damages: Separating Myth from Reality' [2003] ILSA J Intl & Comp L 69, 72.

[19] Centner (n 10) 21; Tom Baker, 'Transforming Punishment into Compensation: In the Shadow of Punitive Damages' [1998] Wisconsin L Rev 211, 212.

[20] Linda L. Schlueter, *Punitive Damages. Volume 1* (LexisNexis 2005) 27.

ages lobbyists contribute to the negative image that consists of the incidence and size of awards. In fact, American courts do not often award punitive damages and the size of awards is generally not as excessive as many outsiders claim. [21] Studies of punitive damages verdicts from 1985 onwards for example disclose that punitive damages have been awarded in 2 to 9% of all cases that were won by the plaintiff. With regard to the size of these awards, the median for punitive damages awards was between $38,000 and $52,000 per award. [22] Furthermore, a close correlation between the amount of compensatory and punitive damages has been found, which implies that punitive damages are not as unpredictable as often believed. [23] Three reports made in 2005, 2009 and 2011 by the Bureau of Justice Statistics of the US Department of Justice have also contributed to the awareness of application of punitive damages awards. The 2005 report, containing data from 2001, reveals that in that year no more than 356 (6%) of the 6,504 state court civil trials that were won by the plaintiff resulted in punitive damages. In half of the 356 trials, plaintiffs obtained a punitive damages award of $50,000 or more. In 41 (12%) of the trials resulting in punitive damages, damages that equaled or surpassed $1 million were awarded and in 9 (3%) trials punitive damages of $10 million or more were awarded. This report estimates the median for punitive damages at $25,000 for the tort cases and $83,000 for the contract cases. [24] According to the 2009 report concerning state court tort trials in 2005, punitive damages were awarded in 254 (3%) of the 8,763 tort trials with plaintiff winners; the median punitive damages award in these cases was $55,000. [25] The report of 2011 reveals that in 2005 punitive damages were sought in 12% of the approximately 25,000 tort and contract

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[21] Mark L. Rustad, 'The Incidence, Scope and Purpose of Punitive Damages' [1998] Wisconsin L Rev 15, 17; Jennifer Kirkpatrick Robbennolt, 'Determining Punitive Damages: Empirical Insights and Implications for Reform' [2002] Buffalo L Rev 103, 160.

[22] Anthony J. Sebok, 'Punitive Damages: From Myth to Theory' [2007] Iowa L Rev 957, 964.

[23] Stephen C. Yeazell, *Civil Procedure* (Aspen Law & Business 2008) 273.

[24] Bureau of Justice Statistics, *Punitive Damage Awards in Large Counties, 2001* (TJ Cohen, Report 2005) 1.

[25] Bureau of Justice Statistics, *Tort Bench and Jury Trials in State Courts, 2005* (TJ Cohen, Report 2009) 6.

cases that were concluded in state courts. Punitive damages were awarded in 700 (5%) of the 14,359 cases that were won by the plaintiff. The median award for these 700 cases was $64,000, whereas in 13% of the 700 cases punitive damages of $1 million or more were awarded. [26] Although excessive awards have been reported, the conclusion that the incidence and size of punitive damages awards is not generally excessive is plausible. Moreover, these 'blockbuster' awards are usually granted against wealthy and powerful business defendants rather than the common individual defendants. [27]

Regarding the popular punitive damages categories in American law, participants in the European debate should remember the following. Punitive damages awards are especially rare in legal fields that receive most public, meaning also political, attention: products liability and medical malpractice cases in particular and personal injury cases in general. [28] Punitive damages are mostly awarded in cases concerning intentional torts (such as battery and assault), defamation and financial torts (such as fraud, bad faith insurance, consumer sales, and discrimination cases), whereas personal injury resulting from negligence, automobile accidents, medical malpractice, and products liability plays a relatively minor role. [29] The difference can be explained by the aggravating element that is required for the imposition of punitive damages. This aggravating element is probably more often present when the cause of action falls within one of the popular punitive damages categories than in the personal injury cases. [30] This does not mean that personal injury cases do not play any role in punitive damages law, but it is important to distinguish between personal injury resulting from negligence and personal injury resulting from intentional behav-

[26] Bureau of Justice Statistics, *Punitive Damage Awards in State Courts, 2005* (TJ Cohen and K Harbacek, Report 2011) 1, 5.

[27] Richard L. Blatt, Robert W. Hammesfahr and Lori S. Nugent, *Punitive Damages, A State-By-State Guide to Law and Practice* (Thomson Reuters/ West 2008) 13.

[28] Sebok (n 22) 966; Theodore Eisenberg, 'The Predictability of Punitive Damages' [1997] J Legal Studies 623, 633.

[29] Bureau of Justice Statistics, *Punitive Damage Awards in Large Counties, 2001* (TJ Cohen, Report 2005) 3.

[30] Stephen D. Sugarman, 'A Century of Change in Personal Injury Law' [2000] California L Rev 2403, 2430.

iour. Punitive damages awards are uncommon in the first category and relatively often awarded in the latter category.

The suggestion that punitive damages awards are excessive is a misconception that participants in the European debate should be aware of. The rejection of punitive damages should not be based on arguments relating to fear for exorbitant awards. Furthermore, the categories of wrongful behaviour in which punitive damages could especially play a role in continental Europe are known in US law as intentional torts, defamation and financial torts.

2.3. *Punitive damages are generally awarded with great caution*

A lesson can also be drawn from the method applied by US courts to assess punitive damages and the legislative and judicial mechanisms to prevent excessive awards. The first foundational requirement in US law for a punitive damages award is the invasion of a legally protected interest. As a general rule, punitive damages are only recoverable for tort actions, but in practice punitive damages are awarded for all sorts of legal infringements. Secondly, the unlawful behaviour must involve a certain element of major aggravation, such as outrageous conduct due to the defendant's evil motive or his reckless indifference to the rights of others. Lastly, the plaintiff must have suffered actual damage in order to obtain punitive damages. [31]

In assessing the amount of punitive damages, courts can especially take the following factors into account: the character of the defendant's act, the nature and extent of the harm, profits that the defendant gained due to his unlawful act, and the financial condition of the defendant. [32] Although Europeans might believe otherwise, in the American legal system value is attached to the principle that the award should be reasonable and should not go beyond what is necessary to achieve its goals. This means that there must be a reasonable relation to the harm done to the plaintiff and to the amount of compensatory damages awarded. [33]

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[31] Kircher and Wiseman (n 13) 5-66, 8-11; Schlueter (n 20) 358.
[32] Restatement (Second) of Torts 1979, s 908.
[33] Schlueter (n 20) 359.

If judges in Europe are given the discretion to award punitive damages, it is advisable to look into legislative and judicial methods that are used in the US legal system to prevent excessive and improper awards. Examples of legislative measures with the aim of controlling and limiting the imposition of punitive damages are: the clarification of vague standards relevant to questions of measurement, liability and misconduct, caps on awards, permitting payment of (part of) the award to the state or state agencies instead of to the plaintiff, separating questions of liability and compensatory issues from punitive damages issues, limiting punitive damages awards to one punishment for a single act or course of conduct, and requiring a higher standard of proof for the recovery of punitive damages in comparison to the recovery of compensatory damages. [34] In respect of judicial review mechanisms, participants in the European debate should specifically be aware of a number of guidelines created by the US Supreme Court to prevent disproportional awards, especially in light of constitutional safeguards relating to excessiveness and due process. Even though the Court has made clear that it is impossible and also undesirable in light of the functions of punitive damages to draw a crystal-clear line between the constitutionally acceptable and the constitutionally unacceptable, the Court has constantly emphasised the need for reasonable punitive damages awards. [35]

Note that an important reason for the necessity of these legislative and judicial reform mechanisms is the unclear situation that exists because each American state has its own punitive damages regime. If punitive damages are introduced in continental Europe, it could be useful to create legal unity by using a set of clear and consistent rules. Based on their long experience with the sanction, authors from the US and also England have indeed recommended that Europe should get the theory

[34] David G. Owen, *Products Liability Law* (Thomson/West 2005) 1200; Jane Mallor and Barry S. Roberts, 'Punitive Damages: On the Path to A Principled Approach?' [1999] Hasting L J 1001, 1006; James R. McKown, 'Punitive Damages: State Trends and Developments' [1995] Rev of Litigation 419, 436.

[35] Blatt, Hammesfahr and Nugent (n 27) 38. See, for an overview of US Supreme Court decisions on punitive damages, paragraph 4.4.4 of my dissertation (n 1).

right before introducing it. [36] A number of recommendations that form a starting point will therefore be provided in paragraph 7.

2.4. *Insurability of punitive damages, cause for concern?*

The insurability of punitive damages is also brought forward as an argument against (introduction of) punitive damages. The availability of insurance and resulting loss spreading allegedly undermines the punitive and deterrent effect of punitive damages awards because the insurer instead of the wrongdoer pays the award (the moral hazard problem). [37] Insurance is in that way contrary to good manners and violates public policy. Another issue is that the economic impact of the insurability of punitive damages supposedly leads to increased costs for the insurance industry and the public at large. [38]

The question whether insurance should cover liability for punitive damages is answered differently throughout the US. Insurability of punitive damages normally depends upon the importance attached to public policy considerations, the type of defendant (direct or vicarious), and the type of tort (intentional or accidental). Research from 2008 shows that the majority of American states allow the insurability of some form of punitive damages. [39] In this respect, the distinction between punitive damages that are assessed directly against the insured and punitive damages that are assessed vicariously against the assured is important. The majority of states permit the insurability of vicariously assessed punitive damages; only two states prohibit this form of punitive damages insurance. A plausible explanation for this result is that there is no real need to prohibit vicariously assessed punitive damages as public policy considerations, especially those relating to ineffective deterrence, play a lesser role in this category than in that of directly assessed punitive damages. In contrast, the insurability of directly assessed

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[36] Anthony J. Sebok, 'The U.S. Supreme Court's Theory of Common Law Punitive Damages: An Inauspicious Start' in Meurkens and Nordin (n 9) 143; Jonathan Morgan, 'Reflections on Reforming Punitive Damages in English Law' in Meurkens and Nordin (n 9) 204.

[37] George L Priest, 'Insurability and Punitive Damages' [1989] Alabama L Rev 1009, 1029.

[38] Ellis (n 3) 71.

[39] Blatt, Hammesfahr and Nugent (n 27) 200.

punitive damages is prohibited in twenty states, because the effect of a punitive damages award on the wrongdoer is almost zero if paid by an insurer. Even if the law in a certain state does not prohibit insurance, insurers may explicitly exclude – in full or in part – coverage for punitive damages liability. Some insurers for instance refuse coverage of punitive damages awarded for intentional or calculative wrongdoing.[40] Despite the controversy that has always surrounded the issue, in the past years the availability of insurance for both directly and vicariously assessed punitive damages has grown in the US.

If the sanction is one day introduced in continental Europe, one should – beforehand – think about the insurability question. Whether the insurability of punitive damages is a cause for concern or not is for insurers to decide. They may refuse coverage, for example because this takes away the deterrent effect of the award or because the punitive damages have been awarded as a result of intentional wrongdoing. This would be understandable, but that does not mean that refusal of insurance is the preferable solution for everyone. The idea that there is no need to prohibit insurance if victims and injurers are rendered better off by it could prevail. In this respect, it is important to remember that in former days the moral hazard argument also played a role in the debate concerning general liability insurance, which was considered invalid and contrary to good manners.[41] Nowadays, liability insurance is the order of the day in modern legal systems. An important supervising task is thereby granted to insurers: indirect punishment and deterrence of wrongdoers via insurers who give incentives is considered normal and accepted. If insurers take this task seriously, also in Europe punitive damages insurance is not beyond the bounds of possibility.

3. REASONS FOR THE NON-EXISTENCE OF PUNITIVE DAMAGES: PROHIBITIVE OBJECTIONS OR NOT?

As mentioned in the introduction, two reasons can be

[40] Alan I. Widiss, 'Liability Insurance Coverage for Punitive Damages?' [1994] Villanova L Rev 455, 459.

[41] Cees C. van Dam, 'Gronden van Nietigheid en Vernietigbaarheid' in Jan Hijma, Cees C. van Dam, Willem A. M. van Schendel and W. Lodewijk Valk (eds), *Rechtshandeling en Overeenkomst* (Kluwer 2013) 163.

pointed out to explain the European resistance to punitive damages: the negativity is based on an incorrect perception of the American reality of punitive damages (previous paragraph), and is caused by a number of obstacles that are intrinsic to the civil law tradition (this paragraph).

The following obstacles seem to prevent the existence of punitive damages in continental Europe: (1) the sanction is inconsistent with the traditional functions of tort law; (2) there is a fundamental rejection in light of the public-private divide; and (3) different views on the role of government in a certain legal system might explain the absence or presence of punitive damages.[42] Opponents in the European debate will probably keep referring to these obstacles as prohibitive objections, and understandably as they form part of our legal tradition for a good reason. Alternatively, as will be shown below it is possible to put each single objection into perspective.

3.1. *Problems relating to the traditional functions of tort law*

First of all, the sanction seems to be inconsistent with the accepted functions of tort law in continental Europe. It is however doubtful whether the introduction of punitive damages can be prohibited on the basis of this argument. In practice, tort law serves more functions than the traditional compensatory function, and the borderline between these functions (e.g. deterrence or satisfaction as opposed to punishment) is not always crystal clear.[43] Tort law has a combination of functions, and it depends on social and political circumstances and per legal system which functions are predominant. For instance, according to law and economics scholars deterrence is the main function.[44] Furthermore, history tells us that the functions of tort law have been subject to change and are dependent on common desires. Historically, tort law did have a clear punitive character in addition to

[42] See, for an extensive overview of these issues, Chapter 6 of my dissertation (n 1).

[43] Helmut Koziol and others, *European Group on Tort Law 2005, Principles of European Tort Law, Text and Commentary* (Springer Verlag 2008) 150.

[44] See for example Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970) 24.

its compensatory function in both common law and civil law systems. In ancient Roman law there was no real public-private divide, and a mixed system of criminal law existed.[45] Modern civil law systems have – at least theoretically – surrendered the punitive function of tort law, whereas common law systems have retained it in the form of punitive damages.[46] Although a punitive function of tort law is theoretically no longer accepted, continental European legal systems in practice still adhere to the historical approach of combining punishment and compensation. For example, although the present acceptance of liability for immaterial loss is dogmatically seen as a difference compared to the punitive character of the Roman law of delict, from a functional point of view this difference should be put into perspective. One could argue that the function of the immaterial damages award, which was introduced when the law of delict lost its punitive function, is comparable to the function of the ancient civil fine.[47] Punitive damages would perhaps have still existed in continental Europe if the social and political desires were different. Despite their incompatibility with the current functions of tort law, punitive damages could be part of private law in continental Europe if this is considered a proper policy choice. Prohibiting to introduce the sanction can even hinder the development of private law which is variable by nature and dependent on common desires in a certain period.[48]

While common law systems explicitly recognize the punitive damages sanction as such, continental European legal systems primarily *de facto* recognize non-compensatory elements in the law of damages.[49] In particular immaterial damages awards may have a preventive, satisfactory or even punitive

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[45] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005) 23.

[46] An interesting historical overview of punitive damages is provided in Jason Taliadoros, 'Thirteenth-Century Origins of Punitive or Exemplary Damages: The Statute of Westminster I (1275) and Roman Law' [2018] JLH 278.

[47] Jan Hallebeek, 'Buitencontractuele Aansprakelijkheid aan de Vooravond van de Moderne Samenleving' in Bruno Debaenst and Bram Delbecke (eds), *Vangnet of Springplank? Het Buitencontractueel Aansprakelijkheidsrecht in een Moderne Samenleving (1804-heden)* (Die Keure 2014) 23.

[48] Ivo Giesen, 'Collectieve Actie in Nederland en de EU: and the winner is...' [2013] NTBR 291, 292.

[49] Chapter 9 of my dissertation (n 1) gives an overview of existing civil sanctions in The Netherlands, Germany and France.

aim in certain situations of grave wrongdoing, for example in the case of serious personality right infringements. In general, the assessment of compensatory damages by courts is sometimes based on factors that go beyond the principle of compensation, such as the nature of the infringement and the degree of blameworthiness. [50] This additional focus on the tortfeasor's behaviour means that compensation of the victim is not the only goal in estimating the damages award. The argument that the punitive damages sanction is alien to continental Europe, especially in relation to the functions of tort law, therefore seems unfounded or over-simplified. This conclusion is in line with the abovementioned historical remarks, *i.e.* the combination of compensatory and punitive elements in the Roman law of delict. In view of the historical foundation of tort law, accepting the idea that the sanction is not alien to continental Europe would be an understandable outcome.

3.2. *Problems relating to the public-private divide*

A similar conclusion can be reached regarding the second reason for the non-existence of punitive damages in continental Europe: the strict public-private divide. Arguments against punitive damages relating to this divide are, although justifiably given as reasons for the non-existence of punitive damages, primarily theoretical obstacles that may be overcome in practice. The public-private divide is an extensively debated topic in legal doctrine. Its character has been explained as not only juridical but also political and ideological. [51] Common law lawyers also know the divide, but generally seem to find it difficult, unimportant or undesirable to classify legal norms as public or private. [52] They do not let it stand in their way when making certain policy choices. An example of such a choice is the imposition of punitive damages. One could therefore say that the Americans are far more pragmatic. In contrast, the idea in civil law systems that

[50] Shelton (n 45) 38.

[51] Gerdy T.J.M. Jurgens and Frank J. Van Ommeren, *De opmars van het onderscheid tussen publiekrecht en privaatrecht in het Engelse recht – Vanuit rechtsvergelijkend perspectief* (Boom Juridische Uitgevers 2009) 107.

[52] Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' [1980] MLR 241, 242.

tort law has a compensatory rather than a punitive function is not only based on the theoretical analysis of tort law, as such, but also results from a strict public-private divide. [53]

One aspect relating to the divide that is especially put forward by opponents as an objection to introducing punitive damages is the compatibility with criminal procedural safeguards, in particular the principle of legality, the *ne bis in idem* principle, several evidential safeguards, and the general right to a fair trial that has been laid down in art. 6 ECHR. [54] The question whether the sanction has a future in continental Europe can obviously not be answered without giving consideration to this problem. As mentioned in paragraph 2.1, the safeguards are also a topic of debate in the US. Nevertheless, in practice this does not impede the imposition of punitive damages by American courts, as the reason for requiring a high level of protection in criminal law is the threat of criminal punishment for the defendant. Civil sanctions, including punitive damages, are generally considered less severe and less stigmatizing than criminal sanctions. [55] The smaller risk of violating the wrongdoer's privacy justifies a smaller degree of protection and therefore the availability of less procedural safeguards in American punitive damages law.

The following should be mentioned about the compatibility of punitive damages with art. 6 ECHR. Due to the broad definition of civil obligation in the sense of art. 6, paragraph 1 ECHR, it is defensible that punitive damages are to be considered as such. This means that this provision is applicable to the imposition of punitive damages, which gives potential punitive damages defendants the right to have 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. [56] On the basis of three criteria developed by

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[53] Anthony J. Sebok, 'Introduction: What does it mean to say that a remedy punishes?' [2003] Chi-Kent L Rev 3; John H. Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition – An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 2007) 92.

[54] Helmut Koziol, 'Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Reports and Conclusions' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer Verlag 2009) 302.

[55] Yehuda Adar, 'Touring the Punitive Damages Forest: A Proposed Roadmap' [2012] ODCC 301, 338.

[56] ECHR, art 6(1).

the ECHR, it is also defensible to consider the imposition of punitive damages as a criminal charge.[57] Although this should not by itself lead to the conclusion that art. 6 ECHR is breached, the additional safeguards of paragraph 2 (presumption of innocence) and 3 (right to defence) ECHR are then applicable. However, it is thus far quite unclear what the level of protection should be, as the Court has not (yet) decided on the criminal charge character of civil fines imposed for non-contractual liability. Should punitive damages one day be introduced in continental Europe, the system of protection has to crystallize. The Court could start by making clear what a less strict treatment, as referred to in the *Jussila v Finland* decision, should precisely look like and whether this treatment could also apply to civil sanctions.[58] The Court decided in this case that, in criminal cases that do not carry any significant degree of stigma, for example if a penalty is imposed for violating a legal rule that does not belong to the hard core of criminal law, the safeguards of art. 6 ECHR are not fully applicable.[59]

Questions remain in the European debate concerning the compatibility of punitive damages with criminal procedural safeguards. Should the introduction of punitive damages one day be seriously considered, a nuanced approach to this problem similar to that in the US is worth considering. The Americans deal with the problem by adapting certain safeguards, for example evidential safeguards, and making them fit for punitive damages law. Other safeguards such as the double jeopardy principle are not considered problematic at all, meaning that the (lack of) these safeguards cannot impede the imposition of punitive damages. To conclude, because of the criticism relating to the confusion of criminal law and tort law and the lack of safeguards, US courts are instructed to avoid largely disproportionate awards and impose punitive damages with great caution.

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[57] Erik-Jan Zippro, *Privaatrechtelijke Handhaving van Mededingingsrecht* (Kluwer 2009) 450.

[58] *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006).

[59] *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006) 43.

3.3. *Problems relating to the role of government*

The third reason for the non-existence of punitive damages in continental Europe relating to the role of government will now be addressed. An important mechanism that has for a long time been virtually absent in continental Europe is private enforcement. However, as will be explained in paragraph 4, there are serious indications that point towards increased attention for private enforcement in Europe to complement public enforcement.

Other aspects that influence civil litigation and the use of punitive damages concern views on other compensation mechanisms and government regulation. Regarding the first aspect, private insurance and social security have been developed to a wider extent in Europe than in the US as alternatives to tort litigation. In Europe, situations involving for example personal injury are often dealt with by social security or private insurance. [60] But the European welfare state is retreating: also due to financial and economic crises that have captivated the world in the past years, a policy of retrenchment nowadays prevails, meaning, for instance, that social security benefits are further reduced. This makes compensation via tort law a more appealing compensation mechanism. [61] Regarding the second aspect, due to the different perspectives on government regulation Europeans do not rely on civil litigation and punitive damages to the same extent that Americans do. An example heard in product liability law is that the US developed a litigation strategy whereas (countries within) the EU developed a regulation strategy towards the protection of health and safety in society. [62] However, also in this respect, the retreat of government is noticeable: increased attention is given to privatization and private enforcement, which are developments that are in line with each other.

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[60] Ulrich Magnus, 'Why is US Tort Law so Different?' [2010] JETL 102, 118.

[61] Michael Faure and Ton Hartlief, 'Het kabinet en de claimcultuur' [1999] NJB 2007, 2013.

[62] Geraint G. Howells, 'The Relationship between Product Liability and Product Safety – Understanding a Necessary Element in European Product Liability through a Comparison with the US Position' [2000] Washburn LJ 305, 307; Mathias Reimann, 'Product Liability in a Global Context: the Hollow Victory of the European Model' [2003] ERPL 128, 151.

This explains the shift from public to private enforcement in different areas such as health care, housing, energy supply, information provision concerning financial and health risks, and transport. [63]

Lastly, the unfamiliarity with certain procedural law mechanisms such as contingency fees and class actions allegedly does not facilitate civil litigation. Not surprisingly, changing ideas are visible in Europe with regard to this point. Think of a recent report, made by the European Parliament, on collective redress including concrete recommendations to ensure access to justice in EU member states. [64] Other examples from, for instance, the Netherlands are the Act on Collective Settlements Mass Damages from 2005, and the experiment started by the legislator in January 2014 to introduce a 'no cure, no pay' system in order to guarantee effective access to court in personal injury cases. Mechanisms like these are slowly winning ground, with the purpose of creating a legal climate in which civil litigation is made more easily accessible.

To conclude, several differences relating to the role of government that influence civil litigation and the use of punitive damages can be pointed out between the US and continental Europe. It is however interesting to see that the differences become smaller, for example due to the retreat of government in Europe. Therefore, it is debatable whether this is still an objection to the introduction of punitive damages. It seems, on the contrary, that the possibilities for introducing the sanction are slowly but surely becoming more realistic.

4. The increased interest in punitive damages

A number of obstacles have thus far prevented the introduction of punitive damages in continental Europe. Despite these obstacles that explain in large part the resistance felt, at the same time there seems to be growing attention for punitive damages. The sanction is clearly on the agenda of academics and policy-

[63] Rianka Rijnhout and others, 'Beweging in het aansprakelijkheidsrecht' [2013] NTBR 171, 173.

[64] European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Collective Redress in the Member States of the European Union* (PE 608.829, October 2018).

makers. It therefore seems that Europe stands at the crossroads in respect of punitive damages. This section concerns the causes for the increased interest that can be pointed out in the European debate: private enforcement and calls for powerful civil sanctions.

4.1. *Shifts from public to private law enforcement*

As mentioned in paragraph 3.3, the retreat of government causes shifts from public to private enforcement to achieve public interest goals in different areas. And the changing view on law enforcement explains the increased European interest in punitive damages. Here private enforcement is referred to when law enforcement is initiated by a private person (think of consumers, entrepreneurs or governmental entities acting as private persons), rather than an initiative of the government (governmental supervisors and regulators, police forces, public prosecutors etc.). [65] The private person uses civil remedies, such as damages awards or injunctions, to obtain justice. Whereas private enforcement is a rather unknown concept in Europe, in the US it is the primary method of enforcing numerous laws. [66] One can think of securities laws, consumer protection laws, civil rights laws, antitrust laws, and environmental laws as examples of this. To give an example: more than 90% of antitrust laws are privately enforced. [67] An important role is thereby reserved for punitive or multiple damages. [68]

Thus, we see a traditionally extensive use of private enforcement in the US, whereas there is limited use of it in Europe. As explained this is mainly due to the different approach towards the public-private divide: common law lawyers seem to put less weight on the divide than civil lawyers do. It is however

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[65] Zippro (n 57) 2.

[66] R Shep Melnick, 'Deregulating the States: The Political Jurisprudence of the Rehnquist Court' in Tom Ginsburg and Robert A. Kagan (eds), *Institutions & Public Law – Comparative Approaches* (Peter Lang Publishing 2005) 74.

[67] Paolisa Nebbia, 'Damages actions for the infringement of EC competition law: compensation or deterrence?' [2008] ELR 23, 25.

[68] Edward D Cavanagh, 'Antitrust Remedies Revisited' [2005] Oregon L Rev 147, 153.

important to stress that in civil law systems the strict public-private divide becomes more blurred and law enforcement theories are shifting from the public to the private level. A reason for this shift in Europe is the impact of EU law and the extension of the effectiveness of European norms in the member states. [69] Another reason is the retreat of government and the privatization of economic markets which results in more regulation of such markets via civil litigation. [70]

Although this debate was initiated in the field of EU competition law, it is no longer merely concentrated there. There is attention for private enforcement in different fields on both the EU and national level, such as intellectual property law, environmental law, human rights law, consumer law, anti-discrimination law, and personality rights. [71] Private enforcement can complement public enforcement, as the ideal enforcement system would be a mix between public and private mechanisms. [72] Due to lower costs there even is a preference for private enforcement but, as private enforcement alone is not sufficient, reliance on more expensive public enforcement mechanisms is needed. In any case, this complementary form of law enforcement probably works best if one has access to powerful civil sanctions.

4.2. *Calls for powerful civil sanctions*

Apart from the European attention for private enforcement, there is another cause of the interest in punitive damages: the changing functions of tort law on a national level. Apart from compensation, tort law nowadays has to fulfil tasks in the field of influencing behaviour. Under the influence of law and economics and 'civilology', *i.e.* the study of civil law using other disciplines such as economics, psychology and sociology, grow-

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[69] Jean-Bernard Auby and M Freedland, 'General Introduction' in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide* (Hart Publishing 2006) 4.

[70] Tom Ginsburg and Robert A. Kagan, 'Introduction – Institutionalist Approaches to Courts as Political Actors' in Ginsburg and Kagan (n 66) 9.

[71] Claire Kilpatrick, 'The Future of Remedies in Europe' in Claire Kilpatrick et al (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 2.

[72] Ellis (n 3) 2; Avihay Dorfman, 'What is the point of the tort remedy?' [2010] American J Jurisprudence 105, 147.

ing attention is paid to the instrumental function of tort law.[73] The idea is that tort law – if equipped with apt legal remedies – could be used as a mechanism to deter tortfeasors.[74] There is a need to improve the enforcement of tort rules and deal with intentional, calculative and grave misconduct. Not surprisingly, this is the type of misconduct for which punitive damages are mostly awarded in the US, where intentional torts, defamation and financial torts are the popular punitive damages categories. These categories indeed include intentional and grave wrongdoing (intentional torts), as well as calculative wrongdoing (defamation and the financial tort fraud).

Thus, the focus in the European debate is both on the private enforcement of legal norms in general and on law enforcement within tort law. The availability of no other remedy than compensatory damages to react to serious breaches of private law duties creates a so-called enforcement deficiency. One could doubt whether it is desirable from the viewpoint of law enforcement that the reaction to private law infringements is dominated by the notion of compensation.[75] Important reasons for this doubt are the undercompensation of the victim or ineffective deterrence of the tortfeasor. In certain specific situations, the available tort remedies do not exert sufficient pressure on tortfeasors. An example is the infringement of personality rights in a calculative manner, such as publications by tabloids or other violations of a person's name, brand or product with the purpose of making profit. A legal problem that also gives rise to the question whether punitive damages could be of help is bad faith insurance, *i.e.* insurers who fail to give their clients what they are entitled to. As mentioned in paragraph 2.2, deterrence and punishment of bad faith insurance by means of punitive damages is common practice in the US. Another example is the situation in which the nature of the infringement is clearly inadmissible. In this respect, some examples from Dutch case law can be mentioned: a father who suffered a serious nervous shock as a result of the horrifying mur-

[73] Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag 2012) 17.

[74] Ton Hartlief, 'Gij zult handhaven!' [2007] NJB 915.

[75] Constant Van Nispen, *Sancties in het vermogensrecht* (Kluwer 2003) 6, 12.

der of his daughter, [76] the parents who lost their children as a result of grave criminal offences leading to a fatal car accident, [77] or the mother who was confronted with the murder of her seven-year-old son because her husband had the intention of wounding her. [78] It has been suggested that private law should respond firmly – by means of punitive damages – to such infringements.

An important remark is that punishment does not seem to be a goal in itself in the search for stronger remedies. In this respect, an important idea developed by law and economics scholars should be mentioned. In their theory of punitive damages, (specific and general) deterrence is the purpose of punishment. [79] In other words, punishment is not the goal of punitive damages but rather a means to an end: deterrence. The idea that the sanction can be introduced as long as it fulfils a preventive rather than a punitive function receives support in European literature. [80] But this main focus on deterrence does not mean that the 'real' punitive element receives no attention at all in Europe. Moreover, it is difficult to ignore the punitive aspect of punitive damages awards, because whichever way you look at it, plaintiffs will probably experience the obligation to pay punitive damages primarily as a punishment. At present, depending on the circumstances of a case, courts in Europe already take into account the nature of the infringement and the degree of blameworthiness in assessing civil damages awards, which gives these awards a punitive character.

5. THE *STATUS QUO* OF PUNITIVE DAMAGES REJECTION

This paragraph explores the *status quo* of punitive damages

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[76] Rechtbank Arnhem 29 March 2006, NJF 2006/252 and subsequent cases Rechtbank Arnhem 16 May 2007, NJF 2007/367; Gerechtshof Arnhem 26 May 2009, NJF 2009/311.

[77] Hoge Raad 9 October 2009, NJ 2010/387 with a commentary by Jan B.M. Vranken (*Vilt*).

[78] Hoge Raad 26 October 2001, NJ 2002/216 with a commentary by Jan B.M. Vranken (*Oogmerkarrest*).]

[79] *Kemezy v Peters* [1996] 64 USLW 2578 [34] (Posner).

[80] Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' [2006] AcP 352, 473; Willem H. van Boom, *Efficacious Enforcement in Contract and Tort* (Boom Juridische Uitgevers 2006) 35.

rejection in Europe, which will be illustrated by defining, albeit briefly, the position of three European institutions. Interesting developments in private international law will not be mentioned here, as the other authors of this book extensively deal with that topic.

5.1. *The European Court of Human Rights (ECtHR)*

Punitive damages are technically not awarded by the ECtHR.[81] In comparison to the legislator of the EU, as well as the CJEU, the negative approach to punitive damages of this Court becomes relatively clear. The Court's rejection of the sanction follows from most of its decisions, and from the Practice Direction on Just Satisfaction Claims of 2007 and 2016. An award of just satisfaction ex art. 41 ECHR is meant to compensate applicants for the actual harmful consequences of a human rights violation. Thus far, the Court has not been willing to depart from this traditional principle. However, as suggested in legal doctrine, there might be room for a broader interpretation of the term 'just satisfaction' in art. 41 ECHR based on the wide range of satisfactory measures that have already been granted in international human rights law.[82]

Some decisions can be pointed out in which the Court allegedly deviates from the compensatory principle by using the award for just satisfaction as a deterrent or even a punishment.[83] This idea is supported by the notion that grave violations should be sanctioned more severely to achieve credible and effective legal protection.[84] The introduction of punitive damages is considered an option in this respect, and it is therefore wise to keep an eye on the Court's future interpretation of this term. It is not surprising that punitive damages is an important sanction in

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[81] Vanessa Wilcox, 'Punitive Damages in the Armoury of Human Rights' Arbiters' in Meurkens and Nordin (n 9) 500; Shelton (n 45) 360.

[82] Shelton (n 45) 103.

[83] *Krone Verlag GMBH v Austria* App no 27306/07 (ECtHR, 19 June 2012); *Trévalec v Belgium* App no 30812/07 (ECtHR, 25 June 2013); *Cyprus v Turkey* App no 25781/94 (ECtHR, 12 May 2014), see the concurring opinion of P. Pinto de Albuquerque paras 12-19.

[84] Shelton (n 45) 366.

American human rights law.[85] Considerable punitive damages have been awarded there in order to give effect to the international prohibition against torture and deter gross human rights violations, which might create a precedent for future European human rights cases.

5.2. *The legislator of the European Union*

The approach of the EU legislator is less straightforward. It has been described as ambivalent and evidently self-contradictory.[86] Some examples of the legislator's negative approach to punitive damages can be mentioned. First of all, the Rome II Regulation considers punitive damages contrary to public policy.[87] However, it should be noted that this rejection is not absolute as only punitive damages of an *excessive* nature are unacceptable. Examples of a negative approach to punitive damages can also be found in the enforcement of intellectual property rights directive,[88] the Montreal Convention on international carriage by air which is applicable within the EU,[89] and the report concerning collective redress mentioned in paragraph 3.3.[90]

The EU legislator also showed some positivity towards punitive damages, for example in the Green Paper on damages actions for breach of EC antitrust rules. Clearly inspired by the American experience with private enforcement of antitrust law, the legislator has extensively discussed the introduction of punitive damages to fight EU competition law infringements

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[85] Richard B. Lillich, 'Damages for Gross Violations of International Human Rights Awarded by US Courts' [1993] Human Rights Q 207, 217.

[86] Gerhard Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadenserzats, Kollektivschaden* (CH Beck 2006) A 71; Koziol (n 4) 749.

[87] European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, preamble (recital 32).

[88] European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

[89] Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), art 29. This Convention has been signed by the European Community in 2001, see Decision 2001/539/EC.

[90] European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Collective Redress in the Member States of the European Union* (PE 608.829, October 2018) 64.

and has thereby contributed to the increased attention for the sanction. This development follows on the *Courage/Crehan* and *Manfredi* judgments in which the CJEU has referred to the possibility to award punitive damages founded on competition law, if such damages may be awarded pursuant to similar actions based on national law.[91] Nevertheless, after a decade of discussion it was decided in the directive on private enforcement of competition law that punitive damages are not allowed in this field.[92]

Lastly, the requirement of effective, proportionate and dissuasive sanctions for breaches of EU law creates a snowball effect that influences private law in general.[93] This formula, that is included in legislation concerning for instance anti-discrimination,[94] consumer credit,[95] competition,[96] and intellectual property,[97] has already been connected to punitive damages in legal doctrine.[98]

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[91] Case C-453/99 *Courage Ltd. v Crehan* [2001] ECR I-6314; Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6641.

[92] European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/1, preamble (recital 13) and art 3(3).

[93] Wagner (n 80) 400.

[94] European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23, art 25; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, art 15; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 17; European Parliament and Council Directive 2002/73/EC of the of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15, art 8 *quinquies*.

[95] Intellectual Property Directive (n 88), art 23.

[96] Directive 2014/104/EU (n 92), art 8.

[97] Intellectual Property Directive (n 88), art 3(2).

[98] Koziol, (n 4) 741, 749; Bernhard Alexander Koch, 'Punitive Damages in European Law', in Koziol and Wilcox (n 54) 202; Ina Ebert, 'Book Reviews: Lotte Meurkens/Emily Nordin (eds), The Power of Punitive Damages. Is Europe Missing Out?' [2013] JETL 95.

5.3. *The Court of Justice of the European Union (CJEU)*

Just like the EU legislator, the CJEU does not have a clear position in the punitive damages debate. On the one hand, it has underlined the absence of EU law on punitive damages. One the other hand, it has contributed to the EU's ambivalent attitude in respect of punitive damages by creating the abovementioned formula that sanctions should be effective, proportionate and dissuasive. [99] The CJEU recently decided an interesting case in this regard. In its decision, concerning art. 13(1) of the intellectual property rights directive, the court in my opinion opened the door to punitive damages so that the protection of such rights can be improved. [100] The decision essentially makes clear that although the directive does not entail an obligation on the member states to provide for punitive damages, this cannot be interpreted as a prohibition on introducing such a measure. [101] It is thus for the member states to decide what effective sanctions are in this field.

6. RECOMMENDATIONS FOR THE INTRODUCTION OF PUNITIVE DAMAGES

Thus far the European debate has not provided definite answers to the question whether the punitive damages sanction has a future in continental Europe. The following recommendations, which form a start and need to develop further, can help to overcome difficulties in respect of the introduction of the sanction:

One of the main questions is who should initiate the introduction of punitive damages in continental European legal systems. There are two strategies for solving this problem. One option is to give the legislator the sole initial competence to create a set of clear and consistent punitive damages rules. In this way, the legislator could prevent the lack of legal unity that currently exists in American punitive damages law. Another option is to

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[99] The Court introduced this formula 30 years ago in Case 68/88 *Commission v Greece* [1989] ECR 2979, paras 23-24.

[100] Case C-367/15 *Stowarzyszenie "Olawska Telewizja Kablowa" v Stowarzyszenie Filmowców Polskich* ECLI:EU:C:2017:36.

[101] Case C-367/15 *Stowarzyszenie "Olawska Telewizja Kablowa" v Stowarzyszenie Filmowców Polskich* (n 100), para 28.

leave the introduction of punitive damages to the judiciary. While the first option might indeed be attractive for reasons of legal certainty and transparency, the second option gives room to experiment with the size of civil damages awards in case of grave infringements and thereby make a gradual transition towards awarding punitive damages possible. This can be done within the framework of existing legislation, for example relating to immaterial damages. The latter option is preferable as it gives the chance to gain more experience with stronger civil remedies and can be reversed more easily is case of persistent opposition. The legislator can of course cancel the experiment prematurely or (refuse to) come into action once the experiment has been finished.

The sanction is limited to certain categories of intentional, calculative and grave misconduct, and is certainly not available for all sorts of tortious behaviour. Based on the US experience, examples of relevant categories are intentional torts, defamation cases and financial torts. The English legal system might also serve as an example. English law points out specified categories in which punitive damages are recoverable: (1) in the case of oppressive, arbitrary or unconstitutional action by servants of the government; (2) in the case of calculated conduct resulting in profit for the defendant; or (3) if exemplary damages are expressly authorized by statute. [102]

The decision to award punitive damages as well as the amount of the award falls within the discretion of the civil judge who determines whether there are sufficient factors present to justify a certain punitive damages award. Due to the absence of a jury system in continental European legal systems, the sole discretion of the judge speaks for itself.

The punitive damages award bears a reasonable relation to its punitive, deterrent and compensatory function. The award is specifically reasonable in relation to: (a) the wrongful behaviour; (b) the harm done to the plaintiff; (c) the amount of compensatory damages awarded; and (d) other legal penalties that are available for the same conduct. In assessing the amount of the award, the civil judge can take the following factors into account: the character of the defendant's act, the nature and extent

[102] *Rookes v Barnard and Others* [1964] AC 1129.

of the harm and the financial condition of the defendant. [103] The possibility of criminal punishment and profits that the defendant gained due to his wrongful act can also influence the size of the award.

Certain measures to avoid excessive awards are imaginable, such as (a) legislative caps on awards; (b) permitting payment of (part of) the award to the state or state agencies to prevent a windfall for the plaintiff; (c) separating questions of liability and compensatory issues from punitive damages issues; (d) limiting punitive damages awards to one punishment for a single act or course of conduct; and (e) requiring a higher standard of proof for the recovery of punitive damages in comparison to the recovery of compensatory damages.

Should legal systems in continental Europe one day be convinced of the possibility and desirability of introducing punitive damages, these recommendations will come in handy.

7. CONCLUSION

Careful judgment is needed in deciding whether the punitive damages sanction has a future in continental Europe. Participants in the European debate should first get the theory of punitive damages right before introducing it. As the American legal system serves as an example for many of them, it is essential to have a proper knowledge of American punitive damages law and practice. The danger of lacking such knowledge is that the rejection of punitive damages is unfounded. Although the sanction is also considered controversial in the US, it has survived several constitutional attacks and still forms an indispensable part of the civil justice system. Many outsiders have an incorrect perception of the incidence and size of American punitive damages awards (empirical research shows that punitive damages are not as excessive as often believed) and of the popular punitive damages categories (personal injury cases play a relatively minor role, whereas intentional torts, defamation and financial torts are most important). American courts are instructed to award punitive damages with great caution. In this respect, many legislative and judicial methods have been incorporated

[103] Restatement (Second) of Torts 1979, s 908.

into American punitive damages law to prevent excessive and improper awards.

Another reason for the European resistance to punitive damages can be pointed out. The negativity is primarily caused by a number of obstacles relating to the civil law tradition. As explained in paragraph 3, introduction of the sanction is problematic in light of problems relating to the traditional functions of tort law, the public-private divide and the role of government. These reasons can be seen as prohibitive objections to the introduction of punitive damages in continental Europe. Punitive damages opponents will probably affirm the idea that all objections form part of continental European legal traditions for a good reason. Furthermore, they will suggest other options than punitive damages to deal with the alleged law enforcement deficiency in continental Europe, the retreating government, and the calls for more powerful civil sanctions. One often heard option is to solve law enforcement deficiencies via public law mechanisms. Another option is to tackle the problem of our reduced social security system rather than to fall back on the tort system. A last option is to rely on already existing civil sanctions in order to exert pressure on wrongdoers, for example by raising the level of immaterial damages awards.

Despite these obvious drawbacks, it is still worthwhile to consider seriously the introduction of punitive damages. This decision is first and foremost a choice of policy. The policy reason to introduce the sanction in continental Europe is twofold: (1) to complement public enforcement mechanisms by providing citizens with a powerful civil sanction in order to privately enforce their rights in different legal fields, such as competition law, environmental law, consumer law, human rights law, intellectual property law, anti-discrimination law, and personality rights; and (2) to improve the enforcement of tort law standards and deal with specific situations of intentional, calculative and grave misconduct.

My recommendations in paragraph 6 form a starting point for the introduction of punitive damages. European policymakers, legislators and courts could pragmatically focus on goals rather than on problems and keep in mind that practical difficulties will remain as long as practice stays the way it is. It could be useful to have an open attitude and focus on the positive effects that the sanction may have. Perhaps it is time to throw objections overboard and start an experimental stage in

which the civil judge has more powerful tools to deal with aggravated tortious behaviour. This might even turn out surprisingly good.

ABSTRACT

In the European punitive damages debate there is both strong interest in and strong resistance to the sanction. This chapter explores the question whether the sanction has a future in continental Europe. The topic will be dealt with from different angles: American punitive damages law, objections that are intrinsic to continental European legal traditions, causes for the increased interest in the sanction, and the status quo of punitive damages rejection in view of the position of three European institutions. Recommendations will be provided that should help to get the theory right and to overcome difficulties relating to the introduction of punitive damages. The popular punitive damages categories in American law are the categories in which the sanction could especially play a role in continental Europe. This is in line with the calls for powerful civil sanctions to improve private enforcement and deal with intentional, calculative and grave misconduct.

Chapter II

PUNITIVE DAMAGES AND THE FUNCTIONS OF REPARATION: SOME PRELIMINARY REMARKS AFTER THE DECISION OF THE ITALIAN SUPREME COURT, JOINT DIVISIONS, 5 JULY 2017, NO 16601

GIULIO PONZANELLI *

Contents: 1. The decision of the Supreme Court, Joint Divisions, has changed the trend in the Italian case law allowing the enforcement of North American judgments awarding punitive damages: the *status quo ante*. – 2. The reasons for the overruling: *a)* a new interpretation of the concept of public policy; *b)* a new identification of the institution of punitive damages and *c)* the recognition of the sanctioning function of non-contractual liability. – 3. The legitimacy of punitive damages: identification of the legislator as the decision-maker. – 4. Compensation for non-pecuniary losses between reparation and punishment. – 5. The consequences of the decision of thee Joint Divisions on the level of compensation. – 6. Some conclusions.

1. The decision of the Supreme Court, Joint Divisions, has changed the trend in the Italian case law allowing the enforcement of North American judgments awarding punitive damages: the status quo ante

Before the decision of the Joint Divisions of the Supreme Court of 5 July 2017, no 16601, [1] Italian case law was absolutely univocal in not admitting the enforcement of foreign judgments ordering payment of punitive damages. And nobody had really

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[1] Cass, 5 July 2017, no 16601, [2017] RDIPP 1049. An English translation by Francesco Quarta can be found in [2017] Italian LJ 277.

ever thought about a possible change in the case law, also considering the few cases in which the enforcement of foreign judgments ordering punitive compensation was brought to the attention of the judicial authority.

The issue of not only compensatory but also punitive awards was then appraised and made the subject matter of doctrinal attention; the powers of the Supreme Court under article 363, third paragraph, of the Italian Code of Civil Procedure (according to which a principle of law can be set out by the Supreme Court when 'the issue decided is of particular importance') have led the issue to be referred to the competence of the Joint Divisions of the Supreme Court.[2] And any decisions of the Joint Divisions are always highly awaited when they are called to decide a case of tort liability: in its essence tort liability produces a transfer of wealth, and public community is particularly interested in transfers of wealth implemented through the rules of tort liability.

The reference, by the decision that referred the issue to the Joint Divisions,[3] to the multi-functionality of the rules of civil liability led to suppose that the Joint Divisions would handle a matter of private law rather than a matter of private international law.

2. THE REASONS FOR THE OVERRULING: *A)* A NEW INTERPRETATION OF THE CONCEPT OF PUBLIC POLICY; *B)* A NEW IDENTIFICATION OF THE INSTITUTION OF PUNITIVE DAMAGES AND *C)* THE RECOGNITION OF THE SANCTIONING FUNCTION OF NON-CONTRACTUAL LIABILITY

Three reasons can be identified as the basis of the 2017 judgment of the Joint Divisions: *a)* a new interpretation of the concept of *public policy*; *b)* a new identification of the institution of punitive damages and *c)* the recognition of the sanctioning function of the third party liability.

While the first item will be discussed in other chapters of this book[4], this chapter will deal with items *b* and *c*.

In the US experience, punitive damages have modified their

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[2] Cass, 1st Division (order), 16 May 2016, no 9978, (2016) I Foro it 1973.

[3] Ibid.

[4] See the chapters by Pietro Franzina and Giacomo Biagioni in this book.

main features and have become more and more '*treble or double damages*' since the historic judgment of the Supreme Court of May 1996 in *BMW v Gore*,[5] thus losing their nature of almost limitless multiple that could not have failed to collide with the principles of the Eight Amendment (which prohibits 'excessive fines').

The reasons why the decision of the Joint Division was so greedily commented can easily be found in the argument by which '... in the current lay system, tort liability is not given only the task of restoring the economic interest of the injured party, since the deterrence and punishment functions of civil liability are internal to the law system'.[6]

The fact that tort liability, in its incredible growth over the last fifty years, did not show only a compensatory goal was a point sufficiently agreed by Italian legal scholars, even by those who remained unfamiliar with economic analysis of law: the latter was certainly the school of thought that at the highest degree considered, almost insistently, the position of the wrong-doer in its continuous exploration of substantive and procedural remedies, aimed at making civil liability more efficient and socially equitable. Quotations taken from the seminal work by Guido Calabresi (starting from his famous monograph 'The Costs of Accidents' to one of his latest contributions devoted to the analysis of the functions performed by punitive damages also outside the North American experience[7]) would be overabundant here.

The non-contractual relationship between the damaging and the damaged parties does not exclude, but indeed imposes – due to the lack of contractual links – the study and analysis of remedies designed not only to prevent the occurrence of harmful events, but also to ensure the right pressure on the conduct of the wrong-doer without, obviously, coming to an unjustified slowdown or a complete paralysis of his activity. It is necessary to avoid both the excessive pressure of the rules of tort liability (ie over-deterrence) as well as the opposite pathology, by virtue

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[5] BMW of North America, Inc. v Gore 517 U.S. 559 (1996).

[6] Cass, 5 July 2017, no 16601 (n 1), para 8.

[7] Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (Yale UP 1977); Id, 'The complexity of torts. The case for punitive damages' in *Liber Amicorum per Francesco D. Busnelli* (Giuffré 2008) II 327.

of which the wrong-doer is not encouraged to improve the quality of his activity (ie under-deterrence). And while the awarding of punitive damages certainly has the merit of overcoming the limits of an exclusively compensatory protection of the injured party, it risks at the same time to create a situation of over-deterrence.

In this situation one may wonder what are the best tools to achieve the purpose of deterrence. For many years, starting from the seminal ideas of Pietro Trimarchi conveyed in a book published over fifty years ago – which is now part of an all-round monograph on civil liability [8] – the criterion of imputation of responsibility was preferred: a rule of strict liability, with the internalization of the related costs for the presence of the insurance tool, is able to carry out a deterrent function with greater persuasion than a rule of fault-based liability.

Following this line of thought, strict liability has progressively been extended to a growing number of cases of civil liability both at legislative level (product liability, environmental liability) and at a case-law level (damage deriving from the exercise of dangerous activity, from goods under custody, etc.). In this way, the relationship between the general rule of liability for fault and the special cases based on other criteria of liability imputation has been reversed. This evolution has resulted in a situation that is very different from the one considered by the Italian legislator in enacting the Civil Code in 1942.

In the last twenty years, driven by the desire to ensure a more intense protection of the rights of personality – also in light of a principle of effectiveness – Italian legal scholars focused on the kind of damages and the level of compensation: the higher the compensation, the more punitive, non-compensatory level; the stronger the deterrent role played by the rules of tort liability, the more effective the remedies designed to protect the values underlying the rights of personality.

Having clarified this, the multi-functionality that the rules of tort liability are aimed at pursuing is obvious: the sum of money, ie the damages compensation, is directed to restore the position of the injured party, but it must also have an impact on the (mis)conduct of the wrong-doer, whatever the extent of

[8] See Pietro Trimarchi, *La responsabilità civile: atti illeciti, rischio, danni* (Giuffré 2017).

the damage suffered is. If, obviously, the compensation turns out to be higher than the extent of the injury, the weight associated with the deterrent and punishment functions will be heavier.

3. THE LEGITIMACY OF PUNITIVE DAMAGES: IDENTIFICATION OF THE LEGISLATOR AS THE DECISION-MAKER

In general, over-compensatory damages raise two orders of problems: first their legitimacy; second their opportunity.

In relation to *legitimacy*, punitive damages appear to be legitimate precisely in light of the cultural development experienced by the rules of tort liability, it being understood that the principle of full compensation does not have a constitutional guarantee. However, only the legislator can provide for over-compensatory damages. In presence of specific public interests, the legislator can increase as well as reduce the level of compensation, as it recently happened in the legislation enacted in the field of motor vehicle liability and medical malpractice liability. This possibility of increasing or reducing the level of (over-) compensation is not available to a court, which makes the civil law system clearly different from the common law system.

The continental judge is in fact required to comply with the principle of full damages compensation.

The judgment of the Joint Divisions clearly shows how many times, in very different contexts, the Italian legislator decided to move from a compensatory to a non-compensatory damages determination model. As clarified by the Supreme Court, such legislative intervention was necessary in light of the statutory reservation set by article 23 of the Italian constitution.

4. COMPENSATION FOR NON-PECUNIARY LOSSES BETWEEN REPARATION AND PUNISHMENT

Once it has been clarified that it is for the legislator to introduce cases of punitive-sanctioning damages, it is necessary to examine whether such introduction is *opportune*: ie, to identify when punitive damages can be useful. The cases considered by the Italian legislator are very different one from another and embrace very diverse areas: in these cases, the legislator intends to ensure a stronger protection than that consisting in the simple

damage reparation. The compensatory function has considerable difficulties when non-pecuniary losses have to be repaired, since these losses are incapable of a market value assessment. Therefore, the Italian legal order, in an attempt to overcome these inherent difficulties, has adopted a conventional mechanism, the so called 'tabular' system, which aims at finding the consent of all the possible players involved in a tort liability litigation: judges, legal scholars, lawyers and, above all, insurers. This mechanism aims at realizing the principle of full compensation in areas and sectors where this would be impossible in principle. On the other hand, tort liability is getting more and more an insured system: and in order to work efficiently, the insurance mechanism requires the damage to be more and more certain. The tables that started to be adopted thirty years ago to quantify in particular the non-pecuniary losses prevented the determination of the non-pecuniary damage (which is by definition irreducible to money) from being affected by the functions of deterrence and punishment. However, not all non-pecuniary prejudices are subject to a pre-established determination by means of the mentioned tables; therefore, there may be room to award compensation that may closely resemble punitive damages.

Two cases decided in 2015 and 2018 clearly show the future developments for the determination of non-pecuniary damages. According to the Supreme Court, compensation awarded for a case of homophobia has to take into account the seriousness of the injury in order to be exemplary; and on this ground the Supreme Court did not deem fair, and thus reversed, the second instance decision that had reduced the quantum of damages (from one hundred thousand to twenty thousand euros). [9] Equally, damages awarded to a teacher who suffered heavy injuries in a middle school (for having been suspended from the activity and subjected to disciplinary proceedings) cannot be merely compensatory [10].

In this perspective, the case-law has sent important signals that it cannot show tolerance to cases of homophobia or indiscriminate insults against teachers.

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[9] Cass, 22 January 2015, no 1126, [2015] Danno resp 511 ff., with observations by Francesco Quarta and Giulio Ponzanelli, 'Diritti inviolabili, gravità dell'offesa e rimedi civilistici'.

[10] Cass civ, 12 April 2018, no 9051.

5. The consequences of the decision of the Joint Divisions on the level of compensation

And here we are to the question that everyone makes and that has determined this extraordinary curiosity about the decision of the Joint Divisions: what are the consequences of such a decision on the level of compensation? The negative answer is offered directly by the same decision of the Joint Divisions, when it clearly acknowledges that the deterrent-punishing trend followed by civil liability cannot in any case allow the judge of contractual or extra-contractual liability 'to impress subjective intensification to the compensation that is liquidated'. [11] In other words, in the absence of a contrary rule, willful conduct and fault remain equivalent for the purpose of the level of compensation. And it is fair that it is so: damage compensation must remain predictable, also in light of the relationship between civil liability and insurance.

However, it is certain that, beyond the clear statement of the Joint Divisions, which precisely focuses on the multi-functionality of civil liability, some legal scholars will believe that the judge can directly apply sanction, punishment and deterrence, even in the absence of a legislative intermediation, in order to increase the level of compensation. And on this point an undue mixture of plans reappears, whereby civil liability seems to aim at enhancing a deterrence function (ie, prevention of the harmful event) but pursues a different practical purpose (ie, increase in the level of compensation).

Beyond the elements contained in the decision of the Joint Divisions, we should ask ourselves on what grounds punitive damages need to be recognized. In other words: if the entire damage is compensated, also the purpose of deterrence is reached. So, we should check whether in Italy there is a situation of under-compensation, that is, a level of compensation that lies below the entire reparation, and thus a situation that would justify the application of punitive damages. However, this is not actually the case, given that Italy is the country in which the highest level of compensation for non-pecuniary losses is granted throughout Europe. Situations of under-compensation may happen: however, one of the classic cases of under-compensation

[11] Cass, 5 July 2017, no 16601 (n 1), para 5.3.

consisting in the so called 'small claims' has been redressed by introducing a 'class action' remedy. Nonetheless, the need to make such 'class actions' more effective cannot entail the disruption of the entire compensation system.

In the same way, the pressure for the introduction of punitive damages clashes with the main characteristics of the tort liability system that is in force not only in Italy but also throughout the world. In other words, tort liability has increasingly become a system of insured responsibility. And providing for the extension of the insurance guarantee also to punitive damages entails two clear negative consequences: on the one hand, if it were legitimate – and it is not – the insurance guarantee extended also to punitive damages would immediately result in an increase of insurance premiums; on the other hand, the insurance guarantee cannot cover the element of malice that underlies the item of 'punitive damages'. With the further effect that the punitive amount, not being covered by an insurance guarantee, would be likely to remain a symbolic remedy, with very few chances of being actually satisfied.

6. SOME CONCLUSIONS

It was highly predictable that the case-law trend, which had been followed so far and that was contrary to enforcing foreign judgments awarding punitive damages, would be overruled for the reasons outlined above.

Equally, one could have foreseen that the Joint Divisions would require a rule of law for awarding punitive damages in Italy.

All the above considered, the decision of 5 July 2017 seems to be a balanced one: it confirms the multi-functionality character of the rules of civil liability and follows the long doctrinal path that began with the pioneering works of Pietro Trimarchi and Guido Calabresi at the beginning of the '60 and then continued under the influence of non-Italian works, mainly based on the economic analysis of law, which were then shared as heritage of all the legal literature.

The Joint Divisions of the Supreme Court show to be well aware that, whenever compensation – being a transfer of wealth and also a social cost – moves away from a compensatory function to include an additional amount as a punishment, the legis-

lator is required to establish, with the due balance and a better persuasiveness, whether or not it is appropriate to increase the level of compensation and, in case of a positive answer to this question, to determine exactly such a monetary sanction.

ABSTRACT

The case decided by the Italian Supreme Court, Joint Divisions, covers a matter of private international law and does not alter the general function of civil liability under Italian tort law. However, the decision is very interesting, because it shows the areas governed by special legislation where civil liability pursues also non-compensatory functions.

Chapter III

THE PURPOSE AND OPERATION OF THE PUBLIC POLICY DEFENCE AS APPLIED TO PUNITIVE DAMAGES

PIETRO FRANZINA *

Contents: 1. Introduction. – 2. The *raison d'être* of public policy. – 2.1. In the conflicts of laws. – 2.2. In the recognition of judgments. – 3. The object and nature of the assessment. – 3.1. The effects of the foreign law or judgment concerned in the circumstances of the case. – 3.2. The 'regularity' of the foreign law or judgment in question. – 3.2.1. A matter of 'international', not internal, regularity. – 3.2.2. International standards as part of a State's public policy. – 4. Assessing whether the public policy defence ought to be raised in a given set of circumstances. – 4.1. A strict scrutiny. – 4.2. An inherently discretionary assessment. – 4.3. Taming the *enfant terrible*: some possible guidelines. – 4.3.1. The rank of the rules in which a particular value is enshrined. – 4.3.2. The seriousness of the infringement. – 4.3.3. The ties between the situation and the forum. – 5. The consequences of raising the defence. – 5.1. In the conflicts of laws. – 5.1.1. The ousting effect. – 5.1.2. The subsidiarily applicable law. – 5.2. In the recognition of judgments. – 6. Concluding remarks.

1. Introduction

In private international law, 'public policy', or *ordre public*, refers to the doctrine whereby the normally applicable foreign law, or a foreign judgment which would otherwise be recognised and enforced, will not be given effect where to do so would be at variance with the fundamental values of the forum. [1]

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[1] The literature on the topic is vast. Contributions of a general character

The doctrine is often described as a 'safety net', or a 'safety valve', with which private international law rules should obviously be equipped. [2] These rules, in fact, allow the legal order of the forum to open its doors to the 'products' of other orders, be they substantive provisions of a general and abstract nature or court decisions dealing with particular cases. Such an open attitude, however, cannot be unconditional, and safeguards are needed to ensure that fairness and justice, as understood in the forum, are preserved in individual cases. Public policy is one such safeguard. It sets the outer limits of the 'tolerance of difference' implicit in private international law, by preventing the risk that its rules may lead to an infringement of the forum's standards of justice. [3]

The purpose of this chapter is to sketch the key aspects of the public policy doctrine, in particular as it may be invoked against the application of a foreign law under which the victim of a tort is entitled to punitive damages, or against the recognition of a foreign judgment which in fact awarded such damages. [4]

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include: Andreas Spickhoff, *Der ordre public im internationalen Privatrecht – Entwicklung, Struktur, Konkretisierung* (Metzner 1989); Andreas Bucher, 'L'ordre public et le but social des lois en droit international privé' (1993) 239 Recueil des Cours 9; Paul Lagarde, 'Public Policy' *International Encyclopedia of Comparative Law, - Private International Law* III (Mohr 1994); Pascal de Vareilles-Sommières, 'L'exception d'ordre public et la régularité substantielle internationale de la loi étrangère' (2015) 371 Recueil des Cours 153. The public policy exception has been described above as interfering with the application of foreign law and the recognition and enforcement of foreign judgments. While these are the most common areas where the doctrine may be called upon to operate, the exception can be raised in other situations, such as where the effects of a foreign public document are relied upon in the forum, or where the authorities of a foreign country ask for the assistance of the authorities of the forum in order to perform a particular act (eg, obtaining evidence). See further Adeline Jeanneau, *L'ordre public en droit national et en droit de l'Union Européenne* (LGDJ 2018) 77 ff.

[2] Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules' (1989) 217 Recueil des Cours 9 30.

[3] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 JPIL 201-202.

[4] The present paper assumes that the availability of punitive damages in a particular case depends on the law governing the substance of the tort from which the claim arises. This is, actually, the current mainstream view on the topic: see Jonas Knetsch, 'La réparation du dommage extracontractuel en droit international privé' in *Le droit à l'épreuve des siècles et des frontières - Mélanges en l'honneur de Bertrand Ancel* (LGDJ 2018) 979, 985 ff. Should the

The chapter analyses public policy from a general, as opposed to a country-specific, perspective. It looks at public policy as a unitary problem, the features of which are common, in essence, to the rules on the conflict of laws and those on the recognition of judgments. [5]

Two questions are addressed at the outset: What is the *raison d'être* of the public policy doctrine? And what is public policy essentially about?

The paper goes on to discuss two issues surrounding the practical operation of the public policy doctrine: By what standards should a court be guided when deciding whether the public policy defence ought to be raised in a given case? What does the defence entail for the decision of the particular dispute, or issue, which would be normally governed by the foreign law or judgment in question?

2. THE *RAISON D'ÊTRE* OF PUBLIC POLICY

The idea that the authorities of a State should refrain from applying a foreign law or from recognising a foreign judgment whenever this would infringe the core interests of the forum, is not new in itself. Rules to that effect appeared almost at the beginning of the history of private international law, and have been in place, in various forms, throughout its development. [6]

The current understanding of the public policy doctrine has its root in the scholarly reflection which resulted, in the 19th Century, in the emergence of the modern paradigm of private international law. [7]

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issue be characterised otherwise (eg, as a procedural matter, submitted to the *lex fori*), the problem would present itself under a different light.

[5] Luigi Fumagalli, 'Considerazioni sulla unità del concetto di ordine pubblico' (1985) 17/18 *Comunicazioni e studi* 593.

[6] Rodolfo De Nova, 'Historical and Comparative Introduction to Conflict of Laws' (1966) 118 *Recueil des Cours* 435-479. On the earliest expressions of the concerns which underlie, today, the public policy doctrine, see Eduard Maurits Meijers, 'L'histoire des principes fondamentaux du droit international privé à partir du Moyen Age spécialement dans l'Europe occidentale' (1934) 49 Recueil des Cours 544, 633, 669-670.

[7] Lagarde (n 1) 3 ff.

2.1. *In the conflicts of laws*

Private international law, in particular as shaped by the teaching of Savigny, posits that all legal systems bear, in principle, the same standing [8]. The law of the forum has, for the purposes of choice of law, the same status as any foreign law, and the selection of the applicable law depends on the localisation of the situation concerned (its 'seat'), not on the comparative merits of its provisions or on their 'willingness', or inherent title, to govern the matter. [9]

Bilateral (or multilateral) conflict-of-law rules, based as they are on geographical rather than substantive considerations, set the conditions for a 'leap in the dark' [10], for they instruct the court to blind itself to the content of the law thus selected and to the result which that law may produce in the case before it [11].

This is precisely where the public policy doctrine gets into the picture. Its purpose is to prevent the process prompted by the conflicts rules from ending up in a violation of the fundamental principles of the forum. The public policy defence effectively averts this risk by 'deactivating' the conflict-of-law rule which would otherwise produce that result, or by adjusting its operation.

Public policy is entrusted, in fact, with a corrective function. It calls for consideration *after* the conflicts rules have performed their task – that is, after they have identified the normally applicable law – but *before* that law is in fact applied to the case. The correction thus performed amounts to a stark deviation from the ordinary functioning of conflict-of-law rules. While these are normally general in scope and are essentially concerned with the allocation of the case under one law or another, public policy provides the opportunity to question the sub-

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[8] See recently, on Savigny's views, Michael Sonnentag, 'Savigny, Friedrich Carl von' in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1609.

[9] On the distinctive features of the 'traditional' approach to the conflict of laws see Paolo Picone, 'Les méthodes de coordination entre ordres juridiques en droit international privé' (1999) 276 Recueil des Cours 9, 35 ff.

[10] Leo Raape, *Internationales Privatrecht* (5th edn,Vahlen 1961) 90.

[11] David F. Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 Harvard Law Review 173, 180.

stance of the designated law, and to do so in light of the context of the case.

Arguably, the reason for such an exception lies in the fact that, in particular instances, the assumption underlying the Savignian approach simply fails to materialise. Reference is made to Savigny's idea of a community of nations having intercourse with one another, and to its corollary that the various laws in the world can in principle apply interchangeably. [12] No matter how different their content may be, the laws of the various States, that is, the members of that community, rest on a generally accepted understanding of legal problems, which reflects, in turn, the common history and the largely common heritage of values of the States in question. The public policy defence is meant to operate where, exceptionally, the designated foreign law deviates, by its content, from commonly accepted standards. Logically, 'blind' conflicts rules only make sense as regards conflicts between *fungible* laws. As such, they do not warrant application where the foreign law and the law of the forum are so different, content-wise, that they fail to reflect a legal or political commonality between the States concerned. [13]

The public policy exception can arguably be justified by a similar reasoning where comity, rather than the idea of a community of nations, is used to explain the applicability of foreign law. Comity entails placing trust and confidence in foreign judicial institutions, and giving full faith and credit to, or respecting the conclusiveness of, the acts of such institutions. [14] Thus understood, comity arises where the States concerned recognise each other as mutually deserving trust, based on some common-

[12] See, generally, Bertrand Ancel, *Éléments d'histoire du droit international privé* (Éditions Panthéon-Assas 2017) 480 ff.

[13] See, for this reading, Etienne Bartin, 'Les dispositions d'ordre public, la théorie de la fraude, et l'idée de communauté internationale', (1897) 29 Rev dr int lég comp 385, 425. Bartin's views built on the Savignian notion of a community of nations, but departed in fact, to an extent, from the German jurist's teaching. For an illustration of Savigny's own views on public policy, see Felix Berner, *Kollisionsrecht im Spannungsfeld von Kollisionsnormen, Hoheitsinteressen und wohlerworbenen Rechten* (Mohr Siebeck 2017) 95 ff.

[14] Adrian Briggs, 'The Principle of Comity in Private International Law' (2011) 354 Recueil des Cours 65, 91. See also Alex Mills, 'Connecting Public and Private International Law', in Verónica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 13, 16 ff.

ality of interests and values.[15] Where that assumption is defeated, as it occurs where the forum sees the otherwise applicable foreign law as shocking or repugnant, comity has no longer a role to play, and nothing stands in the way of rejecting the foreign law which would otherwise govern the matter.

Whether based on the Savignian community of nations or on comity, the application of foreign law presents itself as the outcome of a two-stage assessment. First, the relevant conflicts rules set out a geographical filter, by which they identify the spatially best solution – eg, in the case of a tort, the law of the country where the tort was committed, or *lex loci delicti*. Only after that, a substantive filter applies – the public policy defence – with a view to ensuring that the law so identified does not frustrate by its effect the imperatives of equity and fairness, as it may occur, for instance, where the forum considers that enforcing a claim for punitive damages, no matter how well founded under the *lex loci delicti*, would contravene the forum's fundamental ideas of fairness and justice. Put shortly, the former filter selects the applicable law on account of its origin, while the latter looks at the substance of that law and at the effects that would arise thereunder in the case considered.[16]

Truly enough, the selection of connecting factors is, itself, a political exercise, which the State of the forum obviously carries out having its own schemes and values in mind. For instance, the *lex loci delicti* rule is generally understood to reflect a concern for the effective realisation of a general policy of the law of torts: protecting individuals and the society at large against wilfully or negligently inflicted losses, by preventing such losses from occurring in the first place, and by providing for appropriate redress. Applying the law of the place where the tort was committed enhances the ability of the State which is plausibly most affected by the tort to pursue that goal.[17]

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[15] On the relationship between Savigny's community of nations and the notion of comity, see Roxana Banu, *Nineteenth-Century Perspectives on Private International Law* (OUP 2018) 37 ff.

[16] De Vareilles-Sommières (n 1) 207 ff.

[17] On the different views advocated by scholars to justify the *lex loci delicti* rule, see Angelo Davì, *La responsabilità extracontrattuale nel nuovo diritto internazionale privato italiano* (Utet 1997) 5 ff, and Thomas Kadner Graziano, *La responsabilitè délictuelle en droit international privé* (Helbing & Lichtenhahn 2004) 22 ff.

Yet, the fact that conflicts rules mirror the views of the forum State as to the concerns raised by a particular legal institution does not mean that those rules will systematically produce results which are, in all respects, consistent with the policies of that State. Private international law speaks, in fact, a political language of its own, which differs, due its concern for 'spatial' justice, from the language spoken by substantive private law, the focus of which is rather on substantive interests. [18]

Of course, choice of law is not always, and not everywhere, dealt with under a (pure) Savignian approach. Where rules or doctrines are employed which immediately rely on substantive considerations, following one of the possible schemes that translate result-selectivism in this field, [19] the function of the public policy doctrine is likely to change. [20]

Selecting the applicable law *solely* on account of its ability to yield a given substantive result, leaves in principle no room for a public policy exception of the kind described above. [21] However, where material considerations have a bearing on, but do not entirely define, the law-selecting process, the public policy doctrine can still call for consideration. Thus, where the applicable law is to be identified under rules which combine geographical and substantive considerations, [22] the public policy

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[18] See, generally, Symeon C. Symenonides, 'Material Justice and Conflicts Justice in Choice of Law' in Patrick Borchers and Joachim Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers 2001) 125.

[19] Symeon C. Symeonides, 'Result-Selectivism in Conflicts Law' (2009) 46 *Willamette Law Review* 1. On the various ways in which substantive considerations may affect the methodology of choice of law, see Picone (n 9) 84 ff.

[20] On the variable operation of public policy depending on the choice-of-law methodology followed, see Lagarde (n 1) 9 ff and Jacques Foyer, 'Remarques sur l'évolution de l'exception d'ordre public international depuis la thèse de Paul Lagarde' in *Le droit international privé: esprit et méthodes - Mélanges en l'honneur de Paul Lagarde* (Dalloz 2005) 285, 287 ff.

[21] Cf Supreme Court of Montana, *Phillips v General Motors Corporation*, [2000] MT 55, asserting that, since '[t]he purpose of a choice of law rule is to resolve conflicts between competing policies', the policies 'of all interested states must be considered' with a view to determining 'which state has the more significant relationship'. Hence, the conclusion that a public policy 'exception' to the most significant relationship test 'would be redundant'.

[22] That is, rules under which the applicable law is selected having regard, *inter alia*, to its ability to realise a particular substantive policy, as in the case, for example, of art 4 of The Hague Protocol on the Law Applicable to Main-

defence can still be relevant, although not in the same way and certainly not as strongly as if the case where to be decided under purely 'allocating' rules. Using a conflict-of-law rule with a 'substantive flavour' (*à coloration matérielle*) may indeed be enough to yield the particular result for which those rules have been designed, but the law selected thereunder might infringe some other values of the forum, and pose, as such, a concern for the respect of the public policy of the forum.

2.2. *In the recognition of judgments*

The public policy doctrine similarly performs a corrective function with respect to the recognition of foreign judgments (and other foreign measures or acts, as the case may be). Generally speaking, domestic legislations and international conventions provide that foreign judgments be recognised and enforced locally only if certain pre-requisites are met (or, in the event that recognition is ensured as a matter of principle, only if none of the exceptional grounds for a denial of recognition arises in the circumstances). [23]

The origin of the judgment, for instance, may be crucial to this assessment. Recognition is, in fact, often contingent on a finding that the court of origin could rule on the adjudicated matter in conformity with the rules on jurisdiction of the requested State. [24] Evidence that proceedings in the State of origin have been conducted in a fair and equitable way is, similarly, a common requirement for recognition. Specifically, most recognition regimes provide that a foreign judgment given *in absentia* may only be recognised if it is established that the process was served on the defendant in sufficient time to allow him to arrange for his defence. [25] By contrast, domestic and international rules generally refrain from providing that the substance of the

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tenance Obligations of 23 November 2007, the purpose of which is to make it easier for particular groups of maintenance creditors to actually obtain maintenance from the debtor.

[23] See generally Tanja Domej, 'Recognition and enforcement of judgments (civil law)' in Basedow, Rühl, Ferrari and de Miguel Asensio (n 8) 1471.

[24] See for further references Gilles Cuniberti, 'Le fondement de l'effet des jugements étrangers' (2018) 394 Recueil des Cours 88, 181 ff.

[25] See, eg, art 55(b) of the Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.

judgment be reviewed as a pre-requisite for recognition, and often explicitly state that such a review (*révision au fond*) is prohibited as a matter of principle. [26]

It may be that a judgment, though complying with all of the above conditions, proves otherwise unacceptable, in its purported effects, for the legal order of the forum. Domestic and uniform regimes almost invariably provide that, in similar circumstances, a foreign judgment may – exceptionally – be denied recognition on grounds of public policy. [27]

Public policy can be used, first, to oppose the recognition of a judgment for reasons that relate to its *substance*. The doctrine may be invoked, for example, against a foreign ruling which purports to enforce a contract that the requested State sees as immoral. [28] A foreign judgment may equally prove objectionable because of the legal consequences that it attaches to a given fact, as it may occurs, for instance, where the effects of a judgment awarding punitive damages are relied upon in a State whose legislation only admits compensatory damages.

The public policy defence may also be invoked (and is, in fact, frequently invoked in practice) to oppose the recognition of foreign judgments tainted by serious *procedural* irregularities. [29] Public policy has a role to play, in this configuration, in cases not otherwise covered by any of the 'procedure-related' grounds for recognition as may be available in the circumstances. Thus, for instance, public policy provides a basis for not giving effect to a foreign judgment obtained by fraud or corrup-

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[26] Friedrich K. Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 American J Comparative L 1, 28 ff.

[27] On the exceptional character of the public policy defence, as referred to the recognition of judgments, see generally Pierre-Yves Gautier, 'La contrariété à l'ordre public d'une decision étrangère, échec à sa reconnaissance ou à son exequatur' in *Vers des nouveaux équilibres entre ordres juridiques - Liber amicorum Hélène Gaudemet-Tallon* (Dalloz 2008) 437, 438 ff.

[28] For instance, in various countries where gambling is either prohibited or submitted to a particularly strict regulation, the question has been raised of whether a foreign judgment enforcing a debt arising from gambling ought to be denied recognition as inconsistent with public policy. See, among others, for a discussion of the matter (and a refusal to raise the public policy exception), Ontario Court of Appeal, *Boardwalk Regency Corp. v Maalouf* (1992) 51 O.A.C. 64 (CA), and Cass, 15 June 2016, no 12364, (2017) 53 RDIPP 408.

[29] Patrick Kinsch, 'Droits de l'homme droits fondamentaux et droit international privé' (2005) 318 Recueil des Cours, 9, 94 ff.

tion where, as it is usually the case, the rules on recognition that apply in the requested State fail to explicitly refer to the absence of fraud and corruption among the pre-requisites for recognition. [30] 'Procedural' public policy may in principle be invoked as a ground for rejecting a foreign judgment awarding exemplary damages where, under the law of the requested State, court-ordered measures entailing a punishment are subject to special procedural safeguards, the respect of which has not been ensured, in substance, in the proceedings before the court of origin.

3. THE OBJECT AND NATURE OF THE ASSESSMENT

What is, precisely, the object of the assessment that a court is required to carry out to decide that the public policy defence should be raised in a given case? And what is the best way to describe the nature of such an assessment?

3.1. *The effects of the foreign law or judgment concerned in the circumstances of the case*

The public policy doctrine is understood to protect the values of the State of the forum from the *effects* that the foreign law or the foreign judgment concerned would produce in a given case, not from the principles that inspire such foreign law or judgment or the abstract statements therein. Public policy, it is often observed, must be assessed *in concreto*, that is, based on the actual implications that the law or judgement in question would entail in the circumstances. [31]

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[30] See, for example, England and Wales Court of Appeal, *Korea National Insurance Corp. v Allianz Global Corporate & Specialty AG* [2008] EWCA Civ 1355.

[31] See generally Lagarde (n 1) 21 f. A specification to this effect is explicit in those national codifications and uniform texts whose provisions relating to public policy refer to the 'effects' of the foreign law concerned, or to its 'application' in the circumstances. See, by way of example: art 4 of the Croatian Statute on Private International Law of 1991; art 86(1) of the Dominican Statute on Private International Law of 1991; art 17 of the Swiss Federal Statute on Private International Law of 1987; art 759(4) of the Vietnamese Civil Code of 2005; art 10 of the Hague Convention of 2 October 1973 on the Law Ap-

This approach minimises the impact of the public policy doctrine on the normal operation of private international law rules, and is accordingly consistent with the exceptional nature of the defence. A concrete and context-specific understanding of the public policy defence avoids the risk that a particular foreign law, or the whole of the judgments emanating from a particular foreign country, may be systematically denied effect in the forum due to some general 'defects' of the foreign legal order concerned, including in cases where those defects do not materialise, or may be avoided without denying effect to the law or the judgment concerned.

Thus, for instance, even if the forum State considers the award of punitive damages as incompatible with its fundamental values, the application of a foreign law may not be ruled out solely because that law contemplates, in principle, the possibility of awarding damages beyond mere compensation. For the public policy defence to be raised, the court must rather assess whether the conditions set out by the *lex causae* for the award of punitive damages are met in the circumstances, and whether the *lex causae*, as applicable in the circumstances, requires the court to award such damages as soon as the victim makes a claim to that effect, or rather considers that the court is free, in its discretion, to grant no more than compensatory damages.

As for the recognition of judgments, the idea that the infringement of the basic values of the forum should be assessed *in concreto* entails, in a punitive damages case, that a ruling will not be at odds with public policy merely because the damages awarded are labelled as exemplary, or are meant to have a deterring function. A statement to that effect in the court's reasoning will arguably not suffice, if it appears from the judgment as a whole that the amount awarded does not exceed, in fact, the prejudice suffered by the victim.

Admittedly, the latter survey might come close to a *révision au fond*. The two exercises, however, are different in their object and nature. Reviewing a foreign judgment as to its substance means to determine how the matter would have been adjudicated

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plicable to Products Liability. A similar language is employed, for the same purposes, in provisions governing the recognition and enforcement of judgments. See, among others, art 64(g) of the Italian Statute on Private International Law of 1995, and art 6(c) of the Hague Convention of 30 June 2005 on Choice of Court Agreements.

by a court of the requested State, with a view to excluding the recognition of the judgment in question if its findings do not match with those of its hypothetical local counterpart. The public policy defence, by contrast, no matter whether it entails an analysis of the findings and the reasoning of the court of origin, is solely concerned with one narrow question, namely whether giving effect to the judgment would defeat the fundamental values of the requested State. [32]

On a different note, the focus on the effects of the foreign law or judgment concerned implies that a court, in considering whether to raise the public policy defence in a particular case, should use as a standard the fundamental values of the forum as they exist at the time of deciding the issue, that is, when the enforcement of the effects of the law or judgment concerned is sought. [33] This means that, normally, a claim shaped by an originally unacceptable foreign law or judgment will nevertheless be enforceable in the forum if, in the meanwhile, the fundamental values of the forum have changed in such a way as to regard that claim as acceptable.

This way, for example, if the public policy of the forum evolves in such a way as to make room for the award of punitive damages (while those damages were previously regarded as being at odds with public policy), the new trend will apply, in principle, to 'old' a 'new' situations alike.

3.2. *The 'regularity' of the foreign law or judgment in question*

According to one view, what is basically at stake with public policy is the 'regularity' of the normally applicable foreign law or that of a normally recognisable foreign judgment. [34]

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[32] See extensively Chiara E. Tuo, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia* (Padova 2012) 199 ff.

[33] See, in general, Miguel de Angulo Rodriguez, 'Du moment auquel il faut se placer pour apprécier l'ordre public international' (1972) 61 RCDIP 369.

[34] De Vareilles-Sommières (n 1) 192 ff.

3.2.1. *A matter of 'international', not internal, regularity*

Regularity is a broad notion. Public policy, as understood in private international law, is specifically concerned with 'international' regularity. A foreign law and a foreign judgment are 'internationally regular', according to this approach, if they comply with the requirements set out by the legal order of the forum for the 'reception' of foreign legal products.

Whether the law or judgment in question complies with other requirements is immaterial for the purposes of public policy. This is true, in particular, of the requirements that the *lex fori* may lay down to limit the scope of party autonomy, as is the case of the rules that provide that a contract concluded in defiance of good morals be null and void. The existence of those requirements does not imply that a non-complying foreign law or judgment should, for this reason, be denied effect in the forum.

Legal language, here, may be misleading, since the domestic rules that lay down the kind of limits mentioned above often present themselves as addressing a concern for 'public policy'. To avoid any misunderstanding, the remark is frequently made that private international law is concerned with 'international', as opposed to domestic, public policy (*ordre public international*, not *interne*). [35] The two concepts, it is contended, are different in nature and serve different functions. While the 'domestic' public policy of a State can in principle encompass a broad range of legal and moral prescriptions, its international counterpart must be construed narrowly and applied with circumspection, consistent with its exceptional character. [36]

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[35] Art 3081 of the Civil Code of Québec, for example, excludes the application of foreign law whenever its application would be inconsistent with public policy 'tel qu'il est entendu dans les relations internationales'.

[36] On the distinction between the two notions, see, for a critical view, Otto Sandrock, '"Scharfer" ordre public interne und "laxer" ordre public international? Die Unterscheidung zwischen "ordre public interne" und "ordre public international" ist nicht gerechtfertigt' in Michael Coester, Dieter Martiny and Karl August Sachsen Gessaphe (eds), *Privatrecht in Europa: Vielfalt, Kollision, Kooperation - Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag* (Beck 2004) 615.

3.2.2. *International standards as part of a State's public policy*

Similarly, non-compliance by a foreign law or judgment with the concerned foreign State's international obligations – i.e., the obligations arising from a treaty or otherwise as a matter of public international law – is insufficient *per se* to trigger the public policy defence.

Of course, the fundamental values of the forum may well find their expression in international rules, which, in turn, may happen to be in force for both the forum State and the foreign State in question. Giving effect to a law or judgment infringing those rules would then, by implication, contradict the public policy of the forum, too. The reason for not giving effect to such law or judgment, however, would not be their inconsistency with the obligations of the foreign State concerned, but rather their inconsistency with the fundamental policies of the forum, as shaped, in particular, by the pertinent international obligations.

Truly enough, situations arise where the forum State must refrain, as a matter of international law, from giving effect to certain laws or judgments of a foreign State. It is also true that the forum State will normally have to do so by any appropriate means, including, as the case may be, the public policy defence. Yet, in those situations, the rejection of the foreign law or judgment in question rests, for the forum State, on its own international obligations, not on the public policy doctrine itself. The public policy defence is a tool, among others, for the implementation of the said obligations. [37]

All in all, the public policy of a State is centred, because of its function, on the legal order of that State and its values.

This does not imply that the public policy defence is meant to be raised solely, or primarily, to defend values peculiar to that legal order. Rather, the view is commonly accepted that the public policy of a State can feature a 'transnational', or a 'truly in-

[37] Cf *Pellegrini v Italy* App no 30882/96 (ECtHR, 20 July 2001), finding that Italy had violated art 6 of the European Convention on Human Rights by giving effect to a decree of nullity of marriage issued by the courts of the Vatican without verifying whether the procedural guarantees contemplated in the said provision had been secured in the proceedings before those courts. Italy would have arguably not incurred in such a violation if the Italian authorities had dismissed – on any appropriate ground, including public policy – the application to have the decree declared enforceable.

ternational', dimension.[38] The rejection of a foreign law or a foreign judgment may in fact be prompted by a concern for the respect of a value the existence and status of which result from international texts, or otherwise build on international developments.[39] For the same, if not stronger, reasons, the participation of a State in a regional integration process may result – and does in fact result, specifically as regards the European Union – in the emergence of a regional public policy, shaped by the values underlying that process, and common to the various States involved.[40]

Actually, the existence of genuinely international, or regional, elements in the public policy of a State mirrors the influence of international fora and organisations on the politics of States, including in the area of civil and commercial law. The rules in force in a particular country do not necessarily speak of the views and priorities of that country alone. They underlie a variety of concerns and incorporate a variety of responses to such concerns. Some of those concerns are common to several countries, if not universal (eg, the concern for the physical and psychological well-being of children), and some of the legal responses to those concerns rest on a shared understanding of how the different interests at issue should be managed, or balanced (eg, by making the interest of the child a primary consideration in all cases involving children).

Where the politics of a State's private law develop at a regional or a universal level, and not just domestically, the public policy of that State loses some of its idiosyncratic features, and

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[38] See generally, and for further references, Mathias Forteau, 'L'ordre public "transnational" ou "réellement international" - L'ordre public international face à l'enchevêtrement croissant du droit international privé et du droit international public', (2011) 138 JDI 3.

[39] See already Paolo Benvenuti, *Comunità statale, comunità internazionale e ordine pubblico internazionale* (Giuffrè 1977).

[40] See, in general, Teun Struycken, 'L'ordre public de la Communauté européenne' in *Vers des nouveaux équilibres entre ordres juridiques - Liber amicorum Hélène Gaudemet-Tallon* (Dalloz 2008) 617, and Ornella Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (Giuffrè 2012), especially 78 ff. See also Kurt Siehr, 'Der "ordre public" im Zeichen der Europäischen Integration: die Vorbehaltsklausel und die EU-Binnenbeziehung' in Herbert Kronke, Karsten Thorn (eds), *Grenzen überwinden, Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag am 28. Dezember 2011* (Bielefeld 2011) 424.

effectively incorporates values which are international in nature or otherwise reflect the existence of a common approach.

This applies, in principle, also to punitive damages. Whether the award of such damages infringes the basic policies of the forum State depends, in essence, on the views of that particular State, namely that State's understanding of the nature and function of reparation in the law of torts, and of the safeguards surrounding the issuance of court orders which inflict penalties. Yet, that understanding does not build necessarily only on endogenous developments.

The approach taken by other States to the admissibility of punitive damages is among the elements that the State of the forum can consider for the purposes of shaping its own public policy. A broad acceptance of those damages by foreign States would make it more difficult for the forum State to object to that trend and defend its 'conservative' views. The members of a 'community of nations', or the States which consider that comity requires that they adopt an open attitude in their mutual relationships, can hardly disregard for long the foreign developments that signify the emergence of a new common trend in a particular area of law. They are not, of course, bound to follow that trend, but if that trend actually consolidates, and gradually turns into a generally accepted rule, opposing to it as a matter of principle entails, for the forum country, a risk of isolation from the rest of the community.

4. ASSESSING WHETHER THE PUBLIC POLICY DEFENCE OUGHT TO BE RAISED IN A GIVEN SET OF CIRCUMSTANCES

What steps should a court take to determine whether raising the defence is appropriate in a given set of circumstances? By what standards should that court be guided?

4.1. *A strict scrutiny*

It is a truism that courts, when dealing with public policy, should proceed with particular circumspection. The public policy defence, as noted above, works as an exception to the ordinary operation of the rules of private international law. The interference it produces with the normal functioning of those rules should accordingly be as limited as possible.

The exceptional character of the public policy defence is often explicitly stated in domestic legislations and international instruments. The specification is made in several texts that the application of foreign law and the enforcement of a foreign judgment may only be refused where they are 'manifestly', or 'obviously', incompatible with the basic interests of the forum. [41]

In other words, there must be strong evidence that giving effect to the foreign law or judgment in question would infringe the core values of the legal order of the court. A mere difference in content between the applicable foreign law and the law of the forum (as it occurs, for instance, where the *lex fori* and the *lex causae* protect the same right, but do so under different formulas and to a different degree of intensity) would clearly not be enough. Foreign law can only be rejected if it opposes by its effects the forum's ideas of morality, fairness and justice. [42]

4.2. *An inherently discretionary assessment*

In carrying out the latter assessment, the authorities of the forum enjoy, generally speaking, a broad margin of appreciation. [43] As a matter of fact, States normally refrain from specifying in their legislation which of their principles are fundamental for private international law purposes. They likewise avoid saying in what factual settings the use of the public policy defence may be seen as justified. It is thus for the court seised of the matter to identify those principles, and to determine whether the circumstances of the case require that the defence be raised.

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[41] See, for instance: art 6 of the Introductory Act to the German Civil Code of 1896; Article 1193 of the Civil Code of the Russian Federation of 2001; art 5 of the Turkish Code of Private International Law of 2007; art 6 of Book 10 of the Dutch Civil Code of 2011; art 26 of Regulation (EC) 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II).

[42] See House of Lords, *Kuwait Airways Corp. v Iraqi Airways Corp.* [2002] AC 883, per Lord Nicholls of Birkenhead: 'The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reasons why the forum court should decline to apply the foreign law'.

[43] See, among other authors, François Rigaux, 'Les notions à contenu variable en droit international privé' in Chaïm Perelman and Raymond Vander Elst (eds), *Les notions à contenu variable en droit* (Bruylant 1984) 237, 240 ff.

Things, it is contended, could hardly be otherwise.[44] First, as noted above, the public policy defence is designed to protect the legal order of the forum from such unacceptable effects as might result from the application of a foreign law or the enforcement of a foreign judgment. If the exception were to operate in an overly rigid manner, based on narrowly predetermined standards, its function would risk being frustrated in cases displaying peculiar or unusual features. Some freedom of appreciation is thus necessary for the defence to effectively discharge its function.

Secondly, the fundamental principles of any legal order change over time. Old principles may disappear or become marginal, just as new ones may emerge, or acquire a higher rank. If the public policy is to effectively preserve the identity of the forum, its operation must be flexible enough to follow such an evolution.[45] Since the development of a legal order is often gradual and non-linear, the stage of its evolution at the relevant moment can be properly assessed only through a global consideration of such diverse materials as legislation, case law, literature, political statements, etc. An exercise of this kind involves, by definition, a significant amount of freedom on the part of the interpreter.

Finally, discretion is implicit in the exceptional character of the public policy defence, and in the fact that it operates *in concreto*. As noted in the previous section, the ordinary functioning of the applicable private international law rules should not be interfered with more broadly than needed. Determining whether a deviation from the normal operation of those rules is really necessary may require analysing the whole of the circumstances of

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[44] The Institut de droit international, by a resolution of 30 March 1910 ('De l'ordre public en droit international privé', rapporteur Pasquale Fiore, available at <http://www.idi-iil.org>), expressed the wish that all States express as clearly as possibly which of their provisions may in no case be replaced by foreign law. Somehow more realistically, Ernst Rabel, *Conflict of Laws - A Comparative Study* (Callaghan 1947) 581, while conceding that 'no mechanical rule can shape the elusive exception of public policy', argued that, at least, the notion could 'well be defined in a more reliable manner'.

[45] See House of Lords, *Blathwayt* v. *Cawley* [1976] AC 397, 426, noting, per Lord Wilberforce, that 'conceptions of public policy should move with the times'. See, generally, on the inherently evolving character of public policy, Rolando Quadri, *Lezioni di diritto internazionale privato* (3rd edn, Liguori 1961) 312.

the case, and weight the implications of giving effect to the foreign law or judgment concerned. Arguably, the use of fixed and abstract rules would often miss the point.

4.3. *Taming the* enfant terrible*: some possible guidelines*

Of course, unrestricted discretion destroys legal certainty. Public policy, due precisely to its inherent flexibility and its impact on the normal operation of other rules, is frequently referred to as an 'unruly horse' or a 'troublemaker', [46] or the 'enfant terrible' of private international law. [47] This calls for guidelines capable of framing the evaluation that courts are called upon to discharge, so as to enhance the foreseeability and the legitimacy of their decisions in this respect.

The following are among the guidelines that courts resort to more frequently in this field.

4.3.1. *The rank of the rules in which a particular value is enshrined*

The fabric of public policy is generally considered to consist of 'principles', that is, values that a particular community, organised as a State, perceives as fundamental at a given moment in time. Those values underlie, in turn, the rules in force in the State in question. [48] Of course, as noticed above, this does not mean that an inconsistency with those rules amounts, as such, to an infringement of the underlying fundamental values. It rather means that looking at the rules of a State is an obvious starting point to construe the core principles of that State.

In this regard, the point is often made that only 'important' rules should be considered for the above purposes. The standard

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[46] See, among others, Murad Ferid, *Internationales Privatrecht* (3rd edn, Metzner 1986) 3-13, who speaks of public policy as a 'Störenfried'.

[47] See Charalambos N. Fragistas, 'La competence international en droit international privé', (1961) 104 Recueil des Cours 9, 159, following Leo Raape.

[48] Giuseppe Barile, *I principi fondamentali della comunità statale ed il coordinamento fra sistemi* (Cedam 1969) 83 ff.

is so vague, however, that the risk exists to arrive this way at a very broad understanding of public policy.[49]

The rank, within the hierarchy of sources, of the rules in which a particular value is enshrined would seem to provide some useful indications. Policies embodied in the concerned State's constitution will likely prove fundamental for the purposes of public policy. This is all the more true since a State's constitution is not just the key source of the substantive values of that State's legal order. It has also the task of shaping, in general, the relationship between the legal order of the State in question and other systems of law.[50] A too rigid reasoning, however, would be of little help. It would be wrong, in particular, to rule out in principle the relevance of the ordinary legislation of the forum, insofar as it conveys the fundamental views of the forum and its understanding of legal phenomena.

Actually, considering a State's constitution as the only possible driver of public policy would somehow misses the point. First of all, constitutions, generally speaking, are not drafted with private international law in mind. Indeed, they state values and principles, but they do so for purposes other than assessing the international regularity of foreign legal products. The standards employed to review the constitutional validity of a State's own legislation cannot always be used as such to determine whether the effects of another State's products are acceptable, or not. The two exercises, though no doubt similar in some respects, have a different object and a different function. Secondly, the ideas that form the infrastructure of a country's private law do not necessarily find expression, let alone in their entirety, in constitutional texts. Some constitutions, especially older ones, make in fact limited references to issues within the realm of private law.

Rather, codes, understood in the European Continental sense as comprehensive texts which set the foundations and define the key notions of an entire field of law,[51] may prove a val-

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[49] See Patrick Kinsch, 'La "sauvegarde de certaines politiques législatives", cas d'intervention de l'ordre publique international?' in *Vers des nouveaux équilibres entre ordres juridiques - Liber amicorum Hélène Gaudemet-Tallon* (Dalloz 2008) 447.

[50] Francesco Salerno, 'La costituzionalizzazione dell'ordine pubblico internazionale' (2018) 54 RDIPP 259, 261.

[51] Paolo Grossi, *Mitologie giuridiche della modernità* (3rd edn, Giuffrè 2007) 99 ff.

uable tool to grasp the essence of a country's approach to a whole set of legal issues. The problem, however, lies precisely in that comprehensiveness, since all codes include, almost by definition, provisions embodying general principles alongside provisions dealing with less important details.

'Special' legislation, i.e., legislative texts that do not form part of a code (and do not share its 'status'), may equally play an important role in the construction of a State's public policy. As a matter of fact, it may take decades to the governing principles of a new area of law to make their way into a State's constitution, through the formal amendment of the latter. Those principles may thus happen to be enshrined, for long, only in sub-constitutional rules. Yet this should not exclude *per se* the possibility of characterising those principles as fundamental for the purposes of public policy. If courts were barred from referring to special legislation, the public policy of the forum in areas where new regulatory challenges rapidly arise (as may be the case, today, of data protection or bioethics) would possibly remain blurred for several years.

The preceding discussion shows that the source of the provisions by which a particular principle is asserted is an important element to characterise that principle as fundamental. It also suggests that the source of the relevant provisions is hardly sufficient, and that the construction of public policy involves assessing of a broad range of indicia.

The issue of whether the public policy defence can be raised to exclude against a foreign law or judgment awarding punitive damages provides an illustration of this scheme. In those States where the question is traditionally answered in the negative, civil codes and legislative texts in civil matters often provide that torts give rise to a duty to compensate no more than the damage suffered by the victim. Constitutions hardly take a clear a position on the admissibility of punitive damages, but may well assert the principle, *inter alia*, that no penalties may be imposed on an individual unless some requirements are met, including the requirement that the penalty in question be provided for by statute, not by a mere sub-statutory instrument. Against this backdrop, special legislation may exist which actually contemplate the possibility of awarding penalties or exemplary damages in the case of particular torts. This may then be understood to suggest that awarding punitive damages does not amount as such, and necessarily, to an infringement of the public policy of the

forum. Such an infringement would rather materialise where, in the circumstances, the damages claimed under the foreign law or judgment in question fail to abide to the standards which result from the combined reading of the relevant codified provisions, constitutional texts and special legislative measures. [52]

4.3.2. *The seriousness of the infringement*

Raising the public policy defence, some contend, is all the more justified where it appears that, in the circumstances, the application of a foreign law or the recognition of a foreign judgment would result in a *serious* violation of the basic principles of the forum. The prospect of a milder violation should call, instead, for a more circumspect use of the defence.

It is unclear whether the degree of seriousness of the violation can really be treated as an independent standard of assessment, distinct from the importance of the policy itself. [53] Actually, the claim that the slightest deviation from a given rule would be enough to defeat the underlying policy is often just one way to express the opinion that the policy concerned is in fact a fundamental one.

Be that as it may, principles exist which, by their nature, are either preserved in full or are violated altogether. When it comes to those principles, there is arguably no room for distinguishing between a serious and a mild violation. The prohibition of discrimination is, plausibly, one such principle. If, under the *lex causae*, the enforceability of a claim depends on personal qualities (eg, the claimant's race) which the forum State regards as entailing a discrimination prohibited as a matter of public policy, then relying on those qualities amounts to infringing that prohibition, and no further inquiry is needed.

Where the public policy defence is invoked against a foreign judgment which awarded punitive damages, the seriousness of the alleged infringement – meaning the amount deliberately awarded in excess of the actual prejudice suffered by the victim

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[52] See, in this regard, Cass, 5 July 2017, no 16601 (2017) 53 RDIPP 1049, analysed in this book by Giulio Ponzanelli and Giacomo Biagioni.

[53] Didier Boden, *L'ordre public: limite et condition de la tolérance* (PhD thesis, Paris I University 2002) 713 ff.

– should, similarly, be irrelevant. Insofar as the problem with punitive damages lies in the function they are intended to perform (inflicting a penalty, as opposed to mere compensation), the award of damages serving a 'prohibited' purpose should in principle trigger the same consequences, as regards public policy, irrespective of the amount awarded.

4.3.3. *The ties between the situation and the forum*

It is often argued, especially in some countries (Germany and Belgium, among others), that, in determining whether a foreign law or judgment is to be denied effects on grounds of public policy, special consideration ought to be given to the intensity of the ties between the situation and the forum. [54] A denial, it is contended, should occur more readily in cases with a close connection with the forum State (an *Inlandsbeziehung*, or *Binnenbeziehung*), whereas 'remote' cases should call for a stricter scrutiny. [55]

The approach is far from universally accepted. [56] On a gen-

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[54] Some national codifications of private international law actually state this explicitly. See, eg, art 21(2) of the Belgian Code of Private International Law of 2004, according to which, the inconsistency of a foreign law with the fundamental policies of the forum 's'apprécie en tenant compte, notamment, de l'intensité du rattachement de la situation avec l'ordre juridique belge'. See, in a similar vein, but with reference to the recognition of judgments, art 1097(1)(a) of the Romanian Code of Civil Procedure of 2010. See further Felix M. Wilke, A Conceptual Analysis of European Private International Law (Intersentia 2019) 261.

[55] See generally Patrick Courbe, 'L'ordre public de proximité' in *Le droit international privé: esprit et méthodes - Mélanges en l'honneur de Paul Lagarde* (Dalloz 2005) 227, and Natalie Joubert, *La notion de liens suffisants avec l'ordre juridique (Inlandsbeziehung) en droit international privé* (Litec 2007), and with respect to the recognition of judgments, see also Christian Völker, *Zur Dogmatik des ordre public* (Duncker & Humblot 1998) 231 ff.

[56] The legislation of some States even makes it explicit that the intensity of the ties between the case of the forum is *not* among the circumstances that courts are allowed to rely on for the purposes of deciding whether to raise the public policy defence, or not. See, for instance, art 36(3) of the Tunisian Code of Private International Law of 1998: 'L'exception de l'ordre public ne dépend pas de l'intensité du rapport entre l'ordre juridique tunisien et le litige'. See, in general, on the debate regarding the relevance of proximity to the public policy doctrine, specifically in France, David Sindres, 'Vers la disparition de l'ordre public de proximité?' (2012) 139 JDI 887. On the evolution of the French prac-

eral note, the idea of an *ordre public de proximité* seems to rest on the assumption that, when it comes to 'connected' situations, the law of the forum has a particularly strong title to govern the matter, at least insofar as its basic values are concerned. This reasoning, based as it is on geographical references, departs from the traditional view according to which the public policy doctrine provides the means to question the substance of the law selected under the pertinent conflicts rules, not to dispute the allocation resulting from those rules. The claim that the operation of the public policy defence should depend on the localisation of the elements of the case has, instead, the effect of challenging, in a way, that allocation. The reference thus made to the *lex fori* somehow 'competes' with the reference resulting from the pertinent conflicts rules.

That said, separating 'close' from 'remote' situations for the purposes of public policy is, presumably, not always possible or appropriate. Arguably, much depends, here, on the object and nature of the fundamental value whose safeguard is at issue, and on the reasons why the forum regards that value as fundamental.

Raising the public policy defence may sometimes be a way to prevent the forum State from acting as the 'accomplice' of another country in the violations of a given principle, as they may result from the other country's legislation or the decisions of its courts. The mere fact that a similar violation is relied upon before the courts of the forum is enough to justify the use of the public policy exception, regardless of the intensity of the ties between the case and the forum itself. [57] In other cases, the State of the forum is concerned, instead, with the prospect of importing a legal situation shaped by an objectionable foreign law or judgment, because it considers that this would trouble the life of the local community, or would otherwise give rise to adverse effects, locally. [58] Differently from the previous scenario, the concern, here, is tied to the spatial projections of the case, and would accordingly seem to imply that the operation of the public

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tice on the topic, as it results in particular from a judgment of the Cour de Cassation of 27 September 2017 (Case No 16-19654), see Didier Boden, 'Requiem pour l'Inlandsbeziehung' (2018) 108 RCDIP 882.

[57] See Hélène Gaudemet-Tallon, 'Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l'arc-en-ciel)' (2005) 312 Recueil des Cours 9, 409 ff.

[58] De Vareilles-Sommières (n 1) 226 ff.

policy doctrine may be influenced by the nature and strength of those projections.

The problem is that, in most instances, the two scenarios coexist and are hardly discernible in practice. Where courts raise the public policy exception, they often do so based on a number of concurrent concerns, some of which allude more or less openly to proximity, while others do not.

That said, the most serious objection against the claim that the strength of public policy should vary with the proximity of the case is, arguably, that courts are normally provided with little or no guidance as to the localisation of the case. [59] What kind of connections make a matter appear 'close' to the forum, for public policy purposes?

The connecting factors featured in the conflict-of-law rules are generally of little avail. Public policy only becomes an issue, by definition, where the conflicts rules characterise the case as remote, so much so that they submit it to a foreign law. To assess the proximity of the case for the purposes of public policy, other connecting factors are needed. Failing any legislative guidance, it is for the courts themselves to forge those connecting factors, plausibly on a case-by-case basis.

Predictability may then become a chimera. Torts are especially problematic in this respect, for they can be simultaneously connected with multiple countries, in particular if they involve several persons, as in the case of environmental damage or the infringement of data protection rules, or if they result from conducts which took place in different countries.

The risk of a biased localisation can hardly be excluded in these cases. If the availability of the public policy defence were influenced, say, by the nationality or the habitual residence of the victim, or of the tortfeasor, the choice of law process (taken in its entirety, including the exceptions prompted under the public policy doctrine) would risk losing the neutrality which it is normally meant to feature. The chances of success for each party would ultimately depend, to some extent, on whether litigation

[59] See further, on the possible relevance of proximity to the operation of the public policy doctrine in punitive damages cases, Dirk Brockmeier, *Punitive damages, multiple damages und deutscher ordre public* (Mohr Siebeck 1999) 117 ff, and Olivera Boskovic, *La reparation du préjudice en droit international privé* (LGDJ 2003) 346 ff.

occurs before the courts of one State rather than another. This would in turn encourage opportunistic tactics and increase the appeal of forum shopping.

It is interesting to note that special legislative provisions have been enacted in some countries which build, in fact, on the logic of *Inlandsbeziehung*, but, at the same time, reflect a concern for legal certainty. Article 135 of the Swiss Federal Statute on Private International Law of 18 December 1987, on the law applicable to product liability, provides an interesting illustration. It begins by laying down a bilateral conflict-of-law rule. As a derogation to that rule, however, article 135(2) provides that in the case of product liability claims governed by a law other than Swiss law, no damages may be awarded in Switzerland in excess of those which would be due to the victim, in the circumstances, in conformity with Swiss substantive law.

5. THE CONSEQUENCES OF RAISING THE DEFENCE

What consequences arise, precisely, from the successful invocation of the public policy doctrine? Does the designated foreign law, or the foreign judgment concerned, become irrelevant in its entirety? How is the gap resulting from the non-application of the foreign law or the non-recognition of the foreign judgment to be filled?

5.1. *In the conflicts of laws*

The successful invocation of the public policy defence deactivates, or otherwise alters the functioning of, the conflict-of-law rule under which the normally applicable foreign law had been selected in the first place. The 'ousting' effect of the public policy defence raises, in turn, the issue of which law ought to apply subsidiarily.

5.1.1. *The ousting effect*

In some countries, like Germany, the ousting effect prompted by the public policy defence is understood to concern, selectively, the particular provision of the *lex causae* the application of which would offend the basic interests of the forum. Accord-

ingly, the courts are instructed to single out the provision concerned and to replace it with a different provision of the same law. The replacement occurs on the assumption that the designated foreign law, once stripped of its 'defective' component, would no longer be at odds with the public policy of the forum. [60] This approach translates a concern for the effectiveness of the conflict-of-law rule applicable in the circumstances. It posits that, as a matte rof principle, it is for the law specified under that rule to fix the problem for which the public policy defence was raised.

In other countries, including Italy, the rules on public policy indicate, instead, that the specified foreign law should either be applied genuinely (that is, the way in which it is meant to operate originally, without any adaptation or manipulation), or be disregarded altogether. [61] Neglecting one provision of the *lex causae* and applying another instead, as under the 'German' approach, amounts in fact to deciding the case in accordance with a law which only nominally corresponds to the foreign law selected by the applicable conflicts rules. Where the latter law prescribes the application of a 'defective' provision, applying a different provision of the same law is in fact varying the normal operation of that legal order – the outcome thus produced is not (or not precisely) the result that the law in question would produce by itself.

In reality, when it comes to punitive damages cases, the two approaches will likely lead, in practice, to largely similar results. In a country where the award of punitive damages is considered to be irretrievably at variance with public policy, the 'German' approach will normally involve the replacement of the provision of the *lex causae* which allows the award of such damages by the general provision of the same law under which the victim of a tort is entitled, as a basis, to the full compensation of the loss suffered. The 'latin' approach, for its part, will lead to the non-application of the *lex causae* for the purposes of assessing

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[60] Gerhard Kegel, Klaus Schurig, *Internationales Privatrecht* (8th edn, Beck 2000) 472 ff. See further, on the whole topic, Siegfried Schwung, 'Das Ersatzrecht bei einem Verstoß des ausländischen Rechts gegen den ordre public' (1985) 49 *RabelsZ* 407.

[61] See Giorgio Badiali, *Ordine pubblico e diritto straniero* (Giuffrè 1962) 287 ff.

the damages to which the victim is entitled, followed by the application of a different law providing for merely compensatory damages.

5.1.2. *The subsidiarily applicable law*

No matter how the ousting effect is shaped, the question arises – or may arise – of which law should apply in the event that the specified foreign law either fails to provide an alternative to the 'defective' provision (under the 'German' approach), or is inapplicable altogether because of its inconsistency with the fundamental policies of the forum (under the 'latin' approach).

The majority of countries provide, in this case, for the application of the *lex fori*. This occurs, for instance, under the rules of private international law in force in Austria.[62] Other countries fall back, instead, on the law designated through an alternative connecting factor, which may be, in fact, a foreign law. The latter may be a connecting factor that would normally apply to the case at hand (but was superseded, in the circumstances, by the connecting factor which led in fact to the unacceptable result ousted by the public policy defence),[63] or a connecting factor designed to apply, specifically, to public policy cases.[64] Only where the quest for an alternative fails (eg, because the alternative factor results in the designation of the same legal order that was specified in the first place, or in the designation of a legal order equally leading to objectionable results), the *lex fori* applies.

While the 'Austrian' option provides the court with a quick and simple way-out from the impasse arising from the ousting effect, the other approach seeks to exploit the potential of the conflicts rules in force in the forum to the maximum possible extent.

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[62] Art 6 of the Austrian Statute on Private International Law of 1978.

[63] For example, art 16(2) of the Italian Statute on private international law of 1995 provides that the court apply the law specified under the different connecting factor, if any, as may be applicable to the circumstances.

[64] See, among others, the Ukrainian Statute on Private International Law of 2010, whose art 12(1) provides for the application of the law of the country having the closest connection with the case.

In the field of torts, situations exist in which the two approaches may actually lead to different results. Suppose, for example, that, under the conflict-of-law rules of A (the forum State), torts are governed the *lex loci delicti* unless the parties have agreed on the application of a different law. Imagine that the parties have in fact agreed that the liability arising from a tort committed in B be governed by the law of C, under which the victim is entitled to punitive damages. What if the award of such damages is considered to be at variance with the public policy of the forum? Following the first approach, the subsidiarily applicable law will be the law of A, i.e., the *lex fori*. On the contrary, if the second option is followed, then the subsidiarily applicable law is the law of B, this being the law specified under the connecting factors which apply, in the forum, absent a choice by the parties.

5.2. *In the recognition of judgments*

The public policy defence prevents a foreign judgment from being relied upon in the requested State as an authoritative and binding statement of a claim, as well as an enforceable title.

The ousting effect thus produced extends, in principle, to the entire judgment. Judgments, however, often consist of different parts. Recognition regimes almost invariably include a rule providing for the partial enforcement of a judgment, either where this is applied for, or where the pre-requisites for recognition are only met for part of the judgment.

Partial recognition facilitates the international circulation of judgments by confining the impact of such grounds of non-recognition as may arise in a particular case to the part of the ruling which is affected by them. Thus, where one part of a judgment is inconsistent with the public policy of the requested State, recognition may be denied to that part alone.

Most systems of private international law, as well several uniform instruments, distinguish between 'selective' and 'reductive' partial enforcement. [65] The former refers to the enforcement of a severable part of the ruling, and is normally regarded

[65] See Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (5th edn, LGDJ 2015) 599 ff.

as permissible. The latter consists, in fact, in a review of the ruling involving a limitation of the effects arising thereunder (normally, a reduction of the damages awarded under the judgment), and is generally proscribed as inconsistent with the prohibition to review the judgment as to its substance.

The recognition of judgments awarding punitive damages in a country where those damages cannot be awarded as a matter of public policy may fit, depending on the circumstances, in either of the two scenarios.

If, upon a proper reading of the judgment concerned, the damages awarded to the victim come from two severable parts of the ruling – one awarding nothing more than compensatory damages, the other dealing with the punitive damages – then the partial enforcement of the part awarding the compensatory damages should normally not pose a problem. Otherwise, the prohibition of a review of the merits will lead to the ruling being denied effects altogether. It is for the rules applicable in the requested State to decide whether to mitigate the all-or-nothing approach resulting from a narrow reading of the prohibition of *révision au fond*, thereby allowing for the recognition of non-severable judgments awarding punitive damages *to the extent to which* they do not just compensate a party for the actual loss suffered. [66]

6. CONCLUDING REMARKS

The public policy doctrine is traditionally seen as a means to ensure the preservation of existing values. Its inherent flexibility, however, can also be relied upon to promote change within domestic legal orders. The public policy defence is designed, as such, to prevent foreign legal products from entering the fo-

[66] See Cedric Vanleenhove, 'A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No Pasarán!"' (2016) 41 Vermont L Rev 347, 399 ff, advocating that a reduction of the kind described in the text would not amount to a review of the judgment as to its merits. The court of the requested State, he contends, would neither be 'giving its opinion about the merits of the foreign case', nor 'questioning whether the foreign decision was correct in fact and/or in law'. See, for a similar approach, art 11 of The Hague Convention on Choice of Court Agreements of 30 June 2005.

rum, but reconsidering that barrier in areas where it has been in place for long sets the premises for a renewed dialogue between the forum itself and the other legal orders, and possibly creates the bases for reforms within the forum State itself as well as at a regional or universal level. The changing approach of some States towards punitive damages provide an illustration of these dynamics.

Of course, the public policy doctrine is not itself a driver of change, but rather a tool which allows change to happen. It is, in this regard, a highly sophisticated tool. Courts are called upon to analyse the emerging trends in the legislation and case law of the forum so as to set the limits of tolerance vis-à-vis the law of others. In doing so, they enjoy a remarkable amount of discretion. And, by the same token, bear a significant responsibility.

ABSTRACT

'Public policy' is the doctrine whereby a foreign law that would normally apply, or a foreign judgment which would otherwise qualify for recognition, will, exceptionally, not be given effect where to do so would result in an infringement of the fundamental principles of the forum. The paper discusses the raison d'être *of the doctrine and the place it occupies within the rules of private international law, and outlines the object and nature of the assessment on which the doctrine itself is centred. Finally, having especially regard to punitive damages cases, the paper addresses two aspects of the operation of the public policy doctrine, namely the standards by which a court should be guided when deciding whether the defence should be raised in a given set of circumstances, and the consequences that the defence entails for the decision of the dispute, or issue, in question.*

CHAPTER IV

PUNITIVE DAMAGES AND INTERNATIONAL COMMERCIAL ARBITRATION

AMÉLIE SKIERKA * – SONYA EBERMANN **

CONTENTS: 1. Introduction. – 2. The law applicable to punitive damages in international commercial arbitration. – 2.1. The law of the arbitral seat and public policy. – 2.2. The substantive law applicable to the dispute. – 3. Recognition and enforceability of arbitral awards and foreign court judgments granting punitive damages. – 3.1. Recognition and enforcement of arbitral awards granting punitive damages – 3.2. Recognition and enforcement of foreign court decisions granting punitive damages. – 4. Applying a proportionality standard to the recognition and enforcement of arbitral awards granting punitive damages. – 4.1. Scope for review on the merits of arbitral awards under public policy exception. – 4.2. Lack of certainty regarding the definition of proportionality. – 4.3. Consequences of a finding of disproportionality. – 5. Mitigating the risks of dealing with punitive damages in international commercial arbitration. – 6. Conclusion.

1. INTRODUCTION

The issue of punitive damages in international commercial arbitration is a difficult one. This is primarily because the availability of punitive damages in international commercial arbitration raises conflict of laws questions, the authority to award punitive damages being inseparable from applicable law. Arbitral tribunals will normally possess or exercise such power only when: (i) the authority to grant punitive damages in accordance

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with the arbitration agreement and/or applicable law exists; (ii) the applicable law and/or the *lex arbitri* recognise punitive damages as an available remedy; and (iii) the award granting punitive damages is enforceable.

Only a limited number of legal systems recognize a general remedy of punitive damages, the United States being a prime example. Civil law jurisdictions, however, do not normally recognize punitive damages. Similarly, most common law jurisdictions also generally restrict the availability of punitive damages, particularly in contractual matters, though there are circumstances, normally in tort claims, where punitive damages may potentially be awarded. Therefore, only in the United States are punitive damages in principle routinely awarded, though even this can be limited.

However, even in instances in which arbitral tribunals may grant punitive damages, hesitation remains where the law of the seat (where the award might be challenged) or the law of the place of enforcement, do not recognize punitive damages. Where prohibited, any award granting punitive damages could risk being set-aside or being refused enforcement, endangering the general duty of arbitral tribunals to render enforceable awards.

Arbitral awards granting punitive damages are rare. This is largely because punitive damages remain, at least in the words of one author, 'essentially an American phenomenon'. [1] There is scant jurisprudence outside of the United States concerning the setting-aside or enforcement of arbitral awards ordering punitive damages, thus any examination remains anecdotal. However, studying the recognition and enforcement of US court judgments granting punitive damages in continental European jurisdictions that do not normally permit punitive damages *per se* is instructive. These jurisdictions have traditionally refused to recognise US court decisions granting such damages based upon domestic general legal principles and public policy.

Despite this, several recent decisions may imply a softening of national court stances across continental Europe and other jurisdictions. Rather than outright rejecting foreign court decisions granting punitive damages, courts in Spain, France, and most re-

[1] Markus A Petsche, 'Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?' (2013) 29 Arbitration Intl 91.

cently Italy, have examined whether these judgments are enforceable. In doing so, these European national courts conducted a public policy and proportionality assessment, basing their reasoning on whether the punitive damages granted were proportional to the amount of actual damages claimed or awarded. Where the amount was not deemed excessive, again, in context of the overall amount of actual damages claimed or awarded, recognition or enforcement was granted.

While it remains unclear whether or how this evolution may ultimately impact the recognition and enforcement of arbitral awards granting punitive damages, the proportionality assessment constitutes a relevant development which may provide guidance standards for arbitral tribunals, parties, and national courts in international commercial arbitration.

This paper first briefly considers whether arbitral tribunals possess the authority to award punitive damages under applicable law (see below at para 2). Assuming this power exists, it then discusses standards regarding the recognition and enforcement of arbitral awards granting punitive damages by examining the situation regarding the recognition and enforcement of foreign judgments granting punitive damages (see below at para 3). Following this, it analyses the potential application of a proportionality standard for the recognition and enforcement of arbitral awards granting punitive damages (see below at para 4). The paper concludes by offering arbitral tribunals and parties alike some brief guidance on risk mitigation in the context of dealing with punitive damages in international commercial arbitration (see below at para 5).

2. The law applicable to punitive damages in international commercial arbitration

Damages generally aim to compensate a claimant for loss suffered. [2] Punitive damages, however, are 'intended to be more than just a means to compensate the losses suffered by the non-breaching party, rather they are mainly intended as a means to

[2] Reza Mohtashami QC, Romilly Holland and Farouk El-Hosseny, 'Non-Compensatory Damages in Civil and Common Law Jurisdictions: Requirements and Underlying Principles' in John A Trenor (ed), *The Guide to Damages in International Arbitration* (3rd edn, GAR 2018) 24.

deter and punish conduct that is considered particularly outrageous'. [3]

As mentioned, punitive damages are normally only an available remedy in a limited number of jurisdictions. An award of punitive damages may be especially rare in the context of international commercial arbitration, as an arbitral tribunal will need to consider both the law of the seat of the arbitration (see below at para 2.1) and the substantive law applicable to the dispute (see below at para 2.2), along with the law of the jurisdiction in which the award may be enforced (see below at para 3). [4]

2.1. *The law of the arbitral seat and public policy*

When determining whether it may award punitive damages, an arbitral tribunal must first consider the law of the seat of the arbitration. The majority viewpoint amongst commentators is that a tribunal can only award punitive damages if it has the power to do so under the law of the seat and the awarding of such damages is not contrary to the State's public policy. [5] Redfern and Hunter term this the 'threshold question' in the context of a claim for punitive damages. [6]

This view is reflected in one ICC arbitration, in which a Swiss seated arbitral tribunal applying New York law held:

> [D]amages that go beyond compensatory damages to constitute a punishment of the wrongdoer (punitive or exemplary damages) are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a

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[3] Niccolò Pietro Castagno, 'International Commercial Arbitration and Punitive Damages' (2011) 4(3) Arbitraje 730.

[4] Practical Law Arbitration, 'Damages in international arbitration' (2017) Note 0-519-4371 Thompson Reuters Practical Law UK Practice 18.

[5] Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 517 (`the question of whether an arbitral tribunal has the power to impose penal sanctions depends on the law of the place of arbitration (the *lex arbitri*) ....'); Petsche (n 1) 93; Kyriaki Noussia, 'Punitive Damages in Arbitration: Panacea or Curse?' (2010) 27(3) J Intl Arbitration 283.

[6] *Redfern and Hunter on International Arbitration* (n 5) 517.

> dispute according to a law that may allow punitive or exemplary damages as such. [7]

Not every commentator subscribes to this view. Born, for example, argues that although an arbitral tribunal must of course give effect to any applicable mandatory law and public policy, it must first complete a conflict of law analysis in order to determine what mandatory law and public policy are applicable in a given instance. [8] He states:

> [I]t is difficult to see why the public policy of the arbitral seat should apply to a transaction having no connection to the place of arbitration: more appropriate is application of the public policy of the jurisdiction most closely connected to the parties' dispute. [9]

One justification of the importance of the law of the seat derives from the concern that a domestic court at the arbitral seat may annul an award that it determines is contrary to public policy. As one author explains:

> This prospect inevitably influences the arbitral tribunal's decision. In fact, arbitral tribunals may be reluctant to grant punitive relief if it is probable, or at least possible, that such an award would be set aside by the courts of the place of arbitration. [10]

This concern is linked to issues regarding the enforceability of an arbitral award set aside at the seat of arbitration, as under the New York Convention 1958, a national court may refuse enforcement of an arbitral award if the award has already been set-aside at the seat. [11] These considerations are discussed in further detail below. [12]

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[7] ICC Case 5946, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 16, Kluwer 1991) 113.

[8] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3082.

[9] ibid.

[10] Petsche (n 1) 102.

[11] New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958 (hereinafter 'New York

2.2. *The substantive law applicable to the dispute*

If an arbitral tribunal has the power to award punitive damages under the law of the seat of the arbitration, it must then determine whether punitive damages are an available remedy under the law applicable to the substance of the dispute.

The law applicable to the substance of the dispute will also govern whether punitive damages are available. [13] For example, the Rome I Regulation, which governs the law applicable to contractual obligations in EU member states, states at article 12(1)(c) that:

> The law applicable to a contract by virtue of this Regulation shall govern in particular... within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, *including the assessment of damages* in so far as it is governed by rules of law. [14]

As mentioned, only a limited number of jurisdictions permit punitive damages in contractual disputes. Civil law jurisdictions generally do not provide for punitive damages as a remedy. [15] Many common law jurisdictions provide for punitive damages in tort cases, but fewer do so in the context of contractual claims. [16] For example, under English law, punitive damages are not a remedy for breach of contract, though they may be for tortious claims. [17] In the United States, however, punitive damages are an available remedy in breach of contract cases,

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Convention') art V(1)(e). The New York Convention currently has 159 signatories. List of Contracting States available at <http://www.newyorkconven tion.org/list+of+contracting+states> accessed on 28 March 2019; Petsche (n 1) 102.

[12] See para 3.1.

[13] Noussia (n 5) 283; Petsche (n 1) 92; *Redfern and Hunter on International Arbitration* (n 5) 517-519.

[14] European Parliament and Council Regulation (EC) No 593/2008 of 4 July 2008 on the law applicable to contractual obligations (Rome I Regulation) [2008] OJ L177/6, art 12 (emphasis added).

[15] Castagno (n 3) 729; *Redfern and Hunter on International Arbitration* (n 5) 517.

[16] Castagno (n 3) 731.

[17] ibid 732; *Addis v Gramophone Co. Ltd.* [1909] UKHL 1 [1909]; English Law Commission, *Aggravated, Exemplary and Restitutionary Damages* [1997] EWLC 247, s 5.42.

although only in limited circumstances in which the conduct constituting the breach is also a tort for which punitive damages are recoverable. [18]

With respect to international legal instruments, the United Nations Convention on Contracts for the International Sale of Goods (an instrument that is often applicable in international commercial arbitration) excludes the recovery of punitive damages and only allows the recovery of 'a sum equal to the loss'. [19]

In a frequently cited case, an ICC tribunal applying Indian law refused to award punitive damages, finding that:

> [T]he arbitrators [...] are not here empowered to award either exemplary or punitive damages. As a matter of Indian law, while the issue was not briefed in detail, the arbitrators find that a court, and thereby by extension an arbitral tribunal, will normally give damages for breach of contract only by way of compensation for loss suffered, and not by way of punishment. [20]

Similarly, in the ICC arbitration discussed above, the tribunal recognized the applicability of the substantive law to the issue of the availability of punitive damages, stating that:

> Even if an award of punitive damages were not found to be inconsistent with Swiss public policy, respondent has not proven that under New York law a claim for such punitive or exemplary damages would lie. [21]

In another ICC case, a tribunal seated in Paris refused awarding punitive damages not only because the applicable sub-

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[18] Castagno (n 3) 732; Restatement (Second) of Contracts, s 355 (`Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.').

[19] United Nations Convention on Contracts for the International Sale of Goods, art 74; Petra Butler, 'Damages Principles under the Convention on Contracts for the International Sale of Goods (CISG)', in Trenor (n 2) 54.

[20] ICC Case 8445, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 26, Kluwer 2001) 178.

[21] ICC Case 5946, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 16, Kluwer 1991) 113.

stantive law (the law of an African State X inspired by the French law tradition) did not provide for punitive damages, but also because it held that general principles of international contract law do not allow for punitive damages. [22]

Even in those cases in which the law of the seat and the applicable substantive law in principle allow for punitive damages, arbitral tribunals have exercised scrutiny in awarding such damages. An ICSID tribunal for instance refused to grant punitive damages under the applicable law – Liberian law – as the required criteria to grant such damages were not met. The tribunal found that Liberian law allowed for punitive damages only 'in civil actions when the actions of the liable party are of a "peculiar nature and partake of a criminal character"', which the tribunal did not deem to be fulfilled in the case at hand. [23] Similarly, an ICC tribunal seated in London refused to grant punitive damages because the conditions for granting punitive damages under Pennsylvania law (an 'evil motive' or 'reckless indifference') were not established with sufficient certainty. [24]

We may conclude from the above that, should an arbitral tribunal have the power to award punitive damages under the law of the arbitral seat, and in addition, should punitive damages be an available remedy under the applicable substantive law to the dispute, it can, at least in principle, award punitive damages. However, an arbitral tribunal may also need to consider potential scrutiny of an award granting punitive damages in future setting-aside or enforcement proceedings by national courts in jurisdictions where such damages are not recognized. This stems from the general duty of tribunals to render an enforceable arbitral award. It is this issue to which this paper now turns.

3. Recognition and enforceability of arbitral awards and foreign court judgments granting punitive damages

When punitive damages are awarded by an arbitral tribunal,

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[22] ICC Case 5030, in Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher, *Collection of ICC Arbitral Awards 1991-1995* (Kluwer 1997) 483.

[23] ICSID Case ARB/83/2, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 13, Kluwer 1998) 51.

[24] ICC Case 15652, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 40, Kluwer 2015) 194, 200-201.

important questions arise about enforceability under the New York Convention. Legal systems exhibit significant variation regarding the availability of punitive damages, particularly so in connection with contract law claims. Most jurisdictions provide a blanket prohibition on punitive damages, while only some – such as the United States – permit them. Accordingly, when enforcement of an arbitral award is sought in a jurisdiction where the remedy of punitive damages is unavailable or restricted, questions arise as to whether the award is enforceable and, in particular, whether any grounds for non-recognition under article V of the New York Convention arise.

Even if tribunals possess, in principle, the authority to award punitive damages because they are available under applicable law, they may still refuse to award such damages because of potential problems that may arise when enforcement is sought before national courts.[25] As discussed in more detail below, this trepidation is inherent in the general duty of tribunals to render enforceable awards.[26] As one author eloquently surmises, '[i]f an arbitral award cannot be enforced it is not much more than a piece of paper to the parties'.[27]

Arbitral awards granting, or even overtly discussing punitive damages, are relatively rare, both because: (i) only a limited number of jurisdictions permit punitive damages to begin with; and (ii) arbitral awards are only exceptionally published in international commercial arbitration. Given this relative rarity, there is consequently little jurisprudence concerning the setting-aside or enforcement of international commercial arbitral awards ordering punitive damages.[28] Considering this, it is difficult – if not impossible – to establish concrete standards for the recognition and enforcement of arbitral awards granting punitive damages based on available arbitral awards alone (see below at para 3.1).

As such, the recognition and enforcement by European national courts of US national court decisions awarding punitive damages may provide valuable assistance when attempting to

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[25] Petsche (n 1) 44.
[26] See para 5.
[27] Jessica Jia Fei, 'Awards of Punitive Damages' [2003] SAR 27.
[28] Mohtashami, Holland and El-Hosseny (n 2) 34, citing Petsche (n 1).

establish relevant standards that could apply in the context of international commercial arbitration (see below at para 3.2).

3.1. *Recognition and enforcement of arbitral awards granting punitive damages*

Before analysing the few national court decisions which have dealt with the issue and which will be discussed further below, this paper will shed some light on the international conventions and domestic arbitration laws which provide inspiration regarding the standards applied to the recognition and enforcement of arbitral awards granting punitive damages.

The recognition and enforcement of international arbitral awards is subject to the New York Convention. Article V recognizes two broad categories where a national court before whom an enforcement action is brought may refuse enforcement. Specifically, article V(2)(b) provides that recognition and enforcement of an arbitral award may be refused if it is contrary to the public policy of the State where enforcement is sought. [29] Article V grounds are narrowly and strictly construed, however, generally favouring the enforcement of arbitral awards as an overall guiding principle. [30] This follows from the wording of article V(2), which states that '[r]ecognition and enforcement of an arbitral award *may* also be refused... if [t]he recognition or enforcement of the award would be contrary to the public policy of that country'. [31]

National courts are not obliged to refuse enforcement, as the language used in article V(2) is permissive, not mandatory. [32] In this regard, most national courts have been mindful of the 'pro-enforcement bias' that underpins the New York Convention while interpreting its provisions. [33]

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[29] New York Convention, art V(2)(b).

[30] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer 2016) 222.

[31] New York Convention, art V(2)(b) (emphasis added).

[32] *Redfern and Hunter on International Arbitration* (n 5) 623.

[33] Born (n 8) 3426-7; Swiss Federal Tribunal, *Joseph Mueller A.G. v Sigval Bergesen*, Judgment of 26 February 1982, in Pieter Sanders (ed), *Yearbook Commercial Arbitration* (vol 9, Kluwer 1984) 439 (`the aim of the New York Convention is to avoid the double exequatur as was in practice required under the Geneva Convention, although the latter Convention did not require it

Article V(2)(b) does not define 'public policy'. It was however the intention of the drafters of the New York Convention to give the term 'public policy' the narrowest interpretation possible. [34] Many commentators have long advocated for a necessary distinction between the interpretation of domestic and international public policy under the New York Convention, with the concept of international public policy being interpreted more narrowly. [35]

Recommendations issued by the International Law Association in 2002 regarding the notion of public policy define 'international public policy' as the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account of either the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy). [36] Others have defined international public policy as 'public policy as broadly understood in

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expressly. Under the New York Convention, it is not necessary to obtain a declaration of enforcement of the award from the court in the country under the law of which the arbitral procedure has taken place'); *Gater Assets Ltd v Nak Naftogaz Ukrainy* [2007] APP.L.R 10/17, para 67 (Comm) (English High Ct) (`policy of the Arbitration Act and the New York Convention to give effect to Convention awards by speedy and effective enforcement'); Saskatchewan Court of Queen's Bench, *W Plain Co v NW Organic Community Mills Co-Operative Ltd*, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 34, Kluwer 2009) 475, 476 (recognizing Convention's 'important commercial public policy objectives' that arbitral awards are 'universally recognized and enforceable by the courts of participating jurisdiction'); *Polimaster Ltd v RAE Sys., Inc*., 623 F3d 832, 836 (9th Cir. 2010) (`New York Convention defences are interpreted narrowly'); *Ario v Underwriting Members of Syndicate Lloyds for the 1998 Year of Account*, 618 F3d 277, 290-91 (3rd Cir. 2010) (`Article V of the Convention sets forth the grounds for refusal, and courts have strictly applied the Article V defenses and generally view[ed] them narrowly').

[34] Paulsson (n 30) 222.

[35] *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011) 106-107.

[36] Pierre Mayer, Audley Sheppard and Nagla Nassar, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' [2003] Arbitration Intl 253, recommendation 1(c); *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (n 35) 107.

the international community as applying to transnational business dealings'. [37]

National legislation and domestic court jurisprudence generally apply a narrower interpretation of international public policy with regard to the recognition and enforcement of arbitral awards. Article 1514 French Code of Civil Procedure, for example, explicitly states that:

> Arbitral awards are recognized or enforced in France where the party who relies upon it has established their existence and if this recognition is not manifestly contrary to international public policy. [38]

According to the US Restatement (Third) of Foreign Relations Law:

> United States Courts have construed the public policy exception [under the New York Convention] to the enforcement of foreign arbitral awards narrowly. [39]

This was applied by at least one US court, where it held that 'public policy is to be read narrowly', referring not just to '*national* public policy, but to public policy that is in some respect international in character'. [40]

The Lithuanian Supreme Court also indicated that international public policy must be interpreted narrowly. A Lithuanian Court of Appeal had refused to recognize an arbitral award granting punitive damages which was rendered by a tribunal seated in Switzerland and applying Swiss law. It had reasoned that the arbitral award 'violated public policy because the liquidated damages were not in proportion to the actual damages' and therefore punitive in nature, although punitive damages are prohibited under Lithuanian law. [41] The Supreme Court dismissed this judgment and recognized the award, as a violation of

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[37] Paulsson (n 30) 222.

[38] French Code of Civil Procedure, art 1514.

[39] Restatement, Third, Foreign Relations Law of the United States (Revised), American Law Institute Library, vol 1, 1986, paras 488, 640.

[40] *Parsons & Whittemore Overseas Co. v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2nd Cir. 1974).

[41] Lithuanian Supreme Court, 25 September 2015, case no 3K-3-483-

international public policy 'in its narrow meaning [...] involves an evident violation of fundamental principles of due process and universally recognized principles of law.' [42] While it found that liquidated damages were unknown, but not prohibited in Lithuanian law, it held that the concept was 'related to the actual damage incurred by a party because of the non-performance of contractual obligations.' [43] When assessing whether liquidated damages result in a violation of public policy, the Supreme Court thus advised that courts should take into account

> whether the liquidated damages arise out of contractual relations, whether they reflect the intention of the parties, and whether the parties are experienced in the field of business and negotiation, [44]

indicating that the recognition of awards granting liquidated damages is permissible if these three criteria are fulfilled.

Russian courts, however, often apply expansive interpretations of public policy. [45] In Russia, like in most civil law jurisdictions, the purpose of damages is to compensate for the loss suffered, and punitive damages are traditionally not recognized as an available legal remedy. [46] Russian courts have relied on a wide interpretation of public policy to decline enforcement of foreign arbitral awards if the amount of damages awarded under the foreign law was either 'punitive' or disproportionate to the breach, including in circumstances where the damages were not qualified as punitive under the applicable law. [47]

The Russian Supreme Arbitrazh Court nevertheless enforced a foreign arbitral award granting liquidated damages in 2008. The Court, overruling a decision by lower courts refusing enforcement on the grounds of public policy, held that the award did not *per se* violate Russian public policy, since

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321/2015 in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 41, Kluwer 2016) 508.

[42] ibid 509.

[43] ibid.

[44] ibid.

[45] *Redfern and Hunter on International Arbitration* (n 5) 118.

[46] John Y Gotanda, 'Punitive Damages, A Comparative Analysis', (2004) 42 Columbia J Transnational L 396, fn 24; W E Butler, *Russian Law* (3rd edn, Oxford 2009) 408.

[47] *Redfern and Hunter on International Arbitration* (n 5) para 11.118.

> the company [requesting the refusal of recognition and enforcement of the award] failed to prove, and it does not follow from the facts of the case, that the civil liability measures, applied by the arbitral tribunal, are disproportionate to the consequences of violation of the contract [...] and supplements to it. [48]

More recently, the same court confirmed that the mere fact that liquidated damages exceed the amount of losses actually incurred does not necessarily mean they are punitive in nature and therefore contravene public policy, provided that 'the amount of liquidated damages awarded by the foreign tribunal is reasonable.' [49] According to the Court, 'a number of concepts enshrined in Russian civil legislation do envisage stepping away from strictly compensatory measures of civil law liability.' [50]

As opposed, the Portuguese Supreme Court of Justice confirmed a judgment by the Lisbon Court of Appeal which refused recognition and enforcement of a Spanish arbitral award. The arbitral tribunal, seated in Barcelona and applying Spanish law, had awarded the claimant EUR 4.5 million of punitive damages under a contractual penalty clause. The Court of Appeal had held that such damages violate Portuguese international public policy in respect of Portuguese civil law rules on penalty clauses. The Portuguese Supreme Court confirmed that the amount set as a penalty was 'disproportionate' and 'suffocating,' thereby violating Portuguese principles of morality, good faith and proportionality. [51] The award was also deemed to violate

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[48] Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, 2006, case no A40-64205/05-30-394, 3; Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, 19 September 2006, case no 5243/06, *Joy Lud Distributors International Inc (US) v Open Joint Stock Company Moscow Oil Refinery Plant (Russian Federation)*, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 32, Kluwer 2007) 485; Timur Aitkulov and Dmitry Malukevich, 'Application of Public Policy Doctrine Summarized by the Supreme Arbitrazh Court' (2013) Clifford Chance Briefing Note, <https://www.cliffordchance.com/briefings/2013/05/application_of_publicpolicydoctrinesummarise0.html> accessed 28 March 2019.

[49] Presidium of Supreme Arbitrazh (Commercial) Court of the Russian Federation, 26 February 2013, Information Letter 156, s 6.

[50] ibid.

[51] Supreme Court of Justice of Portugal, 2017, case no 103/

Portuguese international public policy because Spanish law – as opposed to Portuguese law – does not allow the reduction of the amount stipulated as a penalty clause based on an *ex aequo and bono* approach, thereby

> breach[ing] the principle of correction of excessive or abusive conduct in the exercise of freedom of contract, specifically when determining the consequences of non-performance, having good faith as an underlying principle. [52]

The few court decisions which have dealt with the recognition and enforcement of arbitral awards granting punitive damages, as discussed above, allow the conclusion that most jurisdictions assess whether punitive damages violate international public policy, including some level of assessment whether the awarded damages constitute a proportionate compensation for the harm suffered. As the low number of court judgments dealing with arbitral awards awarding punitive damages however makes it difficult to decipher an applicable standard, it may also be helpful to analyse, by analogy, how enforcement courts have treated foreign court decisions awarding punitive damages.

3.2. *Recognition and enforcement of foreign court decisions granting punitive damages*

Traditionally, domestic courts of jurisdictions where punitive damages are not recognized as an available remedy have been reticent to recognize and enforce foreign court decisions granting such damages. [53] In these jurisdictions, punitive damages are generally thought to be incompatible with public policy, given the amount of damages awarded may exceed the scope of mere compensation in jurisdictions where reparation must, at least in principle, be restricted to reparation of the loss only, and nothing more.

These stances are, however, slowly evolving, and the notion of punitive damages no longer triggers alarm bells in these juris-

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13.1YRLSB.S1, *AA, S.L.P and AA & Associados, R.L. v BB* in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 42, Kluwer 2017) 488.

[52] ibid.

[53] Castagno (n 3) 729.

dictions. [54] For example, national courts in several European jurisdictions where punitive damages are not traditionally permitted have started to recognise and enforce foreign court decisions granting punitive damages. Italy provides a recent example, as do Spain and France.

The Spanish Supreme Court, for example, enforced a court decision from Texas granting punitive damages in a 2001 decision, [55] even though, under Spanish law, damages are generally purely compensatory in nature. In this instance, the claimant in the Texas litigation had been granted treble damages by the US court in relation to a wilful patent infringement, ie damages amounting to three times the amount of actual financial losses suffered. [56]

In its reasoning, the Court provided that, in any case:

> [W]hen dealing with the issue of their compatibility with public policy, in the view of recognizing foreign decisions, neither the specific relationship between the dispute and the forum, nor, in particular, the principle of proportionality which has impregnated court decisions of neighbouring jurisdictions in similar situations, can be ignored. [57]

It continued that:

> [T]he proportionality assessment which may be carried out concerning an amount of three times the quantity corresponding to the material harm actually caused, cannot be disconnected from the fact that it was provided under the law, and, as a consequence, from its origin within the applicable material norm. [58]

Although the Court was referring to a principle of 'proportionality' as applied by foreign courts, it made clear that the re-

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[54] Mohtashami, Holland and El-Hosseny (n 2) 36.

[55] Spanish Tribunal Supremo, 2001, case no 2039/1999, *Miller Import Corp. and Florence SRL v Alabastres Alfredo, S.L.*. On this judgment, see the chapter by Cedric Vanleenhove in this book.

[56] ibid. US courts have authority to award treble damages, ie triple of the amount of the compensatory damages, on the basis of certain specific statutes.

[57] ibid 6.

[58] ibid 7.

quirement of proportionality under Spanish law was a determining factor in its decision to enforce the US decision. [59]

The French *Cour de Cassation* adopted a similar reasoning in 2010, basing its refusal to enforce a decision of the California Supreme Court granting punitive damages against a French defendant on the lack of proportionality between the amount of actual damages incurred and the punitive damages awarded. [60] In this instance, the California Supreme Court had awarded punitive damages at a ratio of about 1:1 in a dispute concerning the sale of a boat manufactured by a French company to US citizens where the French company had knowingly omitted bringing serious defects in the boat to the attention of the buyers. The sums awarded were USD 1,391,650 for the actual damage suffered and USD 1,460,000 as punitive damages. [61]

When enforcement was sought in France, the *Cour de Cassation* ultimately refused to enforce the entire award. In doing so, the Court confirmed, however, that punitive damages awarded by a foreign court are not *per se* systematically contrary to French 'international public policy' if they remain proportional to the amount of actual damages awarded. [62] Though enforcement was ultimately refused, it is clear from the decision that a similar 'proportionality' standard was employed by both the French and Spanish courts when it came to assessing the punitive damages.

A more recent example is evinced in a landmark 2017 decision by the Italian Supreme Court enforcing three related judgments by Floridian courts granting punitive damages. [63] Here, the Venice Court of Appeal had initially refused to enforce as contrary to public policy the Florida decisions in a dispute between a motorcyclist and the reseller of allegedly defective mo-

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[59] ibid 6.

[60] Cass civ (1), 1 December 2010, n° 09-13.303, *X & Y v Fountaine Pajot*, D 2011, 423. On this judgment, see the chapter by Olivera Boskovic in this book.

[61] It is noteworthy that the California Supreme Court granted the punitive damages for damages sustained from a breach of contract.

[62] *Fountaine Pajot* (n 60); Pauline Remy-Corlay, 'Dommages et intérêts punitifs et ordre public international: contrôle de proportionnalité', [2011] RTDC 317.

[63] Cass, 5 July 2017, n 16601, *Axo Sport SpA v Nosa Inc* [2017] Italian LJ 278 (English translation by Francesco Quarta). On this judgment, see the chapters by Giulio Ponzanelli and Giacomo Biagioni in this book.

torcycle helmets regarding injuries sustained by the motorcyclist during a motocross race, given that the amount of the damages awarded (characterised by the Court of Appeal as punitive damages) exceeded the amount of purely compensatory damages. The Court of Appeal came to this conclusion although the Florida decision had granted USD 1,000,000 of damages without differentiating between the categories of damages awarded. [64] Based on the high amount, the Court of Appeal found that the damages resembled criminal law sanctions, which were unavailable as a remedy in Italian civil law actions. [65]

The decision was appealed to the Italian Supreme Court, which, contrary to the Court of Appeal, granted recognition and enforcement of the Floridian judgment. In support of its ruling, the Supreme Court held, firstly, that the damages awarded in the instant case were not punitive damages. Secondly, and irrespective of this, the Court found that the function of Italian civil liability was not limited to merely repairing any damage caused, but rather could extend to deterrence and punishment too. [66] The Court concluded that the recognition and enforcement of foreign court decisions granting punitive damages was not contrary to Italian public policy *per se*, on the condition that the foreign court judgment was rendered with reference to an 'adequate legal basis, satisfying the requirements of subject-specificity (*tipicità*) and predictability (*prevedibilità*)', and provided that the proportionality principle of damages, which according to the Court was a 'core element of civil liability law' in Italy, has been affirmed. [67]

Similar principles have previously been applied by domestic courts in Greece, South Africa and, tentatively, Switzerland.

In 1999, for example, the Greek Supreme Court established that judgments by foreign courts granting punitive damages are

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[64] It is noteworthy that the decisions by the US courts do not expressly grant punitive damages to the injured motorcyclist, but rather reflect a settlement between the helmet reseller and the motorcyclist. The scope of the settlement included punitive damages but did not specify the nature of the damages awarded, *Axo Sport SpA v Nosa Inc* (n 63) 278-279.

[65] John Y Gotanda, 'Charting Developments Concerning Punitive Damages: Is the Tide Changing?', (2007) 4(6) Transnational Dispute Management 107-108.

[66] *Axo Sport SpA v Nosa Inc* (n 63) 289.

[67] ibid 277, 287-288.

not, in principle, unenforceable as violations of Greek international public policy, provided that such damages are not excessive or disproportionate to the actual damage claimed or awarded. [68]

In another example from 1996, the South African Supreme Court held that punitive damages were not *per se* contrary to South African public policy, [69] despite South African law not formally recognizing the concept of punitive damages. [70] Deciding on the enforceability of a decision by the Californian courts granting USD 13 million in compensatory damages and USD 12 million in punitive or exemplary damages against a South African defendant, the South African High Court held that whether a foreign court decision is contrary to South African public policy depends on whether the actual amount of the total damages awarded is deemed excessive. [71]

Finally, the Basel Civil Court in Switzerland ruled that punitive damages should not be rejected outright as a matter of first principles, but rather, assessed as to whether the specific amount of punitive damages in question is compatible with Swiss international public policy. In making this finding, the Court affirmed the decision of a lower court which had enforced a California court decision awarding USD 120,060 in actual damages and USD 50,000 in punitive damages. [72]

These decisions highlight an increasing tendency by national courts to neither reject nor accept outright the recognition and enforcement of foreign court decisions granting punitive damages, but rather, to conduct a case-by-case assessment of the pro-

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[68] Greek Supreme Court, 6 July 1999, case no 17/1999; Eva Litina, 'A Navigation in the Unchartered Waters of Different Legal Systems: Enforcement of Foreign Arbitral Awards in Greece', (2017) International Bar Association, fn 35 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=5b6463f0-fa3c-4b83-a647 -015f6b9e0884> accessed 28 March 2019.

[69] *Jones v Krok* [1996] Supreme Court of South Africa, 504 (T).

[70] Perusha Pillay-Shaik and Clement Mkiva and Bowman Gilfillan, 'Litigation and Enforcement in South Africa: Overview', (2015) Thompson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&cont extData=(sc.Default)> accessed 28 March 2019.

[71] *Jones v Krok* [1995] High Court, Transvaal Provincial Division, South Africa.

[72] Basel Court of Appeal, 1989, *S.F. Inc. v T.C.S. AG*; Gotanda (n 65) 108-109. On this judgment, see also the chapter by Astrid Stadler in this book.

portionality of punitive damages against the actual amount of damages claimed or awarded.

This approach is in line with the Hague Convention on Choice of Court Agreements, which allows courts to refuse the recognition and enforcement of judgments that award damages beyond actual loss or harm suffered. [73]

It also appears to be in line with the text of the Rome II Regulation on the law applicable to non-contractual obligations, which provides an *ordre public* exception to the application of a mandatory provision of law designated by the regulation in instances where such application would have 'the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be award,' and may indicate, perhaps, an evolution of the traditional approach taken by courts in civil law jurisdictions regarding the acceptance of punitive damages awarded in foreign court decisions. [74]

In addition, the recognition and enforcement of foreign European court judgments within Europe is governed by the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971. Like the above examples, the Hague Convention provides a public policy exception at article 5. [75] It provides that recognition and enforcement of a foreign court decision 'may' be refused if such recognition or enforcement 'is manifestly incompatible with the public policy of the state addressed'. [76]

Although the Hague Convention is most likely inapplicable to

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[73] Hague Conference on Private International Law 37. Convention on Choice of Court Agreements of 30 June 2005, art 11.

[74] European Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation) [2007] OJ L199/40 art 32 (`Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.').

[75] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1 February 1971 (hereinafter 'HCCH').

[76] HCCH, art 5(1).

the recognition and enforcement of a foreign non-European court decision granting punitive damages, for example, a US court decision, it still provides a useful illustration of the general applicability of the public policy exception and corresponding national court practice. If no convention is applicable, the conditions for recognition and enforcement of judgments and awards will normally depend on the national legislation and jurisprudence of each State in which recognition and enforcement is sought. [77]

While an examination of the above decisions is useful for context, it remains to be seen, however, whether the same evolution can be anticipated or should be advised in relation to the recognition and enforcement of arbitral awards granting punitive damages. It is this issue which this paper now addresses.

4. APPLYING A PROPORTIONALITY STANDARD TO THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS GRANTING PUNITIVE DAMAGES

The applicability of domestic standards regarding foreign court decisions to the recognition and enforcement of arbitral awards granting punitive damages depends, to a large extent, on whether certain standards are comparable. It has been said that the standards applied to the recognition and enforcement of foreign court judgments are either equivalent to, or indeed, more restrictive than the standards applied in the recognition and enforcement of arbitral awards. [78] In addition, it is generally accepted that arbitral awards are more readily enforced than foreign court decisions, given the overwhelming number of States Parties to the New York Convention. [79] On this basis, there is no reason why, at least in principle, the emerging proportionality standard seen in the above national court jurisprudence should not be equally applicable to the recognition and enforcement of arbitral awards granting punitive damages. This seems particularly true because the scope of the public policy exception re-

[77] Gotanda (n 65) 106.

[78] Petsche (n 1) 104; Julian D M Lew, 'When Should International Arbitrators Award Punitive Damages?', in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation, Fordham Papers, 2007* (Martinus Nijhoff Publishers 2008) 164.

[79] ibid.

garding the recognition and enforcement of foreign court decisions and arbitral awards granting punitive damages relies on broadly the same criteria, ie, public policy encompassing some sort of proportionality standard.

At first glance, it appears that an adoption of the above standards, rather than an outright rejection of all arbitral awards granting punitive damages should be welcomed. There are, however, no strict guidelines on how to apply these standards and it remains opaque whether any generalized guidelines will emerge, given the limited number of available decisions on this issue. Several questions must be examined.

The first is that it appears that any reliance on a proportionality standard in the context of the public policy exception of the New York Convention may open the door to an impermissible review of the merits of arbitral awards (see below at para 4.1). The second is that a lack of certainty regarding any possible definition of proportionality may make it difficult for arbitral tribunals to properly appreciate and anticipate the outcome of national court decisions (see below at para 4.2). The third is that, even if an accepted definition of proportionality does eventually materialize, whether a finding that any punitive damages awarded are disproportionate to the actual damages claimed or awarded could be fatal to enforceability (see below at para 4.3). These issues are taken in turn.

4.1. *Scope for review on the merits of arbitral awards under public policy exception*

At first sight, any reliance on a proportionality standard would seem well suited to the inherent nature of international arbitration as a flexible international commercial dispute resolution mechanism serving parties from different legal backgrounds who often bring with them diverging expectations. The introduction of a more flexible assessment may make it possible to better meet the expectations of the parties involved.

The criteria for the non-recognition and annulment of arbitral awards are purposely restrictive, however. Enforcement proceedings are not intended to provide an occasion for an enforcing national court to conduct *de novo* review of the merits of the underlying award. [80] For the most part, enforcement proceedings

[80] *Zeiler v Deitsch*, 500 F.3d 157 (2nd Cir. 2007) 169 (`Confirmation

do not permit the award debtor to re-litigate the merits of the dispute or challenge the factual findings of the arbitral tribunal. [81] The New York Convention, for example, does not permit any review on the merits of an award to which the Convention applies. [82]

On this basis, as mentioned above, [83] the Lithuanian Supreme Court sanctioned a Court of Appeal who had refused to recognize an arbitral award because the latter had found the awarded liquidated damages not to be in proportion to the actual damages and thus had qualified the liquidated damages as punitive rather than compensatory damages. The Supreme Court held that the Court of Appeal had

> overstepped the bounds of its limited review by examining the contractual relationship between the parties and reaching different conclusions than the conclusions reached by the arbitral tribunal, which had found that the liquidated damages provision was valid and the amount fair. [84]

While the Court of Appeal's review may have been deemed problematic because it had re-qualified the category of awarded damages under Lithuanian law, the Supreme Court's decision stresses the importance for domestic courts to refrain from a review on the merits.

The introduction of any criteria permitting an analysis of the proportionality of punitive damages should therefore in principle only be permissible to the extent such analysis can be carried out without a review of the merits of the arbitral award. This may be the case if the award explicitly qualifies a category of damages as punitive damages and the reviewing court only assesses whether the proportion of these punitive damages to the actual

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under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm.').

[81] Born (n 8) 3423; *Redfern and Hunter on International Arbitration* (n 5) 622.

[82] *Redfern and Hunter on International Arbitration* (n 5) 622; Paulsson (n 30) 168.

[83] See para 3.1.

[84] Lithuanian Supreme Court, Civil case 3K-3-483-321/2015 of 25 September 2015, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 41, Kluwer 2016) 509.

harm is deemed contrary to international public policy, without proceeding to a detailed substantive re-assessment of the tribunal's findings. Some limited review of the merits may however not be avoidable. As pointed out by a prominent author, courts 'may sometimes come close to, or engage in, a form of judicial review of the merits of the arbitrators' award in the context of a public policy... analysis', [85] leading to 'limited judicial review of the merits of awards even in jurisdictions where such review is formally excluded.' [86]

4.2. *Lack of certainty regarding the definition of proportionality*

Even if the application of a proportionality standard is possible with no – or only a very limited – review of the merits, it remains to be seen whether any specific definition of the excessive nature of punitive damages, ie of their lack of proportionality, to the actual damages has emerged. Examining relevant decisions from the perspective of the recognition and enforcement of arbitral awards and foreign court judgments, it appears that a mere quantitative review is insufficient to establish a concrete definition of, or set of standards regarding, proportionality in the context of punitive damages.

On the one hand, Spanish courts have, for example, accepted punitive damages amounting to three times the amount of actual financial loss suffered. [87] Whereas, on the other hand, French courts have refused to enforce a foreign judgment granting punitive damages at a much lower ratio than that involved in the Spanish decision, being 1:1, as disproportionate. [88] There is little consistency.

Despite this, US courts have had the occasion to consider whether punitive damages are excessive in the context of domestic arbitration awards subject to the Federal Arbitration Act (`FAA'). In doing so, US jurisprudence proposes a consideration of three general principles identified by the US Supreme Court in *BMW of North America v. Gore*. [89]

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[85] Born (n 8) 3326-3332, 3341, 3354.
[86] ibid 3357-3358.
[87] *Miller Import Corp* (n 55) 6-7.
[88] *Fountaine Pajot* (n 260).
[89] *BMW of North America, Inc. v Gore*, 517 US 559 (1996).

In *Gore*, the Supreme Court set out a three part test to determine whether punitive damages were excessive: (i) a comparison of the amount of the punitive damages awarded with the amount of the civil or criminal penalties that could be imposed for comparable misconduct; (ii) a comparison of the amount of punitive damages to the actual harm caused; and (iii) the degree of reprehensibility of the offending conduct.

Subsequent US courts have employed this standard in determining annulment and enforcement proceedings under the FAA. In *Sanders v. Gardner*, for example, a New York court upheld an award granting punitive damages of USD 10 million and did not consider it 'grossly excessive' under the *Gore* test. [90] As a corollary, another US court set aside an award on the basis that it granted USD 25 million in punitive damages, which was deemed excessive under the *Gore* test. [91]

Gore is of limited value in civil law jurisdictions, however, given the traditionally strict divide between civil and criminal liabilities. It is thus unsurprising that national courts in jurisdictions other than the United States rely on an assessment of the proportionality between the punitive damages awarded and the actual harm caused only.

In the words of the Italian Supreme Court, the 'proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct' needs to be established, as '[p]roportionality of damages, whatever their nature may be, even beyond this legal provision, remains a core element of civil liability law.' [92] The words of the Italian Supreme Court echo those of its Spanish and French counterparts. [93]

The Greek Supreme Court, in a 2002 decision, established a series of more specific standards on which to base a legal analysis of excessiveness or proportionality. These were: (i) the du-

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[90] *Saewitz v Epstein*, 6 F. Supp. 2d 151 (N.D.N.Y. 1998)

[91] *Sawtelle v Waddell Reed*, 304 A.D.2d 103, 112 (N.Y. App. Div.(`Thus, the $25 million punitive damages awarded here bears no rational relationship to the amount of compensatory damages sustained by Sawtelle or to the severity or extent of Waddell's misconduct, and is totally out of proportion to the statutory penalty provided and damages awarded in prior comparable cases and cannot stand').

[92] *Axo Sport SpA v Nosa Inc* (n 63) 288.

[93] *Miller Import Corp* (n 55) 7; *Fountaine Pajot* (n 60).

ration of the debtor's wrongful behaviour; (ii) the interests of the creditor; (iii) the moral and financial condition of the parties; and (iv) the particulars of the case. [94]

The Russian Supreme Arbitrazh Court also detailed specific criteria to assess whether damages awarded were disproportionate to the consequences of a contractual breach. These were: (i) if the amount of liquidated damages is so anomalously high as to exceed the amount of damages which the parties could have reasonably foreseen when entering into the agreement many times over; and (ii) if, in the course of agreeing the amount of liquidated damages there were obvious signs of abuse regarding the right of freedom to contract (eg, exploitation of a weak negotiating position, infringement of the public interest, and third party interests, etc.). [95]

In two more recent decisions, Russian courts refused the recognition and enforcement of domestic arbitral awards granting damages on the basis that the amount of damages awarded by domestic arbitral tribunals was so excessive as to violate Russian public policy: in particular, the principle of proportionality of civil liability measures. [96]

Thus, at least in the above examples, the question of whether the amount and type of damages awarded are proportional to the consequences of a contractual breach is determined on a case-by-case basis. While the authors of this paper endorse the proportionality standard, they are of the view that it would be beneficial to establish a set of concrete criteria which could be uniformly applied in enforcement jurisdictions. Such criteria could foster greater legal certainty regarding the enforceability

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[94] Greek Supreme Court, 21 June 2002, no 1260/2002.

[95] ibid.

[96] Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, 2013, no A40-57217/12-56-534, 6 (the Supreme Arbitrazh Court concluded that the arbitral award violated Russian public policy, in particular, the principle of proportionality of civil liability measures, because the amount of damages for the delay in performance of one stage of works, awarded by the tribunal, substantially exceeded the price of such works, as well as the sums that are usually awarded for similar violations); Supreme Arbitrazh (Commercial) Court of the Russian Federation, 2017, case no A33-23740/2016, 3 (the Supreme Arbitrazh Court considered that the arbitral award violated Russian public policy, in particular, the principle of proportionality of civil liability measures, because the arbitral tribunal awarded liquidated damages amounting to 80% of the price of the works).

of punitive damages abroad. Useful criteria which have been applied in civil law jurisdictions and seem particularly helpful include (i) a comparison of the amount of punitive damages to the actual harm caused, (ii) an assessment whether there are obvious signs of abuse regarding the right of freedom to contract when the parties agreed the amount of punitive damages, and (iii) an assessment whether the amount of punitive damages exceeds the amount of damages which the parties could have reasonably foreseen when entering into the agreement.

4.3. *Consequences of a finding of disproportionality*

Given the uncertainty of the enforceability of an arbitral award granting punitive damages, another related question arises for consideration. Where a national court is inclined to deny enforcement of an award granting punitive damages, will such non-enforcement be directed at the entire award, or only that part of the award which grants the offending punitive relief: a partial enforcement on certain issues other than the punitive damages. [97]

According to a literal reading of article V(2) of the New York Convention, which states that 'recognition and enforcement may also be refused', the only option available to the enforcing State would be to deny recognition and enforcement of the entire award granting punitive damages. [98]

Partial enforcement of an arbitral award is only specifically contemplated in the context of article V(1)(c), which concerns situations where an arbitral tribunal exceeds its authority in only some part of an award. It provides for a refusal of the recognition or enforcement of an award in cases where

> the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on

[97] Petsche (n 1) 103.

[98] Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 410.

> matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matters submitted to arbitration may be recognized and enforced. [99]

The same rule permitting partial recognition is nonetheless more generally applicable under article V's other exceptions, even in the absence of express language like that in article V(1)(c). [100] Partial recognition of an arbitral award is permitted so long as the offending portion of the award is severable and distinct from the remainder of the award. [101] Where enforcement of only certain elements of an award violate the enforcing State's public policy, then the remaining part of the award may be enforced, provided that separating the award into 'harmful' and 'harmless' elements is possible. [102] This is found in numerous partial recognition decisions, all of which enforced the remaining 'harmless' portions of the awards in contention, with no apparent reported precedent finding otherwise. [103]

An example of this is the US decision in *Laminoirs,* where enforcement of the portion of an arbitral award granting 5% interest for a delayed payment was refused, while the remainder of the award granting the principal and regular rate of interest was enforced. [104]

A similar result was obtained when an Austrian court partially enforced an award resulting from an international commercial arbitration between an Austrian buyer and a Serbian seller. [105] The Court deemed the rate of interest awarded, which

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[99] New York Convention, art V(1)(c).

[100] Born (n 8) 3434.

[101] ibid; Martin King and Ian Meredith, 'Partial Enforcement of International Arbitral Awards' (2010) 26(3) Arbitration Intl 381.

[102] Kronke, Nacimiento, Otto and Port (n 98) 326; Jean-Louis Delvolvé, Jean Rouche and Gerald Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (Wolters Kluwer 2009) para 364; Micha Bühler, Michael Cartier, 'Recognition and Enforcement of Awards', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Wolters Kluwer 2018) paras 87-88.

[103] Born (n 8) 3433-3434.

[104] *Laminoirs ETC v Southwire Co*, 484 F. Supp. 1063 (N.D. Ga. 1980).

[105] Supreme Court of Austria, 26 January 2005, Case 3Ob221/04b in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 30, Kluwer 2005) 421-436.

was around 73%, to be excessive and therefore unenforceable. The Court did, however, hold that the principal sum was severable and therefore enforceable separately from the award on interest. [106]

In Egypt, the Supreme Court held that interest awarded beyond the maximum amount of interest allowed under Egyptian law, which was 5% per annum at the time, violated Egyptian public policy. [107] In doing so, the Court did not, however, refuse enforcement of the entire arbitral award, but merely the portion granting the excess amount of insurance. [108] The Court stressed that when it was solely the excess interest which violated Egyptian public policy, but not the main part of the arbitral award, then the main part without the part granting the excess interest should be declared enforceable.

In fact, partial enforcement of certain arbitral awards must be employed under certain circumstances, to avoid frustrating the arbitral process, for example. In this vein, a Hong Kong court, specifically discussing partial enforcement and any conditions applicable thereto, decided that it would be

> absurd if, in relation to just one such dispute, there was a public policy defense, and it were argued that this rendered the whole of the award unenforceable under the [New York] Convention. Provided the court is satisfied that the good part is separable from the bad, there can be no objection in principle to enforcing the good and if necessary refusing to enforce the bad. I would go so far as to hold that to decide otherwise would be to bring the whole arbitration process into disrepute. [109]

Considering the above, it appears that the application of a

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[106] ibid.

[107] Egyptian Supreme Court, 2007, case no 810/71, *Andritz v Deutsche Babcock*; Kronke, Nacimiento, Otto and Port (n 98) 393.

[108] ibid.

[109] Supreme Court of Hong Kong, 1992, *JJ Agro Indus Ltd v Texuna Int'l Ltd* in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 28, Kluwer 1993) 396, 400; Supreme Court of Austria, 1991, case no 13/E4, 3Ob221/04b, *Buyer (Austria) v Seller (Serbia and Montenegro)*, in Albert van den Berg (ed), *Yearbook Commercial Arbitration* (vol 30, Kluwer 2005) 421.

proportionality standard in the context of the public policy exception may be possible in relation to arbitral awards without engaging in a full review of the merits. This may ultimately depend on whether a concrete definition of both public policy and proportionality emerge. Regardless, even if such standards remain unclear, or whether a national court finds that an award of punitive damages is disproportionate to the actual damages claimed or awarded, this is not necessarily fatal, as the punitive damages awarded may be severed from the rest of an otherwise enforceable award.

5. MITIGATING THE RISKS OF DEALING WITH PUNITIVE DAMAGES IN INTERNATIONAL COMMERCIAL ARBITRATION

Whether an arbitral tribunal has the authority to grant punitive damages depends on the intention of the parties, the determination of which requires an examination of two issues: (i) the parties' explicit agreement, ie have the parties specifically granted the authority to award punitive damages under the arbitration agreement; and (ii) the parties' implicit agreement, ie have the parties chosen arbitral rules or applicable law under which the arbitral tribunal has – or does not have – authority to grant punitive damages.

All parties involved in an international commercial arbitration, including the arbitrators themselves, may be well-advised to consider questions relating to the validity of punitive damages, not only at the time of rendering a final award, but also throughout the lifetime of the arbitration itself.

It is not apparent that drafters of arbitration agreements generally confer much thought to the issue of remedies, let alone punitive damages. [110] Despite this, drafters of an arbitration agreement have significant control over the availability of punitive damages, both in conferring an arbitral tribunal with the power to award punitive damages and by the same token, in denying such power. [111] Parties are free to specify in their contract that they wish to exclude punitive damages from consideration.

[110] E Allan Farnsworth, 'Punitive Damages in Arbitration' (1991) 7(1) Arbitration Intl 15.

[111] ibid 13.

Thus, drafters can eliminate any risks by specifically excluding them in the arbitration agreement.

Even if this opportunity is missed, for example, because the drafters of the arbitration agreement were not acutely aware that punitive damages were an available remedy under applicable law, there may be further opportunities to restrict any potentially negative impact that the granting of punitive damages may have on the recognition and enforcement of an arbitral award.

One suggestion may be for the claimant to resist requesting punitive damages in the first place, given the strong likelihood that a successful claim may jeopardize the recognition and enforcement of the arbitral award, or at least that part of the award granting punitive damages. Another suggestion may be to request that the arbitral tribunal rule on an application for punitive damages in a separate section of the award, making it easier for future enforcing national courts to distinguish and ultimately sever from the rest of the award, which can then be enforced normally.

Notwithstanding a specific application by parties for a separate ruling on punitive damages, it could be argued that it may in fact be the *duty* of arbitral tribunals to systematically rule on the availability of punitive damages in a separate section of the award, to ensure future enforceability. Some institutional arbitration rules, for example, contain an express provision that tribunals shall 'make every effort' to ensure that an award is enforceable. [112] But, as aptly pointed out by illustrious authors, even

> the most conscientious arbitrator in the world cannot guarantee that the tribunal's award will be enforceable in whatever country enforcement may be sought. The most that can be expected is that the tribunal will do its best to ensure that the appropriate procedure is followed, and that, above all, each party is given a fair hearing. [113]

To prevent any difficulties, it would therefore be advisable for all parties to an international commercial arbitration to consider the practical difficulties and uncertainty related to the recognition and enforcement of arbitral awards granting punitive

[112] ICC Arbitration Rules, art 41; LCIA Arbitration Rules, art 32(2).
[113] *Redfern and Hunter on International Arbitration* (n 5) 608.

damages at the time of: (i) the negotiation of the arbitration agreement (ie, by expressly excluding or including punitive damages as a remedy); (ii) during the arbitration proceedings (ie, parties should perhaps avoid claiming, and arbitral tribunals avoid awarding, punitive damages if it is clear that potential annulment or enforcement will take place in a jurisdiction hostile to punitive damages): and (iii), at either annulment or recognition and enforcement proceedings before national courts (ie, by applying for partial annulment or enforcement of arbitral awards granting punitive damages).

6. CONCLUSIONS

In summary, it remains unclear whether the standards employed by national courts to the recognition and enforcement of foreign court judgments awarding punitive damages are applied to the recognition and enforcement of arbitral awards awarding punitive damages. This is primarily because most discussion is anecdotal, considering the lack of an established body of jurisprudence regarding punitive damages in international commercial arbitration.

That saying, the authors of this paper are of the view that the proportionality standard recently developed by national courts for foreign court judgments is transferable to foreign arbitral awards. The above analysis demonstrates two prevailing standards for assessing whether arbitral awards granting punitive damages could be recognized and enforced abroad: (i) whether punitive damages are generally prohibited or contrary to the public policy of any applicable law to the dispute, ie, the seat, the substance, or any potential place of enforcement; and (ii) if they are not, whether the amount of punitive damages award is proportionate to the amount of actual damage caused, claimed, or awarded.

ABSTRACT

This paper examines the availability of punitive damages in international commercial arbitration. Awards granting punitive damages are rare, as arbitral tribunals possess the power to award these damages only when: (i) they have authority to do so in accordance with the arbitration agreement and/or applica-

ble law; (ii) the applicable law and/or the lex arbitri *recognise punitive damages as an available remedy; and (iii) the enforcement jurisdiction does not reject awards granting punitive damages under public policy considerations. Arbitral awards granting punitive damages indeed have often been annulled or declined recognition and enforcement in civil law jurisdictions, which have been traditionally averse to this category of damages. While it is difficult to depict a uniform applicable standard to the recognition and enforcement of such awards given the scarce amount of decisions, recent developments in civil law jurisdictions regarding the recognition and enforcement of foreign court judgments may shed light on current and future standards in arbitration. This paper analyses the 'proportionality standard' which domestic courts increasingly apply to punitive damages awarded by foreign courts, makes a case for its transferability to the recognition and enforcement of arbitral awards, and provides guidance on risk mitigation to parties, arbitral tribunals and enforcement courts dealing with punitive damages in international commercial arbitration.*

CHAPTER V

PUNITIVE DAMAGES AND PUNITIVE DAMAGES 'IN DISGUISE' IN INTERNATIONAL COMMERCIAL ARBITRATION

ANTONIO LEANDRO *

CONTENTS: 1. Preliminary remarks. – 2. Punitive damages and arbitration: selected method of analysis against the backdrop of the equivalence between arbitration and judicial function. – 3. Concurring characterization for the purpose of determining the law governing punitive damages as remedy or relief. – 4. Setting aside punitive damages awards for 'incompatibility with public policy'. – 5. The perspective of the State in which the enforcement of a punitive damages award is sought. – 6. Partial concluding remarks. – 7. Breach of the obligation to arbitrate: truly punitive damages, 'punitive damages in disguise', and the right of access to justice. – 8. Recognition of punitive damages or 'punitive damages in disguise' for breach of the arbitration agreement and the Brussels I bis Regulation: a) awards. – 9. Continued: b) judgments.

1. PRELIMINARY REMARKS

Punitive or exemplary damages are awarded against a defendant for special wrongful conducts in addition to compensatory (economic/moral) damages. [1] As a result, they add to the to-

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[1] Examples are fraud and substantial malice: Julian D M Lew, Loukas A Mistelis and Stephan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 372 ff; Nigel Blackbay, Martin Hunter, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International OUP 2015) 515.

tal amount of actual losses, or the debt owed by the defendant to the plaintiff.

Generally speaking, punitive damages are conceived of as a 'sanction', viz. a 'quasi-criminal sanction' or 'social sanction' [2], which are usually granted by the court for the public purpose of punishing the wrongdoer or deterring him — as well as others — from repeating the same misconduct in the future. [3]

The public purposes underlying the punishment of the wrongdoer reveal an educational function of punitive damages in addition to the task of protecting the rule of law (by means of sanctioning the violation of a right which is deemed of great importance) and restoring legality between parties.

Punitive damages are also aimed at private ends, which correspond to the reparation of losses that may not be recoverable by way of compensation under the legal order governing the damages (legal expenses, damages from pain and suffering, and damages whose value is not easily quantifiable, such as damages in anti-trust misbehavior).

As a matter of principle, there is no need to distinguish between contractual and non-contractual disputed claims when it comes to assessing the *rationale* of punitive damages, even though a comparative overview reveals that punitive damages are mostly granted in tort actions, while the US and Canadian legal systems give more room than other systems to punitive damages for breaches of contract. [4]

Finally, it should be borne in mind that punitive damages

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[2] Blackbay, Hunter, Partasides and Redfern (n 1) 516.

[3] As an author puts, 'punitive damages, properly used, serve the public good'. Jackson Pahlke, 'It Is Time For Washington State to Take a Stand Against Holmes's Bad Man: the Value of Punitive Damages in Deterring Big Business and Intentional Tortfeasors' (2016) 50 University of Michigan J L Reform 215, 249.

[4] John Y Gotanda, 'Punitive Damages: a Comparative Analysis' (2004) 42 Columbia J Transnational L 391 ff. Actually, even among the US States some legislations disfavor the award of punitive damages. See the case of Louisiana on which Brooksie L. Bonvillain, 'Slaying the Trojan Horse: Arabie v CITGO and Punitive Damages Under Louisiana's Conflict-of-Laws Provisions' (2013) 74 Louisiana L Rev 327. For a survey on the difference between UK and US systems, also for the particular focus on the State liability, see Bradley Raboin, 'Punish the Crown, But Protect the Government: a Comparative Analysis of State Tort Liability For Exemplary Damages in England and Punitive Damages in the United States' (2016) 24 Cardozo J Intl Comparative L 261.

represent a remedy different from sanctions and penalties awarded for procedural misconduct (such as undue delay with respect to the scheduled time for each procedural step, or non-compliance with interim measures or procedural rulings).

Against the foregoing backdrop, this chapter deals with: a) the main private international law issues that arbitral tribunals should address when awarding punitive damages or evaluating their power in this regard, and b) the main problems that a punitive damages award may bring about both in the State of the arbitral seat and in the States where the enforcement is sought.

Moreover, when it comes to assessing what behavior may trigger punitive reactions in the realm of international commercial arbitration, the breach of the obligation to arbitrate seems to deserve specific consideration. Assuming the perspective of the right of access to justice, the chapter sheds light on whether and to what extent such specific consideration is justified in the European judicial space.

2. PUNITIVE DAMAGES AND ARBITRATION: SELECTED METHOD OF ANALYSIS AGAINST THE BACKDROP OF THE EQUIVALENCE BETWEEN ARBITRATION AND JUDICIAL FUNCTION

While the functional equivalence between arbitral tribunals and courts in the settlement of civil disputes is well established, arbitral tribunals are still far from having the same powers as courts.

This holds true even more when it comes to assessing the authority of arbitral tribunals to award punitive damages, as is evidenced by the fact that punitive damages in international commercial arbitration are almost non-existent. [5]

Actually, doubts as to the equivalence between courts and arbitration may stem from the fact that arbitrators lack public authority and their aim is not to protect the public or general interests (and, accordingly, to achieve public or general purposes), especially because of the contractual basis of arbitration, while punitive damages are instead conceived as a tool for social-pub-

[5] Markus A Petsche, 'Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?' (2013) 29 Arbitration Intl 89.

lic objectives, taking into account their punishing and deterring effect.

Furthermore, punitive damages depend on a number of assessments that hardly fit the role and task of arbitral tribunals. Managing the unpredictability of the amount, applying the test of proportionality to fix the amount, and deciding for *multiple* or *treble* damages, are in fact tasks that, if not theoretically incompatible with arbitration, nonetheless cast doubts on their consistency with the arbitral tribunal's mandate which is less discretionary than the courts', as it is restricted to – and dependent upon – the arbitration agreement and the reliefs requested by the parties.

What is more, the deterrent effect of punitive damages, on the one hand, targets both the defendant and third parties in a similar position, and, on the other, relies upon evidence of harm that sometimes affects persons other than the plaintiff. [6] All this appears to be at odds with the tenet whereby arbitration binds only the parties to the arbitration agreement.

Finally, it should be remembered that a comparative overview of the laws allowing punitive damages reveals that they are rarely available in contractual claims, which are often the subject matter of arbitral disputes.

At the same time, the content and extent of the equivalence between arbitral tribunals and courts vary from State to State (ie from one legal order to another), and so do the authority and the remedies that parties seek from arbitration according to the legal framework which surrounds the arbitration in the instant case.

Punitive damages do not seem to come as an exception to this state of the art. As a consequence, it is useless to debate whether arbitration is generally closed or generally open to punitive damages.

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[6] It should be noted that, since the *Philip Morris* case (*Philip Morris USA v Williams* [2007] 549 US 346, at 357), the US Supreme Court has stressed for the sake of the procedural due process that the harm of non-parties may be relied upon to determine the reprehensibility of the defendant's conduct, without affecting the assessment of the amount of punitive damages. The protection of the due process was also at the core of the *BMW* case against 'grossly excessive' punitive damages (*BMW of North America Inc. v Gore* [1996] 517 US 559). See Hironari Momioka, 'Punitive Damages Revisited: a Statistical Analysis of How Federal Circuit Courts Decide the Constitutionality of Such Awards' (2017) 65 Cleveland State L Rev 379.

Actually, in order to chart the legal framework of international commercial arbitration to find room for punitive damages in the instant case, a private international law analysis is needed. Such analysis brings arbitral tribunals to a multi-fold evaluation as to whether they may award punitive damages and, if so, the amount thereof.

The arbitral tribunals' task is quite burdensome in this regard, given that they would face at least three problems in the attempt to render an enforceable award: 1) the arbitrability of both the disputed claims for which punitive damages are requested and the very request for punitive damages itself; 2) a two-fold characterization of punitive damages (as both a substantive remedy and a procedural relief) before determining the law which governs the availability thereof; and, 3) the determination of the legal order whose public policy may actually be infringed by a punitive damages award.

3. CONCURRING CHARACTERIZATION FOR THE PURPOSE OF DETERMINING THE LAW GOVERNING PUNITIVE DAMAGES AS REMEDY OR RELIEF

At the outset of any analysis concerning the arbitrators' power to award punitive damages is the issue of arbitrability, which refers not only to the disputed claim – ie the claim for which punitive damages are being awarded – but also to the very punitive remedy and the amount thereof, as a logically separate issue from compensatory damages.

Turning specifically to the legal grounds of the power to award punitive damages, several laws may theoretically be relied upon by arbitral tribunals, depending on the characterization of punitive damages as substantive remedy or procedural relief. In particular, four set of rules must be considered.

The first set is composed of the (domestic or transnational) rules governing the contractual or non-contractual relationship, which forms the subject matter of the dispute. [7] Assuming a European private international law perspective, the arbitrators could resort to the conflict of laws rules contained in the Rome

[7] Blackbay, Hunter, Partasides and Redfern (n 1) 516.

I Regulation [8], in case of contractual claims, and the Rome II Regulation [9], in case of non-contractual claims.

The second set is the law of the seat of arbitration, [10] ie the law that determines, along with the arbitration agreement and/or the institutional rules, the powers of the tribunal (including the types of relief at its disposal and the entitlement to order 'public sanctions').

Thirdly, there is the arbitration agreement and the law applicable thereto as the legal framework that may define the disputed claims, the available remedies to the parties and the arbitral tribunal, the damages to be awarded, and the arbitration authority. [11] As for the damages, an arbitration agreement is deemed to confer the power to award punitive damages whenever it expressly or implicitly admits 'multiple damages' or 'any damage'.

Fourthly, the institutional arbitration rules have a role insofar as they are directly or indirectly incorporated into the arbitration agreement as rules providing the arbitral tribunal with 'such remedies as may be granted in the instant case'.

As a result, arbitral tribunals should handle several sets of rules in order to determine whether they may award punitive damages.

This task may prove to be not an easy one, as the arbitral tribunal may need to fix problems of incompatibility between the legal sources it has to handle in order to render an enforceable award.

An incompatibility may arise between the arbitration agreement – which includes punitive damages as a remedy and the related power of the arbitral tribunal to grant them – and the *lex arbitri* (namely, the law of the arbitral seat) that does not admit punitive damages. As we will note below, this case should also be assessed from the standpoint of public policy.

In a reverse scenario, it may happen that the arbitration agreement does not include any mention to punitive damages,

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[8] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

[9] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

[10] Blackbay, Hunter, Partasides and Redfern (n 1) 516.

[11] *Mastrobuono v Sherason Lehman Hutton Inc.* [1995] 514 U.S. 52.

while the law of the arbitral seat allows the arbitral tribunal to award them.

In a further scenario, the arbitration agreement might expressly exclude that the tribunal may award punitive damages. In such cases, might the law of the arbitral seat be applicable and, consequently, allow the arbitral tribunal to award punitive damages even if the arbitration agreement is contrary to them?

The natural answer is in the negative; otherwise the tribunal would exceed its powers. However, a different conclusion might have merit in the case of punitive damages caused by an outright wrongful conduct. Should arbitral tribunals pretend not to see the reality of gross misbehavior? As a matter of fact, in light of the foregoing description of the arbitral powers compared with those of the courts, the answer is again in the negative, essentially because arbitral tribunals lack public authority, ie the authority to distinguish – outside the realm of the arbitration agreement – conducts which 'deserve' to be punished.

A different scenario unfolds when the parties do not expressly entitle the arbitral tribunal to award punitive damages and, accordingly, the rules of the arbitral institution that they have selected, on the one hand, forbid punitive damages, but, on the other hand, allows the arbitral tribunal to apply 'any [...] law [which] requires that compensatory damages be increased in a specified manner' [12]. Although it is debatable whether the arbitral tribunals might target punitive ends in this case, such a provision entitles them to increase the compensation amount as long as either the *lex arbitri* or the 'law' governing the disputed claims so permit.

4. SETTING ASIDE PUNITIVE DAMAGES AWARDS FOR 'INCOMPATIBILITY WITH PUBLIC POLICY'

It goes without saying that punitive damages mostly raise concern regarding their compatibility with public policy, as several States ignore (or forbid) non-compensatory damages.

Generally speaking, it is well known that punitive damages pertain more to common-law than to civil-law countries. However, in recent decades this divide has eroded, with the civil-

[12] See art 31 (5) of the AAA-ICDR International Arbitration Rules.

law countries also gradually admitting non-compensatory aims in awarding damages as well as 'civil sanctions' and 'quasi-criminal clauses', even in contractual matters. [13]

For instance, the distance between Italian legal order and common-law traditions radically diminished after the Italian Supreme Court ruled positively on the recognition of three US judgments charging an Italian company with liability for defective products. [14]

Even after this judgment, the fact remains that civil-law countries require that punitive damages be established by law, for the sake of legal certainty and the principle of legality, [15] and meet a strong threshold of proportionality. [16]

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[13] As early as the 90s, some authors debated the real incompatibility between punitive damages and civil law: see, among others, Alberto Saravalle, 'I punitive damages nelle sentenze delle corti europee e dei tribunali arbitrali' [1993] RDIPP 867.

[14] Cass, 5 July 2017, no 16601, [2017] RDIPP 1049. Asked to assess the alleged Venice Court of Appeal's errors in the recognition governed by the Italian Law on Private International Law (Law 218/1995), the Italian Supreme Court grasped the occasion to revise its previous case law on punitive damages after charting the role of the public policy in modern private international law. When dealing with public policy, the Italian Supreme Court addressed procedural and substantive topics the applicant had claimed before it. The overall reasoning of the Court is noteworthy as it depicts public policy as a device designed as much to safeguard as to promote principles being common to the States, especially those concerning the protection of fundamental rights, regardless of whether the judgments to be recognized come from EU or non-EU Member States. This reasoning holds true both in procedural and substantive matters, but it fits more the former, mainly for the need to ease the circulation of judgments, because – the Court says – the opening to foreign legal substantive provisions and related effects still requires a clear-cut balance with the protection of internal constitutional values. Of course that does not lead to banning foreign devices just for being unknown in the State where the recognition is sought.

[15] In light of the premises depicted in the previous note, the Court weighed the *rationale* and purposes of US punitive damages against the principles currently underpinning the Italian rules of civil liability so as to assess whether and to what extent they are contrary to Italian public policy. In a nutshell, a framework comes to light whereby the civil liability, along with the granted damages, aims also in Italian legal order to multi-fold wide-ranging purposes, which go from preemptive to punitive ends. As for the punitive damages, the Italian constitutional principles require that they be provided for by law or other legal sources that meet the principle of legal certainty. This means that any sanction whose enforcement is sought must comply with the general rule 'no punishment without law'. Accordingly, only foreign judgments granting punitive damages in accordance with such principles may be recognized in Italy.

[16] The problem also comes to light when civil-law courts are requested to

Therefore, the US experience can hardly be transposed *per se* to civil-law countries, especially in light of the 'quasi-criminal' nature of punitive damages and the discretion of judges in awarding sums under patterns and parameters not previously defined by law.

The incompatibility of a punitive damages award with public policy may arise either in the State of the arbitral seat, or in the States where the enforcement of the award is sought, or in both of them.

As to the law of the arbitral seat, according to some opinions, the relevant concept of 'public policy' is that of 'transnational public policy'. This interpretation would make it possible to award punitive damages, even when they infringe the domestic public policy of the arbitral seat, whenever the disputed case has stronger connections with a different State that instead permits punitive damages. [17]

Conversely, the arbitral tribunal should refuse to award punitive damages, even if the legal order of the seat permits them, whenever the foreign legal order most closely connected to the disputed claim forbids punitive damages.

Be that as it may, the reasoning that makes the potential annulment of a punitive damages award for breach of public policy dependant on what the law of the seat provides for works well when this law clearly forbids punitive damages (in which case the award should be annulled) or clearly permits them and the tribunal respects the requirements set by this law, including the proportionality test (in which case the award should not be annulled).

Things get complicated in the second case, when the tribunal infringes the proportionality test. Depending on the law of the seat, this breach could result in an incompatibility with the

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award punitive damages under a foreign law (such as US law). With regard to EU Member State courts, it should be remembered that, in matters of tort, the Rome II Regulation prospects the possibility, 'depending on the circumstances of the case and the legal order of the Member State of the court seized', to regard 'the application of a provision of the law designated by [the same] Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an *excessive nature to be awarded*' 'as being contrary to the public policy (*ordre public*) of the forum'(Recital 32, first emphasis added).

[17] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 3082.

'public policy' or in a 'serious error of law', leading to the annulment of the award, or in a mere 'error in law' that does not affect the validity of the award.

5. THE PERSPECTIVE OF THE STATE IN WHICH THE ENFORCEMENT OF A PUNITIVE DAMAGES AWARD IS SOUGHT

Turning to the cross-border enforcement, punitive damages awards are frequently reported as an example of awards breaching the international public policy of the State where the enforcement is sought for reasons akin to those leading to the annulment in the State of the seat. The starting point of the analysis is whether the law of the State of enforcement ignores or forbids non-compensatory/punitive damages. [18]

Although the public policy exception in matters of recognition of punitive damages should logically operate irrespective of the authority (arbitral tribunal or court) that grants them, some authors deem that the reason to refuse the recognition of foreign judgments may not *per se* be transposed to the recognition of foreign awards. [19] Other authors hold that the obstacles to enforcing punitive damages are greater for awards than for judgments. [20]

However, nobody debates the possibility that the incompatibility with public policy prevents the enforcement of a foreign arbitral decision awarding punitive damages.

Apart from the public policy exception under art V (2) (b) of the New York Convention (which may be breached either by the award of punitive damages in itself, or by a disproportionate determination of such damages), some scholars put forward as a further obstacle to the recognition of punitive damages awards the fact that generally the loosing party is not able to dis-

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[18] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (n 1) 415.

[19] Wolfgang Kühn, 'RICO Claims in International Arbitration and their Recognition in Germany' (1994) 11 J Intl Arbitration 37, who commented the position of the *Bundesgerichtshof* that in 1992 refused to recognize part of an US judgment for the recovery of punitive damages because these latter were contrary to German public policy. Analogy between judgments and award is instead upheld by Blackbay, Hunter, Partasides and Redfern (n 1) 517.

[20] Giovanni Zarra, 'The Doctrine of Punitive Damages and International Arbitration' (2016) Dir comm int 963, 984.

cuss the amount of punitive damages before the arbitral tribunal. [21] This would warrant the application of art V (1) (b) of the New York Convention as ground for refusing to recognize the punitive damages award because the 'party against whom the award is invoked [...] was [...] unable to present his case'.

A further scenario concerns the recognition of punitive damages awards that have been annulled in the State of origin because of the incompatibility of punitive damages with the public policy of such State. However, it seems that such scenario does not raise any specific issue, other than the ones involved in general by the recognition of awards set-aside in the State of origin. [22]

6. PARTIAL CONCLUDING REMARKS

Arbitral tribunals are called to perform a multi-fold assessment when deciding to award punitive damages in the instant case.

Such an assessment overcomes the boundaries of the mere 'admissibility/legitimacy' of punitive damages, but requires the arbitral tribunal also to be sensitive to the general caveat to 'render an enforceable award'.

Therefore, all the efforts to assess the availability of punitive damages are worthy only insofar as arbitral tribunals are fully satisfied that parties to the arbitration agreement consented to having punitive damages awarded in the instant case.

If so, they should determine whether the law applicable to the disputed claim allows granting punitive damages as a non-compensatory remedy.

In addition, they should deeply weigh the consequences of awarding punitive damages against the chance for the award to be set-aside in the courts of the arbitral seat, or not enforced

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[21] ibid

[22] See extensively Andrea Giardina, 'The International Recognition and Enforcement of Arbitral Award Nullified in the Country of Origin' in Robert Briner, L Yves Fortier, Klaus Peter Berger and Jens Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century.* Liber amicorum *Karl-Heinze Böckstiegel* (2001 Carl Heymanns) 205; Luca Radicati di Brozolo, 'The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao Lignite' (2014) 25 American Rev Intl Arbitration 47.

abroad, namely in the State where enforcement is most likely to be sought.

As a result, arbitral tribunals should heed both the *lex arbitri* and the law of the State most closely connected to the disputed claims, or, if different, the State where the recovery of punitive damages may take place through the enforcement of the award. [23]

7. BREACH OF THE OBLIGATION TO ARBITRATE: TRULY PUNITIVE DAMAGES, 'PUNITIVE DAMAGES IN DISGUISE', AND THE RIGHT OF ACCESS TO JUSTICE

As put forward in the preliminary remarks, punitive ends may underlie also the damages awarded against the party who breaches the obligation to arbitrate by bringing the would-be arbitrated claim before the courts. Are those damages true 'punitive damages'?

Actually, it seems more typical to claim 'ordinary' damages in order to compensate for the legal costs incurred in defending the previous arbitration agreement and subsequently the disputed claim before the courts, as well as for the damages stemming from delaying or derailing the convened arbitration.

The High Court of Justice and the Swiss Supreme Court also paved the way for 'damages for damages', [24] ie compensating the damages awarded on the merits by the court seized in breach of the obligation to arbitrate.

Similar damages aim at the same purposes as the anti-suit injunctions: both are means to reinforce the arbitration undertakings by deterring a party from breaching the arbitration agreement. Moreover, it may happen that damages are granted after the infringement of an anti-suit injunction *pro* arbitration. [25]

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[23] As Blackbay, Hunter, Partasides and Redfern (n 1) 518 point out, an arbitral tribunal should treat punitive damages as a separate claim in order to have the punitive part of the award severable in the event of successful challenge in the State of the enforcement.

[24] See respectively, *CMA CGM SA v Hyundai Mipo Dockyard Co. Ltd.* [2008] EWHC Comm 2791, [2009] 1 Lloyd's Rep 213, and *X. S.A. v Z. Ltd*, 30 September 2013, 4A_232/2013, *X. S.A. v Z. Ltd* [2013] Swiss Supreme Court, available at <www.bger.ch>.

[25] See the ICC *interim award* (14 May 2001, ICC Case n° 8307) which held that 'it falls [...] to the requesting Parties to take the necessary measures

Claims for damages often reply to the so-called 'torpedo actions', ie when a party launches court proceedings to plead either for the arbitration agreement to be annulled (or declared inoperative) or for the merits, counterclaiming in this case the invalidity of an arbitration agreement against the other party who contests the court's jurisdiction. A party could act in such a way for tactical reasons, such as the expectation of obtaining a more favourable decision on the merits from the courts in its home jurisdiction, or simply to derail or delay the arbitration proceedings by profiting from the courts' slowness in ruling on the effects of the arbitration agreement [26].

As a matter of fact, since they aim to strengthen the obligation to arbitrate, to deter the party from similar behavior, and to repair unforeseen costs, even similar 'ordinary' compensatory damages, taken as whole, represent a sort of 'punitive damages in disguise' which aim, notwithstanding the 'statutory' purpose to restore actual losses, to punish or deter an infringement of an arbitration agreement.

On the other hand, theoretically, nothing impedes legal orders from bestowing 'punitive purposes' upon judgments that condemn the party for bringing the action before the courts rather than the convened arbitral tribunal.

For instance, in 2012 the Court of Appeal of Verona applied art 96 (3) of the Italian Code of Civil Procedure which entitles judges to grant on an equity basis damages other than (or irrespective of) compensatory damages against a party who sues or resists the process with fault or *mala fide* in the case of a judicial proceeding started in breach of an arbitration agreement.

Thus, the damages under art 96 'punish' both the abuse of process and the related misdeed in neglecting the existence of a valid and binding arbitration agreement (which would have brought the party before the arbitrators if it had acted in good faith). In doing so, art 96 gives grounds for a 'sanction' regard-

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for the enforcement of the [anti-suit injunction]. Should such measure not be successful, relief for damages suffered as a consequence of the breach to the agreement to arbitrate might be sought in this arbitration'.

[26] See, in general, Emmanuel Gaillard, 'Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international' [1990] Rev arb 760; Andrew Pullen, 'The Future of International Arbitration in Europe: West Tankers and the EU Green Paper' (2009) 12 Intl Arbitration L Rev 56; Günther J Horvath and Stephan Wilske (eds), *Guerilla Tactics in International Arbitration* (Kluwer Law International 2013).

less of whether the party has or has not suffered actual damages in the 'abuse of process' committed by the other party.

Moreover, art 96 (3) of the Italian Code of Civil Procedure has been put forward as an example of a 'not compensatory' remedy with legitimate punitive ends and a dissuasive purpose by the Italian Supreme Court in the abovementioned judgment no 16601/2017.

The fact remains that, just as punitive damages are generally not allowed in all legal orders, neither are those granted for violation of the obligation to arbitrate: the 'punitive/dissuasive purposes' trigger the same problems of compatibility with public policy as those described above.

However, further reasons come to light which also include what this author has labelled 'punitive damages in disguise', ie the 'ordinary' damages aimed at compensating for the legal costs incurred in defending the arbitration agreement and facing the proceedings before the courts, the actual losses in suffering the delay or derailment of the convened arbitration, and the damages referred to as 'damages for damages'.

Even in 'torpedo' cases, an action takes on a request for justice which deserves protection in terms of the right of access to the courts under the ECHR and the Charter of Fundamental Rights of the European Union, as a sub-right of the right of access to justice.

Needless to say, the right of access to the courts deserves protection when the action does not hide stalling or deferral tactics against the arbitration agreement. In this case, indeed, the *rationale* of punitive damages disappears because of the lack of fraud, substantial malice, or intentional aim to circumvent the obligation to arbitrate.

Therefore, in order to assess compatibility, or incompatibility, with the public policy, a distinction should be drawn between a malicious intent to breach the arbitration agreement and the mere purpose of challenging the validity of an arbitration agreement before the courts.

However, it should not be overlooked that, in questionable cases, courts are always called upon to comply with art II (3) of the New York Convention which compels them to defer the disputes to arbitration and which may freeze all the problems surrounding punitive damages for breach of an arbitration agreement that may arise if the same courts continue to rule on the case.

8. RECOGNITION OF PUNITIVE DAMAGES OR 'PUNITIVE DAMAGES IN DISGUISE' FOR BREACH OF THE ARBITRATION AGREEMENT AND THE BRUSSELS I BIS REGULATION: A) AWARDS

Assuming that the court before which the action is brought in breach of an arbitration agreement pertains to an EU Member State, a further question arises as to whether the recognition and the enforcement of 'punitive damages' or 'punitive damages in disguise' are consistent with the Brussels I bis Regulation. [27]

The analysis is different depending on whether the authority that awards damages is an arbitral tribunal or a court.

In general, it should be recalled that the Brussels I bis Regulation, like its predecessor (Brussels I Regulation), [28] does not apply to arbitration (see art 1 (2) (*d*)), but provides a safeguard clause in favor of the New York Convention (art 73 (2)). [29] Therefore, the arbitration exclusion and the clause embodied in art 73 (2) stress that the rules which govern the enforcement of an arbitral award are autonomous and are not jeopardized by those governing judgments.

To begin with arbitral tribunals, and assuming the general admissibility of their power to grant such types of damages, one precedent may be found in the *West Tankers* saga: the High Court of Justice was asked to determine whether the arbitrators might rule on damages without infringing upon the principles enshrined by the CJEU in defence of the mutual trust surrounding the functioning of the grounds of jurisdiction provided for by the Brussels I Regulation, as well as of the individual right of access to the courts which are competent under this Regulation. The High Court of Justice held that the arbitration exclusion in Brussels I is so comprehensive as to not affect the arbitral jurisdiction in awarding damages. [30]

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[27] Council and European Parliament Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[28] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[29] On the issue see Antonio Leandro, 'Towards a New Interface Between Brussels I and Arbitration' (2015) 6 J Intl Dispute Settlement 188.

[30] *West Tankers Inc. v Allianz S.p.a., Generali Assicurazioni S.p.a.* [2012] EWHC Comm 854, [2012] 2 All ER (Comm) 395. The English court's views may be summarized as follows: Brussels I Regulation does not apply to arbitral

Certain problems in terms of consistency with the Brussels I system seem to arise whenever the *exequatur* of the damages award is sought in the Member State whose courts have been seized of the action breaching the obligation to arbitrate.

In particular, as the Brussels I bis Regulation allows a party to bring an action in a Member State, the enforcement of the damages award would trigger 'punitive' effects on the same party therein: that is to say, the Member State where the enforcement is sought should simultaneously allow and punish the conduct of the party who brought the action before its courts.

However, the arbitration exclusion, along with the *Gazprom* judgment of the CJEU [31], makes it clear that the recognition and enforcement of any awards of damages fall outside the Brussels I bis Regulation (as happens to all arbitral orders and awards).

Nevertheless, if the requested State does not permit punitive damages (due to their incompatibility – as a punitive remedy – with the exercise of a right, ie the right of access to justice), the 'punitive' effects could be perceived as contrary to its public policy and could therefore be refused under art V (2) (*b*) of the New York Convention. This seems more likely to occur in the State where the 'punished' action has been brought, even though the enforcement of punitive damages awards makes no restrictions, neither to the judicial function, nor to the right of access to justice before the courts of that State.

At any rate, the foregoing analysis has demonstrated that the public policy exception in the case of punitive damages varies from State to State, and, accordingly, so do the chances of the damages award being recognized beyond the seat of arbitration.

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awards, including those ruling on the arbitration agreement. As a result, the Regulation does not face the possible contrast between arbitral awards and judgments in this regard. An arbitral tribunal with seat in a Member State may therefore declare its jurisdiction on the damages requested by a party in reaction to the other party's action brought before a court in breach of the arbitration agreement. It does not matter that this court is already seized and has not yet ruled on its own jurisdiction. The fact that the arbitral jurisdiction might affect the party's right of access to a court competent under the Regulation (right to be implemented in compliance with the EU principle of effectiveness) is relevant only so far as courts are involved. In other words, if a Member State court must refrain from thwarting the right of access to another 'Brussels I court', this duty does not pertain to an arbitral tribunal due to the Brussels I arbitration exclusion.

[31] Case C-536/13 *Gazprom OAO v Lietuvos Respublika* ECLI:EU:C:2015:316.

9. CONTINUED: B) JUDGMENTS

As far as damages granted by courts are concerned, and assuming their admissibility and legitimacy in the State of origin, the chances of refusal to recognize and enforce them in other Member States are higher: there is, in fact, more than one question regarding their consistency with the Brussels I bis Regulation.

It is worth noting that punitive damages judgments are not covered by the arbitration exclusion in the Brussels I bis Regulation, given that the damages are accorded for breach of a contractual obligation.

Reasoning with the Brussels I bis framework in mind, their enforcement in the State where the action in breach of an arbitration agreement has been brought is logically at odds with two premises: i) the Brussels I bis Regulation allows the seized court to rule on the arbitration agreement before handing down the judgment on the merits; and, ii) the Regulation allows this judgment to be enforced in other Member States, including the State where the damages for breach of the obligation to arbitrate have been granted.

The enforcement of punitive damages in other States (whose legal orders allow punitive damages) does not trigger similar problems – neither the incompatibility with the mutual trust among judges, nor the inconsistency with the framework in which the interface between the Brussels I bis Regulation and arbitration has been forged.

Some possible concern may arise as to the coexistence within the same requested State of the judgment granting punitive damages and the judgment on the merits of the claims that should have been arbitrated in absence of breach of the arbitration agreement. However, since the Brussels I bis Regulation enables the judgment on the merits to circulate irrespective of the requested State, and the subject matter of the judgments at stake is different, the recognition of punitive damages does not seem to meet any obstacles.

ABSTRACT

Moving from the rationale of punitive damages and the equivalence between arbitration and judicial function, this chapter firstly addresses the main difficulties that arbitrators may face

in granting punitive damages without infringing upon their main duty to render an enforceable award. Problems of inconsistency between the sources that shape the arbitration legal framework and of incompatibility with the public policy may arise when it comes to deciding if punitive damages are to be accorded in the instant case. This chapter also deals with damages awarded in case of breach of an arbitration agreement in the attempt to draw a difference, under the light of the right of access to justice, between punitive damages or damages that are punitive 'in disguise', and to evaluate whether the awards or the judgments granting such damages may circulate within the European judicial space.

Chapter VI

RECOGNITION OF PUNITIVE DAMAGES IN GERMANY AND SWITZERLAND

ASTRID STADLER *

Contents: 1. Introduction. – 2. Germany. – 2.1. Service of documents - Hague Service Convention. – 2.2. Legal basis for the recognition of non-EU judgments. – 2.3. Punitive damages before the German Federal High Court. – 2.3.1. Applicability of rules on recognition of judgments in a 'civil and commercial matter'. – 2.3.2. Public policy objection: no recognition of 'real' punitive damages in Germany. – 2.3.3. Partial recognition of US punitive damages awards – 2.4. Developments in US and German law since 1992. – 2.4.1. Restrictions on punitive damages in the US and their effects. – 2.4.2. Deterrence and punishment as complementary functions of German tort law. – 2.4.3. Trends towards accepting deterrence as a function of damages awards in particular legal fields. – 2.4.3.1. Defamation cases. – 2.4.3.2. Insurance law. – 2.4.3.3. Labour law and antidiscrimination law. – 2.4.3.4. Intellectual property law. – 2.4.3.5. Antitrust law and unfair competition law. – 2.4.4. Are statutory damages the new punitive damages? – 2.4.4.1. District Court Leipzig: non-recognition of excessively high statutory damages awards in an intellectual property infringement case. – 2.4.4.2. Statutory damages in the US and German 'ordre public'. – 2.5. Summary. – 3. Switzerland. – 3.1. Legal basis for recognition – 3.2. Case law and professional literature. – 3.3. Compensatory and deterrent function of Swiss tort law? – 4. Conclusion.

1. Introduction

US punitive damages claims and awards have always caused European lawyers to frown. With the increasing number

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of European companies becoming active in the US market since the 1970s, more of them have become involved in US litigation as defendants, and the clash between legal cultures was inevitable. German and other European businesses were not only surprised (and annoyed) by the generous US rules on international jurisdiction ('long-arm statutes') and the plaintiff-friendly procedural law (eg 'pretrial discovery') but also faced the risk of extremely high damages awards. 'Punitive damages' [1] are different from the traditional continental doctrine, according to which the purpose of civil actions for the recovery of damages is to return the claimant to the position where he or she was before the accident or tort. By contrast, punitive damages are meant to punish the defendant for conduct that was especially egregious or outrageous, and as they are to be paid to the claimant as a matter of principle, they have been described as a windfall profit for claimants. [2] In the 1990s, European courts regularly adopted a strict general attitude against the US concept of punitive damages and have declined to recognize and enforce US punitive damages awards based on public policy. However, case law in Europe has changed over the past few years. Beginning with the French *Court de Cassation* in 2010 in the famous *Fountaine Pajot* case, the uniform resistance to enforcing US punitive damages started to crumble. [3] On July 5, 2017, the Italian *Corte de*

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[1] For the historical development of punitive damages, see also Michael Wells, 'A Common Lawyer's Perspective on the European Perspective on Punitive Damages' (2010) 70 Louisiana L Rev 557, 570-572. In *Exxon Shipping Co v Baker*, 554 US 471, sub IV A (2008), the US Supreme Court explained the origins of punitive damages in the 18th century:

`Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts. See eg Code of Hammurabi s 8 (R Harper ed. 1904) (tenfold penalty for stealing the goat of a freed man); Statute of Gloucester, 1278, 6 Edw I, ch 5, 1 Stat at Large 66 (treble damages for waste). But punitive damages were a common law innovation untethered to strict numerical multipliers, and the doctrine promptly crossed the Atlantic; see eg *Genay v Norris*, 1 S C L. 6, 7 (1784); *Coryell v Colbaugh*, 1 NJL 77 (1791), to become widely accepted in American courts by the middle of the 19th century, see eg *Day v Woodworth*, 13 How 363, 371 (1852)'

[2] Dan Dobbs, Paul Hayden and Ellen Bublick, *Hornbook on Torts* (2nd ed, West Academics 2000) Ch 34 B; *Day v Woodworth*, 13 How 363, 371 (1852).

[3] See the chapter by Olivera Boskovic in this book.

Cassazione also decided that the US doctrine of punitive damages is not principally contrary to the Italian legal system. [4] Two important developments were responsible for this change. First, the doctrine of punitive damages, which has always been controversial in the US, [5] as pushed by the US Supreme Court, [6] underwent major changes in its country of origin. As a result, several US states have limited punitive damages to particular types of cases, but there are also statutory and constitutional caps on the amounts which juries and courts can award. [7] The awards are still extraordinary, compared, for example, to the damages for pain and suffering in most European jurisdictions, but the gap is shrinking. [8] Secondly, European civil law has in many aspects accepted that civil liability rules are not only about compensation but, at least to some extent, also about deterrence and prevention of future wrongdoing. However, whereas the punitive and deterrent character of civil damages was the offending object in Europe in the 1990s, a new line of arguments has appeared in recent years. Deterrence is no longer taken alone as the focus, but the excessiveness of US damages awards is an increasing issue.

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[4] See the chapter by Giacomo Biagioni in this book.

[5] The US Supreme Court, in *Exxon Shipping Co v Baker*, 554 US 471 (2008) sub IV D concluded that the 'discretion to award punitive damages has not mass-produced runaway awards', but 'the real problem ... is the stark unpredictability of punitive awards'.

[6] See, for example, *BMW of North America, Ins v Gore*, 517 US 59 (1996), holding that disproportionate punitive damages awards violate due process (in the case at hand, the actual damage was USD 4,000, and the punitive damages award amounted to USD 2 million); and *State Farm Mut Automobile Ins Co v Campbell*, 538 US 408 (2003), which held that punitive damages awards should take into account the severity of the defendant's conduct and should generally not exceed single-digit multipliers of the compensatory damages (in the case at hand, the punitive damages award of USD 145 million, as compared to the compensatory damages of USD 1 million, was held to be excessive and to violate the due process clause of the 14th Amendment of the US Constitution). Finally, in *Exxon Shipping Co v Baker*, 554 US 471 (2008), the US Supreme court found a USD 5 billion punitive damages award against Exxon (compared to USD 287 million in compensatory damages) excessive under maritime law and held that a punitive-to-compensatory ratio of 1:1 would be acceptable.

[7] For details, see the references to US state laws in *Exxon Shipping Co v Baker*, 554 US 471, sub IV C (2008) and below n 29, 30.

[8] John Y Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 Columbia J Transnational L 391, 421.

This chapter will explain how the attitudes of German and Swiss courts and the positions in legal literature have changed over the years with respect to the recognition of punitive damages awards by US courts. Both countries have a lot in common with respect to the recognition of punitive damages, but whereas the 1992 decision of the Federal High Court in Germany declined to give recognition to a US punitive damages judgment, no such landmark case exists in Switzerland.

This chapter starts, however, with a preceding question which appears in a much earlier stage of civil proceedings and which the German Constitutional Court has had to deal with several times. When European parent companies are sued in US courts, service of the documents instituting the proceedings is necessary. Claimants have often tried to serve documents in Germany under the Hague Service Convention of 1965 [9] but faced the public policy objection of article 13 of the Convention.

2. GERMANY

2.1. *Service of documents – Hague Service Convention*

The Hague Service Convention of 1965 established simplified methods for cross-border service of documents and, in particular, improved and accelerated letters rogatory. Under the Convention, courts in one contracting state may send a formal request to a so-called central authority in another contracting state to arrange service of documents by a local court, in a manner allowed within the receiving state (arts 3-5 of the Convention). The Convention provides only limited grounds which central authorities may invoke to deny cooperation. Central authorities can dismiss letters rogatory if the request does not comply with the formal requirements of the Convention (Art 4) or if the addressed state deems that compliance would infringe upon its sovereignty or security (Art 13 [1] of the Convention).

Despite the narrow wording of article 13 (1), there has been a tendency in Germany to interpret this article as a (narrow) international public policy exception which allows a state to refuse

[9] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November 1965. Both the US and Germany are contracting states to the convention.

a request if compliance would be contrary to basic principles of the addressed state. In particular, the German Constitutional Court tried to interpret national 'security' in a way which takes into account constitutional guarantees for defendants. Thus, article 13 can become, in a way, a barrier to protecting German citizens and companies against excessive and potentially ruinous US claims. Since 1994, the Constitutional Court has in several cases issued provisional injunctions prohibiting the service of documents instituting US class actions. In one early case in 1995, the 1st Senate of the Constitutional Court finally dismissed the defendant's complaint and denied the application of article 13 of the Hague Service Convention. Further down the line, the 2nd Senate of the Constitutional Court was more open to the idea that defendants should be protected against excessive US punitive damages in an early stage of the US proceedings. However, applying article 13 of the Hague Service Convention to block the service of punitive damages claims in Germany has always been controversial because service of process is only the beginning of the lawsuit, and it is then far from clear whether there will ever be a punitive damages award against the defendant. Yet, once US civil proceedings have started, defendants cannot find consolation in the fact that recognition of a US punitive damages award might later be denied in Germany. Defendants cannot escape enforcement if they have assets in the US or in countries which recognize and enforce US judgments, including punitive damages awards.

In 2003, the Constitutional Court therefore decided that even at that stage of service of process, the defendant's constitutional rights must be taken into account. In the famous *Napster* case, [10] a USD 17 billion action had been filed against the defendant, German *Bertelsmann AG*, on behalf of approx. 160,000 US musicians and music publishers, based on alleged violations of copyrights. The German Constitutional Court issued a provisional injunction prohibiting the service of documents under the Hague Service Convention and explained its decision as follows. When US claimants apply for an excessively high amount of damages (including punitive damages) which is apparently without any substantial basis on the merits, and if

[10] Constitutional Court, 25 July 2003 – 2 BvR 1198/09, NJW 2003, 2598.

lawsuits are – as is often the case in US class actions – accompanied by awareness campaigns in the media, then the defendant can be under enormous pressure to settle the case, taking into account the special features of US procedural law such as pre-trial discovery, jury verdicts and the American rule of costs. For issuing the provisional injunction, it was sufficient for the Constitutional Court that there was at least a substantial *risk* that service of the US documents might violate the defendant's constitutional rights.

Bertelsmann AG later withdrew its constitutional complaint because service of process had been effected in the United States on a US subsidiary of the defendant and the claimants had thus avoided the use of the Hague Service Convention in the first place. As the class action could no longer be prevented from starting, the constitutional complaint had lost its basis. The Constitutional Court therefore did not have to make a final decision on the merits of whether US actions for punitive damages do in fact violate constitutional rights.

In the following years, the court became more reluctant to issue provisional injunctions and did not easily accept complaints by German companies sued in the US for punitive damages. It emphasized that service of process should be denied only in case of a clear abuse of the US proceedings by the claimant and that, as a matter of principle, US actions for punitive damages do not violate the defendant's rights under the German Constitution. [11] In 2015, a German company which had been sued in a US class action by a group of South African claimants, based on the defendant's alleged support of the violation of human rights by the South African apartheid regime, again filed a constitution appeal against the decision of the German courts to permit service of process in Germany. The complaint was clearly not admissible under German law because the US court

[11] Constitutional Court (1st Chamber of 2nd Senate), 9 January 2013 – 2 BvR 2805/12, NJW 2013, 990; Constitutional Court (1st Chamber of 2nd Senate), 14 June 2007 – 2 BvR 2247/06 NJW 2007, 3709 (for a review of the decision see Astrid Stadler, '4.6.2007 – 2 BvR 2247/06' (2007) JZ 1047 [note]). However, the Court of Appeals of Düsseldorf decided in 2009 that a refusal to comply with a letters rogatory for the service of a US claim requires the risk of very severe impairment of the defendant's rights. Punitive damages, pre-trial discovery and class action proceedings taken neither alone nor together put the defendant in such jeopardy.

had denied certification of the class action due to lack of international jurisdiction of the US courts, according to the *Kiobel* decision by the US Supreme Court.[12] Notwithstanding that conclusion, the German Constitutional Court explained at length why article 13 of the Hague Service Convention should be applied with care. Courts should resist the temptation to apply domestic legal principles to foreign proceedings in order to avoid thwarting the objective of providing international legal assistance by preventing foreign claimants from suing domestic defendants abroad.[13] The court confirmed the Court of Appeals' position that neither punitive damages nor the particular features of US civil proceedings, taken alone or in combination, cause an obvious violation of the defendant's constitutional rights.[14] All in all, the court obviously tried to backpedal from earlier decisions with its clear statement (which was not necessary to decide the case at hand).

In sum, the Constitutional Court's previous attempts to protect German defendants from becoming involved in US class actions were unsuccessful and were not even suitable to provide such protection. An immediate result was that US claimants no longer used the Hague Service Convention but effected service of documents directly in the US, at the defendants' subsidiaries. As a consequence, many formal safeguards included in the Convention (e.g. with respect to necessary translations of the documents) did not apply, which thwarted the Convention's objectives. It was also strange to argue with the lack of a substantive basis of US punitive damages claims with respect to article 13 of the Hague Service Convention. Whether the claimant's case is meritorious is not taken into account when serving the documents instituting the proceedings, in domestic cases or in cross-border cases. Moreover, neither the amount of the damages sought nor the use of the class action mechanism alone can be taken as evidence for or indicate misuse on the plaintiff's side.[15] 'Misuse' as a concept is closely related to the case's mer-

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[12] *Kiobel v Royal Dutch Petroleum Co*, 17 April 2013, 569 US 108 (2013).

[13] Constitutional Court, 3 November 2015 – 2 BvR 2019/09, NJOZ 2016, 465 para 38.

[14] ibid para 39.

[15] Astrid Stadler, '4.6.2007 – 2 BvR 2247/06' (n 11), 1047; Rolf Stürner, '4.6.2007 – 2 BvR 2247/06' (2006) JZ 60 (note); Paul Oberhammer, 'Deutsche

its and should also not be taken into account by a requested court, in the context of the Hague Service Convention. The proper reason why protecting German defendants was regarded as appropriate in the early decisions was probably the general rejection of the substantially different US philosophies of civil procedure, class actions and punitive damages. This is, however, no valid ground on which to refuse letters rogatory under the Hague Service Convention. The Constitutional Court was finally aware of that and therefore refrained from following the *Napster* case further down the line. [16] Companies doing business in the US and with assets in the US must generally be aware of the fact that German courts cannot protect them from becoming defendants in US civil proceedings. The only protection they can provide is against the enforcement of US punitive damages awards in Germany.

2.2. *Legal basis for the recognition of non-EU judgments*

In the absence of a bilateral treaty with the US, the legal bases for the recognition of US judgments are s 328 and 722 of the German Civil Procedure Code (GCPC). S 328 of the GCPC is the basic rule for recognition of non-EU judgments. Any holder of a US judgment must follow the exequatur procedure described in the GCPC. German courts will grant enforceability if the foreign judgment has a *res judicata* effect and if there is no reason for non-recognition, as listed in s 328. In short, recognition can be denied (1) if the foreign court had no international jurisdiction to try the case [17]; (2) if, in the case

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Grundrechte und die Zustellung US-amerikanischer Klagen im Rechtshilfeweg' [2004] IPRax 40.

[16] Constitutional Court, 3 November 2015 – 2 BvR 2019/09, NJOZ 2016, 465.

[17] German literature, as with the literature in Austria and Italy, distinguishes between jurisdiction to hear a case ('Entscheidungszuständigkeit') and jurisdiction with respect to the recognition of judgments ('Anerkennungszuständigkeit'). For the latter, in order to decide whether the foreign court had international jurisdiction to hear the case in the sense of s 328 GCPC, German courts would not apply the jurisdictional rules of the foreign forum. Based on the so-called 'mirror principle', a hypothetical examination is required, according to which the facts underlying the case have to be transferred to the country of recognition and that country's rules on international jurisdiction have to be applied. If the foreign court has international jurisdiction according to these (German) rules, then the requirements of s 328 GCPC are fulfilled. For

of a judgment by default, the documents instituting the proceedings have not been served upon the defendant in due form and in due time for the defendant to prepare his or her defence; (3) if the judgment contradicts a German court decision or a foreign judgment rendered earlier that is subject to recognition in Germany; (4) if recognition of the foreign judgment violates German public policy; or finally, (5) if reciprocity of recognition is not granted [18].

As a matter of course, the internationally accepted principle applies that there is no *révision au fond* of any foreign judgment. [19] In case of punitive damages awards, the public policy exception ('*ordre public*') is the most likely obstacle for recognition and enforcement. The threshold for a public policy objection is high, and it is not to be mistaken as a *révision au fond*. German courts will not examine whether the foreign judgment was correct based on the rules of private international law and the applicable substantive law. Even a false judgment is per se not grounds for non-recognition. [20] The public policy objection can be raised only if the recognition of the foreign judgment would lead to a result which is irreconcilable with material principles of German law, especially if recognition would violate a party's constitutional rights. [21] It is not sufficient that the procedural or substantive law of the forum state be different from German law, nor could it be argued that a German court, if it had decided the case, would have come to a different result. Also, a violation of mandatory German rules which are not subject to party disposition can violate German public policy only if

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details, see Bundesgerichtshof (Federal High Court), 29 April 1999 – IX ZR 263-97, NJW 1999, 3198; Martin Fricke, *Anerkennungszuständigkeit zwischen Spiegelbildgrundsatz und Generalklausel* (Gieseking 1990); Haimo Schack, *Internationales Zivilverfahrensrecht* (6th ed, C.H. Beck 2014), s 17 III 2. With respect to US courts, it is sufficient that based on the 'mirror principle', any court in the US has international jurisdiction; Bundesgerichtshof, ibid, 3199.

[18] Reciprocity can be a matter of international treaties, but even in the absence of treaties, it is sufficient that in practice, courts in the decision's country of origin to be recognized will, for their part, recognize German judgments in civil and commercial matters. With respect to the US, reciprocity is not an issue.

[19] Astrid Stadler, '§ 328' in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (15th ed, Vahlen 2018) para 23; Schack (n 17) s 17 III 5c.

[20] Schack (n 17) s17 III 5c .

[21] Peter Murray and Rolf Stürner, *German Civil Justice* (Carolina Academic Press 2004) 526.

these rules claim to be applied irrespective of the *lex causae*.[22] As a consequence, recognition can be denied based on the public policy argument only if recognition of the foreign judgment would be plainly intolerable.[23]

2.3. *Punitive damages before the German Federal High Court*

Back in 1992, the German Federal High Court rendered a leading decision with respect to the recognition of US punitive damages awards (the so-called 'California case').[24] A California court had awarded exemplary and punitive damages in the amount of USD 400,000 to a fourteen-year-old victim of sexual abuse in the US. As the defendant had moved to Germany, where he owned property, the question arose as to whether the judgment was enforceable in Germany. The Federal High Court granted recognition of the compensatory part of the judgment but denied recognition of the punitive damages part of the California judgment based on the public policy exception of s 328 of the GCPC. The court explicitly emphasized that, as matter of principle, punitive damages awards of a significant amount which are awarded in addition to compensatory material or immaterial damages cannot be recognized and enforced in Germany.

The decision applied a strict standard, even though the case had very few connections to the forum (the defendant had US and German citizenship), thus suggesting that the aversion against punitive damages was very strong.[25] In legal writing, a majority of scholars welcomed the decision.[26]

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[22] For example, European Parliament and Council Regulation (EC) No 593/2008 of 4 July 2008 on the law applicable to contractual obligations (Rome I Regulation) [2008] OJ L177/6, art 9, European Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation) [2007] OJ L199/40 art 16.

[23] Bundesgerichtshof, 29 April 1999 – IX ZR 263-97, BGHZ vol 138, 331, 334.

[24] Bundesgerichtshof, 4 June 1992 - IX ZR 149/91 ('California' case), NJW, 1992, 3096 and BGHZ vol 118, 312.

[25] Csongor István Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe' [2012] NIP 4, 8.

[26] Schack (n 17) s 17 III 5c; Juliana Mörsdorf-Schulte, *Funktion und Dogmatik US-amerikanischer punitive damges* (Mohr Siebeck 1999) 295; Pe-

2.3.1. *Applicability of rules on recognition of judgments in a 'civil and commercial matter'*

The court, however, first raised the question as to whether s 328 of the GCPC applied to US punitive damages awards because its scope of application is limited to civil and commercial judgments and does not cover foreign decisions made under criminal or administrative law. Although the US judgment was rendered in a civil litigation, the classification of punitive damages as a civil law matter is not self-evident. The punitive and deterrent nature of punitive damages, which explicitly goes beyond the objective of compensation of material or non-material damages, puts them close to criminal law.[27] On the other hand, they are not clearly criminal sanctions either because the amount to be paid by the defendant traditionally goes to the claimant. This was the pivotal argument for the German Federal High Court to finally apply s 328 of the GCPC.

Since that decision was made in 1992, a lot has happened in the US regarding punitive damages. Several US Supreme Court decisions, as already mentioned, identified constitutional limits for punitive damages awards.[28] Punitive damages, as an element of essentially tort law (rarely contract law), are within the jurisdiction of the US states. A number of states have reacted to the

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ter Müller, *Punitive Damages und deutsches Schadensrecht* (De Gruyter 2000) 360 ff; Joachim Rosengarten, *Punitive damages und ihre Anerkennung und Vollstreckung in Deutschland* (Boysen & Mauke 1994) 207; Rolf Stürner, 'Anerkennungsrechtlicher und europäischer Ordre public als Schranke der Vollstreckbarerklärung', in Claus-Wilhelm Canaris and others (eds), *50 Jahre Bundesgerichtshof* (vol 3, C.H. Beck 2000) 677. For a more liberal attitude, see Dirk Brockmeier, *Punitive damages, multiple damages und deutscher ordre public* (Mohr Siebeck 1999) 87.

[27] Service of process under the Hague Service Convention also requires a 'civil and commercial matter', and it has been disputed whether US actions for the recovery of punitive damages are within the Convention's scope of application; Hanno Merkt, *Abwehr der Zustellung von 'punitives damages'-Klagen* (Fachmedien Recht und Wirtschaft 1995) 113 ff. This approach, however, has not become accepted in Germany, eg Jan von Hein, 'BVerfG gestattet Zustellung einer US-amerikanischen Klage auf Punitive Damages' [2007] RIW 249, 251; Martin K Thelen, 'Are Statutory Damages the New Punitive Damages? – Haftungs- und Prozessrisiken durch pauschalierte Schadensersatzansprüche im US-amerikanischen Recht' (2018) 117 ZVglRWiss 156, 178-180.

[28] *BMW of North America, Inc v Gore*, 517 US 559 (1996); *State Farm Mut. Automobile Ins. Co v Campbell*, 538 US 408 (2003); *Exxon Shipping Co v Baker*, 554 US 471 (2008).

concern that has often been raised that the high amounts of punitive damages are a windfall profit to the claimant and can be considered an unjust enrichment, to some extent. Thus, 40 US states have enacted restrictions on punitive damages, 19 states cap or limit the amount of punitive damages,[29] and some legislations provide that a considerable part of the punitive damages be collected by the state and go to charity or a public fund.[30] In particular, the punitive character becomes predominant in cases where the better part of the punitive damages award does not go the claimant. Authors in the US speak about 'quasi-criminal punishments',[31] but others, particularly 19th-century scholars, had emphasized that punitive damages never functioned as punishment and that their historical purpose was solely to provide the claimant with extra compensation for otherwise nonactionable harm.[32] State legislation, however, sometimes explicitly emphasizes the punitive character. For example, Georgia punitive damages provision § 51-12-5.1 (c) (2010) says, 'Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.' The German Federal High Court explicitly left open whether recognition would be possible in cases where a considerable part of the punitive damages amount goes to the state. However, the approach taken by the rules of recognition of foreign judgments is quite

[29] There is a list of states where such rules apply in an appendix to the *BMW of North America v Gore* decision; for more details, see Mörsdorf-Schulte (n 26) 221 ff.; Richard Blatt, Robert Hammesfahr and Lori S Nugent, *Punitive damages: a state-by-state guide to law and practice* (Thomson West 2009) s 3.3. Examples: Florida Statute s 768.73 (1997): an amount of more than three times actual damages is excessive, but greater awards are not completely banned, Madeleine Tolani, 'US Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public' (2011) 17 Annual Survey of Int & Comp. Law 185, 191; in Idaho (s 6-1604 Idaho Code), punitive damages cannot exceed the greater of USD 250,000 or three times the amount of compensatory damages; Georgia has a cap of USD 250,000 for cases which do not arise from product liability, Georgia Code (O.C.G.A.) s 51-12-5.1 [g] (2010).

[30] For example, in Georgia, 75% of punitive damages awards in product liability cases go to the state, Georgia Code (O.C.G.A.) s 51-12-5.1. [e] [2] (2010).

[31] Andrew Marredro, 'Punitive Damages: Why the Monster Thrives' (2017) 105 Georgia L J 767, 769.

[32] Simon Greenleaf, *A Treatise on the Law of Evidence* (16th ed, Little Brown and Co 1899) 240.

formal in both European regulations, such as the Brussels I bis Regulation, [33] and in domestic law, as long as damages are awarded in civil proceedings by a civil court – without granting the various criminal procedural safeguards the US Constitution affords to the accused in criminal proceedings. [34] The punitive element derived from the amount of the award is probably insufficient to deny that the case and award altogether are still a 'civil matter'. [35]

2.3.2. *Public policy objection: no recognition of 'real' punitive damages in Germany*

The main argument for denying recognition has traditionally been the public policy argument. In its 1992 decision, the German Federal High Court contrasted the concept of punitive damages in detail with the German idea of purely compensatory damages. German law – as a matter of principle – does not allow damages awards to entail an enrichment of the injured party. According to the court, the US concept of a 'private attorney' is contrary to the strict German distinction between criminal and civil law and to the exclusive right of law enforcement authorities and criminal court to punish a wrongdoer. The court further explained that German law does not accept deterrence as a primary function of damages awards. Although the criteria for compensation for pain and suffering under German law include the aspect of satisfaction to the injured person, the idea of compensating the victim's harm still prevails.

Another argument in favour of non-recognition was the principle of proportionality, which is derived from administra-

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[33] With respect to European Parliament and Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation) [2012] OJ L351/1, art 1, there is much case law from the European Court of Justice, but it has not resulted in clear guidance for national courts to handle the interpretation.

[34] For details about the debate on that issue, see Thomas Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs' (2003) 87 Minn L Rev 583, 608, 619 ff.

[35] In practice, the problem does not carry so much weight, as the Federal Supreme Court allowed partial recognition of the US award and denied recognition and enforcement for the punitive part.

tive law but also applies in German tort law. Excessively high punitive damages without a clear relation to the compensatory damages and without being measured by the court's discretion according to a public interest are unacceptable and contrary to the idea of predictable damages awards.

2.3.3. *Partial recognition of US punitive damages awards*

In its 1992 decision, the German Federal High Court did not completely close the door to recognition of punitive damages awards. The judges were aware of the fact that punitive damages may have several other functions in a particular case beyond punishment and deterrence and might also compensate the victim for otherwise uncovered harm or loss or be intended to disgorge ill-gotten gains. The 'punitive' part of the damages may include compensation for pain and suffering, for example, and the amount may also be 'inflated' because the claimant must share the award with his or her lawyer based on a contingency fee arrangement. Damages for pain and suffering and reimbursement of legal costs are, of course, also elements of German law, so the foreign judgment cannot be deemed to be irreconcilable with the material principles of German law, even in the guise of punitive damages. For those situations, the Federal High Court has clearly stated that a partial recognition of a US punitive damages award is possible and only the purely 'punitive' part will not be recognized and enforced.

This approach, however, entails a couple of practical problems. First of all, in order to apply the approach taken by the German Federal High Court, it is necessary for the court of origin to reveal what considerations drove the court or jury when determining the amount of punitive damages in the first place. That is not always the case in US judgments. Secondly, without clear indications in the US judgment, German courts cannot arbitrarily split the punitive part without possibly violating the prohibition of *révision au fond*.[36] In the case at hand in 1992,

[36] Rolf Schütze, 'The Recognition and Enforcement of American Civil Judgments Containing Punitive Damages in the Federal Republic of Germany' (1990) 11 Univ of Penn J of Int Business L 581, 601 (arguing against such a separation).

the Court of Appeal had allowed enforcement of the US judgment in the amount of USD 275,325, based on the presumption that the total amount included reimbursement for the claimant's legal costs. For the Federal High Court, however, the situation was clear because the amount of USD 400,000 was explicitly awarded in addition to damages for pain and suffering and the judgment did not disclose why punitive damages had been awarded. So there was no room for partial recognition based on a general assumption that punitive damages awards include an element with respect to costs. This may have been valid back in 1992, but it could be seen different today, as reimbursement for legal costs in general have become an important consideration in punitive damages awards [37] – in some states such as in Connecticut, [38] it is even the only legitimate ground for awarding punitive damages.

2.4. *Developments in US and German law since 1992*

2.4.1. *Restrictions on punitive damages in the US and their effects*

When reading the German Federal High Court's arguments, we must keep in mind that the decision was made in 1992 and that in the years that followed, the US Supreme Court has restricted punitive damages awards and provided guidelines for juries and courts, according to which punitive damages must not be disproportionate to the defendant's wrongdoing, to the ac-

[37] Peter Brand, 'Punitive Damages Revisited: Taking the Rationale for Non-recognition of Foreign Judgments Too Far' (2005) 24 J L Comm, 181, 196.

[38] *Hanna v Sweeney*, 78 Conn 492 (1906): 'In this state, the common-law doctrine of punitive damages as above outlined, if it ever did prevail, prevails no longer. In certain actions of tort the jury here may award what are called punitive damages, because nominally not compensatory; but in fact and effect they are compensatory and their amount cannot exceed the amount of the plaintiff's expenses of litigation in the suit, less his taxable costs'. For a very critical comment on the situation in Connecticut, see Brendan Faulkner and Michael A D'Amico, 'Personal Injury Litigation: Conn Punitive Damages Laws Outdated, Ineffective' (Conn Law Trib, 12 September 2014) <http://www.mayalaw.com/2016/08/03/connecticut-punitive-damage-law-personal-injury-deterrence/> accessed 25 November 2018.

tual damages and to other civil or criminal sanctions imposed for the kind of violation at hand. In *State Farm Mut. Automobile Ins. Co. v. Campbell*,[39] the Supreme Court held that punitive damages should in general not exceed single-digit multipliers of the compensatory damages. In the *Exxon*[40] case, it allowed only a ratio of 1:1, but it seems to be unclear whether this decision can be applied outside maritime law.

Despite the Supreme Court's holdings and state legislatures' attempts to deal with the problem of excessive awards, punitive damages have remained a problem in the US and hence as an issue for cross-border recognition. Studies in the US show that juries still award amounts in ratios multiple times larger than single digits and that so-called 'blockbuster' punitive awards of USD 100 million and more are even rising.[41] The doctrine's underlying problems have remained unaddressed over the years, with the overlap and tension between civil and criminal law objectives, excessive jury discretion, and multiple punishment of defendants on the one side and windfall recoveries on the other side.[42] Costly post-trial motions and appeals are often necessary to reverse or reduce awards, and one reason why parties fight hard is because many US states exclude the insurability of punitive damages.[43] In Germany, insurance companies regularly also exclude punitive damages from insurance policies. Therefore, the question of recognition and enforceability is of utmost importance for domestic companies.

2.4.2. *Deterrence and punishment as complementary functions of German tort law*

Against the background of German law, one might today ask whether the German Federal High Court would still deny

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[39] See above n 6

[40] See above n 1.

[41] Marredro (n 31) 769; W Kip Visuci, 'The Blockbuster Punitive Damages Awards' (2004) 53 Emory L J 1405.

[42] Marredro (n 31) 770.

[43] Richard Porter, 'A Review of the US Punitive Damages Liability Landscape', <https://www.chubb.com/bm-en/business-insurance-by-type/a-deeper-dive-into-united-states-punitive-damages.aspx> accessed 25 November 2018.

the recognition and enforcement of punitive damages awards. The answer is not easy. An increasing number of scholars in Germany are advocating for a more liberal attitude because deterrence and punishment are no longer alien to German civil law,[44] but some authors also hold onto the line of the Federal High Court decision.[45] It has always been emphasized that even compensatory damages have a deterrent effect in some tort situations. In an ideal world, the tortfeasor's general obligation to pay a compensation to potential tort victims may make him or her exercise due care and try to avoid such an obligation. Authors supporting an economic analysis approach in tort law clearly favour accepting prevention as a legitimate objective of tort rules.[46] Although such effects are accepted as the legislative objectives of rules on civil liability, they are still considered to have only a secondary or complementary function in civil law.[47]

2.4.3. *Trends towards accepting deterrence as a function of damages awards in particular legal fields*

Since 1992, however, the aspect of deterrence has gained more importance in some fields of law, and courts are emphasizing that deterrence must be taken into account in awarding damages.[48]

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[44] Astrid Stadler, '§ 328' (n 19) para 25; Brockmeier (n 26); Joachim Zekoll and Nils Rahlf, 'US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public' [1999] JZ 384, 394 (emphasizing that s 33 of the German Antitrust Act is also interpreted to have a deterrent effect).

[45] Thomas Rauscher, *Internationale Privatrecht* (4th ed, C.F. Müller 2012) para 2480; Schack (n 17) s 17 III 5c .

[46] Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' (2006) 206 AcP 352; Stefan Grundmann (1997) 61 RabelsZ 423; Jochen Taupitz, 'Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz' (1996) 196 AcP 114.

[47] Gerhard Wagner, 'Vorbemerkung § 823 BGB' in *Müncher Kommentar zum BGB* (7th ed, C.H. Beck 2017) paras 43, 59, 51, with further references.

[48] For general overview of punitive aspects in German civil law see Ina Ebert, *Pönale Elemente im deutschen Privatrecht* (Mohr Siebeck 2004); Marita Körner, 'Zur Aufgabe des Haftungsrechts – Bedeutung präventiver und punitiver Elemente' (2000) NJW 241; Reinhard Möller, *Das Präventionsprinzip des Schadensersatzrechts* (Duncker & Humblot 2006); Gerhard Wagner, 'Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadener-

2.4.3.1. *Defamation cases*

Prominent examples come from defamation cases. Only three years after the decision in the 'California case', the Federal High Court had to decide on a defamation case brought by *Caroline von Monaco*, Princess of Hannover (since 1999), who alleged a violation of her personal rights due to false and misleading reports in the yellow press. The Court of Appeal had awarded only 30,000 Deutsche Mark (approx. 15,000 Euros) as compensation for immaterial harm, although the plaintiff had applied for 100,000 Deutsche Mark (approx. 50,000 Euros). The Federal High Court followed the claimant's arguments and held that the amount awarded was too low. Traditional methods of determining damages in defamation cases were insufficient, according to the court. The amount of compensation for celebrities should take into account the defendant's attitude towards misusing another person's personal rights in order to make a profit. In particular, the yellow press should not expect to pay compensation out of their petty cash. Therefore, the amounts of compensation must have a deterrent effect and should almost skim off the illegally gained profit. [49] Since then, there has been a clear tendency towards higher awards, even in cases where the victims were not celebrities. [50]

2.4.3.2. *Insurance law*

Insurance law is another example for which the attitude of courts has changed. In 1999, the Court of Appeals in Frankfurt set new standards. If insurance companies act in bad faith, delay proceedings and payments or attempt to unduly influence victims or third parties, punitive awards for pain and suffering ranging from 10-100% are allowed on top of the compensatory damages. [51] This may not be considered punitive damages in the

satz, Kollektivschaden', in Johannes Masing (ed) *Verhandlungen des 66. Deutschen Juristentages* (vol 1, C.H. Beck 2006) 68; Gerhard Wagner, 'Vorbemerkung §823' (n 47) paras 45-50 with further references.

[49] Federal High Court, 15 November 1994 – VI ZR 56/94, NJW 1995, 861, 865.

[50] Tolani (n 29).

[51] Court of Appeals Frankfurt, 7 January 1999 – 12 U 7-98, NJW 1999,

strict US sense of the word, but the arguments have obvious parallels.

2.4.3.3. *Labour law and antidiscrimination law*

In labour law and antidiscrimination cases, the trend towards deterrence and punishment is even clearer. Based on European law, employers are not allowed to discriminate against a prospective employee on racial or ethnic, gender, or religious grounds. If employers refuse to provide a job position for these illegitimate reasons, they must pay damages for immaterial and material loss by the applicant. An earlier version of the German provision for damages had to be changed twice since the European Court of Justice (ECJ) considered them insufficient. In 1997, the ECJ explicitly demanded higher awards of damages and emphasized that the sanctions must have a deterrent effect on employers. [52] A similar ECJ judgment in 1984 [53] could have been taken into account in the 'California case' by the Federal High Court but was not even mentioned. Ever since Germany enacted its new Equal Treatment Act in 2006, the lump sum compensation for applicants who have been discriminated against is up to three times the monthly salary paid in the job they applied for. The concept of deterrence can also be found in the EU directives against discrimination, [54] and it is clear that German legislators have accepted it for German civil law. [55]

2.4.3.4. *Intellectual property law*

Intellectual property law is another field in which the pre-

2447; even before 1999, some courts had taken a similar position. Court of Appeals Karlsruhe, 2 November 1972 – 4 U 149/71, NJW 1973, 851.

[52] Case C-180/95, *Nils Draehmpaehl* v *Urania Immobilienservice OHG* [1997] ECR I-2195: the ECJ held that the German law implementing Directive 76/207/EEC on the equal treatment of men and women failed to satisfy the requirements of effective implementation.

[53] Case Rs 14/83, [1984] ECR I-1891, NJW 1984, 2021.

[54] Art 15 Directive 2000/43/EC; art 17 Directive 2000/78/EC; art 25 Directive 2006/54/EC.

[55] Martina Benecke, 'Article 15 - Equal Treatment Act' in Beate Gsell, Wolfgang Krüger and Stefan Lorenz (eds) *Bürgerliches Gesetzbuch Commentary* (Beck-Online) para 56.

ventive character of damages awards has more or less been undisputed for many years. [56] Calculation of compensatory damages has always been challenging for the holders of an intellectual property right. Therefore, German courts accepted special methods of calculating damages very early on, including (1) proof of actual loss, (2) calculation of loss based on the perpetrator's profit made through violating the claimant's intellectual property rights, and (3) calculating damages based on hypothetical royalty fees. In case of copyright infringement, courts have also allowed damages to be calculated by doubling the hypothetical royalties. [57] All of these approaches accept a total amount of damages to be paid by the defendant, which may go beyond the amount of compensatory damages in order to prevent future violations.

2.4.3.5. *Antitrust law and unfair competition law*

Two other examples taken from German law may illustrate the 'hidden' convergence of continental law and US approaches. In 2016, based on efforts to enhance the private enforcement of competition law, a revision of German antitrust rules recognized the concept of a 'punitive interest rate' payable to the creditor. In contrast to other tort cases, in the case of a violation of German or European competition rules, the violator is charged interest on the amount of damages from when the harm had occurred, rather than from the point in time when an action was filed against him or her. [58] This rule considerably increases the amount of damages and is meant to promote the debtor's willingness to pay. [59] In practice, it is also an incentive for defendants to settle antitrust lawsuits early.

Regarding unfair competition, the German legislature in 2005 enacted the s 10 Unfair Competition Act, which was meant

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[56] Gerhard Wagner, 'Vorbemerkung § 823 BGB' (n 47) para 49; Gerhard Wagner, 'Prävention und Verhaltenssteuerung' (n 46) 352, 364 ff.

[57] Federal High Court, 24 June 1955 – I ZR 178/53, 17 BGHZ 376, 383; Federal High Court, 10 March 1972 – I ZR 160/70, 59 BGHZ 286, 287; Federal High Court, 22 January 1986 – I ZR 194/83, 97 BGHZ 37, 49 ff.

[58] S 33a (4) German Antitrust Act, enacted 1 June 2016, BGBl (Official Journal) 2016 I, p 1416.

[59] Nagy (n 25) 6.

to cope with mass harm events where consumers have suffered only small individual damage. This provision allows consumer associations and other qualified entities to bring an action for skimming off illegally gained profits which defendants have made through the intentional violation of competition rules. The money to be paid by the defendant is not compensation to be distributed among consumers who have suffered a minimal loss; instead, it goes to the federal budget. The legislations' objective by establishing such a new claim for consumer associations was clearly deterrence and prevention.

2.4.4. *Are statutory damages the new punitive damages?* [60]

2.4.4.1. *District Court Leipzig: non-recognition of excessively high statutory damages awards in an intellectual property infringement case*

Recently, the District Court of Leipzig [61] denied recognition of a US judgment in an intellectual property infringement case, even though the US court had clearly indicated that the amount awarded 'was not punitive in nature'. The case was based on an alleged infringement of US copyrights by a German company. The defendant produced automation software to be used in connection with the plaintiff's online games, like *World of Warcraft*, to circumvent and outwit certain technological safeguards of the games. The US court had not awarded punitive damages, but USD 8.5 million in 'statutory damages' based on an abstract calculation of the plaintiff's damages according to the US Digital Millennium Copyright Act. The act allows minimum allowable statutory damages of USD 200 for each violation, and the court acted on the assumption that more than 42,000 violations had occurred. The German court in *Leipzig* held that the aggregated amount, although not punitive, was excessive, not explainable in its extent, and disproportionate to the actual damages. Thus, recognition and enforcement of the judgment would be contrary to German public policy.

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[60] This title has been borrowed from Thelen (n 27).

[61] District Court Leipzig, 19 February 2018, 05 O 3052/17 (not published).

2.4.4.2. *Statutory damages in the US and German* 'ordre public'

The case demonstrates that the punitive damages problem appears in a different form today, particularly in intellectual property law and unfair competition law. In both fields of law, courts in many legal systems have taken recourse to particular methods of calculating damages, against the background that it is always difficult for the holder of an intellectual property right to prove actual damages. As described above, German intellectual property law provides methods of calculating damages which may lead to high awards and, as a further consequence, to enrichment of the victim.[62] The extra amount is accepted in Germany and Switzerland as an instrument of skimming-off unjust profits and for deterrence. US law has introduced double- and treble damages awards (also in cartel law), which simply allow a multiplication of the actual damages. Therefore, the Leipzig court could not bring forward the argument that the deterrent character of the US award was against German public policy. Its main argument was the disproportionality of the award, and it relied on a debate in the US which also illustrated that there is some concern about disproportionate statutory damages and violations of due process.[63]

Statutory damages are not only available in US copyright law but also in consumer protection law and can vary between USD 100 and USD 1,000 per violation. Federal[64] and state law[65] provides that in cases of particular violations of consumer law, consumers are entitled to a statutorily fixed amount of damages, regardless of the real damage caused. As in copyright law, the idea behind the concept of statutory damages is to cope with the difficulties of proving actual damages. Consumers and intellectual property right holders are helped out by consolidation into a lump sum award.[66] If statutory damages are claimed in class actions or aggregated claims, the aggregated amount

[62] See above, para 2.4.3.4.

[63] For details about the development, see Thelen (n 27).

[64] For details, see 15 USC Chapter on Consumer Credit Protection; 5 USC s 552a (g) (4) Privacy Act; also 17 USC s 504 (c) (Copyright Act).

[65] Thelen (n 27) 159, who refers to the Biometric Information Privacy Act of Illinois and the case *Rosenbach v Six Flags & Great Am*erica, 2017 IL App (2nd) 170317.

[66] Furthermore, statutory damages are an incentive to claimants and thus

awarded may reach millions or even billions of US dollars [67] and may be intended to have a deterrent effect. In practice, these situations appear today, particularly in case of large-scale data theft and in the credit service sector, where consumers are not provided with sufficient information on the terms of loan or mortgage conditions or companies do not comply with the strict rules on non-disclosure of credit card information on receipts. In all these cases millions of consumers can be affected; thus, the aggregated amount of statutory damages between USD 100-1,000 easily adds up to a dimension with which we are familiar, with respect to punitive damages.

2.5. *Summary*

All told, there is a certain trend in German civil law to accept at least prevention and deterrence [68] as elements of tort law. Although there is no doctrinal concept of punitive damages in the strict American sense, deterrent elements are increasingly inflating compensatory damages in some fields of law. The argument that the idea of punishment embedded in civil damages is manifestly contrary to German public policy no longer carries as much weight anymore. However, that is not the end of the difficulties in recognizing US awards in Germany. Excessively high statutory damages awards which are manifestly disproportionate with regard to the violation and the individual damages to the claimants will continue to face problems with respect to the public policy objection in Germany. And again, we can observe attempts in the US to limit such awards, [69] but it will probably take another decision from the US Supreme Court to bring about clear results. [70]

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enhance private enforcement; *Parker v Time Warner Entertainment Co.*, 331 F3d 13, 22 (2nd Cir. 2003).

[67] In *In re Toys 'R' US – Del, Inc - Fair & Accurate Credit Transactions Act Litigation*, 300 FRD 347, 359 (CD Calif 2013), the claimants sued the defendant for USD 29 billion.

[68] This includes punishment as an objective, insofar as punishment itself operates on the basis of deterrence.

[69] In some cases, Congress has already implemented a cap on statutory damages, eg 15 USC s 1640 (a) (2) (B) (Truth in Lending Act, 2006): awards in class action proceedings should not be more than the lesser of USD 500,000 or 1 percent of the defendant's net worth; see also s 1691e Equal Credit Opportunity Act, s 1692k Fair Debt Collections Practices Act.

[70] Some courts tend to apply the restrictions imposed on punitive dama-

In 1992, the German Federal High Court had emphasized that not only could the punitive character of the US awards be contrary to material principles of German law but also the size of the amount. US courts are of course aware of the widespread scepticism against punitive damages in continental Europe. This may explain why the California court in the *World of Warcraft* case explicitly pointed out that the USD 8.5 million award was not punitive in nature. However, with respect to statutory damages, it is not easy to make a clear distinction between compensation and punishment or deterrence. Therefore, in the future, the recognition of US awards, whether punitive damages or statutory damages, may depend predominantly on the question of proportionality and excessiveness. Rather small awards that are also punitive in nature may be recognized. A more sophisticated approach that is also more difficult to handle in practice is to generally exclude any clearly punitive part of an award from recognition, if identifiable in the US judgment. If no such identification or, hence, differentiation is possible, the German court will probably tend to deny recognition completely. [71]

3. SWITZERLAND

3.1. *Legal basis for recognition*

The situation in Switzerland is not completely different from that of Germany. Recognition of US judgments depends on art 27 of the Swiss Private International Law Act. The grounds for non-recognition and enforcement are more or less the same as in Germany, but the public policy objection is mentioned in the first place in the Act.

3.2. *Case law and professional literature*

In Switzerland, only two cases have been reported in which Swiss courts of lower instance had to decide upon the recognition of US punitive damages judgments. In 1982, a judge in *Sar-*

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ges awards to statutory damages, eg *Murray v GMAC Mortgage Corp*., 434 F3d 948, 951 et seq (7th Cir. 2006). For more examples and case law which tries to restrict excessive statutory damages, see Thelen (n 27) 169 et seq.

[71] In favour of such a solution is Thelen (n 27) 187-188.

gans denied the recognition of a Texas punitive damages award. Apparently, the court did not distinguish between the compensatory and punitive parts of the judgment but denied recognition altogether based on the argument that punitive damages are manifestly contrary to the Swiss principle that a tort victim should not be enriched by receiving compensation which goes beyond the actual damages and the punitive character of the judgment. [72] In 1989, however, a court in *Basel*, [73] granted recognition and enforcement of a US judgment which – based on English law – had awarded USD 5000 in punitive damages. As the amount was apparently awarded to skim the defendant's ill-gotten gains, the court did not identify punitive elements. On the contrary, the court confirmed that disgorgement of illegally gained profits has an equivalent in s 423 of the Swiss Code of Obligations.

In 1990s Swiss legal literature, there was and still is a consensus that punitive awards will clearly not be recognized and enforced in Switzerland. [74] Some authors advocate for a more liberal application of the public policy objection in cases which have no or only a slight connection to Switzerland. [75] This has also been pointed out by the *Basel* court in its 1989 decision. It is often emphasized that punitive damages awards must be recognized on a case-by-case analysis, by taking into account the award's particular function and its possible equivalents in Swiss law. There is also a strong tendency among Swiss authors to support a partial recognition of US judgments. Courts should be tolerant in recognizing US awards as long as they do not clearly violate the Swiss prohibition of the claimant's enrichment. [76]

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[72] The case is reported by Jens Drolshammer and Heinz Schärer 'Die Verletzung des materiellen orde public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages" Urteil' (1986) 82 SJZ 309.

[73] *SF Inc v TCS AG*, Civil Court Basel, 1 February 1989, BJM 1991, 31 ff the Court of Appeals Basel dismissed the appeal, but confirmed that punitive damages awards are a civil judgment, not a criminal judgment (BGE 116 II 376).

[74] Kurt Siehr 'Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "punitive damages"', [1991] RIW 705, 709; Christian Lenz, *Amerikanische Punitive Damages vor dem Schweizer Richter* (Schulthess 1992) 168 ff.

[75] Lenz (n 74).

[76] ibid 174-176.

3.3. *Compensatory and deterrent function of Swiss tort law?*

As in Germany, Swiss law has developed elements of tort law over the years which are not completely different from the philosophy behind punitive damages. In particular, intellectual property law allows for a disgorgement of profits based on hypothetical licence fees and accepts as a result the enrichment of the holder of the infringed intellectual property right. Due to the increasing monetarisation of social values, Swiss courts have also given up their traditional reluctance to award high amounts for pain, suffering and immaterial damages. Deterrence and expiation are accepted elements when assessing such damages awards.

Swiss labour law and antidiscrimination law underwent a similar development as in Germany. Art. 5 of the Equal Treatment Act provides that courts in cases of discrimination or sexual harassment may impose damages awards of from three to six times the amount of the employee's monthly salary. Although it is called 'compensation', actual damages must not be proven and the legislature explicitly intended to provide the reparations instead of criminal sanctions, with the objective of deterrence. This is underlined by the fact that a possible satisfaction for the employee must be paid separately. [77] In labour law, according to Art. 336a and 337c of the Swiss Obligations Law, employers who have terminated labour contracts abusively or without a legitimate reason are obligated to pay a compensation of up to six months of salary. This obligation is on top of the compensation of actual damages and is of a clearly punitive character. [78]

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[77] For details, see Felix Dasser, 'Punitive damages: vom "fremden Fötzel" zum "Miteidsgenossen "?' (2000) 96 SJZ 101.

[78] ibid 101 ff, sub. 3 a) (5); Manfred Rehbinder, *Basler Commentary on the Obligations Law*, art 336b N1, art 337c N3; Lenz (n 74) 99-104. The Swiss Federal Court emphasized that the compensation is also meant to be a satisfaction of the dismissed employee, but this does not eliminate the punitive element; Bundesgericht, 9 June 1994 – BGE 123 V 5 E 2b; Bundesgericht, 23 March 1993, BGE 123 III 391 E. 3.

4. CONCLUSION

Germany and Switzerland have accepted elements of deterrence and punishment in their civil law which cannot be disregarded when applying public policy standards. Courts will have to scrutinize the objectives of punitive damages awards, which may often result in at least a partial recognition of US judgments.

This is also in line with the approach taken by the Hague Choice-of-Court Convention of 2005.[79] According to its article 11, recognition of punitive damages in a judgment may be refused, but the compensatory part may not. The courts addressed with exequatur applications must also take into account whether and to what extent the punitive damages award serves to cover legal costs and expenses. While the deterrent and punitive elements embedded in both punitive damages awards and statutory damages can be of minor importance today, German (and probably also Swiss) courts will still be reluctant to recognize damages awards which are disproportional compared to the actual damages. However, a clear demarcation will be difficult to find, as particularly intellectual property regulations in continental Europe also accept an over-compensation of victims, to some extent.

ABSTRACT

Punitive damages are still a controversial issue in Germany and Switzerland. In Germany, the Federal High Court in 1992 refused to give recognition to a US punitive damage judgment based on Sec. 328 para 1 no. 4 German Civil Procedure Code. The court considered punitive damages awarded in addition to material and non-material damages as being contrary to German public policy because of a clear distinction in the German legal system between civil law and criminal law. The court, however, also emphasized that a partial recognition of a US judgment is possible where the punitive damage part of the award covers e.g. non-material damages or a compensation for claim-

[79] The Hague Convention of 30 June 2005 on Choice of Court Agreements, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 27 November 2018.

ant's lawyer's contingency fees - elements which have an equivalent in German law. In principle this leaves room for declining enforcement only for the "real" punitive portion of a US court judgment where the judgment itself identifies the different categories of damages and the particular purpose of punitive damages in the case at hand. It seems, however, that in practice, partial recognition and enforcement has remained a rare exception in Germany. An increasing number of scholars argue that deterrence and punishment are no longer alien to German civil law and refer to court decisions in tort law, labour law and anti-discrimination law. It is therefore not clear whether the German Federal High Court will adhere to its 1992 decision in the future. A greater receptivity towards deterrent elements in civil law may suggest that there is no longer such a fundamental public policy as to prevent all foreign punitive damages awards from recognition. New developments, however, suggest that US damages awards which are excessively high (because they are based on statutory damages) may face problems in terms of recognition even though they are not punitive damages in the traditional sense.

In Switzerland, there is no decision of the Swiss Federal High Court with regard to the recognition of US punitive damages awards. Lower courts have granted recognition for decisions without a clear punitive element, but the question is still controversial among scholars. An increasing number of legal scholars advocate a more differentiated, rather quantitative approach: punitive damage should be enforced in Switzerland as long as the amount awarded in the foreign judgment is not excessive, but proportionate and adequate from the Swiss perspective. This requires a case-to-case analysis which also depends on how close the case is connected to Switzerland.

Chapter VII

RECOGNITION AND ENFORCEMENT OF PUNITIVE DAMAGES IN FRANCE

OLIVERA BOSKOVIC *

Contents: 1. Introduction. – 2. The solution. – 2.1. No violation *per se*. – 2.2. The conditions of violation of international public policy. – 3. The questions. – 3.1. A general solution? – 3.2. The consequences of excessiveness.

1. Introduction

In France, when European union law is not applicable, the rules on recognition and enforcement of foreign judgments are to be found in the case law. In the silence of the civil code, it is the *Cour de cassation* that devised the rules on this question. The leading case that laid down the basis of the modern system of recognition and enforcement of foreign judgments is the *Munzer* case decided in 1964 [1]. This case abolished the system of *révision au fond* (review on the merits) [2], and instead laid down conditions that a foreign judgement must satisfy in order to be recognised in France. Originally there were five conditions: jurisdiction of the foreign court, regularity of the foreign procedure, application of the law designated by French choice of law rules, conformity of the foreign decision with French in-

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[1] Cass Civ (1) 7 January 1964, RCDIP 1964, 302, with a commentary by Henri Batiffol; JDI 1964, 302, with a commentary by Berthold Goldman; JCP 1964, II, 13590, with a commentary by Bertrand Ancel.

[2] The exact meaning of the prohibition of review as to the merits and its implications for the recognition and enforcement of foreign judgments or arbitral awards is still debated in France.

ternational public policy and absence of fraud Out of those five, three are still required today. Indeed, another leading case decided in 2007, the *Cornelissen* case [3], (which was interestingly about the enforcement of a US decision awarding treble damages, but this aspect was not examined by the courts) stands for the rule that from that moment on, three conditions must be satisfied: the foreign court must have had jurisdiction, the foreign decision must not violate French international public policy [4], and there must have been no fraud.

Concerning foreign decisions awarding punitive damages the debate of course focuses on the condition pertaining to international public policy [5]. First of all, it is worth mentioning that, as a general rule, French courts apply this requirement with a lot of flexibility. In the field of contracts and torts, they rarely consider foreign decisions as contrary to international public policy and even when they do, most of the time the violation concerns procedural aspects of international public policy such as, for example, lack of motivation of the foreign decision. On the contrary, concerning substance, international public policy tolerates e.g. the absence of compensation of moral damage, different

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[3] Cass Civ (1), 20 February 2007, n° 05-14.082, Bull civ I, n° 68; D 2007, 1115, with a commentary by Louis D'Avout et Sylvain Bollée ; D 2007, 891, with observations by Pascal Chauvin, in particular 892 ; RCDIP 2007, 420, with a commentary by Bertrand Ancel and Horatia Muir Watt; JDI 2007, 1195, with a commentary by François-Xavier Train.

[4] The concept of *ordre public international français* (French international public policy) is clearly distinguished from domestic public policy. Rules which are mandatory in the domestic context and hence are a part of domestic *ordre public* are not necessarily part of the *ordre public international*. Instead international public policy is defined as "a set of rules and values the disregard of which the French legal system will not accept even in international matters". On the other hand, the exact influence of European rules and values on the determination of the concept of international public policy is a debated question. The requirement of conformity with French international public policy includes the requirement that the foreign decision must not be irreconcilable with a French judgment.

[5] An even more radical argument could have been to invoke the criminal nature of punitive damages and hence argue that these awards were outside of the scope of exequatur proceedings, which are reserved to decisions of a civil nature. This argument is unanimously rejected. It has been invoked concerning a US penalty stemming from contempt of court, but the *Cour de cassation* rejected it and accepted the recognition and enforcement [of the decision?] regardless of the criminal nature of this last institution. See infra n 18

lengths of statute of limitation and a number of rules contrary to French mandatory domestic rules [6].

There are at least three cases decided by the French *Cour de cassation* during the last ten years, which provide guidance and elements for thought on these matters [7] but only one decision explicitly ruled on the enforcement in France of a foreign decision awarding punitive damages. Although punitive damages are generally awarded in tort cases, the French case was on the enforcement of a US judgement rendered in a contractual context. However, the reasoning and the principles laid down are general and, as such, transposable to tort cases.

The case that explicitly ruled on the enforcement of a foreign judgment granting punitive damages is the *Fountaine Pajot* case decided on 1 December 2010 [8]. In this case a US couple bought a boat from a French manufacturer. Between the signature of the contract and the delivery there was a huge, hurricane like, storm in France and the boat, which was in the French port of La Rochelle, was seriously damaged. However, the manufacturer did not say a word about this problem to the buyers, tried to conceal the damage and proceeded with some patchwork repairs. Nevertheless, the buyers soon experienced problems with the vessel and found out that its structural integrity was compromised. By way of consequence, they brought an action in front of a Californian court designated by a choice of court agreement.

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[6] See the Kieger case, Cass civ (1), 30 May 1967, Bull civ 1967, I, n° 189; RCDIP 1967, with a commentary by Pierre Bourel; JDI 1967, 622, with a commentary by Berthold Goldman; D 1967, with a commentary by Philippe Malaurie; JCP 1968, II, 15456, with a commentary by Antoine Jack-Mayer; Cass civ (1), 15 December 1969, Bull civ 1969, I, n° 393; Cass crim, 16 June 1993, n° 92-83.871; JurisData n° 1993-002499; Bull crim 1993, n° 214; Cass civ (1), 30 September 2003, n° 00-22.294; JurisData n° 2003-020395; Bull civ 2003, I, n° 39. All these decisions are unanimously interpreted as determining the level of tolerance of the French legal order towards both foreign laws and foreign judgments.

[7] Cass civ (1), 28 January 2009, n° 07-11.729; Cass civ (1), 1 December 2010, n° 09-13.303; Cass civ (1), 7 November 2012, n° 11-23.871. All three decisions will be referred to *infra*.

[8] Cass civ (1), 1 December 2010, n° 09-13.303, D 2011, 423, with observations by Inès Gallmeister, with a commentary by François-Xavier Licari; ibid 1374, with observations by Fabienne Jault-Seseke; RCDIP 2011, 93, with a commentary by Hélène Gaudemet-Tallon; JDI, 2011, 14, with a commentary by Olivera Boskovic; RTD civ 2011, 122, with observations by Bertrand Fages.

The action was successful and the Californian court awarded them not only approximately USD 1.3 million of compensatory damages, but also USD 400 000 thousand for legal costs and approximately USD 1.4 million of punitive damages. The claimants then tried to enforce that decision in France. This was quite a long process: there was a first decision refusing exequatur based on the lack of jurisdiction of the US court, but that decision was quashed. The second decision, important for the question under examination, refused to recognise the US judgement on the grounds that in France damages cannot be based on the seriousness of the breach or on the financial situation of the defendant [9]. Hence the American decision was considered contrary to French international public policy. It is an appeal against this decision that led to the *Cour de cassation* ruling. The Court refused to quash the decision of the appellate court but gave a different motivation for it. Indeed, the *Cour de cassation* held that punitive damages are not *per se* contrary to public policy but that they may be considered as such if the amount awarded is disproportionate to the damage actually sustained and to the seriousness of the breach of contractual obligations. By this ruling the *Cour de cassation* adopted a solution, which, as a matter of principle, seems to be satisfactory. However, it is far from solving all the questions that might arise. So one must first analyse the solution and then try to reflect on its repercussions.

2. THE SOLUTION

The solution can be summarised in two propositions: punitive damages are not *per se* contrary to French international public policy; they may be considered as contrary if the amount

[9] Poitiers Court of Appeal, 26 February 2009, n° 07/02404. The idea that damages have a purely compensatory function is implicitly but necessarily present in the motivation. The court asserts that the function of tort law in France is to replace the victim in the situation he or she would have been in if the causal event had not occurred; by way of consequence the amount of damages can not be determined by the seriousness of the breach or by the financial situation of the defendant. In other words, it can only be determined by the importance of the damage suffered by the claimant. However, the court rejected the US decision as a whole, without distinguishing between punitive and compensatory damages. On the question of partial exequatur see below para 3.2.

awarded is out of proportion with regard to certain criteria. These two ideas deserve to be examined in detail.

2.1. *No violation* per se

The first key idea to remember is that there is no violation *per se.* This assertion is very important because before this decision was rendered, the traditional view was that the rule according to which damages have a purely compensatory function was a fundamental rule of French law. By way of consequence, the punitive function of damages was in itself contrary to French international 'public policy' [10]. It is remarkable to note that that is exactly what the appellate court decided in the *Fountaine Pajot* case. Therefore, the assertion that punitive damages are not *per se* contrary to French international public policy is a very significant step forward.

Of course it is well known that this solution is in accordance with modern legal developments. Many scholars analysing French law have shown that the idea of punishment was not completely absent even before the *Cour de Cassation* decision from domestic civil law and that many institutions may be explained through this idea [11]. Draft reforms of French tort law even envisaged introducing punitive damages as such into

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[10] See Tribunal de Grande Instance de Paris (1), 15 July 2004, n° 03/09481, *Consorts Chapgier v Taitbout Prévoyance & B. Mesqui*, 8 ('En effet . . . les dommages-intérêts punitifs . . . ont été ordonnés pour . . . sanctionner un comportement avec une fonction principale de dissuasion, proche de la sanction pénale qui relève en France du monopole de l'Etat. Prononcés pour punir et dissuader, ces "*punitive damages*" sont en contradiction avec le principe de l'ordre public de l'équivalence, en droit français de la responsabilité, entre la réparation et le préjudice subi.'). [`Indeed . . . punitive damages . . . have been awarded to punish a behavior with a primary function of deterrence, closer to a criminal sanction, that is in France a monopoly of the State. Awarded to punish and deter, these "punitive damages" are in contradiction with the principle of public policy of equivalence, under the French law of liability, between the remedy and the damage suffered.']. More generally, on the question of damages in private international law as a whole see Olivera Boskovic, 'La réparation du préjudice en droit international privé' [2003] LGDJ. See also Olivera Boskovic, 'Les dommages et intérêts en droit international privé – ne pas manquer une occasion de progrès' [2006] JCP 163.

[11] See, for an early example Suzanne Carval, 'La responsabilité civile dans sa fonction de peine privée' [1995] LGDJ. See also Philippe Brun, 'La peine privée', in *L'indemnisation* (LGDJ 2004, Travaux de l'Association Henri

French law [12]. The provision was finally rejected [13] but currently one can surely say that the idea that civil liability can also have a punitive function is now widely accepted. It is also well known that European law and in particular European private international law developed in the same direction. The Rome II regulation on the law applicable to non-contractual obligations [14] immediately comes to mind. It is interesting to remember that the initial versions of the regulation contained radical provisions under which, in substance, the application of a law allowing the award of non-compensatory damages would have been contrary to European public policy [15]. The later versions became less hostile. Today two traces of this debate can be found in the Regulation: recital 32 [16] and article

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Capitant, LIV) 155 ff. Examples include penalty clauses, astreinte, or even compensation of moral damage.

[12] See the "projet Catala", 'Avant-projet de réforme du droit des obligations et de la prescription, La documentation française' (2006). Article 1371 was drafted as follows: 'L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public'. ('One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim.'). Translated in <www.henricapitant.org/sites/default/files>. For comments, see Muriel Chagny, 'La notion de dommages-intérêts punitifs et ses répercussions sur le droit de la concurrence – Lectures plurielles de l'article 1371 de l'avant-projet de réforme du droit des obligations' [2006] JCP Edition Générale I 149; Solène Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in *Reforming the French law of obligations* (Hart Publishing 2009) 325.

[13] Current, 2017, versions of the draft reform replaced punitive damages by a civil penalty ("*amende civile*") to be paid to the State. See François Rousseau, 'Projet de réforme de la responsabilité civile – L'amende civile face aux principes directeurs du droit pénal' (2018) 686 JCP.

[14] European Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[15] See article 24 of the 2003 proposal for a regulation on the law applicable to non-contractual obligations. (COM(2003)427 final).

[16] 'Considerations of public interest justify giving the courts of the Member States the possibility in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstan-

15 [17] are both quite open to punitive damages. However the *Fountaine Pajot* case does not mean that any foreign decision awarding punitive damages could be recognised in France. The Court immediately specifies that punitive damages awards may violate French international public policy in some cases. This is the second key idea that needs to be analysed.

2.2. *The conditions of violation of international public policy*

The foreign judgment will be contrary to French international public policy if the amount awarded is out of proportion with regard to the actual damage suffered by the plaintiff and the seriousness of the breach of the contractual obligations of the defendant. It is remarkable that the *Cour de cassation* uses a vocabulary which is specific to contractual liability. However, all commentators agree that the rule can be generalised and that in the context of tortious liability it should be understood as referring to the seriousness of the fault. Consequently, there are two points to be analysed: first the use of the principle of proportionality and then the criteria referred to.

The principle of proportionality plays a very important role in many areas of the law [18]. In the field of recognition of foreign judgements, however, it is fairly new. In France, before the *Fountaine Pajot* case, the idea of proportionality had been used once to try to oppose the enforcement of a thirteen million USD financial penalty deriving out of contempt of court, but the court considered that there was no disproportion in that particular case [19].

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ces of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.' One can observe, first of all, that there is no automatic violation of public policy. According to the recital only awards of non-compensatory exemplary or punitive damages of an excessive nature *may* be regarded as being contrary to the public policy of the forum.

[17] Point e) of article 15 includes into the scope of the governing law 'the existence, the nature and the assessment of damage or the remedy claimed'. The distinction between the assessment of damage and assessment of remedy shows that the latter may be based on criteria other than the sole damage.

[18] Especially in European law and European human rights law. It has traditionally been more often used in a public law context, but has now become familiar to private law lawyers. However, its application in private law as a general principle continues to be questioned. See François Terré, 'Le principe de proportionnalité comme principe', (2009) 52 JCP , para 31.

[19] Cass civ (1), 28 January 2009, n° 07-11.729, JDI 2009, 17, with a com-

Independently from that case, although the use of the idea of proportionality may seem adequate, on second thought it is perhaps not the most satisfactory test. The main criticism that it has given rise to, is that it inevitably leads to a review on the merits (*révision au fond*) [20]. The criticism is not necessarily very relevant. If the review of foreign judgements is supposed to have a meaning, then it supposes a comparison between the outcome of the judgment and the one that can be tolerated by the requested legal order. This means that the reviewing court should be able to re-examine the facts and points of law as long as this is done not to check whether the foreign court reached the right or wrong decision but in order to check that there is no violation of public policy. In other words, the requested court may not refuse recognition just because the amount is different from the one that a local court would have awarded, but it may re-examine points of fact and law in the light of the requirement of proportionality. However, two points are worth noting: first, in the *Fountaine Pajot* case the court considered that the amount was not proportionate although it was perfectly within the limits set by American case law and just slightly above a 1 to 1 ratio between compensatory/punitive damages [21]. Secondly, one can wonder about an amount that would be out of proportion in the sense that it would be too low. Would it provoke the same

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mentary by Fabien Marchadier. Commentators discussed not only the existence and grounds for that principle but also the terms of the comparison. In the 2009 case, the *Cour de cassation* considered that the US court's sanction could not be criticized as disproportionate given the underlying fraud of USD 200 million. Marchadier, for example considers that the underlying fraud should not have been taken into account. Rather, the court should have examined the existence of a disproportion between the thirteen million penalty and the financial situation of the defendant or his behaviour.

[20] See eg Benjamin West Janke and François-Xavier Licari, 'Enforcing Punitive Damages Awards in France after *Fountaine Pajot*' (2012) 60 AJCL 775, 801 who write: 'The critical flaw in applying the proportionality principle in cases involving the recognition of foreign damage awards is that it resurrects the *révision au fond*'.

[21] The United States Supreme Court has restricted punitive damages, in most cases, to a ratio of less than or equal to nine-to-one. In *State Farm Mutual Automobile Insurance v Campbell* 538 US 408, 425 (2003), the Court referred to 'a lesser ratio, perhaps only equal to compensatory damages' as 'the outermost limit of the due process guarantee', when the compensatory damages are substantial. For a detailed analysis of US law see Jessica J Berch, 'The Need for Enforcement of US Punitive Damages Awards by the European Union' (2010) 19 Minnesota J Intl L 55.

reaction? The answer is obviously negative. In the light of these observations, it appears that it is not really the disproportion that violates international public policy. Rather, it is the excessiveness of the amount awarded. Of course this is a nuance, but excessiveness seems like a better test than proportionality [22]. However, adopting this test does not make the difficulties disappear. Excessiveness needs to be established with regard to something. So the second question pertains to the criteria referred to by the court.

According to the *Cour de cassation*, there are two criteria: the damage and the seriousness of the fault (or reprehensibility of the conduct). Concerning the latter, punitive damages are meant to deter and punish, so reprehensibility of the conduct seems like a perfectly natural criterion. Concerning the damage actually sustained, the situation is more ambiguous. One could think that since punitive damages are not meant to compensate, the harm actually caused by the conduct should not be taken into account. On the other hand, it appears that US case law, in an effort to limit punitive damages, does refer to the loss. The US Supreme court itself, when deciding whether punitive damages violate the due process clause, takes into account several factors including the actual loss suffered. Finally the two criteria taken into account by the *Cour de cassation* seem legitimate [23]. It is also worth noting, that unlike decisions in other European countries, the importance of the protected interest or predictability are not taken into account by the *Cour de cassation*. To sum up, although one could discuss several aspects of the solution, the general idea behind it has largely been approved. However, this does not mean that the problem of recognition and enforcement of foreign judgements awarding punitive damages is now solved in an adequate manner. Indeed the *Fountaine Pajot* case raised a number of important questions yet to be answered.

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[22] The Rome II regulation (recital 32) also refers to punitive damages of an excessive nature.

[23] However, taking into account the damage for the assessment of proportionality is an additional argument for generalising the solution to all types of damages. See below, para 3.1.

3. THE QUESTIONS

The most important question raised by the *Fountaine Pajot* case is that concerning the consequences of the disproportion. What should the enforcing Court do once the existence of a disproportion, or excessiveness according to our preferred vocabulary, has been established? This is indisputably the main question. However, in order to answer it, a clarification of an implicit consequence of the case, pertaining to the scope of the solution adopted by the *Cour de cassation*, is necessary. In other words, does the Fountaine-Pajot solution concern all damages?

3.1. *A general solution?*

The question is the following: does the 2010 solution concern only damages characterised as punitive by the foreign judge or does it concern all damages regardless of how they are labelled by the court of origin?

The rule laid down in the *Fountaine Pajot* case inevitably raises this problem. Indeed, if it is no longer the punitive function that is found contrary to French international public policy but the excessive amount awarded, then there is probably no reason to treat punitive and compensatory damages differently. Would it not be surprising to attach such an important consequence to the characterisation given by the foreign judge? One can sincerely hesitate, especially knowing how difficult it can sometimes be to draw a line between compensatory and punitive damages. Intellectual property law offers good examples of these difficulties [24]. The same could be said about the concept of "aggravated damages". This conclusion is reinforced by the fact that the damage actually sustained is taken into account to assess the proportionality. Indeed, why would a disproportion with regard to the damage be problematic for punitive damages, but not for compensatory ones if the punitive function is not *per se* contrary to international public policy?

On the other hand, of course, the idea that this solution could be a general one can raise some reservations. Generally

[24] See for example European Parliament and Council Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L157/45.

speaking, the evolution of rules on recognition and enforcement of foreign judgments has been a constant movement of liberalisation and this could seem as a step back. Accepting that the recognition and enforcement of an award of compensatory damages could be refused if it is found excessive can seem disturbing [25]. However, the conclusion that the solution is a general one, although uncomfortable seems to be inevitable. In addition to the fact that it would be surprising to attach such an important consequence to the characterisation given by the foreign judge, several arguments can be invoked in favour of this interpretation.

First of all, the wording of the 2010 decision seems to support this view. In the first part of the ruling the court says that punitive damages are not *per se* contrary to public policy but that they can be contrary to public policy if the amount is disproportionate with regard to the actual damage suffered by the plaintiff and the seriousness of the breach of the contractual obligations by the defendant. However, in the second part, the court says that in this particular case, the court of appeal established a certain number of facts and rightfully deduced from those facts that the awarded *damages* were disproportionate with regard to the damage suffered by the claimant and the reprehensibility of the conduct. In this second part, the court refers to 'damages' and not to 'punitive damages' [26].

An additional argument can be drawn from a later decision. In 2012 [27] the *Cour de cassation* was confronted again with a US

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[25] Some scholars consider that compensatory damages should always be enforced regardless of the amount awarded. See Cedric Vanleenhove 'A Normative Framework for the Enforcement of US Punitive Damages in the European Union: Transforming the Traditional "¡No Pasaran!"' (2016) 41 Vermont Law Review 347.

[26] 'Mais attendu que si le principe d'une condamnation à des dommages-intérêts punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur; qu'en l'espèce, l'arrêt relève que la décision étrangère a accordé à l'acquéreur, en plus du remboursement du prix du bateau et du montant des réparations, une indemnité qui dépasse très largement cette somme; que la cour d'appel a pu en déduire que le montant des dommages-intérêts était manifestement disproportionné au regard du préjudice subi et du manquement aux obligations contractuelles de sorte que le jugement étranger ne pouvait être reconnu en France; que le moyen ne peut être accueilli'.

[27] Cass civ (1), 7 November 2012, n° 11-23.871, D 2012, 2671; ibid

judgement awarding USD twenty million of damages, which were not said to be punitive. The appellate court had granted exequatur in spite of the lack of motivation of the foreign judgement. Although this was a sufficient reason to quash the decision, the *Cour de cassation* used also another ground: the appellate court should have answered the defendant's argument according to which the amount awarded was out of proportion with regard to the damage actually sustained. The use of this argument seems to show that in the eyes of the *Cour de cassation* the principle of proportionality concerns all damages and not only those characterised as punitive. In other words, French international public policy requires the proportionality of all monetary awards to the actual harm suffered by the claimant [28].

Finally, the idea that compensatory and non-compensatory damages should be treated in the same manner when it comes to recognition and enforcement can be found in several international instruments. Article 33 of the Preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters prepared by the Hague Conference on Private International Law and adopted by the Special Commission on 30 October 1999 contained a paragraph [29] on compensatory damages expressing the same idea, ie that excessive compensatory damages should not be recognised. In turn, this provision influenced a lot the drafting of article 11 of the Hague Convention on choice of court agreements adopted in 2005. This article provides that: "Recognition and enforcement of a judgment may be refused if and to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered". The important point from our perspective is that all damages, compensatory or

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2013, 1503, with observations by Fabienne Jault-Seseke; ibid 2293, with observations by Louis d'Avout and Sylvain Bollée.

[28] However, one must note that the *Cour de cassation* accepts to enforce foreign decisions ordering a guarantor to pay the agreed sum although it was out of proportion with his income and financial situation. Such agreements would be void under domestic mandatory rules designed to protect natural persons entering into guarantee agreements. However, this rule on proportionality, although mandatory under domestic law, is not considered part of international public policy. See Cass civ (1), 30 January 2013, n° 11-10.588; Cass civ (1), 28 March 2018, n° 17-10.626. In consequence it seems that the *Cour de cassation* distinguishes liability on the one hand and enforcing of contractual obligations on the other.

[29] See above, para 2.1

not, of legal or contractual origin are treated alike [30]. Finally, exactly the same provision is to be found in the draft convention on Foreign judgments presented in May 2018 [31].

By way of consequence, it is possible to consider that the *Fountaine Pajot* solution [32] concerns all damages, whether characterised as punitive or not by the court of origin. If this is the right interpretation, then the second question, about the consequences of excessiveness, is even more important. In other words, determining what the requested court should do if the existence of a disproportion is established arises even if the *Fountaine Pajot* case was interpreted as concerning only punitive damages expressly characterised as such. But if the *Fountaine Pajot* solution concerns, as it seems, all types of damages then the question of consequences is even more crucial.

3.2. *The consequences of excessiveness*

In the *Fountaine Pajot* case, the court rejected the exequatur for the entire US judgment. As a result, seven years after the final ruling of the Supreme Court of California, the claimants were back at the starting point and could not get a single dollar from the defendant in France [33]. All commentators agreed that the result was too harsh on the claimants [34]. It can, nevertheless,

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[30] However, one must note that the wording of the quoted provision is particularly problematic. The term excessive does not appear hence leaving room for a very strict interpretation. Any damages considered by the requested court as being in excess of what is required by compensation could be refused. The report does however explain that the provision should only come into play in cases of manifest disproportion between the damage actually sustained and the award. On this question, see eg Laurence Usunier, 'La Convention de la Haye de 2005 sur les accords d'élection de for' [2010] RCDIP 37.

[31] Article 10.

[32] It is interesting to note that the *Fountaine Pajot* scenario would have been covered by the 2005 Convention if it had been in force.

[33] The 2010 decision did not actually end the saga. On 11 May 2012, the claimants obtained from the Californian courts a judgment *nunc pro tunc* indicating the different elements of the judgment. They then presented a request for partial exequatur of the part of the decision awarding compensatory damages only. The request was refused, on res judicata grounds, and the claimants` action was considered abusive. They have been required to pay 30,000 euros to the defendant *Fountaine Pajot* on grounds of abusive litigation. Cass civ (1), 24 May 2018, n° 16-26.012.

[34] See comments quoted *supra* n 8.

partly be explained by the claimants' own strategy. The claimants did not ask for partial exequatur. Indeed, under French law, it is accepted that exequatur can be given to certain parts of the foreign judgment if they are severable from the others [35]. However, although the rule is not perfectly clear, it seems that, procedurally, the court can not grant partial exequatur of its own motion [36]. Consequently, since the claimants had not asked for exequatur only for the award of compensatory damages, the court had no choice but to refuse it for the entire judgement.

However, one could encounter similar situations even if claimants asked for partial exequatur. This could be the case if the different parts of the foreign judgment were not clearly severable. Above all, if, as it seems, the *Fountaine Pajot* solution concerns all types of damages, in other words if even damages characterised as compensatory by the court of origin cannot be recognised if they are excessive, then one must seriously wonder whether the all-or-nothing approach is not too harsh [37]. Instead of refusing exequatur altogether, shouldn't the requested court be allowed to recognise and enforce the foreign judgement to the extent deemed compatible with its own international public policy?

Of course, an important obstacle comes immediately to mind, namely the prohibition of review of the merits (*révision au fond*). It has already been mentioned that this principle does not prohibit a control. The control should not be purely formal. The requested court may review the facts and the law applied by the court of origin if the purpose of this review is to check that the conditions of recognition of foreign judgments laid down by French law are fulfilled [38]. However the idea of reducing the

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[35] Academic writers refer to '*exéquatur partiel séléctif*', which is accepted, as opposed to '*exéquatur partiel reductif*', implying a modification of the sum awarded by the foreign judgment, which is prohibited in the name of prohibition of review as to the merits. See eg Pascal de Vareiles-Sommières, 'Jugement étranger' in *Répertoire de Procédure civile*, [2013] D para 397. For an example see also Tribunal de Grande Instance de Paris, 26 November 2008, RCDIP 2009, 310, with a commentary by Pascal Ancel.

[36] The court cannot grant something that has not been requested.

[37] It must be added that one necessarily wonders whether the fact that all the damages, compensatory and not, awarded by the Californian court in this case were much higher than the ones the claimants would have received in front of a French court did not play a role in the decision.

[38] A similar debate exists in France concerning the recognition and enfor-

awarded amount goes a step further. The prohibition of review as to the merits is traditionally understood as entailing the prohibition of any modification of the content of the foreign judgement [39]. The requested court can only give or refuse exequatur; it cannot modify the foreign judgment. However important this obstacle may seem, when reflecting on this problem one must remember the initial justification of the prohibition of review on the merits: the idea was to avoid the rejection of foreign judgments simply because the solution they reached was different from the one a French judge would have reached if he or she had been seized of the case. Here the situation is completely dif-

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cement of arbitral awards. Initially, case law opted for a full review. The courts considered that all the grounds for annulment or denial of recognition listed in the code of civil procedure were to be assessed according to the same method laid out in a 1987 decision (Cass civ (1), 6 January 1987, Rev arb 1987, 469, with a commentary by Philippe Leboulanger; JDI 1987, 638, with a commentary by Berthold Goldman) and referred to as the Pyramid test. This test did not distinguish legal or factual elements that were or were not present in the award or elements which were or were not discussed in front of the arbitrators. The reviewing court could re-examine all the elements whether or not they appeared in the award and whether or not they had been discussed in front of the arbitrators. This full review was applied to all grounds, including international public policy (see eg Paris Court of Appeal 30 September 1993, European Gas Turbines, Rev arb 1994, 359, with a commentary by Dominique Bureau; RCDIP 1994, 349, with a commentary by Vincent Heuzé; RTD com 1994, 703, with observations by Eric Loquin). But then two famous cases decided by the Paris Court of Appeal in 2004 and by the *Cour de cassation* in 2008 in the *Thales* (Paris Court of Appeal, 18 November 2004, Rev arb 2005, 751; RCDIP, 2006, 104, with a commentary by Sylvain Bollée.) and *Cytec* (Cass civ (1), 4 June 2008, Rev arb 2008, 473, with a commentary by Ibrahim Fadlallah; JDI 2008, 1107, with a commentary by Alexis Mourre) cases abandoned this approach and decided that that the violation of public policy can only be taken into account if it is flagrant, effective and concrete. These cases introduced what is known as the minimalist approach to review. The recent case law, at least from the Paris court of appeal is now abandoning the minimalist approach and seems favourable to a full review again. However, for the time being the *Cour de cassation* remains true to the minimalist approach. (Cass civ (1), 12 February 2014, n°10-17.076, D 2014, 490; JCP 2014, 475, with a commentary by Denis Mouralis, considering that any argument challenging the interpretation of the facts by the arbitrator leads to a substantive review, which is prohibited.)

[39] The object of exequatur proceedings, as understood under French law, is to confer enforceability to the foreign judgment. These are not proceedings as to the merits of the underlying case. This explains why traditionally the requested court will refuse any additional or counter claim. A timid evolution on these questions can be noted. See Pierre Mayer and Vincent Heuzé, *Droit international privé* (LGDJ 2014) paras 435-440.

ferent: the idea is to allow the enforcement of the foreign decision to a certain extent. Almost twenty years ago, a distinguished scholar as Georges Droz already advocated this solution [40]. Article 33 of the draft convention 2000, Article 11 of the 2005 convention on choice of court agreements and article 10 of the 2018 Draft Convention on the recognition of foreign judgments all adopted this view [41]. By way of consequence, although it departs from well-established principles on recognition and enforcement of foreign judgements under French law this would probably be the best solution. Of course it would need to be clarified. Should the requested court merely examine the excessiveness of the award based on the assessment of the damage and the reprehensibility of the conduct as carried out by the court of origin or should the requested court assess these elements itself [42]? Should the question of excessiveness be left to the lower courts or should the *Cour de cassation* control it [43]? One must now hope for another decision of the *Cour de cassation* allowing this important development.

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[40] Georges Droz 'Variations Pordea, à propos de l'arrêt de la Cour de cassation, 1re chambre civile du 16 mars 1999' [2000] RCDIP, 182; cf Cedric Vanleenhove (n 25) also advocating the possibility for the requested court to reduce the awarded amount, but only concerning damages labelled as punitive.

[41] For the 2005 Convention see the report prepared by Trevor Hartley and Masato Dogauchi. Concerning article 33 of the Draft Convention 2000 see the report prepared by Peter Nygh and Fausto Pocar.

[42] Should the excessiveness be assessed by reference to circumstances of the country of origin or of the requested country? Compare the discussion to be found in the report prepared by Peter Nygh and Fausto Pocar quoted *supra* n 41. The report insists on the fact that the requested court should take into account circumstances in the country of origin and refuse recognition and enforcement in so far as the award is much higher than the usual awards in the country of origin in similar circumstances. Cost of life, the absence of medical insurance and similar factors may justify big differences between the amounts awarded in the country of origin and in the requested country.

[43] It would seem natural to say that the *Cour de cassation* should control the excessiveness of the award but the example shows, once again, the difficulty of the distinction between fact and law which is the basis of the jurisdiction of the *Cour de cassation*. Needless to repeat that the *Cour de cassation* examines only points of law and does not re-examine the facts.

Abstract

Although there are at least three cases decided by the French Cour de cassation *during the last ten years which provide guidance and elements for thought on the recognition in France of foreign decisions awarding punitive damages, only one decision, the* Fountaine Pajot *case, explicitly ruled on this matter. By this ruling, in 2010, the* Cour de cassation *adopted a solution, which, as a matter of principle, has generally been approved. However, it is far from solving all questions that might arise. The first part of this chapter analyses the solution given by the* Cour de Cassation*; the second part reflects on its repercussions. The solution can be summarised in two propositions: punitive damages are not* per se *contrary to French international public policy; they may be considered as contrary to it if the amount awarded is out of proportion with regard to certain criteria. The most important question raised by the* Fountaine Pajot *case is the question of the consequences of the disproportion. What must the enforcing court do when the existence of a disproportion, or excessiveness, according to our preferred vocabulary, has been established? This is undisputedly the main question. However, in order to answer it one must first clarify an implicit consequence of the case, which has to do with the scope of the solution adopted by the* Cour de cassation*. Does it concern all damages or only those damages labelled as punitive by the court of origin?*

CHAPTER VIII

RECOGNITION OF PUNITIVE DAMAGES IN THE UNITED KINGDOM

ALEX MILLS *

CONTENTS: 1. Introduction. – 2. Punitive damages in UK private law. – 2.1. Punitive damages in English private law. – 2.2. Punitive damages in Scottish private law. – 3. Punitive damages in the recognition and enforcement of foreign judgments. – 3.1. Judgments for a 'penalty'. – 3.2. Public policy. – 4. Punitive damages in the application of foreign law. – 4.1. The substance/procedure distinction. – 4.2. Public policy. – 5. Conclusions.

1. INTRODUCTION

This chapter addresses the potential recognition of punitive damages (also frequently described as 'exemplary damages') [1] in foreign judgments and in the application of foreign law in the courts of the United Kingdom. [2] Before examining these pri-

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[1] The terminology varies in English law. For a discussion of this terminology, see *Broome v Cassel & Co.* [1972] AC 1027 (in which the Lords generally rejected the language of 'vindictive' or 'retributory' damages, but expressed varying preferences for the terms 'exemplary' or 'punitive' damages). James Edelman, Simon Colton and Jason Varuhas (eds), *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para 13.001, expresses a preference for the term 'exemplary' as it emphasises the objective of deterrence rather than punishment. The terms 'exemplary' and 'punitive' damages are used interchangeably in this chapter.

[2] The courts and law of Northern Ireland are not examined. England and Wales share a single court system and system of private law, referred to in this chapter (with apologies) as English; Scotland has a separate system of courts

vate international law questions, it analyses the position of punitive damages under both English and Scottish domestic private law. This is principally because there is relatively little recent case law on the private international law questions, and the (evolving) position on the award of punitive damages under domestic private law is highly likely to inform the attitude of the courts toward the question of whether foreign law or a foreign judgment providing for such damages should be recognised. It would evidently be unprincipled for the English or Scottish courts to hold that an award of punitive damages under foreign law or as part of a foreign judgment is contrary to public policy when the English or Scottish courts would themselves award punitive damages in equivalent circumstances.

The question of whether punitive damages should be awarded for breach of private law obligations has long been a source of controversy and debate, because it is a fundamental question which goes to the heart of the conception of the function of private law. One traditional conception of private law is that it provides compensation for a breach of obligations, whether those obligations are derived from a contract or from duties imposed, for example, through the law of tort. The aim of a damages award may thus be conceived as restoring the injured party to the position they would have been in if the wrong had not been committed. While this conception of damages is relational, in that the restorative payment is sourced from a party who bears responsibility for the wrong, it is primarily focused on compensating the injured party for the loss it has suffered. Once it has been established that a party is responsible for a wrong, the quantification of damages under this approach does not focus on any analysis of the severity of the wrongful conduct, but rather purely on the loss suffered by the injured party. [3] Punitive damages are essentially non-compensatory, and so they do not fit comfortably within this conception.

A rival conception of private law, particularly tort law, is that it has a regulatory function – it is designed to shape the behaviour of private actors, in a way which is perhaps analo-

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and private law; all are subject to the ultimate supervision of the UK Supreme Court.

[3] Responsibility may also be partitioned between multiple wrongdoers, or where the injured party has contributed to their own loss, but this is again not based on the degree of severity of the conduct of any wrongdoing party.

gous to the function of criminal law. This conception of private law shifts the focus from the loss suffered by the claimant to the conduct of the respondent. If private law is conceived as serving this regulatory function, then punitive damages may have a role to play, in three respects. First, they may be viewed as responding to particular characteristics of the behaviour of the respondent, where breaches of obligations are egregious and mere compensation is considered insufficient to 'punish' such wrongdoing or to act as a deterrent for parties to continue with that behaviour. Second, they may be viewed as justified by broader public interests, where the behaviour may be systemic or affect a number of parties, and compensation for the losses suffered by an individual claimant is not considered to be sufficient to reflect the broader social impact of the behaviour. Third, they may serve to justify an award of damages in cases in which the conduct of the respondent is viewed as wrongful, but the claimant has not suffered any actionable loss which would lead to an award of compensatory damages. In each case, the quantification of damages is not limited to analysis of the loss suffered by the injured party, but must also include analysis of the character and effects of the wrongful conduct which caused the loss. The debate between these different conceptions of private law is a continuing feature of many legal systems, and the contested issue of punitive damages is a reflection of these fundamental and foundational questions.

2. Punitive damages in UK private law

The treatment of punitive damages is different in English and Scottish law, and each is examined separately below.

2.1. *Punitive damages in English private law*

It has long been the case that punitive (or 'exemplary') damages are not available in contract claims in English law.[4] This was reaffirmed by the House of Lords in *Johnson v Unisys*

[4] See eg *Addis v Gramophone Co* [1909] AC 488.

Ltd (2001).[5] This position has been subject to some academic criticism,[6] but remains the current law. This should, importantly, be distinguished from the question of whether a contract may itself expressly provide for 'penalty' damages for its breach – that is, damages which are not based on a calculation of the loss caused by the breach. While English law has long been sceptical of such a possibility, the most recent authority suggests that penalty damages clauses are permissible provided they protect a legitimate interest and are not extravagant, unconscionable, or 'out of all proportion'.[7] Thus, for example, the courts have held that a private car park operator may impose contractually agreed 'fines' for cars which exceed time limits, as this protects their legitimate interest in managing the usage of the car park.[8]

Historically, the position of punitive damages in English tort law was relatively unclear. Although there had long been cases in which the courts awarded what appeared to be non-compensatory damages, the principles underlying the award of such damages were in general not clearly defined, with various different justifications potentially drawn upon. In the case of *Wilkes v Wood* (1763),[9] for example, government agents acting under an unlawful warrant damaged and seized property owned by Wilkes, who sued for trespass and was awarded exemplary damages. In instructing the jury, the judge was reported to have said:

> a jury have it in their power to give damages for more than the injury received. Damages 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.[10]

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[5] [2001] UKHL 13.

[6] James Edelman, 'Exemplary Damages for Breach of Contract' (2001) 117 LQR 539; *McGregor on Damages* (n 1) para 13-016.

[7] *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, [32].

[8] ibid

[9] (1763) 98 ER 489. See further discussion in James Edelman, 'In Defence of Exemplary Damages', in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2008).

[10] ibid 498-9.

Some of the justifications for punitive damages which were discussed above are clearly evident here, particularly their role in offering punishment and deterrence. The decision was also arguably influenced by its public implications – counsel for the claimant argued that this was a case that 'touched the liberty of every subject of this country', [11] and the Solicitor-General in protesting against the claim for punitive damages argued that it was 'the first time he ever knew a private action represented as the cause of all the good people of England'. [12] A closely related case, *Huckle v Money* (1763), [13] which was brought pursuant to the same illegal warrant, awarded exemplary damages to a party who had been wrongly detained but had been treated 'with beefsteaks and beer, so that he suffered very little or no damages'. [14] On appeal the court noted 'the small injury done to the plaintiff', but observed that this:

> did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom ... These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. [15]

Aside from emphasising again the public interest in the award of damages in the case, this suggests a further justification for punitive damages, also as noted above, in providing for damages in the absence of compensable loss.

The basis for the modern English law on the award of exemplary damages was established in the House of Lords decision of *Rookes v Barnard (No. 1)* (1964). [16] Lord Devlin began by noting that it could be considered that the award of exemplary damages 'confuses the civil and criminal functions of

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[11] ibid 490.

[12] ibid 493.

[13] (1763) 95 ER 768.

[14] ibid 768. The judgment did not note any effect on the claimant's cholesterol level.

[15] ibid 769.

[16] [1964] AC 1129.

the law'. [17] He held that there were two contexts in which such damages did serve a legitimate function, and should be available (but as a matter of judicial discretion): first, where the case concerns 'oppressive, arbitrary or unconstitutional' exercises of power by a public official (a situation perhaps hybridising concerns of public and private law, but exemplified by the case examples discussed above); and second, where the defendant has deliberately profited from his wrongdoing in a way which exceeds the loss suffered by the claimant, and exemplary damages could be used where 'it is necessary to teach a wrongdoer that tort does not pay'. [18] (In modern English law this may be similar to 'restitutionary damages' or an 'account of profits', which are further recognised categories of remedy focused on reversing the unjust enrichment of the defendant.) Aside from these two contexts, Lord Devlin held that the common law should not provide for the award of exemplary damages. As Lord Devlin recognised, it is also evidently open to parliament to provide for exemplary damages by statute, although in practice this is relatively rare. [19]

Some earlier cases in which apparently 'exemplary' damages had been awarded were reclassified by Lord Devlin as cases dealing with 'aggravated' damages, in which the claimant is considered to have suffered additional loss as a consequence of the malice or other conduct of the defendant (including harm to reputation, mental distress, and injury to feelings). Compensation for aggravated damages was viewed as consistent with principle, and remains part of English law. [20] This was, however, carefully distinguished from exemplary or punitive damages which are non-compensatory.

Although Lord Devlin's decision was the subject of critical

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[17] ibid 1221.

[18] ibid 1227.

[19] One (somewhat controversial) example is under the Crime and Courts Act 2013, s 34, which provides for exemplary damages in certain circumstances to be awarded where claims are brought against publishers of news-related material (media organisations) who are not members of 'voluntary' regulatory schemes, as a means of incentivising publishers to participate in such schemes.

[20] For further analysis of this distinction, and an argument that exemplary damages should be abolished because they are contrary to principle, see Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 Oxford J L Studies 87.

commentary by the Court of Appeal in *Broome v Cassell and Co Ltd* (1971),[21] this decision was overturned and the approach set out by Lord Devlin was reaffirmed by the House of Lords in 1972.[22] The general rejection of exemplary damages, except in the limited categories identified by Lord Devlin, was justified again on the basis that it would be 'confusing the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent and punitive penalties'.[23] It was a particular concern to the Lords that punitive civil damages could be awarded without the safeguards and the burden of proof provided by the criminal law.

The effect of these decisions was that exemplary damages were limited to the two categories of cases set out by Lord Devlin (except as provided for by statute). In *AB v South West Water Services Ltd* (1993),[24] the Court of Appeal took the view that there were in fact two limitations – first, the limitation of categories noted above, and second, that punitive damages could be awarded only for causes of action (types of tort) in which punitive damages had been awarded prior to *Rookes v Barnard* (the 'cause of action' test, which was also derived from the House of Lords decision in *Broome v Cassell*). The Court reached these conclusions somewhat reluctantly, however, expressing the concern that these limitations prevented the principled development of the law to provide for exemplary damages in other cases. Perhaps in consequence, the Law Commission (an independent statutory body devoted to law reform) examined the issue as part of a detailed Aggravated, Exemplary and Restitutionary Damages Report, published in 1997.[25] The conclusion of the Law Commission was essentially that exemplary damages served a legitimate purpose, and they should not be limited to the two specific categories approved by Lord Devlin in *Rookes v Barnard*, although they should be 'an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the

[21] [1971] 2 QB 354.
[22] [1972] AC 1027.
[23] ibid 1086C-D.
[24] [1993] QB 507.
[25] Available at <www.lawcom.gov.uk/project/aggravated-exemplary-and-restitutionary-damages/>.

law'.[26] The Law Commission proposed that the 'cause of action' limitation should similarly be abolished – that a statute should be adopted under which exemplary damages should be generally available for any tort, equitable wrong, or breach of statutory duty (if consistent with the policy of the statute), provided that 'an award should be made only if the defendant's conduct showed a deliberate and outrageous disregard of the plaintiff's rights and the other remedies awarded would be inadequate to punish the defendant for his conduct'.[27]

Although no such statute was adopted, the practice of the courts was influenced (and perhaps emboldened) by the findings of the Law Commission. In *Kuddus v Chief Constable of Leicestershire* (2002),[28] the House of Lords held that the 'cause of action' limitation was not in fact part of the law – that the situations in which exemplary damages could be awarded should not be considered to be limited to the specific causes of action identified by Lord Devlin in *Rookes v Barnard*, in which such damages had been awarded prior to 1964.

According to the authors of *McGregor on Damages*:

> [I]t can confidently be said that today exemplary awards are possible across the whole range of tort. Provided always that there is unacceptable behaviour on the part of the defendant, behaviour that displays features which merit punishment by way of malice, fraud, cruelty, insolence and the like, behaviour referred to, where it is the conduct of government servants that is in issue, as oppressive, arbitrary or unconstitutional, there is no tort where a claim for exemplary damages will not be permitted [...] [A]ll torts, or more precisely all torts which may contain a wilful element, are now up for consideration in the exemplary stakes.[29]

If this is intended to claim that the law goes beyond the two categories of cases identified by Lord Devlin (oppressive exercises of public power, and seeking to profit from wrongdoing), then it is unclear if it accurately reflects the authorities – it

[26] At para 1.17.
[27] ibid para 1.20.
[28] [2002] 2 AC 122.
[29] *McGregor on Damages* (n 1) para 13-011.

may be better read as reflecting the distinct claim that exemplary damages are possible for all tortious causes of action, where the claim falls within the recognised categories. The views expressed in *McGregor on Damages* are, however, a more accurate reflection of the approach in other common law jurisdictions such as Canada, [30] Australia, [31] and New Zealand, [32] which have expanded the circumstances in which exemplary damages can be awarded to all torts involving egregious wrongdoing.

In England, by contrast, it is probably still the case that the award of exemplary damages must fall under one of the two categories of cases identified by Lord Devlin (setting aside exemplary damages provided for by statute, which is a distinct situation). [33] It is sometimes questioned whether either remains a necessary part of the law – the first because of the development of public law judicial review (which provides alternative means of ensuring that government officials comply with the limitations on their powers), and the second because of the development of the law of unjust enrichment (which may provide an alternative means of recovering a wrongfully obtained profit). [34] It is important to note, however, that damages in judicial review cases remains an exceptional remedy, [35] and the award of punitive damages where the defendant has sought to profit from

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[30] *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) (SCC); see also eg *Whiten v Pilot Insurance Co* [2002] SCC 18; *Fidler v Sun Life Assurance Co of Canada* [2006] SCC 30, at para 61 ('While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, punitive damages are designed to address the purposes of retribution, deterrence and denunciation'). These authorities also establish that in Canada punitive damages are exceptionally available in contract claims.

[31] *Uren v John Fairfax & Sons Pty Ltd* [1967] ALR 25; see also eg *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12, at para 10 ('it is now beyond argument that, by the law of this country, it is proper to award exemplary damages by way of punishment of the tortfeasor').

[32] *Taylor v Beere* [1982] 1 NZLR 81.

[33] For examples see *McGregor on Damages* (n 447) para 13-018 (claims against government officials for oppressive, arbitrary or unconstitutional conduct) and para 13-022 (claims in which the defendant has profited from wrongdoing).

[34] See eg *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, per Lord Scott, at paras 107-109.

[35] See generally <https://www.lawcom.gov.uk/project/administrative-redress-public-bodies-and-the-citizen/>.

wrongdoing does not require actual profit, so in some cases (such as where the wrong was discovered before profit could ensue) punitive damages might still have a distinctive role to play as a deterrent.[36]

In general, it may be observed that the stated practice of the English courts remains cautious.[37] In *Watkins v Secretary of State for the Home Department* (2006),[38] Lord Bingham emphasised that 'the policy of the law is not in general to encourage the award of exemplary damages',[39] and they remain discretionary. However, recent empirical analysis of the practice of the English courts (between 2000 and 2015) suggests that punitive damages are in fact not uncommonly awarded – in approximately 40% of the successful cases in which they were sought[40] – although that may also reflect a cautious approach from claimant lawyers. The study also notably observed that, contrary to popular perception, punitive damages were not commonly awarded in defamation cases.

2.2. *Punitive damages in Scottish private law*

The position in Scots law is rather more straightforward. Scots law does not countenance punitive or exemplary damages.[41] Such damages were long ago rejected in *Black v North British Railway Co* (1908),[42] a case in which the claimants argued that they should be entitled to additional damages if they were able to show that the respondent's actions constituted 'gross negligence'. This claim was rejected on the basis that the idea of damages as punishment was 'absurd' and '[t]he very heading under which it is treated in our older books 'Reparation'

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[36] See eg *Axa Insurance UK Plc v Financial Claims Solutions Ltd* [2018] EWCA Civ 1330.

[37] See eg ibid, para 25 .

[38] [2006] UKHL 17.

[39] At para 26.

[40] James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 Oxford JL Studies 90.

[41] The position under Scots law with regard to penalty damages clauses in contract is, however, the same as that under English law, discussed above – see *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, para 215 *et seq*.

[42] 1908 SC 444

excludes the idea'. [43] More recently, in the House of Lords decision in *Watkins v Secretary of State for the Home Department* (2006) [44] (an English law case noted above), Lord Hope took the opportunity to describe what the equivalent position would be under Scots law. He described exemplary damages under Scots law as 'contrary to principle', further stating that:

> The function of the law of delict in Scotland is to ensure that if loss is caused by another person's wrongful act the loss will be compensated. The wrongful act of a public officer gives rise to an obligation in delict. The obligation arising from his wrongful act is to make reparation for loss, injury or damage suffered. Reparation is achieved either by restoring to the other party what he has lost or, where that cannot be done, by giving the like value, or that which is nearest, to make up the damage (...) The loss suffered is the basis for the assessment of damages. It is not the function of the law of delict to exact anything more, and certainly not anything by way of punishment. If no loss has been suffered, the wrongful act will not give rise to any liability. [45]

The possibility of a change in this position cannot be ruled out, but at present Scots law does not therefore appear open to the award of punitive damages.

3. PUNITIVE DAMAGES IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The rules governing the recognition and enforcement of judgments in the UK are a combination of EU law (for judgments from other Member States) and the common law (for judgments from non-EU Member States). [46] This chapter focu-

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[43] At 453–454, per Lord President Dunedin.

[44] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17.

[45] At para 31, citation omitted.

[46] The Lugano Convention also applies for European Free Trade Association states (except Liechtenstein), and is essentially equivalent in effect to the Council Regulation (EC) No 44/2001 of 20 December 2000 on jurisdiction and

ses exclusively on the common law rules.[47] These are slightly different in England and Scotland, but not in a way which affects the analysis in this section. There are also two UK statutes affecting the recognition and enforcement of judgments from particular states,[48] which again do not affect the analysis in this section and are not discussed further in this chapter.

Under English and Scottish common law, there is no specific rule providing that a judgment which includes punitive damages is not enforceable. However, there are two rules which might affect the enforceability of such judgments. First, a foreign judgment for a 'penalty' is not enforceable. Second, a foreign judgment may be refused enforcement where it is contrary to public policy.

3.1. *Judgments for a 'penalty'*

At least since *Huntington v Attrill* (1893),[49] it has been established that the English and Scottish courts will not enforce certain foreign judgments which provide for a 'penalty'. This rule is typically applied to exclude enforcement of a fine which is payable to the state, in the context of criminal or administrative law. Judgments for the payment of tax are similarly excluded from recognition and enforcement. Such judgments are not considered to fall within the scope of common law rules on recognition and enforcement, which are limited to private law judgments. A distinction is thus drawn between 'a suit for

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the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1, although without the additional streamlining introduced in its most recent version, the European Parliament and Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation) [2012] OJ L351/1).

[47] The practice of the courts under the Brussels I Regulation is, however, unlikely to be significantly different from that under the common law (as analysed below), particularly as the Regulation is limited to civil and commercial matters (which excludes public law penalty damages) and allows for the refusal to enforce a judgment on the basis of public policy. It is possible, however, that public policy may be somewhat constrained by obligations of mutual trust which arise in the context of the EU: see further eg Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 JPIL 201.

[48] Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933.

[49] *Huntington v Attrill* [1893] AC 150.

penalty by a private individual in his own interest, and a suit brought by the government or people of a state for the vindication of public law'. [50] It is the underlying purpose rather than the form of the cause of action which is decisive. A civil claim for defaulting under a bond would, for example, be viewed as a matter relating to the enforcement of public law if it arose in the context of a bond given by a defendant in exchange for bail in criminal proceedings. [51] In *Huntington v Attrill*, the case concerned a New York judgment applying a 'punitive' rule under which company directors had been held to be personally liable to creditors where the company had failed to meet certain statutory regulations. The judgment was considered to be enforceable. If a judgment contains both a payment to the state and a payment to a private party (as in those legal systems in which a civil claim may be attached to criminal proceedings), the private aspect of the judgment may be severed and enforced. [52]

Although punitive damages are payable to a private party and not the state, it has at times been questioned whether they might nevertheless fall within the definition of penalty damages, because of their non-compensatory character. In *Huntington v Attrill*, one basis for the decision of the court (that the award was enforceable) was that the damages payable were 'protective and remedial'. [53] As noted above, the case did not concern an award of punitive damages, but rather a 'punitive' rule under which company directors became personally liable for the debts of the company. The decision thus did not directly concern the question of whether a foreign judgment may be unenforceable where punitive private law damages have been awarded – but it raises the question of whether punitive damages awarded to serve a broader (non-remedial) public purpose might fall within the penalty exclusion. In English law, for example, one of the well-established categories of situations in which punitive damages may be awarded is the case of excesses of power by a public official, as discussed further above – although this concerns damages payable by the state rather than to the state, they nevertheless serve a public purpose in defending civil liberties. The

[50] ibid, at 161.
[51] *United States of America v Inkley* [1989] QB 255.
[52] *Raulin v Fischer* [1911] 2 KB 93.
[53] ibid 159.

generally accepted position is, however, that punitive damages awards payable to a private party do not fall within the scope of the 'penalty' judgments exclusion. [54]

One possible reason to doubt this position comes from the special treatment of a foreign judgment in which the amount of damages awarded has been calculated through a process of multiplication (typically, 'treble damages') because of an egregious breach of law. Older English authority (outside the context of private international law) had taken the view that such damages awards should be viewed as a penalty, [55] and there were suggestions that this approach should be extended to the context of the recognition and enforcement of foreign judgments, to exclude their enforcement. [56] This outcome (if not necessarily this analysis) was confirmed through the adoption of a statute, the Protection of Trading Interests Act 1980. The Act precludes enforcement of any foreign judgment 'for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given'. [57] In *British Airways Board v Laker Airways Ltd* (1984), [58] a case applying the Act, it was described as reflecting the common law characterisation of such damages as 'penal' and thus unenforceable. [59] There is also Australian authority which supports the idea that a foreign multiplied damages award should be viewed as a penalty and thus unenforceable. [60] In the Scottish decision of *Service Temps Inc v Ma-*

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[54] See eg *Cheshire, North and Fawcett*'s *Private International Law* (15th edn, OUP 2017), at 552 ('A penalty in this sense normally means a sum payable to the state, and not to a private claimant'). See also *SA Consortium General Textile v Sun and Sand Agencies Ltd* [1978] 1 QB 279, discussed further below, in which the court also took the view that a penalty was an amount payable to the state rather than the defendant.

[55] *Jones v Jones* (1889) 12 QBD 425.

[56] *Rio Tinto Zinc v Westinghouse Electric Corporation* [1978] AC 547 at 589G-590H.

[57] Protection of Trading Interests Act 1980, s 5(3).

[58] [1984] QB 142.

[59] ibid 163.

[60] *Schnabel v Lui* [2002] NSWSC 15 (New South Wales, Australia). In this case it may have been significant, however, that the multiple damages were awarded because the defendant had failed to comply with orders made by the foreign court, not because of the egregiousness of the defendant's wrongdoing to the claimant.

cLeod (2013),[61] however, it was suggested that in the absence of the Act an award of multiple damages would have been contrary to public policy, an alternative doctrine discussed below.[62]

It is unclear what effect the existence of this statutory rule has on the broader question of whether foreign punitive damages awards are unenforceable under the common law through the 'penalty' judgments exclusion. The context in which the Act was adopted was the award of treble damages in US competition (antitrust) law cases, and it might be considered that the quasi-public context of such awards (essentially serving a public regulatory purpose which is in many legal systems pursued through criminal or administrative law)[63] brought them particularly within the scope of the rule, although the Act is not limited to competition law judgments. The better view is probably that the enforceability of foreign punitive judgments should be determined through the application of the more flexible public policy exception, discussed below.[64] The Act may indeed be better viewed not as codifying a common law conception of 'penalty' damages, but rather as codifying a rule that multiplied damages are contrary to public policy (perhaps because of their lack of attentiveness to the circumstances of each individual case), which leaves open the question of whether or when other punitive damages awards may be similarly contrary to public policy.

On the other hand, the Act is in one important way distinctive from either such characterisation, and may simply be best viewed on its own terms. Under the Act, if a compensatory amount of damages is trebled in a foreign judgment, the entire amount (including the compensatory component) becomes unenforceable[65] – this is different from the effect of finding that

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[61] [2013] CSOH 162.

[62] ibid paras 39-41.

[63] See similarly eg *United States of America v Inkley* [1989] QB 255 at 266.

[64] See eg *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell 2012), para 14-022.

[65] The point is at least presumed in *Lewis v Eliades* [2003] EWCA Civ 1758, and appears to be most consistent with the text and the policy of the legislation. If, however, a judgment includes a component which is multiplied and a component which is not, the non-multiplied component may still be enforced, as was the case in *Lewis v Eliades*.

a punitive component of a damages award is either a penalty or contrary to public policy, as discussed above and below, which leads only to the severing of the punitive component of the award. This reflects the fact that the Act is intended to have more than a negative blocking effect, but to reflect a policy of hostility to the foreign practice of multiplication of damages awards. The effect of this approach should be to dissuade foreign claimants from seeking multiple damages awards at all, if a judgment once obtained may require enforcement in the UK.

3.2. *Public policy*

Aside from the special issue of multiple damages discussed above, the question of whether a foreign judgment awarding punitive damages may be contrary to public policy, and if so under what circumstances, is not clearly determined in either English and Scottish law. The case law on the point is very limited and does not establish clear principles. Any decision as to whether a foreign judgment is contrary to public policy would also take into account a range of other factors, such as the proximity of the dispute to the forum. [66]

The case most commonly cited [67] as authority in support of the proposition that foreign judgments awarding punitive damages are not contrary to public policy is *SA Consortium General Textile v Sun and Sand Agencies Ltd* (1978). [68] In this case the French courts had awarded additional damages because the defendant was considered to have committed 'résistance abusive' – the unreasonable failure to pay an obviously meritorious claim. The Court of Appeal of England and Wales was unanimous in determining that this award of damages did not constitute a 'penalty' for the purposes of the prohibition on the enforcement of such foreign judgments (as discussed above). The court also unanimously determined that the award of additional damages was in fact compensatory – it was designed to recompense the claimant for the unnecessary costs incurred in bringing the pro-

[66] See eg Mills (n 47) 201.

[67] See eg *Cheshire, North and Fawcett's Private International Law* (15th edn, OUP 2017), at 575; *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), at para 14-157.

[68] [1978] 1 QB 279.

ceedings, the equivalent in English law of an adverse costs order (or perhaps an award of aggravated damages). In addition, however, Lord Denning observed (obiter) that enforcement of a claim for exemplary damages would not be contrary to English public policy.[69] This decision is thus relatively weak authority for the proposition that foreign punitive damages awards are not contrary to public policy, although this weakness is not always duly acknowledged when the case is cited in support of this view. The issue was discussed again in *Lewis v Eliades* (2003),[70] a case applying the Protection of Trading Interests Act 1980 (discussed above), but the point was not decided. In *Whyte v Whyte* (2005),[71] it appears to have been assumed (again without clearly deciding) that a punitive damages award, which formed part of a judgment obtained by one parent against the other in the context of a bitter custody dispute before the Texas courts, was enforceable.

There is some authority which might be considered to suggest, contrary to these cases, that foreign punitive damages are or may be contrary to English public policy. A perhaps analogous issue arises in the context of the award of an anti-suit injunction – an order restraining the commencement or continuation of foreign proceedings. Where the court is considering making such an order, one factor which is taken into account is whether the foreign proceedings are 'oppressive', and it has been held that the availability of punitive damages in the foreign court may be a factor taken into account in making this determination.[72] This at least suggests that the award of punitive damages may not be consonant with English standards of justice. These decisions do not, however, necessarily suggest that *any* award of punitive damages would be 'oppressive' or contrary to English policy, and it may be that the courts are merely acknowledging the *possibility* that such damages could be oppressive if, for example, they were excessive (as discussed further below).

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[69] ibid 299H-300B.

[70] [2003] EWCA Civ 1758.

[71] [2005] EWCA Civ 858.

[72] See eg *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL); *Donohue v Armco Inc* [2001] UKHL 64; *Royal Bank of Scotland Plc v Hicks* [2011] EWHC 287 (Ch).

The fact that the English courts are themselves prepared to award punitive damages in some circumstances, as analysed earlier in this chapter, is perhaps the strongest authority for the proposition that a foreign punitive damages award is not necessarily contrary to English public policy. It must be noted, however, that there is a surprising lack of case law under which the developing role for exemplary damages under English domestic law has been considered to influence English public policy when it comes to the enforcement of foreign damages awards providing for such damages. The argument for such an influence is unimpeachable, and it may simply be that the right cases to address this issue have not yet arisen. Perhaps the most difficult case would be one in which a foreign court awarded punitive damages in a situation which did not fall within the existing categories in which such damages may be awarded in the English courts (as discussed above). The courts would then have to determine whether the award of such damages outside the English categories was contrary to public policy – in other words, whether the limits on the categories in which punitive damages may be awarded under English law are merely a matter on which different legal systems may adopt different approaches, or a matter of fundamental principle. Given the more expansive approach of other common law jurisdictions, as noted earlier in this chapter, it would be difficult to justify the latter approach.

The expected influence of domestic law on domestic public policy would also suggest that the Scottish courts are likely to be more wary of enforcing foreign punitive damages awards, because (as also addressed earlier in this chapter) they do not award such damages themselves. It might also be expected that both the English and Scottish courts would be more likely to find that a foreign award of punitive damages in a contractual claim [73] would be contrary to public policy, given their own entrenched unwillingness to award punitive damages in such cases.

Dicey, Morris and Collins concludes on this issue with the statement that:

[73] As is possible in, for example, Canada – see *Whiten v Pilot Insurance Co* [2002] SCC 18; *Fidler v Sun Life Assurance Co of Canada* [2006] SCC 30.

> The question whether enforcement of a judgment may be refused on grounds of public policy when the judgment is for exemplary, punitive, or manifestly excessive damages remains undecided. [74]

However, it further notes that:

> In the English context it is arguable that to enforce a judgment for a sum which is manifestly excessive, when measured against what an English court would have awarded by way of compensation, would be contrary to the European Convention on Human Rights. [75]

It is accepted in UK law that the European Convention on Human Rights is a source of domestic public policy, although when considering the impact of the ECHR on the enforcement of a foreign judgment from a non-Convention state it has been held that only a 'flagrant' breach should suffice, as applying the ECHR strictly would give it unwarranted extraterritorial effect. [76] The European Court of Human Rights has determined that civil damages awards must accord with the principle of proportionality, holding for example that in an English defamation case 'an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered'. [77] The most recent English case law appears to offer some further support for this approach – in *JSC VTB v Skurikhin* (2014), [78] for example, the court considered it 'at least arguable that the award of a "manifestly excessive" rate of interest [as part of a foreign judgment] would run contrary to ... English law public policy'. [79] Under English law, in the calculation of punitive damages one of the factors taken into account is similarly a requirement that the award of damages be 'moderate', [80]

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[74] *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell 2012), para 14-157.

[75] ibid para 14-157.

[76] See eg *USA v Montgomery (No 2)* [2004] UKHL 37.

[77] *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 at para 49.

[78] [2014] EWHC 271 (Comm).

[79] ibid para 42.

[80] *McGregor on Damages* (n 1) para 13-034.

alongside a requirement that the award reflect the conduct of the parties. [81] The better view is therefore that, at least in tort claims, a foreign judgment for punitive damages is not *necessarily* contrary to English public policy (although it may be contrary to Scottish public policy), but an award of damages which is manifestly excessive or disproportionate will be and thus will not be enforced by the English (or Scottish) courts. [82] It was noted above that if a judgment contains both a payment to the state and a payment to a private party (as in those legal systems in which a civil claim may be attached to criminal proceedings), the private aspect of the judgment may be severed and enforced – it is highly likely that the same principle would be adopted in the context of punitive damages, and thus the compensatory part of an award also containing excessive punitive damages would in any case remain enforceable. Indeed, if it is possible to sever the excessive punitive damages award from a non-excessive component of punitive damages, there does not seem to be any reason why the non-excessive component should not be enforced, provided it is not otherwise contrary to public policy.

4. PUNITIVE DAMAGES IN THE APPLICATION OF FOREIGN LAW

The question of the compatibility of punitive damages with English or Scottish public policy could arise in another private international law context. Choice of law rules could provide for the application of a foreign law under which such damages are awarded, and this may raise the question of whether the application of that law should be refused on the basis that the foreign law is contrary to public policy. There are two distinct issues here which will be considered in turn – first, whether a foreign damages rule will be applicable as part of the choice of law process, and second, if so, whether and in what circumstances it might be considered to be contrary to public policy to apply that rule.

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[81] *McGregor on Damages* (n 1) para 13-039.

[82] A similar approach would likely apply to cases in which damages were determined arbitrarily or at least not in accordance with recognised principles – the courts have tended to analyse this as a case involving procedural unfairness rather than a breach of public policy, but to the same effect. See eg *Adams v Cape Industries* [1990] Ch 433.

4.1. *The substance/procedure distinction*

For this issue to arise, a prerequisite is that the English or Scottish courts must take the view that they are (subject to the public policy considerations discussed below) obliged to apply the foreign rule providing for punitive damages, rather than forum law on damages – in other words, they must view the provision of punitive damages as a matter of substance rather than procedure (as a court always applies its own procedural law). The approach to the substance/procedure distinction under EU choice of law rules is different than that traditionally followed under the common law.

For claims in contract covered by the Rome I Regulation (or its predecessor, the Rome Convention), the substantive law governing the contract also regulates 'the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law'. [83] For claims in tort covered by the Rome II Regulation, the substantive applicable law governs 'the existence, the nature and the assessment of damage or the remedy claimed'. [84] It is difficult to see any argument why under these Regulations the substantive applicable law would not govern the question of whether punitive damages are available, and if so, how such damages should be calculated. An underlying purpose of these Regulations is to maximise the consistent resolution of disputes between the courts of different EU Member States, and thus the definition of what is covered by the substantive applicable law is likely to be interpreted expansively. It has, for example, been held that the substantive applicable law even includes soft law guidelines on the calculation of damages. [85] If the substantive law is taken to encompass rules governing punitive damages awards – as it surely must be [86] – this means that courts applying foreign law pursuant to the

[83] Article 12(1)(c), Rome I Regulation 2008 (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008).

[84] Article 15(c), Rome II Regulation 2007 (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007).

[85] *Wall v Mutuelle De Poitiers Assurances* [2014] EWCA Civ 138.

[86] Recital 32 of the Rome II Regulation, discussed further below, implicitly provides additional support for this view.

Rome I or Rome II Regulations must also apply foreign punitive damages rules, which then raises the question of whether applying such rules would be contrary to forum public policy.

The position under UK national choice of law rules is more uncertain.[87] Prior to 1996, choice of law in tort in the UK was governed by the double-actionability rule, under which a claim could (generally)[88] only be brought where it was actionable under both the law of the place of the tort and under forum (English or Scottish) law.[89] This choice of law rule continues to apply to defamation claims, largely because it has been difficult to shape a replacement which takes account of the unique policy considerations involved in a tort which engages both private rights and the public interest in free speech as part of a functioning democracy.[90] In practice, the application of the double-actionability rule meant that there was little need for consideration of whether the law of the place of the tort was compatible with local public policy – a claim would (absent exceptional circumstances)[91] only be possible where it was actionable under forum law, which automatically excluded claims that would be contrary to forum policy. Under the Private International Law (Miscellaneous Provisions) Act 1995, however, this rule was replaced (for all torts apart from defamation) with a *lex loci delicti* (law of the place of the tort) rule with a flexible exception, raising the possibility that foreign law would exclusively govern a claim in tort and thus its compatibility with public policy would

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[87] It may be noted that the Rome II Regulation excludes from its scope 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation' (Article 1(2)(g)), and it only applies where the event giving rise to damage occurred after 11 January 2009 (Case C-412/10 *Homawoo v GMF Assurances* ECLI:EU:C:2011:747).

[88] It was held in *Boys v Chaplin* [1971] AC 356 that the rule was subject to a flexible exception in favour of the exclusive application of the law of the forum.

[89] *Phillips v Eyre* (1870) LR 6 QB 1.

[90] See further eg Alex Mills, 'The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?' (2015) 7 J Media L 1.

[91] The Privy Council held, in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, that the flexible exception could operate in favour of the exclusive application of the law of the place of the tort. Given the discretionary character of this exception, it is in practice unlikely that the courts would apply it in favour of the exclusive application of a foreign law which would raise public policy concerns.

need to be determined. This issue would only arise, however, to the extent that a particular rule was a matter of substance (governed by foreign law) rather than procedure (governed by forum law).

Traditionally a distinction was drawn in the common law between the quantification of damages and the availability of 'heads' of damages. The question of quantification was viewed as a matter of procedure, and thus always governed by the law of the forum, while the availability of different categories of damages was viewed as a matter of substance, and thus potentially governed by foreign law. This distinction was preserved under the Private International Law (Miscellaneous Provisions) Act 1995.[92] In practice this distinction meant, for example, that if a tort claim was governed by foreign law, and this law did not provide for damages for pain and suffering, then such damages would not be recoverable in English (or Scottish) courts.[93]

It is, however, not entirely clear under this distinction whether punitive damages should be viewed as a separate head of damages (which would mean that their availability may be governed by foreign law) or as a matter of quantification of damages (which would mean that their availability is a matter of forum law). The former approach, which appears the more likely (and has some academic support[94] and the support of authority from Australia[95]), raises the possibility that under the 1995 Act the English and Scottish courts would also need to consider the compatibility of a foreign law providing for punitive damages with forum public policy. However, even if this approach were adopted, the *quantification* of punitive damages would still be left for the forum under the common law. Thus the only question for review would be whether the availability of a *category* of punitive damages was contrary to public policy, not whether the *amount* of punitive damages was contrary to public policy (because this latter question would be governed by forum law). As discussed below, it would be difficult to argue

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[92] *Harding v Wealands* [2007] 2 AC 1.

[93] *Boys v Chaplin* [1971] AC 356.

[94] Christopher GJ Morse, 'Torts in Private International Law' (1996) 45 ICLQ 888, at 895; *Cheshire, North and Fawcett*'s *Private International Law* (15th edn, OUP 2017), at 93.

[95] *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1.

that the category (rather than the quantum) of punitive damages is contrary to English public policy, at least in situations in which the English courts could award such damages themselves, although the same argument may not apply in Scotland given the distinct practice which has developed under Scots law. It should also be noted that the distinction between the category and quantum of damages may not be easy to apply in some cases. For example, a rule that provided for the award of treble damages for egregious breaches of tort law would appear to be both a category of damages and a formula for calculating their quantum, and 'unpacking' these two elements may not be straightforward. As noted above, under the Rome I and II Regulations this distinction is no longer relevant, as the quantification of damages is also a substantive matter potentially governed by foreign law. This means that the Rome I and II Regulations raise more clearly and directly the question of whether a foreign rule providing for punitive damages is contrary to the public policy of the forum.

4.2. *Public policy*

Assuming the issue of the compatibility of foreign punitive damages laws with forum public policy arises, as it does under the Rome I and II Regulations and probably also (at least to some extent) under the 1995 Act, the question is then what approach the courts will apply. There is very little authority on this question. The approach in practice is likely to be very similar to that analysed above in the context of the recognition and enforcement of foreign judgments which award punitive damages. As in the context of foreign judgments, any decision as to whether a foreign law is contrary to public policy would take into account a range of other factors, such as the proximity of the dispute to the forum. [96] The mere fact that foreign law would award punitive damages is not, however, in itself likely to be viewed as contrary to public policy in England (although could be so considered in Scotland), perhaps even if awarded in situations in which such damages would not be awarded by the English courts themselves (such as a tort case falling outside the rec-

[96] See eg Mills (n 47) 201.

ognised English categories as discussed above), with the potential exception of contractual claims. However, a foreign law which provided for multiple damages, or for excessive or disproportionate damages, would be very likely to be refused application by both the English or Scottish courts. The courts in such a case would potentially continue to apply the remaining foreign rules providing for damages (including both compensatory and potentially non-excessive punitive damages), or if that were not possible, fall back on forum law to calculate damages – which could again potentially (in England) include a non-excessive award of punitive damages. [97]

Further support for this approach may be found in recital 32 of the Rome II Regulation, which provides that:

> Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

There is a clear indication in this Recital that foreign laws under which punitive damages are awarded may be contrary to public policy if they are 'of an excessive nature'. It is less clear whether by implication the Recital is intended to preclude the possibility that the mere availability of punitive damages which are not excessive would be contrary to public policy, and if so, whether a community definition of 'excessive' is required to police the limits of national public policy. The issue is, however, ultimately left to 'the circumstances of the case and the legal order of the Member State of the court seised'. Given these qualifications and its limited legal status it is un-

[97] On the consequences of applying public policy, see ibid, p 208.

clear whether or to what extent the Recital will influence the practice of national courts.

5. CONCLUSIONS

The award of punitive damages is now recognised in English (but not Scottish) tort law, at least in certain categories of cases. Although there is limited case law on point, as a consequence it would be difficult if not impossible to argue that foreign judgments or foreign law which provide for punitive damages in tort claims should automatically be considered as contrary to English public policy or otherwise refused enforcement. The position in Scotland is, however, less clear, as is the position in relation to punitive damages in contractual claims. The better view under English law is that in tort cases at least only foreign judgments or foreign law which provide for manifestly excessive or disproportionate punitive damages should be refused enforcement. The statutory rule prohibiting the enforcement of foreign damages awards which include a punitive multiplication component may be considered a particular example of this categorisation, but it should also be viewed as exceptional because it provides that the compensatory component of the damages award is also unenforceable. Outside this special context (and the hostile policy pursued by the statutory regime), the better view is that the award of excessive punitive damages in a foreign judgment or the availability of excessive punitive damages under a foreign applicable law should not preclude the severing of the components of the judgment or foreign law, and thus the enforcement or award of compensatory (and perhaps even non-excessive punitive) damages. The law is, however, surprisingly unclear, and it would benefit from judicial clarification to ensure that the development of public policy in the private international law context adequately takes into consideration the evolution of the treatment of punitive damages in private law systems around the world, including particularly in English private law itself.

ABSTRACT

This chapter addresses the potential recognition of punitive damages in foreign judgments and in the application of foreign law in the courts of the United Kingdom. Before examining these

private international law questions, it analyses the position of punitive damages under domestic private law, noting that the availability of punitive damages is now well established in English (but not Scottish) tort law, at least in certain categories of cases. As a consequence it would be difficult if not impossible to argue that foreign judgments or foreign law which provide for punitive damages should automatically be considered as contrary to English public policy (but Scottish public policy may differ). Although there is limited case law on point, and some authority which suggests otherwise, the better view under English law is that only foreign judgments or foreign law which provide for manifestly excessive or disproportionate punitive damages should be refused enforcement. With the notable exception of the statutory rules governing foreign 'multiple' damages awards, such a refusal should ordinarily leave the compensatory and even non-excessive punitive components of the foreign judgment or foreign law capable (respectively) of enforcement or application

Chapter IX

RECOGNITION OF PUNITIVE DAMAGES IN ITALY

GIACOMO BIAGIONI *

Contents: 1. Preliminary remarks. – 2. Domestic law framework. – 3. Recognition of foreign judgments and punitive damages. – 4. The evolution in the case-law of the Italian Supreme Court. – 5. Analysis. – 5.1. The interpretation of the foreign judgment. – 5.1.1. Condemnation to punitive damages and other punitive or deterring measures. – 5.1.2. The determination of the punitive or deterring function of foreign civil liability measures. – 5.2. Compatibility with public policy. – 5.2.1. Public policy and protection of public values. – 5.2.2. The sources of public policy. – 5.3. Requirements for recognition of foreign judgments awarding punitive damages. – 5.3.1. Legality and predictability. – 5.3.2. Proportionality. – 6. Punitive damages as a possible outcome of the application of foreign law.

1. Preliminary remarks

It was not until recent years that the issue of punitive damages happened to be relevant before Italian courts. Nonetheless, Italian private international law scholars used to assume that such a legal institution, known only in a small number of foreign countries and alien to domestic tradition, was not incompatible with national legal categories. In particular, in the light of an assessment of the abstract features of the concept, punitive damages were characterised as a private penalty, insofar as they impose the duty to pay a certain amount of money to a private party, but are not aimed at redressing an incurred loss or suffering; rather, they serve the purpose of punishing the wrongdoer

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and preventing the repetition of the fact. [1] Moving from that assumption, it was argued that they were to be governed by the law applicable to non-contractual obligations [2] and were not incompatible as such with Italian public policy, [3] even if a case-by-case evaluation was always needed. [4]

However, in 2000 a seminal judgment of the Court of Appeal of Venice concerning recognition and enforcement of a United States judgment awarding punitive damages followed a different approach and held that the judgment could not be recognised, as it was in blatant conflict with *ordre public*.

The subsequent practice of Italian courts has not been significant in quantity. Nevertheless, it appears remarkable that within less than ten years the same view, initially shared by the Italian *Corte di Cassazione*, was essentially reversed, as a landmark decision was adopted by the Joint Chambers of the same Court in July 2017. The latter judgment provides the general framework in order to assess the compatibility of the doctrine of punitive damages with the Italian legal system. [5] For that reason, it aroused considerable attention by legal scholars, striving to draw conclusions concerning especially domestic law principles in matters of contractual and non-contractual liability. [6]

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[1] Giulio Ponzanelli, 'I *punitive damages* nell'esperienza nordamericana' [1983] Riv dir civ 435; Vincenzo Zeno Zencovich, 'Pena privata e *punitive damages* nei recenti orientamenti dottrinari americani' in Francesco D Busnelli and Gianguido Scalfi (eds), *Le pene private* (Giuffré 1985), 374.

[2] See Luigi Ferrari Bravo, *Responsabilità civile e diritto internazionale privato* (Jovene 1973) 61 and 152.

[3] Alberto Saravalle, 'I *punitive damages* nelle sentenze delle corti europee e dei tribunali arbitrali' [1993] RDIPP 867.

[4] See Ferrari Bravo (n 2) 253; Edoardo Vitta, *Diritto internazionale privato*, vol 3 (Utet 1975) 516.

[5] For a recent judgment referring to the same approach in the framework of the EU Regulation 1215/2012, see Tribunale di Siracusa, 5 December 2018 (unpublished).

[6] See, for instance, Francesca Benatti, 'Note sui danni punitivi in Italia: problemi e prospettive' [2017] Contr impr/ Eur 1129; Roberto Carleo, '*Punitive damages*: dal *common law* all'esperienza italiana' [2018] Contr impr/ Eur 259; Pier Giuseppe Monateri, 'Le Sezioni Unite e le molteplici funzioni della responsabilità civile' [2017] Nuova giur civ comm 1410; Gianluca Scarchillo, 'La natura polifunzionale della responsabilità civile: dai punitive damages ai risarcimenti punitivi. Origini, evoluzioni giurisprudenziali e prospettive di diritto comparato' [2018] Contr impr/ Eur 289, envisaging a cross-fertilization perspective based also on a supposedly deterrent function of art 41 ECHR.

However, the acceptance of foreign legal institutions should not be read necessarily as a general upheaval in the domestic legal system, but is rooted in the need for coordination between different legal orders in transnational cases, to be achieved through private international law mechanisms. [7] In that context, the judgment raises several issues, especially with regard to the notion of public policy and to its role and functioning in the recognition and enforcement of foreign judgments emanating from non-EU countries. The present contribution will be focused on discussing precisely those issues.

2. DOMESTIC LAW FRAMEWORK

In the Italian legal system the general rule concerning damages is enshrined in article 1223 of the Civil Code, which provides that damages can be awarded only insofar as they are direct and immediate consequence of the breach of a contractual or non-contractual obligation. Accordingly, the plaintiff is expected to be restored into the same position in which it would have been in the absence of the wrongful act. As an action for damages is deemed to pursue a merely compensatory function, in the context of the Italian Civil Code the concept of punitive or exemplary damages is unfamiliar. [8]

However, the plaintiff is entitled to claim compensation for different types of damages; in the Civil Code the two main categories of pecuniary and non-pecuniary damages are envisaged, both applicable either when a contractual obligation or a non-contractual obligation is breached. [9] When non-pecuniary dam-

[7] In the same vein, Massimo Franzoni, 'Quale danno punitivo?' [2017] Contr impr/ Eur 1109 ff; Giulio Ponzanelli, 'La decisione delle Sezioni Unite: cambierà qualcosa nel risarcimento del danno?' [2018] Riv dir civ 300 ff; Marco Lopez de Gonzalo, 'La Corte di Cassazione cambia orientamento sui *punitive damages*' [2017] Dir comm int 714, 720.

[8] For the peculiar case of a judgment of a court of first instance awarding punitive damages under Italian law, see Tribunale di Torre Annunziata, 24 February 2000, [2000] Danno e resp 1121.

[9] See Cass, Joint Chambers, 11 November 2008, no 26973, [2009] Foro it 120, and the adjoining commentaries [Alessandro Palmieri, 'La rifondazione del danno non patrimoniale, all'insegna della tipicità dell'interesse leso (con qualche attenuazione) e dell'unitarietà'; Roberto Pardolesi and Roberto Simone, 'Danno esistenziale (e sistema fragile): «die hard»'; Giulio Ponzanelli, 'Se-

ages are awarded, the plaintiff may expect to be compensated for any pain and suffering it may have incurred, if they concern its physical integrity, its moral sphere or its social life, provided that they exceed the mere discomfort or annoyance. [10] The principle calling for a comprehensive compensation of all the damages incurred is considered by the *Corte di Cassazione* as part of Italian public policy. [11]

In this connection, it is hardly questionable that some types of damages can be said to restore the plaintiff into its previous position only as a result of a legal fiction, especially when they are determined as a lump sum or are established by the court on the basis of an equity criterion. [12] Nonetheless, they are always linked to an actual loss or suffering experienced by the plaintiff and their amount is roughly proportional to the gravity of such a loss or suffering.

In addition, unlike in the legal system of the United States, the plaintiff is expected to recover its costs, according to the general rule, stated in article 91 of the Code of Civil Procedure, that the losing party will bear the costs of litigation; [13] again, the pursued function is merely compensatory. However, under article 96.3 of the same Code, as recently amended, a domestic

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zioni Unite: il «nuovo statuto» del danno non patrimoniale'; Emanuele Navarretta, 'Il valore della persona nei diritti inviolabili e la sostanza dei danni non patrimoniali'].

[10] The punitive nature of non-patrimonial damages under Italian law was suggested by some scholars: see Alfonso Di Majo, 'La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente' [2008] Europa dir priv 289; Giovanni Bonilini, *Il danno non patrimoniale* (Giuffré 1983) 272 ff.

[11] See Cass, 22 August 2013, no 19405, [2014] Foro it 2898: the Italian Supreme Court held that a foreign law not allowing for the compensation of moral damages is incompatible with Italian public policy.

[12] Art 1226 of the Italian Civil Code reads: 'if damages cannot be proved in their exact amount of the damage, they are equitably liquidated by the court' [excerpt from Mario Beltramo, Giovanni E Longo and John Henry Merryman (trs), *The Italian Civil code* (Oceana Publications 1969), 303].

[13] See, in contrast, for the notion of contingency fees in the US system, Dennis E Curtis and Judith Resnik, 'Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients' [1997] DePaul L. Rev. 425. On the connection between punitive damages and costs of the litigation, see Gerardo Broggini, 'Compatibilità di sentenze statunitensi di condanna al risarcimento di «punitive damages» con il diritto europeo della responsabilità civile' [1999] Europa dir priv 479; Elena D'Alessandro, 'Pronunce americane di condanna al pagamento di *punitive damages* e problemi di riconoscimento in Italia' [2007] Riv dir civ 383.

court will be allowed to award an equitable sum to one of the parties following the abuse of process by the other party, [14] regardless of whether the successful party incurred an actual damage or not. [15]

While this is the general framework, it is now widely accepted that special rules concerning damages and departing from the traditional function of civil liability exist in particular matters, in order to accommodate public interests or to grant enhanced protection of some parties (consumers, holders of intellectual property rights, etc.). However, in most cases those rules merely lead to the application of measures having mainly a preventive or dissuasive function or imposing to calculate damages as a lump sum without requiring a specific allegation of the loss incurred. Sometimes, administrative sanctions can also be put in place, in addition to ordinary civil remedies, in order to stress the disapproval towards the breach of some obligations; but it is quite uncommon that the Italian legal system can actually establish genuine private penalties [16].

3. RECOGNITION OF FOREIGN JUDGMENTS AND PUNITIVE DAMAGES

As explained, when Italian law is applicable, usually the courts will not be able to impose punitive damages on the wrongdoing party. For this reason, the currently existing case-law of Italian courts about punitive damages concerns recognition of foreign judgments which awarded such damages based

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[14] See Francesco Donato Busnelli and Elena D'Alessandro, 'L'enigmatico ultimo comma dell'art. 96 c.p.c.: responsabilità aggravata o "condanna punitiva"?' [2012] Danno e resp 584. The provision is interpreted in the sense that it allows the courts to award punitive damages for abuse of process by Franzoni (n 7) 1117.

[15] See Cass, Joint Chambers, 22 September 2018, no 22405, unpublished.

[16] In judgment no 16601/2017 the Joint Chambers of the *Corte di Cassazione* made up a very long list of measures in the field of civil liability, departing from the traditional compensatory function; however, only a small number of them seem to qualify as rules actually establishing private penalties, namely art 4 of the Legislative Decree 259/2006 and art 12 of the Law 47/1948. The latter is considered as exceptional by the case law of the same Court (see Cass, 12 December 2017, no 29640, unpublished). See, in a different vein about the use of punitive damages in the Italian legal system, Angelo Riccio, 'I danni punitivi non sono, dunque, in contrasto con l'ordine pubblico interno' [2009] Contr impr/ Eur 854.

on foreign law. As such judgments usually emanate from the courts of non-Member States of the European Union, domestic courts are expected to apply national rules on recognition and enforcement of foreign judgments, namely article 64 of the Italian Statute on Private International Law No 218/1995. [17] Article 64, while possibly setting an implicit prohibition on the review of foreign judgments as to their substance, [18] sets forth several grounds for non-recognition, [19] including a public policy clause. Like in many domestic legal orders, under Italian law the notion of public policy encompasses both *substantive* public policy and *procedural* public policy. [20]

The notion of "public policy" that comes into play in that context is obviously influenced both by fundamental principles of European Union law [21] and by principles stemming from international law, especially from those instruments having a particularly strong impact on the domestic legal system, such as the European Convention on Human Rights. [22] Moreover, in the interpretation of the notion Italian courts may take into account the

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[17] However, the rules contained in arts 796-801 of the Code of Civil Procedure were still applicable to the proceedings before the Court of Appeal of Venice in the first Italian case concerning punitive damages.

[18] See Stefania Bariatti, 'Artt. 64-68' [1995] RDIPP 1225; Nerina Boschiero, *Appunti sulla riforma del sistema italiano di diritto internazionale privato* (Giappichelli 1997) 158 f; Luigi Fumagalli, 'Riconoscimento di sentenze straniere' in Roberto Baratta (ed), *Diritto internazionale privato* (Giuffré 2010) 414; Paolo Picone, *La riforma italiana del diritto internazionale privato* (Cedam 1998) 120. See also, on the relationship between prohibition of the review of foreign judgments as to their substance and the grounds of non-recognition and non-enforcement envisaged by the Law 218/1995, Chiara E Tuo, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia* (Cedam 2012) 36 ff.

[19] For the use of 'exorbitant' heads of jurisdiction by US courts in awarding punitive damages, see Broggini (n 13) 490 ff.

[20] On the issue, see Francesco Salerno, 'L'ordine pubblico internazionale processuale e la tutela dei diritti fondamentali' in Pasquale Pirrone (ed), *Circolazione dei valori giuridici e tutela dei diritti e delle libertà fondamentali* (Giappichelli 2011) 121.

[21] Luigi Fumagalli, 'L'ordine pubblico nel sistema del diritto internazionale privato comunitario' [2004] Dir comm int 635; Bruno Nascimbene, 'Riconoscimento di sentenza straniera e ordine pubblico europeo' [2002] RDIPP 659; Ornella Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (Giuffré 2012) 350 ff, suggests that the so-called European public policy may co-exist with the public policy of the forum.

[22] See, among others, Lowrens R Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Springer 2014)

findings of the courts in other States, at least insofar as a general affinity between the respective legal systems exists. [23]

As noted above, the relevance of public policy considerations as to the recognition and enforcement of foreign judgments awarding punitive damages was clearly stated in the first Italian decision concerning the subject-matter in the light of the above summarised principles. [24] In that case the Court of Appeal of Venice had been requested recognition and enforcement of a U.S. judgment issued in a trial by jury and awarding the amount of USD 1,000,000 in a case concerning product liability. [25]

The domestic court held that two different but intertwined grounds of incompatibility of the foreign judgment with Italian public policy existed. On the one hand, the very nature of punitive damages, as a penalty to be awarded to a private party for the protection of public interests, was deemed to be in conflict with general principles of Italian law concerning civil liability. On the other hand, the lack of reasoning in the foreign judgment to be recognised, though not giving rise in itself to a conflict with public policy, prevented the Italian court from examining whether the amount awarded (or part of it) qualified as compensatory damages. In fact, when a foreign judgment contains two distinct condemnations to compensatory damages and to punitive damages, a partial recognition is certainly possible. [26]

It is along these lines that the subsequent evolution of the Italian case-law concerning punitive damages has taken place.

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176 ff; Patrick Kinsch, 'Droits de l'homme, droits fondamentaux et droit international privé' (2007) 318 Recueil des Cours 171 ff.

[23] For this method and its relevance in the Italian case-law even in the 19th century, see Paolo Benvenuti, *Comunità statale comunità internazionale e ordine pubblico internazionale* (Giuffré 1977) 41 ff.

[24] For a detailed commentary on the judgment, see Zeno Crespi Reghizzi, 'Sulla contrarietà all'ordine pubblico di una sentenza straniera di condanna a *punitive damages*' [2001] RDIPP 977.

[25] On the impact of punitive damages in the field of product liability, see Alberto Saravalle, *Responsabilità del produttore e diritto internazionale privato* (Cedam 1993) 106 ff.

[26] See Corte d'Appello di Trento – Sezione Distaccata di Bolzano, 16 August 2008, [2008] RDIPP 448, concerning the recognition of a US judgment awarding, simultaneously but distinctly, compensatory and punitive damages in a defamation case. In the same vein, with regard to Brussels I Regulation, see Catherine Kessedjan, 'Recognition and Enforcement of Foreign Judgments' in Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds), *International Antitrust Litigation* (Hart Publishing 2011).

4. THE EVOLUTION IN THE CASE-LAW OF THE ITALIAN SUPREME COURT

As yet, the Italian *Corte di Cassazione* had three occasions to deal with the recognition and enforcement of foreign judgments awarding punitive damages.

In the first case, the mentioned decision of the Court of Appeal of Venice had been challenged before the Italian Supreme Court, which, in its judgment no 1183/2007,[27] entirely upheld the reasoning of the lower court. First, it held that the absence of any clarification about the legal grounds of the condemnation and about the method used for the quantification of damages, along with the very large amount of money granted to the claimant[28], could lead the Court of Appeal to characterise the foreign judgment as a condemnation to punitive damages. Secondly, it considered that, according to fundamental principles of Italian law, civil liability rules only fulfil a compensatory function, so that a condemnation to damages can be recognised only to the extent that it gives relief for an actual loss and suffering.

Subsequently, the matter was brought again before the *Corte di Cassazione* when the Court of Appeal of Turin recognised a US judgment in matter of product responsibility, that had awarded approximately 5,000,000 USD to the claimant. In judgment no 1781/2012[29] the *Corte di Cassazione* reversed the finding of the lower court, expressly reiterating the principles developed in its previous decision.

However, in its judgment No 7613/2015 the Italian Supreme Court upheld the decision to recognise a Belgian decision

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[27] Cass, 19 January 2007, no 1183, [2007] RDIPP 781. On the judgment, see Marco Lopez de Gonzalo, 'Punitive damages e ordine pubblico' [2008] RDIPP 77; Alessandro P Scarso, 'Punitive Damages in Italy' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 106.

[28] However, the *Corte di Cassazione* did not even suggest that the foreign judgment could be considered incompatible with public policy only for this reason: for issues raised by foreign judgments awarding disproportionate amounts of money, see Ferrari Bravo (n 2) 251; Vitta (n 4) 518. However, nowadays the condemnation awarding punitive damages that are grossly excessive is not accepted in the US system itself: Giulio Ponzanelli, 'Sezioni Unite e danni punitivi' [2017] Contr impr/ Eur 1122.

[29] [2012] Foro it 1449.

issuing *astreintes*: [30] the Court considered it as compatible with public policy and, though it stressed the different function and nature of *astreintes*, it envisaged a possible evolution even in the recognition of punitive damages. [31]

More recently, the latter issue arose again when the Court of Appeal of Venice declared enforceable a US judgment issuing a condemnation for damages claimed in matters of product responsibility. When the judgment was challenged before the *Corte di Cassazione*, the case was referred to the Joint Chambers, as the First Chamber of the Court urged a reconsideration of the matter. [32] The First Chamber put forward several reasons that could bring about an overruling of the previous case-law: first, it referred to a strict notion of public policy, encompassing only fundamental principles of the domestic legal system as enshrined in the Constitution or in supra-national and international rules; secondly, it mentioned the case-law of the courts of other European States entailing a recognition of punitive damages; moreover, it suggested a departure from the traditional model of civil liability rules as having only compensatory function, providing examples of that tendency in several statutory provisions.

In its subsequent judgment no 16601/2017 [33] the Court declared the appeal inadmissible, but availed itself of the power of issuing a decision 'in the interest of the law', in order to provide guidance on the compatibility of punitive damages with Italian public policy. It clearly stated that the civil liability system under Italian law now entails also a punitive function, as demonstrated by a long list of statutory provisions not fulfilling only the traditional compensatory function.

Accordingly, it re-examined the question of the recognition of punitive damages, relying on a strict notion of public policy, recently developed in its case-law and based on principles stemming from constitutional provisions and from international and supra-national instruments in matters of protection of fundamental rights. That notion can be read as paving the way for a broad-

[30] [2015] Foro it 3951.

[31] Angelo Vecchiarutti, 'Le *astreintes* sono compatibili con l'ordine pubblico italiano. E i *punitive damages*?' [2015] Resp civ prev 1899.

[32] Cass, order 16 May 2016, no 9978, [2016] Resp civ prev 1232.

[33] Cass, 5 July 2017, no 16601, [2017] RDIPP 1049.

er freedom of circulation of foreign judgments into the Italian legal system. In that context, the *Corte di Cassazione* held that general principles in matters of civil liability cannot prevent recognition of foreign judgments awarding punitive damages, as those principles do not pertain to public policy. However, the Supreme Court also clarified that Italian courts are still called upon to evaluate whether such judgments are in conformity with the principles of legality, predictability and proportionality, as expressed by articles 23 and 25 of the Italian Constitution and by article 49 of the European Charter of Fundamental Rights. [34]

5. ANALYSIS

The approach taken by the Joint Chambers of the *Corte di Cassazione* seems generally favourable to the recognition of foreign judgments, but the departure from the previous case law is less marked than it may appear at first glance and the suggestions contained in the referring order of the First Chamber were only partially received. The Court seized the opportunity to remark that the abstract features of punitive damages cannot be considered in themselves as repugnant to Italian public policy, insofar as the concept of private penalties is by now familiar to Italian law. Nonetheless, it did not draw all the possible conclusions either from the new general approach to civil liability, or from its impact on public policy, so that the judgment cannot be interpreted as clearing the way altogether to the recognition of punitive damages in Italy.

In fact, notwithstanding the emphasis placed on the multiple functions of civil liability rules, the dichotomy between compensatory and punitive damages continues to be relevant. The existence of such a demarcation line, though not entirely justified by the characteristics of punitive damages in the US legal system, [35] will have to be taken into account by domestic courts as a preliminary step. Of course, even foreign judgments awarding compensatory damages are subject to an examination as to their

[34] On this provision, see Valsamis Mitsilegas, 'Article 49' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury 2014) 1351.

[35] D'Alessandro (n 13) 385.

compatibility with public policy. However, domestic courts should be alerted to the possible presence of punitive damages, as they may have a stronger potential to trigger the public policy exception, and conduct a deeper review in that case.

In the view of the Italian Supreme Court, such a need arises from two concurring observations. On the one hand, the judgment underlines the finding (not completely consistent with the premises that Italian rules on civil liability have a multifunctional nature and that private penalties are contained in statutory provisions) that punitive damages are in themselves unknown to Italian law.[36] On the other hand, the Court emphasises that punitive damages, even if they fall within the scope of civil liability,[37] are closely connected to criminal law[38] and it is necessary to verify whether the inherent fundamental guarantees were provided before the foreign court. For this reason, the Court clarifies that the principles expressed in the judgment also apply to other foreign measures having the nature of a penalty or of a deterrent.

In the light of the above, the following analysis will focus on the need of a thorough interpretation of foreign judgments in order to rule on their recognition and enforcement (para 5.1); on the nature and extent of the public policy clause (para 5.2); on the procedural requirements for the recognition of foreign judgments awarding punitive damages (para 5.3).

5.1. *The interpretation of the foreign judgment*

Article 64(g) of the Italian Statute on Private International Law provides that a foreign judgment cannot be recognised if its ruling brings about consequences that are incompatible with public policy. In analogy with the rule concerning the public pol-

[36] For the general issue of the characterisation of unknown legal institutions in the Italian legal system, see Sara Tonolo, *Le unioni civili nel diritto internazionale privato* (Giuffré 2007) 119 ff.

[37] As remarked by D'Alessandro (n 13) 394.

[38] See also Sara Landini, 'La condanna a danni punitivi tra penale e civile: la questione rimane attuale' [2017] Diritto penale e processo 1; Omar Vanin, 'L'incidenza dei diritti fondamentali in materia penale sulla ricostruzione dell'ordine pubblico internazionale: il caso del riconoscimento delle decisioni straniere attributive di *punitive damages*' [2017] RDI 1190.

icy clause in the field of applicable law, this provision stresses the fact that the court before which recognition or enforcement of a foreign judgment is sought has to focus on the *effects* of the foreign judgment.[39] In this regard, the wording of article 64(g) is different from the terminology usually contained in the corresponding provisions of the regulations of the European Union,[40] even though the general approach seems to be similar.[41]

Notwithstanding the clear reference to the effects of the foreign judgment, it can be remarked that only in very special cases the effects of a judgment will be *per se* contrary to public policy: this would be the case with a foreign judgment instituting a legal relationship that is repugnant to fundamental principles (eg slavery) or issuing a condemnation that would entail an obligation in conflict with them[42]. Such a conclusion cannot be reached for a judgment awarding punitive damages, as the payment of an amount of money cannot be seen in itself as incompatible with public policy.

In most cases, the evaluation of the judgment as to its compatibility with public policy implies a consideration of the legal basis of the claim brought before the foreign court.[43] In fact, the

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[39] See Bariatti (n 18) 1230; Maurizio Maresca, 'Artt. 64, 65 e 66' in Stefania Bariatti (ed), *Legge 31 Maggio 1995, n. 218. Commentario* [1995] Nuove leggi civ comm 1460.

[40] See European Parliament and Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis) [2012] OJ L351/1, art 45: a judgment can be refused recognition 'if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed'.

[41] The formula initially contained in art 27 of the 1968 Brussels Convention and now in art 45 of Regulation 1215/2012 is usually understood to mean that the courts of the addressed State must assess whether the recognition (and not the foreign judgment) would infringe public policy principles: see Report by Paul Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/1 *sub* art 27.

[42] See eg BGH 19 July 2018, available on <http://juris.bundesgerichtshof.de>: the mentioned judgment refused recognition and enforcement of a Polish judgment ordering a German broadcasting company to publish an apology message on its website, on the ground that enforcement would infringe freedom of speech and freedom of the press as embodied in the German Constitution.

[43] See, with regard to art 797 of the Italian Code of Civil Procedure, Luigi Fumagalli, 'L'unità del concetto di ordine pubblico' [1985] Comunicazioni e studi 596.

incompatibility with public policy may stem from the legal grounds on which the judgment relies and so, ultimately, from the contents of the law applied by the foreign court.[44] Yet, the express reference to the 'effects' of the judgment should prevent domestic courts from examining only the abstract features of the law applied by the foreign court; rather, it requires that the domestic court be satisfied that the application of that law in the instant case does not conflict with public policy principles.

In that context, before assessing the compatibility of the ruling with public policy, the domestic court must engage into a *prima facie* interpretation of the foreign judgment in order to detect the legal grounds of the findings enshrined therein.[45]

5.1.1. *Condemnation to punitive damages and other punitive or deterring measures*

The case-law concerning punitive damages provides a clear example of that approach, as the foreign judgments often do not clarify the legal grounds of the condemnation. For this reason, in the three mentioned judgments of the *Corte di Cassazione* the issue of the interpretation of the foreign judgments at stake was widely discussed and played a crucial role in the outcome of the respective cases.

As above noted, judgments nos 1183/2007 and 1781/2012 basically relied on the presumption that the lack of any reference to the types of damages awarded by the foreign judgments could lead the domestic courts to infer that they entailed a condemnation to punitive damages. In order to reach this conclusion, the Italian Supreme Court emphasised that the amount of money calculated by the foreign court could be seen as excessive if compared to the damages that could be liquidated under Italian law.

In judgment no 16601/2017 the *Corte di Cassazione* clearly departed from that approach and upheld the finding of the Court of Appeal according to which the foreign judgment at issue did not entail a condemnation to punitive damages. It considered

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[44] Alex Mills, 'The Dimensions of Public Policy in Private International Law' [2008] JPIL 209.

[45] Gianluca Contaldi, 'Ordine pubblico', in Baratta (n 18) 273.

that the absence of any reference to the relevant criteria for the liquidation of damages could not imply that punitive damages had been awarded and denied that the damages calculated in the instant case could be seen as excessive. [46]

The position of the Italian Supreme Court was probably influenced by the circumstances of the case: the foreign judgment had been issued against a co-wrongdoer making reference to a settlement agreement between the damaged party and another co-wrongdoer, so that an express mention of the nature of the damages thus awarded could be unnecessary. Furthermore, it must be borne in mind that the power of the *Corte di Cassazione* to review the interpretation of the foreign judgment as provided by the Court of Appeal was recently curtailed after a reform of the Italian Code of Civil Procedure, limiting the possible grounds of appeal. [47]

Accordingly, the *Corte di Cassazione* contented itself with referring to the principle according to which the interpretation of the foreign judgment is a *quaestio facti* and is within the exclusive province of lower courts. However, one can doubt whether the approach taken by the Italian Supreme Court is consistent with the real nature of the scrutiny so required, that concerns the legal effects of the ruling to be recognised or enforced and is an essential preliminary step to the recourse to the public policy exception.

5.1.2. *The determination of the punitive or deterring function of foreign civil liability measures*

At any rate, the Italian Supreme Court did not provide any effective guidance as to the factors to be taken into account to that aim, merely stressing that the interpretation of the foreign judgment cannot be based only on presumptions. As a result, unless the foreign judgment clearly states the nature of the con-

[46] It must be noted that the amount of money liquidated in the foreign judgment was in itself very similar to the amount of the condemnations taken into account by the Italian Supreme Court in the previous cases. The similarity between the cases is also highlighted by Patrizia Petrelli, 'Verso I «danni punitivi»?' [2017] Contr impr/ Eur 1211 f.

[47] On the reform, see Leo Piccininni, 'I motivi di ricorso in Cassazione dopo la modifica dell'art. 360 n. 5 c.p.c.' [2013] Riv dir proc 407.

demnation, the lower courts will enjoy a wide discretion in determining the nature of the condemnation issued by the foreign court. For this reason, it may be useful to try to sketch out the characteristics of the measures falling into the category referred to by the Italian Supreme Court as having the nature of a penalty or of a deterrent and so needing a careful examination as to their compatibility with public policy.

On the one hand, domestic rules on the recognition of civil judgments do not apply to measures that are criminal in nature or that entail administrative sanctions to be paid to a State authority. Accordingly, the recognition of foreign judgments awarding punitive damages (or condemning to other penalties or deterring measures) will fall within the scope of application of article 64 of the Italian Statute on Private International Law as far as the measure is adopted in the State of origin in the framework of civil liability rules.

This will not give rise to significant problems for punitive damages, that are usually seen as non-criminal in nature both in the State of origin and from the viewpoint of the Italian legal system [48] and are to be paid to a private party acting as 'private attorney general'. [49] However, in this regard, the reference to Italian statutory provisions entailing administrative sanctions, as contained in the judgment of the *Corte di Cassazione*, [50] may be misleading for lower courts.

On the other hand, domestic courts will have to focus on those private-law measures having the nature of a penalty or

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[48] Saravalle (n 25) 109 ff. See, however, for a criticism, Alessandro Ciatti Càimi, 'I danni punitivi e quello che non vorremmo sentirci dire dalle corti di common law' [2017] Contr impr/ Eur 1. For a historical and comparative analysis of the demarcation line between civil and criminal matters in the field of civil liability, see Broggini (n 13) 492 ff.

[49] This feature is seen by some scholars as incompatible in itself with public policy: see Antonio Gambaro, 'Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali' [2017] Nuova giur civ comm 1409.

[50] See eg art 140.7 of the Legislative Decree 206/2005, providing for a sanction in matters of consumer and user rights, to be paid to the State budget; art 709-*ter*.4 of the Code of Civil Procedure, providing for a sanction for failure to comply with parental obligations relating to rights of custody, to be paid to a public penalty fund; art 18.14 of Statute 300/1970, providing for a sanction for failure to reinstate a worker to his/her job, to be paid to a public pension fund. For a parallelism between punitive damages and administrative sanctions with regard to the predictability of those measures, see also Carleo (n 6) 272.

of a deterrent. Once again, the scope has to be circumscribed: the judgment itself of the Joint Chambers remarks that every remedy relating to civil liability implies also a punitive or deterring aim, even mere compensation. [51] The distinction drawn by the Italian Supreme Court can only make sense if it refers only to measures having a mainly punitive function. On the contrary, measures like the liquidation of damages as a lump sum do not require special scrutiny as to their compatibility with public policy, insofar as they correspond to a mechanism available even under the ordinary rules of Italian law in matters of civil liability. [52]

However, that still provides no answer on how to detect whether a foreign judgment entails a measure having the exclusive nature of a penalty or of a deterrent. It is remarkable that, in the first judgment issued on the subject-matter after the ruling of the Joint Chambers of the Italian Supreme Court, the Tribunale di Siracusa had to solve precisely that question [53] and it did so by making reference to the case-law of the European Court of Human Rights and to the so-called '*Engel* criteria'.

The criteria, developed by the European Court in order to define the notions of 'criminal offence' and of 'penalty' under articles 6 and 7 of the Convention, [54] have now been largely ac-

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[51] See Matteo Dellacasa, '*Punitive damages*, risarcimento del danno, sanzioni civili: un punto di vista sulla funzione deterrente della responsabilità aquiliana' [2017] Contr impr/ Eur 1153 ff.

[52] In judgment no 16601/2017 the mention of such measures, like art 28.2 of the Legislative Decree 81/2015, providing for a lump sum to be paid to the worker when a fixed-term contract is converted into a permanent contract, and art 125 of the Legislative Decree 30/2005, providing that compensation for damages arising from a breach of industrial property rights has to be liquidated as a lump sum, was only helpful explaining the multiple function of civil liability rules.

[53] The case concerned the request for recognition of a Danish labour court judgment awarding a large amount of money to a Danish trade union as a penalty against an Italian company for failure to pay social security contributions. The domestic court held that according to the '*Engel* criteria' the measure amounted to a 'criminal sanction', as it was characterised as a penalty under Danish law; served a punitive and deterring function and placed a very significant economic burden on the defendant. It is to be noted that the recognition of the judgment was sought under the Reg 1215/2012, but the Tribunale considered that the approach suggested by the Joint Chambers was relevant.

[54] *Engel and Others v Netherlands* (1976) Series A no 22. On the so-called *Engel* criteria see Tom Barkhuysen, Michiel van Emmerik, Oswald Jansen and Masha Fedorova, 'Right to a Fair Trial (Article 6)' in Pieter van Dijk,

cepted by national courts.[55] These criteria include the nature and purpose of the measures in question; their characterisation under national law; the procedures involved in the making and implementation of the measures; and their severity.[56] Within this framework, the European Court has placed a special emphasis on the punitive purpose of the measures concerned, attaching importance to their general characteristics, to the aim pursued and to the rules that govern those measures.[57]

As for now, it is impossible to know whether other Italian courts will follow suit, but, in principle, the approach appears to be consistent with judgment no 16601/2017. In fact, the ruling of the *Corte di Cassazione* recommends to scrutinise the compatibility of punitive damages and other similar measures in relation to fundamental principles concerning criminal law, whose scope of application under the European Convention on Human Rights is clarified by the '*Engel* criteria'. However, as above noted, this should not imply blurring the divide between private law measures and criminal law measures, that remains crucial for the application of domestic (and European) rules concerning recognition and enforcement of foreign judgments.[58]

5.2. *Compatibility with public policy*

As previously noted, the Italian Supreme Court held that punitive damages cannot be considered as repugnant in themselves to public policy. In judgment no 16601/2017 the Italian Supreme Court repeatedly stressed that the different attitude towards foreign judgments awarding punitive damages was al-

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Fried van Hoof, Arien van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2018) 497.

[55] See Italian Constitutional Court, judgment no 43/2018 [2018] RDI 651; Italian Constitutional Court, judgment no 43/2017 [2017] RDI 928.

[56] See *G.I.E.M. Srl and Others v Italy* Apps no 1828/06 34163/07 19029/11 (ECtHR 28 June 2018); *Del Río Prada v Spain* App no 42750/09 (ECtHR 21 October 2013); *Welch v UK* (1995) Series A no 307-A.

[57] See the case law quoted in n 56 and, in addition, *Jamil v France* (1995) Series A no 317-B.

[58] The private law dimension of punitive damages and the necessity to keep in mind the divide with public law is also remarked by Marta Requejo Isidro, 'Punitive Damages From a Private International Respective' in Koziol and Wilcox (n 27) 253.

so prompted by the reception of a new notion of public policy. [59]

The idea of a new notion of public policy [60] had already emerged in the referring order of the First Chamber and had been reiterated by the same Chamber in its judgment no 19599/2016, concerning family private international law. In the latter judgment the Court, moving from the unnecessary distinction between national and international public policy, [61] took the view that public policy is not to be conceived as a national notion and is only composed by principles regarding the protection of human rights as stemming from the EU Treaties and the EU Charter of Fundamental Rights, from the European Convention on Human Rights, save for the supreme rules of the Italian Constitution. Thus, the public policy review was expressly defined as a 'constitutionality test': in that context, the application of foreign law could be discarded only in a situation in which even a rule of Italian law having the same contents would infringe fundamental values.

In its subsequent judgment no 16601/2017 the Joint Chambers showed a more cautious approach. [62] The Court held that the older definition of public policy, considered as a set of fundamental principles pertaining to the ethical and social structure of the national community in a certain period of time, is no lon-

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[59] The evolution of the notion of public policy is welcomed by Dellacasa (n 51) 1149. The evolution of the notion and of the role of public policy is often discussed, especially in family private international law: see, for instance, Cristina Campiglio, 'Il diritto all'identità personale del figlio nato all'estero da una madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)' [2014] Nuova giur civ comm 1132; Pietro Franzina, 'Some remarks on the relevance of Article 8 of the ECHR to the recognition of family status judicially created abroad' [2011] DUDI 609.

[60] In the same vein, see Mauro Grondona, 'Il problema dei danni punitivi e la funzione degli istituti giuridici, ovvero: il giurista e la politica del diritto' (*giustiziacivile.com*, 30 May 2017) <http://giustiziacivile.com/danno-e-responsabilita/approfondimenti/il-problema-dei-danni-punitivi-e-la-funzione-degli-istituti> accessed 19 November 2018, referring to the idea of a 'global public policy' replacing national notions of public policy.

[61] Already criticised by Fumagalli (n 21) 643 and Franco Mosconi, 'Exceptions to the operation of choice of law rules' (1989) 217 Recueil des Cours 1.

[62] See Giovanni Zarra, 'L'ordine pubblico attraverso la lente del giudice di legittimità: in margine a Sezioni Unite 16601/2017' [2017] Dir comm int 722.

ger acceptable. In the view of the Court, it should be replaced by a different notion, according to which public policy results from the system of protection of fundamental rights stemming from the Constitution (including sub-constitutional norms tightly intertwined to it) or from the European Charter of Fundamental Rights (in the light of its legal position after the entry into force of the Lisbon Treaty).

The position taken by the Joint Chambers is not entirely convincing, even though it has some merits in making appropriate adjustments to the conception envisaged by the First Chamber. In particular, it is worth noting that the Joint Chambers reverted to a national notion of public policy, to be complemented, and not replaced, by the so-called European public policy. [63] In this connection, it must be borne in mind that even the EU regulations in matters of private international law confirm that public policy cannot be considered as an exclusively supra-national notion and consistently refer to the public policy of the requested Member State, as it was pointed out also by the Court of Justice of the European Union. [64] *A fortiori*, when a national court is called upon to apply domestic conflict-of-laws rules or domestic rules on recognition and enforcement of foreign judgments, as it was the case for the *Corte di Cassazione*, it has to take into account public policy as a national concept. [65]

The novelty of the approach of the *Corte di Cassazione* as to the use of public policy review (developed under the domestic rules on private international law, but likely to exert some influence also on the application of EU rules) can be found in two points stressed in judgment no 16601/2017 in accordance with the referring order: those points, concerning the identification of the values protected by public policy and of the sources from which they can be derived, deserve separate consideration.

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[63] On those issues, see the contribution by Ornella Feraci in this book; Zarra (n 62) 728.

[64] See eg Case C-681/13 *Diageo Brands* [2015] ECLI:EU:C:2015:471 para 44; Case C-302/13 *flyLAL – Lithuanian Airlines* [2014] ECLI:EU:C:2014:2319 para 49; Case C-453/99 *Courage Ltd. v Crehan* [2001] ECR I-6314.

[65] Fumagalli (n 21) 644.

5.2.1. *Public policy and protection of public values*

With regard to the values that can be protected by public policy, judgment no 16601/2017 showed a twofold attitude.

On the one hand, it held that the doctrine of punitive damages is no longer incompatible with public policy, as the evolution of the Italian system of civil liability can lead domestic courts to accept that private parties bring actions aimed at enforcing general interests and that such a possibility is not inconsistent with the reservation of certain powers to public authorities. [66]

On the other hand, following the tendency envisaged by the above mentioned judgments of the *Corte di Cassazione*, the Joint Chambers apparently held that the notion of public policy is entirely focused on the protection of fundamental rights. For this reason, they considered that a refusal of recognition of a foreign judgment awarding punitive damages can be based only on the existence of a violation of fundamental rights in the State of origin and should not rely on the general features of the Italian rules concerning civil liability.

Now, the impact of human rights on private international law has been the subject matter of a vivid discussion in recent years and the opinion that the relevant instruments and principles can contribute to the definition of public policy is widely shared. [67] The conclusion can be easily drawn as a consequence of the influential function of those instruments and principles in shaping the legal discourse in every field of law. In that context, the capacity of public policy, especially in the dimension of the so-called positive public policy, to achieve also the promotion of general values linked to the protection of fundamental rights is indisputable. [68]

Nonetheless, it is still possible to contend that the principles concerning the protection of fundamental rights do not exhaust

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[66] See Zarra (n 62) 734.

[67] See, among others, Petra Hammje, 'Droits fondamentaux et ordre public' [1997] RCDIP 1; Pasquale Pirrone, 'I diritti umani e il diritto internazionale privato e processuale tra scontro e armonizzazione' in Pirrone (n 20) 24; Markus Voltz, *Menschenrechte und ordre public im Internationalem Privatrecht* (Peter Lang 2002).

[68] Francesco Salerno, 'Il vincolo al rispetto dei diritti dell'uomo nel sistema del diritto internazionale privato' [2014] DUDI 549.

the range of essential values of a legal system and that public interests should continue to play a significant role to that aim. Although their relevance is restricted by the necessity to ensure their compatibility with human rights, in the framework of doctrines based on the mechanism of the 'margin of appreciation' or, more generally, on the principle of proportionality, [69] the need to preserve values shared by the national community as a whole cannot be ignored. While the protection of human rights (though individual in nature) can be seen in itself as a collective interest contributing to the well-being of the community, other public goods, as identified by positive law, are worth being protected; in that context, also principles concerning the functions of the State can be taken into consideration.

This approach is also consistent with the historical origins of public policy in private international law: as it is made clear by the name itself, public policy considerations were usually linked to the protection of general interests and policies and to the sovereignty of the State as a matter of public law. [70] Accordingly, the traditional function performed by public policy implies safeguarding political or social views or national interests capable of superseding the ordinary functioning of private international law, at least when they are not enshrined in overriding mandatory rules. [71] The Italian legislator certainly had that notion in mind, when articles 16 and 64 of the Statute of Private International Law were drafted twenty years ago. [72] Even supposing that a different notion of public policy has meanwhile developed, the alleged evolution cannot have gone as far as completely overlooking the traditional concept underlying the function of public policy.

In addition, focussing on the protection of fundamental

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[69] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR* (Intersentia 2002).

[70] Pasquale Stanislao Mancini, 'Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali' [1959] Diritto internazionale 377. On the notion of public policy in Mancini, see Mosconi (n 61) 32 ff.

[71] See Cristina Campiglio, 'Ordine pubblico [dir. int. priv.]' [2013] Diritto on line 1; Mills (n 44) 201; Kent Murphy, 'The Traditional View of Public Policy and *Ordre Public* in Private International Law' [1981] Georgia J Intl & Comp L 591.

[72] See eg Franco Mosconi, 'Articolo 16' [1995] RDIPP 995.

rights as the only dimension of public policy can also give rise to shortcomings arising from the structure of civil proceedings. Civil proceedings are aimed at accommodating the conflicting substantive rights of the parties, that can be often traced back to fundamental rights.[73] Punitive damages clearly illustrate that situation, since the fundamental rights of the defendant, concerning the general guarantees under criminal law but also its right to property, can be viewed as antagonistic to the fundamental rights of the claimant breached by the wrongful act (for instance, the right to physical integrity or the right to private life).

It can be argued that, especially in matters of recognition of foreign judgments, public policy cannot work as a proper tool for dealing with the clash between the opposing substantive rights of the parties, even when those rights enjoy the protection granted to fundamental rights. In that context, the balance between those competing rights is struck by the court in the State of origin. Consequently, it is not for the court before which recognition or enforcement is sought to engage into a thorough re-evaluation, that could in fact lead to the refusal of recognition or enforcement, depriving the foreign judgment of any effect in the requested State and so unduly tipping the scales in favour of one of the parties.

The role of public policy as to the protection of fundamental rights must be understood in the sense that the courts of the requested State may refuse recognition or enforcement only when one of the substantive fundamental rights at stake was completely ignored in the State of origin (eg because it is not protected as a fundamental right under the applicable law)[74] or when the foreign court struck a manifestly unfair balance between the competing rights.

Conversely, an examination of the foreign judgment as to its compatibility with public values protected by the legal system of the requested State is acceptable, insofar as they were not taken into account by the court of the State of origin. While the promotion of some common values can be also ensured by interna-

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[73] See Kiestra (n 22) 216 and 275.

[74] On the issue of dismissal in employment contracts based on the scheme of the so-called employment at will, see Cass, 9 May 2007, no 10549 [2008] RDIPP 216. See also Roberta Clerici, 'Rapporti di lavoro, ordine pubblico e Convenzione di Roma del 1980' [2002] RDIPP 809.

tional rules common to most States, the protection of collective values at the EU or at the purely national level still retains its significance and can accordingly be ensured through recourse to public policy.

5.2.2. *The sources of public policy*

As noted above, the new notion of public policy envisaged by the *Corte di Cassazione* is also based on a narrow selection of the relevant sources. In judgment no 16601/2017 only the Italian Constitution, the sub-constitutional norms closely connected to it and the European Charter of Fundamental Rights are expressly mentioned, but the list could probably also include other international instruments playing a crucial role in the protection of fundamental rights.

At any rate, the Italian Supreme Court seems to have in mind an exhaustive list of sources whence public policy principles can be derived, even though the yardstick for picking them out remains unclear. As far as it is possible to understand, a special attention was placed on the sources of law that rank highest from the point of view of the Italian legal order. [75] This interpretation is not contradicted by the fact that the *Corte di Cassazione* expressly refers also to sub-constitutional norms, as their relevance depends on the existence of a close link to the implementation of constitutional principles. [76]

However, such a strict public policy doctrine is open to criticism for several reasons.

First, the Italian Supreme Court appears to accord an excessive importance to the hierarchy of the sources of law. In private international law the role played by the *lex superior* principle is

[75] This can explain the lack of any reference to the European Convention on Human Rights: on its rank in the Italian legal system see Francesco Salerno, 'La coerenza dell'ordinamento interno ai trattati internazionali in ragione della Costituzione e della loro diversa natura' [2018] Osservatorio sulle fonti 2.

[76] Francesco Salerno, 'La costituzionalizzazione dell'ordine pubblico internazionale' [2018] RDIPP 259. For a similar approach of the Court of Justice of the European Union about the relationship between the EU Charter and EU secondary law, see Francesco Bestagno, 'I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia' [2015] DUDI 259.

usually quite weak, while the purpose served by the different rules is crucial. So, conflict of law rules do not rank higher than the substantive rules of a given national legal system, although they are supposed to determine their scope of application. [77] Mandatory rules are able to prevail over foreign law, but they are identified from their intrinsic characteristics, while the fact that they emanate from a higher-ranking source of law is not essential. In that context, public policy can be well considered as composed by principles that are fundamental for their purpose rather than for their rank: the fact that a principle does not possess an express constitutional foundation [78] should not in itself lead to the conclusion that it is not part of public policy.

Secondly, the exclusive reference to the Constitution and to supra-national and international instruments [79] can also affect other traditional features of public policy, in particular its capacity to take into account values and principles that vary over time. It is common ground that recourse to public policy can be adjusted in order to reflect progressively occurring changes in the social and political structure, so ensuring the necessary degree of flexibility in its use. However, if principles contributing to public policy are to be found only in some given sources of law and have to be matched by specific positive rules contained therein, this may reduce the adaptability of public policy itself to the development of new or different values in the legal system. [80]

Thirdly, that approach does not even seem to limit the sphere of discretion enjoyed by domestic courts when they invoke public policy as a ground of non-application of foreign law or as a ground of non-recognition of foreign judgments.

On the one hand, the identification of the legal sources pertaining to public policy involves in itself a choice between dif-

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[77] The 'constitutional' purpose of private international law, irrespective of its formal rank in the hierarchy of the sources of law, is also remarked by Salerno (n 76) 271 f.

[78] On the lack of a constitutional foundation in the Italian legal system for compensatory damages, see Dellacasa (n 51) 1166.

[79] According to Salerno (n 76) 276 ff such an approach would show a parallelism between foreign law, on one hand, and general international law or EU law, on the other hand.

[80] Salerno (n 76) 261.

ferent instruments:[81] for instance, one can argue that also principles emanating from international conventions in matters of human rights (eg the 1989 UN Convention on the Rights of the Child or the 1951 Geneva Convention Relating to the Status of Refugees) should have an impact on the definition of public policy.

In this regard, the identification of those sources as made by the *Corte di Cassazione* in judgment no 16601/2017 is disputable for other reasons, especially insofar as the EU Charter of Fundamental Rights is concerned.[82] As it was pointed out,[83] the Charter is not an instrument of general application and under article 51 of the Charter itself domestic courts can rely on it only to the extent that they are expected to apply EU law.[84] It can be conceded that the contribution of a source of law to public policy is not contingent upon the actual applicability of that source in every single case. Nonetheless, it seems paradoxical to stress the importance of a source that, according to its own provisions, will apply only subject to certain conditions, while at the same time other sources of more general application, like the European Convention on Human Rights,[85] are not mentioned.

On the other hand, even though the approach envisaged by the Italian Supreme Court can lead domestic courts to derive public policy principles only from a small number of sources, those courts will still be called upon to determine which principles or rules are part of public policy. The existence of a certain degree of discretion in setting the boundaries of public policy will be magnified in the process of identification of the sub-con-

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[81] Zarra (n 62) 733. The existence of an unavoidable degree of discretion in the application of the public policy exception is pointed out in Mosconi (n 61) 36 f.

[82] For a different interpretation, emphasising the contribution of the EU Charter to public policy in the light of possible (but rather vaguely defined) connections to the single market, see Dellacasa (n 51) 1165.

[83] See Vanin (n 38) 1192.

[84] Astrid Épiney, 'Le champ d'application de la Charte des droits fondamentaux l'arrêt *Fransson* et ses implications' [2014] Cahiers de droit européen 283; Emily Hancox, 'The meaning of «implementing» Union law under art 51(1) of the Charter' [2013] Common Market L Rev 489.

[85] On the so-called application *par ricochet* of the European Convention, see Kiestra (n 22) 247; Olivia Lopes Pegna, 'L'incidenza dell'art. 6 della convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere' [2011] RDI 29.

stitutional rules that can be considered as closely linked to the Constitution itself and that ensure a minimum level of compulsory protection of certain essential interests.

Lastly, the method of public policy suggested by the *Corte di Cassazione* is also unconvincing insofar as it emphasises the content of single provisions in the interpretation of public policy.[86] That solution does not appear to be in line with the traditional doctrine of public policy,[87] but resembles a 'constitutionality test' calling into question the compliance of the foreign judgment (or of the foreign applicable law) with specific fundamental rules of the domestic legal system. Such a recourse to public policy can give rise to serious shortcomings: on the one hand, the selection of possibly relevant rules may be, again, controversial;[88] on the other hand, it may lead domestic courts to shift their focus from the effects and the contents of the foreign judgment. In that perspective, the risk is clear that public policy control may easily slide towards an abstract re-examination of the rules applied by the foreign court, or even to a re-evaluation of the case, that could be contrary to the prohibition of the review of the foreign judgment as to its substance. The judgment of the Joint Chambers concerning punitive damages provides a clear example of that scenario.

5.3. *Requirements for recognition of foreign judgments awarding punitive damages*

Relying on its findings about the notion of public policy, the Italian Supreme Court identified the fundamental provisions relevant to the recognition of punitive damages taking into account their proximity to criminal matters, namely articles 23 and 25 of the Italian Constitution and article 49 of the EU Charter of Fundamental Rights. Accordingly, it held that a foreign judgment awarding punitive damages can be recognised and enforced in Italy only if it complies with the requirements set forth in those

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[86] For a criticism of this method, Mosconi (n 61) 62 f.

[87] Fumagalli (n 21) 641; Paul Lagarde, *Recherches sur l'ordre public en droit international privé* (LGDJ 1959) 164 f.

[88] The reference to art 23 of the Italian Constitution is considered as doubtful by Petrelli (n 46) 1214 f.

provisions for the imposition of sanctions, namely the principles of legality, predictability and proportionality.

Recognition of punitive damages in Italy is thus not unlimited but subject to certain conditions.[89] The award of punitive damages must have a legal basis in the State of origin; it has to be made according to predictable criteria; it must be proportionate to the gravity of the facts and to the compensatory damages awarded.

At first glance, it can be noted that the first two principles alluded to by the Italian Supreme Court do not concern the effects or even the reasoning of the foreign judgment, but rather the general characteristics of the foreign law applied by the court of the State of origin.[90] On the contrary, the principle of proportionality revolves around the outcome of foreign proceedings and the amount of money thus awarded.

Accordingly, domestic courts will be called upon to a complex review, whose necessity flows from the abandonment of the traditional view about public policy. If reference has to be made to single provisions, a synthetic evaluation as to the compatibility with the general values of the domestic legal system is not sufficient, but an analytical examination of the conformity with the contents of those domestic provisions is required.

So, in case of foreign judgments awarding punitive damages, at first, domestic courts will have to ascertain the contents of foreign law, in order to verify its conformity to the principles of legality and predictability: that examination will fall within the *ex officio* powers of domestic courts, as in the Italian legal system the *iura novit curia* principle applies also to foreign law. Subsequently, they will be called upon to conduct a re-evaluation of the facts of the case, as they will be required to assess the gravity of the wrongdoing and of the damage incurred;[91] on that matter, if the foreign judgment does not provide sufficient

[89] The existence of those requirements is considered by some scholars as necessary in order to prevent possible abuses: see Pietro Trimarchi, *La responsabilità civile: Atti illeciti, rischio, danno* (Giuffré 2017) 32 ff.

[90] The shortcomings arising from the uncertainty and unpredictability of US judgments awarding punitive damages, especially as they are often issued by a jury, were clearly highlighted by Crespi Reghizzi (n 24) 988 ff; Zeno Zencovich (n 1) 377 ff.

[91] See Paola Ivaldi, 'Civil Liability for Health Damages and Uniform Rules of Private International Law' [2017] RDIPP 878.

elements, they will have to rely on the submissions of the parties.

5.3.1. *Legality and predictability*

As previously noted, the principles of legality and predictability require a formal review of the foreign law applied in the State of origin, in order to verify whether its characteristics ensure fundamental guarantees that are equivalent to those provided by Italian law.

The principle of legality pertains to the existence of a legal basis and so concerns the source of law governing punitive damages under foreign law. The Italian Supreme Court held that domestic courts should satisfy themselves that a statute, or a similar source of law, governs the matter: as nowadays many US States have passed statutes concerning punitive damages, in most cases this principle will not be an obstacle. Some doubts may arise when in the foreign legal system punitive damages are governed exclusively by case-law, which does not appear to be a 'similar source of law', even though this may not imply special difficulties as to predictability. [92]

The principle of predictability refers to the contents of foreign law: it must set out the cases in which punitive damages may be awarded and establish the maximum amount of the condemnation. Again, predictability is seen as an abstract quality of the source of law governing the matter and cannot be ensured only by the existence of a consistent case-law, [93] as the latter would not provide the same guarantees, especially concerning adequate knowledge by the defendant. Since predictability has to be assessed in abstract terms, the circumstances of the case, like the degree of connection with the State of the forum, [94] should not play any role.

In the view of the Italian Supreme Court a foreign judgment is incompatible with public policy if foreign law lacks the con-

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[92] In a different vein, Carleo (n 6) 269 ff; Mauro Tescaro, 'Il revirement "moderato" sui punitive damages' [2017] Contr impr/ Eur 52.

[93] On the shortcomings arising from the existence of court discretion, see Gambaro (n 49) 1408.

[94] On the importance of the theory of *Inlandsbeziehung*, see, however, Crespi Reghizzi (n 24) 985 ff and Ivaldi (n 91) 880.

tents required by the mentioned constitutional provisions. However, the judgment did not entirely clarify the limits of such a review: accordingly, one can wonder whether domestic courts may also consider as repugnant to Italian public policy a foreign judgment which awards punitive damages for facts not mentioned by the applicable law. In addition, it is unclear whether domestic courts may review a foreign judgment awarding punitive damages for facts that may not deserve a punishment from the viewpoint of the Italian legal system.

5.3.2. *Proportionality*

However, the *Corte di Cassazione* itself stressed that proportionality is the crucial criterion as to the recognition of punitive damages.[95] The conclusion is clearly in line with the case-law of French courts,[96] even though the Italian Supreme Court does not refer to it and even assumes that the case-law of other States should not be taken into consideration in order to define the contents of public policy. This passage of the judgment clearly shows elements of inconsistency in the approach followed by the Supreme Court, insofar as it seems to rule out the use of a comparative analysis, especially with other Member States of the European Union.

The review of the foreign judgment as to the compliance with the principle of proportionality is clearly focused on the quantification of punitive damages.[97] In that regard, the *Corte di Cassazione* held that lower courts are empowered to assess the compatibility of the amount of money awarded as punitive damages in the light of the gravity of the facts and of the compensatory damages possibly awarded by the same judgment.

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[95] For the same conclusion, see Elena D'Alessadro, 'La Corte suprema slovena si confronta con i danni punitivi' [2014] Danno resp 25; Saravalle (n 25) 208.

[96] Tescaro (n 92) 64. On the position of the French Cour de cassation, see Garance Cattalano-Cloarec, 'Lo stato dell'arte del risarcimento punitivo nel diritto francese' [2017] Contr impr/ Eur 12; Tuo (n 18) 207 f.

[97] The reference to the principle of proportionality is welcomed by Franco Ferrari, 'Il riconoscimento delle sentenze straniere sui danni punitivi. Brevi cenni comparatistici all'indomani della pronunzia italiana del 5 luglio 2017' [2018] Riv dir civ 281.

It can be pointed out that the latter examination will be only possible if the foreign judgment clarifies the nature of the condemnation. However, all the cases above reported show that it is often difficult to discern whether and to what extent an amount of money was awarded also for compensatory damages, especially when the foreign judgment refers only to an all-encompassing sum. Since the lack of reasoning does not bring about the incompatibility of the judgment with public policy and since it is not permitted to rely on mere presumptions, the question will have to be re-examined by the court before which recognition or enforcement is sought, in order to assess the correct quantification of compensatory damages. Likewise, the revision of the condemnation with reference to the gravity of the wrongdoing will require domestic courts to take cognizance of the facts of the case. Accordingly, they could be induced to superimpose their evaluation of those facts on the evaluation made in the State of origin and to check the compatibility of the condemnation both with the law applicable in the State of origin and with the principle of proportionality as expressed by Italian law. [98]

Thus, domestic courts will be allowed to have a 'second look' at the condemnation issued by the foreign court and to make an overall evaluation of its fairness. Consequently, the excessive vagueness of the principle of proportionality in the assessment of the compatibility of punitive damages with public policy seems to create a danger for the compliance with the prohibition of the review of foreign judgments as to their substance. [99] If no appropriate guidance will be provided by the *Corte di Cassazione* in future judgments, this may open the door to the exercise of a widely discretionary control by the court before which recognition or enforcement is sought, notwithstanding the apparently narrow notion of public policy envisaged by judgment no 16601/2017 and even beyond the traditional limitations set to the application of that exception.

[98] See also Tescaro (n 92) 65 f.
[99] The same risk is highlighted by Tuo (n 18) 209 ff.

6. PUNITIVE DAMAGES AS A POSSIBLE OUTCOME OF THE APPLICATION OF FOREIGN LAW

It remains still to be seen how far the approach of the Joint Chambers of the *Corte di Cassazione* will take the Italian legal system in the recognition of punitive damages. At any rate, the necessity of such an evaluation may occur even outside the context of the procedures for recognition and enforcement of foreign judgments.

Even though under Italian law the awarding of punitive damages is only permitted in exceptional cases, this finding cannot entirely rule out the possibility that an Italian court can award punitive damages, if it is so requested by the plaintiff and as long as it is entitled, under EC Regulation 864/2007 in matters of non-contractual obligations ("Rome II Regulation") and by EC Regulation 593/2008 in matters of contractual obligations ("Rome I Regulation") [100], to apply a foreign law allowing such an award.

The preamble of the Rome II Regulation contains the much vexed Recital 32, [101] suggesting a cautious approach to the application of foreign law when it can lead a court to award punitive or exemplary damages. [102] Whatever the actual relevance of the recital as to the interpretation of article 26 of the Rome II Regulation, [103] it certainly leaves some discretion [104] to the fo-

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[100] On the role of punitive damages in contractual matters, see, among others, Ponzanelli (n 1) 470 ff.

[101] On the process leading to the adoption of the Regulation and the discussion of the issue in the preparatory works, see Andrew Dickinson, *The Rome II Regulation* (OUP 2008) 577; Fabrizio Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato* (Giuffré 2013) 170 ff; Requejo Isidro (n 58) 253 f.

[102] On the use of the Recital 32 by the Italian courts in purely internal cases, concerning art 96 of the Code of Civil Procedure, see Filippo Marchetti, 'The Rome II Regulation in Italian and Other National Courts' [2017] RDIPP 899 ff.

[103] Marchetti (n 102), at 903, argues that the Recital 'is indeed just "open", rather than supportive or unsupportive' of punitive damages, even though the 'the current setting strongly limits the possibility of raising a public policy exception in the case of punitive damages'. See also Harry Duintjer Tebbens, 'Punitive Damages: Towards a Rule of Reason for US Awards and Their Recognition Elsewhere' in Gabriella Venturini and Stefania Bariatti (eds), *Liber Fausto Pocar* (Giuffré 2009) 273.

[104] Dickinson (n 101) 577 f. A somewhat more mechanical approach, according to which punitive damages are always excessive in the light of Recital

rum court in order to tailor the application of the public policy clause to the general attitude of its own legal system in matters of civil liability. [105] In that context, an Italian court would be probably free to establish that in the light of the circumstances of the case, the application of foreign law allowing for the condemnation to punitive damages is not repugnant to fundamental principles pertaining to Italian public policy, [106] provided that the foreign law complies with the criteria set forth by the Italian Supreme Court for the recognition of punitive damages. In that case, the conformity with the principle of proportionality could be easily reached, as it will be for the Italian court to apply foreign law and determine the amount of punitive damages to be awarded.

The same conclusion can be reached with regard to contractual matters. The Rome I Regulation does not even contain any reference to punitive or exemplary damages and to their possible relevance as to public policy. [107] However, the need for a consistent interpretation of different Regulations concerning judicial cooperation in civil matters suggests that the same *caveat* included in the preamble of the Rome II Regulation may apply when punitive damages are claimed as a consequence of a breach of contract. [108]

The application of a foreign law providing for punitive

32, is suggested by Mihail Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing 2011) 176.

[105] On the position of EU law towards punitive damages in antitrust law, see Marc Fallon and Stéphanie Francq, 'Private Enforcement of Antitrust Provisions and the Rome I Regulation' in Basedow, Francq and Idot (n 26) 88, commenting on the judgment of the CJEU in joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6641. See now European Parliament and Council Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 45.

[106] Art 26 of the Regulation makes a clear reference to the 'public policy of the forum': Dickinson (n 101) 577; Feraci (n 21) 237 ff. After the entry into force of the Regulation, the convenience of accepting the application of foreign laws allowing for the condemnation to punitive damages before Italian courts was highlighted by Francesco Munari, 'L'entrata in vigore del regolamento «Roma II» e I suoi effetti sul *private antitrust enforcement*' [2008] Dir comm int 281 ff.

[107] See Sylvaine Poillot-Peruzzetto and Dominika Lawicka, 'Relevance of the Distinction Between the Contractual and Non-Contractual Spheres (Jurisdiction and Applicable Law)' in Basedow, Francq and Idot (n 26) 141, suggesting a specific amendment to Rome I Regulation.

[108] According to Danov (n 104) 210 f, Recital 32 was also relevant for the

damages is also facilitated by the fact that in contractual matters the parties may avail themselves of a wider freedom to choose the applicable law. In that context, the parties may be induced to agree that the contract be governed, entirely or partially, by such a law in conformity with article 3.1 of the Rome I Regulation. For this reason, Italian courts could be less inclined to consider the applicable law as incompatible with public policy, when it was designated by the parties on the basis of their own will, so that the effects of that law are certainly predictable for them.

ABSTRACT

In recent years recognition of punitive damages has been the subject of an evolving case-law in Italy. At the outset, the Italian Supreme Court held that a foreign judgment awarding punitive damages could not be recognised, being contrary to public policy, insofar as it conflicted with general principles concerning civil liability. Subsequently, the Joint Chambers of the Supreme Court overruled those findings, referring to the multiple functions of civil liability rules under Italian law and to a narrower notion of public policy, stemming from the provisions in matters of fundamental rights contained in the Italian Constitution and in the European Charter of Fundamental Rights. This new legal framework should facilitate recognition and enforcement of foreign judgments awarding punitive damages before Italian courts. However, it still raises several issues, related to the interpretation of the foreign judgment to be recognised, to the method proposed for the definition of the notion of public policy and to the requirements set forth by the Italian Supreme Court for recognition of punitive damages. In this regard, the reference to the principle of proportionality seems to be especially problematic, as it may induce domestic courts to overlook the prohibition of the review of the foreign judgment as to its substance.

interpretation of art 34 of Brussels I Regulation, referring to public policy as a ground of non-recognition of judgments.

Chapter X

A HELICOPTER OVERVIEW OF THE RECOGNITION AND ENFORCEMENT OF PUNITIVE DAMAGES

CEDRIC VANLEENHOVE *

Contents: 1. Introduction. – 2. Spain: receptive attitude in 2001 Supreme Court judgment *Miller v Alabastres*. – 3. Classification of the investigated countries. – 4. Who is right? – 5. Excessiveness test: how much is too much? – 6. Conclusion.

1. Introduction

The chapters of Astrid Stadler, Olivera Boskovic, Alex Mills and Giacomo Biagioni elsewhere in this book investigated the enforcement of punitive damages from a purely German/Swiss, French, English and Italian perspective respectively. In this contribution we move away from the national outlooks and attempt to present a more 'transnational' approach to the legal phenomenon of punitive damages. To that end, we first bring the country of Spain into the discussion (part 2). Subsequently, we classify the examined countries by the degree of openness they exhibit towards the legal remedy (part 3). It is then assessed which of the positions taken by the various countries is to be preferred (part 4). Finally, after having proposed the principled acceptance of punitive damages, we elaborate on the excessiveness analysis that should be the test when dealing with requests

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for enforcement of foreign punitive damages judgments (part 5). A short conclusion ends this contribution (part 6).

2. SPAIN: RECEPTIVE ATTITUDE IN 2001 SUPREME COURT JUDGMENT *MILLER V ALABASTRES*

It is enriching to add the Spanish situation to discussion. As is the case for Germany, France and Italy, the Supreme Court in Spain has ruled on the enforceability of punitive damages. In the case of *Miller Import Corp. v Alabastres Alfredo, S.L.* of 13 November 2001 the Spanish Supreme Court (*Tribunal Supremo*) dealt with a request for enforcement of a US judgment containing punitive damages.[1] At that time, the civil division of the Spanish Supreme Court had exclusive jurisdiction over a request for enforcement of judgments coming from abroad.[2] Litigation between the plaintiffs Miller Import Corp. (domiciled in the US) and Florence S.R.L. (domiciled in Italy) and defendant Alabastres Alfredo, S.L. (domiciled in Spain) arose before the Federal District Court for the Southern District of Texas (Houston Hall) in Houston. The plaintiffs alleged that the Spanish defendant had infringed intellectual property rights by manufacturing falsified labels of a registered trademark in Spain. In a judgment of 21 August 1998 the American court awarded treble damages to the plaintiffs.[3] Before the Supreme Court the defendant argued, among other things, that enforcement should be refused on public policy grounds.

After noting that punitive damages are not acknowledged in Spanish law, the Supreme Court emphasised that its intent was not to usurp legislative competence in the matter but rather to assess the foreign judgment under substantive public policy as identified by Spanish courts.[4] It noted that the Texas judgment

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[1] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, AEDIPR 2003, 914.

[2] Francisco Ramos Romeu, 'Litigation Under the Shadow of an Exequatur: The Spanish Recognition of US Judgments' (2004) 38 Intl Lawyer 945, 951.

[3] Federal District Court for the Southern District of Texas (Houston Hall) 21 August 1998, unpublished and archived. The exact amount of the treble damages is unknown as it is not mentioned in the judgment of the Spanish Supreme Court.

[4] Scott R. Jablonski, 'Translation and comment: enforcing US punitive

contained some damages that did not serve a compensatory objective but were more punitive, sanction-like and preventive in nature. The Court classified compensation for injuries as part of (Spanish) international public policy. However, it added that coercive, sanctioning mechanisms are not uncommon in the areas of (Spanish) substantive law, specifically contract law, and procedure. According to the Court the presence of such punitive mechanisms in private law to compensate the shortcomings of criminal law is consistent with the doctrine of minimum intervention in penal law. This doctrine is embedded in the Spanish legal system and requires the legislature to first counter unwanted conduct by employing less invasive remedial intervention, such as civil penalties. Criminal penalties should only be used as *ultimum remedium*. [5] Furthermore, it is often difficult to differentiate concepts of compensation. The example of moral damages to which the Court refers makes this point clear. Moral damages fulfil a compensatory role (the reparation of moral damage) as well as a sanctioning function and it is not easy to distinguish between the two. [6] In Spanish law a minimal overlap between civil law (compensation) and criminal law (punishment) is thus not completely unknown. [7] In making their public policy analysis, the Court finally added, courts should not lose sight of the connection between the matter and the (Spanish) forum. All these reasons led the Court to the conclusion that punitive damages as a concept do not oppose public policy. [8]

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damages awards in foreign courts – a recent case in the Supreme Court of Spain' (2004-2005) 24 J L Comm 225, 229.

[5] Francesco Quarta, 'Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe', Conference paper – 'Extraterritoriality and Collective Redress', London 15 November 2010, Draft 19 November 2010, 10.

[6] Csongor Istvan Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe' (2012) NIP 4, 9.

[7] Scott R. Jablonski (n 4) 229; Istvan Nagy (n 6) 9.

[8] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, AEDIPR 2003, 914; Marta Otero Crespo, 'Punitive Damages Under Spanish Law: A Subtle Recognition?' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 281, 289; Marta Requejo Isidro, 'Punitive Damages From a Private International Law Perspective' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 237, 247-248; Marta Requejo Isidro, 'Punitive Damages: How Do They Look Like When Seen From Abroad?' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 309, 326.

This finding however did not end the public policy test. The principle of proportionality was the second and final yardstick the award needed to overcome before enforcement could be allowed. The Court considered two elements to be relevant when assessing the (potentially) excessive nature of the treble damages: (1) the predictability of the award and (2) the nature of the interests protected. [9]

The Court first referred to the fact that the treble damages arose *ex lege*. The legal provisions sanctioning infringements of the intellectual property rights at hand took the intentional character and the gravity of the defendant's behaviour into account and foresaw a tripling of the amount of compensatory damages. This reliance on the statutory origin of the punitive damages begs the question whether punitive damages developed by case law would be predictable enough for the Spanish Supreme Court. [10] In our opinion the absence of a written provision would not automatically rule out the enforcement of the judgment. [11] One wonders what would happen to punitive awards coming from states where punitive damages legislation does not provide for caps. [12] In those states the only restraint on the amount of punitive damages comes from the American courts, most notably from the US Supreme Court's case law regarding due process. The Spanish Supreme Court confirmed that the U.S courts are prudent in policing the proportionality of damages awarded. [13] Moreover, legality leads to foreseeability but it does not guarantee proportionality. The legislature's intervention to fix the amount of the punitive damages (whether by establishing a maximum, a minimum or an appropriate range) does not make the award proportional in all cases. Furthermore, the foreign country's idea of proportionality may vary from the Spanish legislature's estimation. [14]

As to the second aspect of the proportionality criterion the

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[9] Requejo Isidro (n 8) 327-328.

[10] Requejo Isidro (n 8) 328.

[11] Requejo Isidro, 'Punitive Damages – Europe Strikes Back?', presentation delivered at the British Institute of International and Comparative Law, 2 November 2011, London, text on file with the author.

[12] Requejo Isidro (n 11).

[13] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, AEDIPR 2003, 914; Jablonski (n 4), 229.

[14] Requejo Isidro (n 11).

Court argued that in a market economy the safeguarding of intellectual property rights is important. Moreover, this interest in offering protection to such rights is not strictly local but is shared universally by countries that harbour similar judicial, social and economic values. [15] The common desire to protect the interests at stake justified the awarding of an amount of twice the compensatory damages on top of the compensation granted. [16] The importance of the underlying *ratio legis* will thus determine the outcome of the proportionality analysis. [17]

3. Classification of the investigated countries

The countries that have been discussed in this book can be divided into three groups, according to their position on the spectrum of openness towards foreign punitive damages judgments. [18]

In the conservative group we find Germany and, up until July 2017, Italy. The Supreme Courts of Germany and Italy have always taken a traditional view and have denied the enforcement of US punitive damages because the concept of punitive damages is considered contrary to the fundamental separation of criminal and private law. The judgments make clear that Civil Law countries in the European Union are wary of punitive damages as they are administered in civil proceedings but pursue objectives which are traditionally the focus of criminal law. Punitive damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff. [19]

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[15] Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, AEDIPR 2003, 914.

[16] Jablonski (n 4) 230.

[17] Requejo Isidro (n 8) 328.

[18] For an in-depth examination of the positions taken in Germany, Italy, England, Spain and France: Cedric Vanleenhove, 'The Current European Perspective on the Exequatur of US Punitive Damages: Opening the Gate but Keeping a Guard' (2015) PYBIL 235-263.

[19] For Germany: German Supreme Court 4 June 1992, *John Doe v Eckhard Schmitz*, BGHZ 118, 312, NJW 1992, 3096, RIW 1993, 132, ZIP 1992, 1256 (English translation of the relevant parts of the judgment by Gerhard Wegen and James Sherer, 'Germany: Federal Court of Justice decision concerning the recognition and enforcement of US judgments awarding punitive damages'

England and Switzerland could be marked as nations in an intermediate group, due to the hybrid or uncertain stance they display. England distinguishes itself from the other scrutinised countries because English substantive law provides for exemplary damages, the English equivalent of punitive damages. [20] This fact does, however, not mean that England is completely receptive to enforcing US punitive damages. Multiple damages cannot be enforced due to Section 5 of the 1980 Protection of Trading Interests Act (PTIA). Section 5 of PTIA not only prevents the enforcement of the additional damages but deems the basic compensatory element of a multiple damages award unenforceable as well. It is currently uncertain whether other forms of punitive damages will be accepted for enforcement purposes by English courts. Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v Sun and Sand Agencies Ltd*. seems to indicate an opening in the affirmative. He repeated the conventional idea that a fine or other penalty only refers to sums payable to the state by way of punishment, and that a sum payable to a private individual is not a fine or penalty. [21] As punitive damages are, in general, paid to the plaintiff, this would imply that they are not to be labelled as a fine or other penalty, paving the way for their enforcement. Further case law is nevertheless required to confirm this position. In Switzerland the situation is also unclear as there is no judgment from the Federal Supreme Court. The two available lower courts decisions do not settle the issue conclusively. [22]

In the progressive group we find Spain, France and also Italy, at least since July 2017. As discussed (*supra* part 2), in the sole decision on the matter the Spanish Supreme Court embraced punitive damages for enforcement purposes. In France the Supreme Court (*Cour de Cassation*) indicated its willingness

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(1993) 32 International Legal Materials 1320, 1327). For Italy: Cass, 19 January 2007, *Parrott v Fimez*, no. 1183, Rep Foro it 2007 v Delibazione no. 13 and v Danni Civili no. 316; Corr. Giur., 2007, 4, 497; Cass, 8 February 2012, Soc Ruffinatti v Oyola-Rosado, no. 1781/2012, Danno resp 2012, 609.

[20] *Rookes* v *Barnard*, [1964] 1 *All E.R.* 367, 410-11 (H.L.)

[21] *S.A Consortium General Textiles v Sun and Sand Agencies Ltd.* [1978] Q.B., 299-300.

[22] District Court Sargans 1 October 1982, Schweizer Juristenzeitung 1986, 310; District Court Basel-Stadt 1 February 1989, upheld by the Basel-Stadt Court of Appeal 1 December 1989, Basler Juristische Mitteilungen 1991, 31-38.

to accept foreign punitive damages awards.[23] According to the *Cour de Cassation*, punitive damages are not in and of themselves contrary to (international) public policy. Foreign punitive damages can, therefore, in principle be enforced in France. Although the concept of punitive damages conforms to France's international public policy, the proportionality of the award is still a requirement of said policy. The investigation of their amount now forms the heart of the public policy analysis of foreign punitive damages, in line with the ruling of the Spanish Supreme Court in *Miller v Alabastres*.

The Italian judgment in the case of *Axo Sport S.P.A. v Nosa Inc.* of 5 July 2017, one of the impetuses for this book, represents a Copernican revolution in Italy.[24] For the first time, the Italian Supreme Court ruled that punitive damages do not violate Italy's (international) public policy. The Supreme Court's decision represents a landslide in the treatment of foreign punitive damages judgments. It did, however, lay down that courts faced with a foreign punitive award must check the proportionality between the compensatory damages and punitive damages and between the punitive damages and the wrongful conduct.

4. Who is right?

In light of the existence of diverging national outlooks on requests for enforcement of punitive damages, the reader might wonder which position merits support.

European courts should not treat US punitive damages as, in themselves, contrary to international public policy. The traditional interpretation of international public policy, as rejecting the concept of punitive damages, does not reflect the legal reality. It cannot be sustained that the outright dismissal of the remedy of punitive damages is warranted under international public policy.

We assert that Member States' courts should not refuse the enforcement of US punitive damages because their own legal

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[23] Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v Fountaine Pajot S.A*, no. 09-13303, D 2011, 423.

[24] Cass, 5 July 2017, *Axo Sport S.P.A. v Nosa Inc.*, no. 16601/2017. See the case notes by Barbara Pozzo, Michel Cannarsa, Cedric Vanleenhove, Lotte Meurkens, André Janssen and Natalia Alvarez Nata (2018) 5 ERPL 661-702.

systems contain private law instruments akin to punitive damages or pursuing identical or similar goals. In such a context, it seems problematic to employ the international public policy exception to reject foreign punitive damages in private international law cases. The international public policy test should be restricted to an excessiveness (or proportionality) check of the American punitive damages.[25] It should be underlined that we do not offer an opinion about the introduction of punitive damages as a full-blown remedy in substantive law.

The legal systems of France, Spain and Germany, to take these major countries as an example for the purposes of this contribution, contain private law instruments which resemble punitive damages or which pursue the same goals of punishment and/or prevention. An argument of internal legal coherence then leads to the acceptance of US punitive damages at the enforcement stage. When a legal system itself contains punitive-like remedies in private law, it cannot declare punitive damages unenforceable by using the international public policy escape clause.[26] Member States would be guilty of legal hypocrisy if they were to reject US punitive damages as violating international public policy while at the same time acknowledging or condoning similar instruments in their substantive law.[27] Let us look at a few of these 'punitive elements'.[28]

In Spanish law article 123 of the *Ley General de la Seguridad Social*[29] (General Act on Social Security) provides a clear example of a punitive provision within private law.[30] This pro-

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[25] François-Xavier Licari, 'Prendre les punitive damages au sérieux: propos critiques sur un refus d'accorder l'exequatur à une décision californienne ayant alloué des dommages intérêts punitifs' (2010) JDI 1234, 1262.

[26] Volker Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts (2003) 78 Chicago-Kent Law Review 105, 153; Madeleine Tolani, 'US Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public' (2011) 17 Annual Survey of International and Comparative Law 185, 207.

[27] Jessica Berch, 'The Need for Enforcement of US Punitive Damages Awards by the European Union' (2010) 19 Minnesota JIL 55, 77; Istvan Nagy (n 6) 11.

[28] For a more extensive list see Cedric Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Intersentia 2016) 158-204.

[29] Real Decreto Legislativo 1/1994 of 20 July, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social, BOE no. 154,

vision deals with the legal consequences of a labour accident or an occupational disease caused by the employer's fault. When the harm to the worker was caused by faulty equipment, in a workplace without obligatory safety devices or where safety and hygiene measures were not observed, the benefits paid out (by the state) to the employee will be increased by 30 to 50% depending on the seriousness of the employer's wrongdoing. [31] The provision further lays down that under these circumstances the employer is liable for the surcharge and cannot insure himself against this liability. [32] Lastly, the liability for the additional amount is independent from and compatible with any criminal (or other) liability. [33]

The victim of a labour accident or an occupational disease is thus entitled to receive increased financial benefits in case his condition can be attributed to the employer. This financial burden is imposed by the Spanish Department of Employment and has to be borne by the employer. The exact percentage (between 30 and 50) depends on the assessment of the gravity of the employer's wrong. This criterion reflects the tortfeasor-oriented approach of punitive damages and contradicts the idea of (compensatory) damages which are strictly related to the victim's loss. Furthermore, the instrument of the surcharge appears to have a punitive as well as a deterrent objective. It aims at punishing the employer for allowing the damaging event to take place and contributes to the prevention of such accidents by seeking the employer's compliance with his duties in the future. [34] The punitive and deterrent nature of the administrative sanction has been explicitly confirmed by the Spanish Supreme Court in a decision of 23 April 2009. [35]

A number of other characteristics of the employer's surcharge are also reminiscent of punitive damages. First, like punitive damages in the US, the amount is payable to the victim

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29 June 1994, 20658-20708, available at <www.boe.es/diario_boe/txt.php?id=-BOE-A-1994-14960>, accessed 28 March 2019.

[30] Otero Crespo (n 8) 294-295.

[31] Article 123.1 General Act on Social Security.

[32] Article 123.1 General Act on Social Security.

[33] Article 123.1 General Act on Social Security.

[34] Otero Crespo (n 8) , 294.

[35] Spanish Supreme Court (Civil Chamber, Plenary Section) 23 April 2009, RJ 2009, 4140.

and not to the state.[36] Second, the liability under article 123 of the *Ley General de la Seguridad Social* does not exclude any criminal (or other) liability the employer might incur. The same goes for US punitive damages. A wrongdoer can face criminal prosecution and still be ordered to pay punitive damages with regard to the same conduct. Following the case law of the US Supreme Court the civil court should take the possible criminal sanctions into account in order to avoid excessive punitive awards.[37]

The field of personality rights offers an example of deterrence objectives going beyond the normal preventive side-effect of damages. In Germany personality rights received increased attention after World War II. The *Bundesgerichtshof* recognised a general right of personality for the first time in 1954. The *Reichsgericht* (Imperial Court of Justice), the supreme criminal and civil court of the German empire from 1879 to 1945, had always declined to do so. In the so-called *Schachtbrief* case a lawyer wrote a letter to a newspaper on behalf of his client, minister Hjalmar Schacht. In it he requested the correction of certain false political statements. The newspaper published the letter under its 'Letters from Readers' section. The reproduction did not make it clear that the lawyer was acting on behalf of his client. The publication thus shed a negative light on the lawyer as it gave the impression he was voicing his own political views instead of performing his professional duty. The *Bundesgerichtshof* referred to article 1 (Human Dignity) and article 2 (Personal Freedoms) of the 1949 Constitution and established a general personality right. On the basis of that right it ordered a corrective statement to be issued by the defendant.[38]

The matter of *Caroline von Monaco I* is a seminal one in the line of cases dealing with personality rights. The *Bundesgerichtshof* emphasised the preventive purpose of damages for breach of personality rights.[39] Two widely distributed German maga-

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[36] Split recovery schemes, whereby a portion of the punitive award flows to the state, are of course an exception to this general principle. California law, for instance, provides that 75% of the award flows to a Public Benefit Trust Fund: Cal. Civ. Code § 3294.5.

[37] *BMW of North America, Inc. v Gore*, 517 US 574-575, (1995).

[38] BGH 25 May 1954, BGHZ 13, 334.

[39] Ulrich Magnus, 'Punitive Damages and German Law' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe*

zines contained a fictitious interview with Princess Caroline. In addition, an article mentioned a number of untrue statements about her. Pictures of her taken by paparazzi also appeared on the cover. The Princess brought a claim for retraction and clarification as well as for monetary compensation for infringement of her personality right. Both at first instance as well as before the Court of Appeal of Hamburg the Princess was granted the right of correction as well as DM 30.000 in damages. [40]

The *Bundesgerichtshof* repeated that victims of a breach of the general right of personality are entitled to compensation if the violation is grave. The gravity of the violation depends *inter alia* on the defendant's motive and degree of culpability. The Court found such a grave intrusion on the facts of the case. The defendant knew that Princess Caroline did not want to be interviewed and instead created a fake interview about the problems in her private life. In order to boost its sales figures it deliberately exposed the plaintiff's private sphere to hundred thousands of readers.

The Court further ruled that the compensation of DM 30.000 was not sufficient. It no longer relied on § 847 BGB (damages for pain and suffering) as the basis for the monetary claim. Instead, the redress was held to flow from articles 1 and 2 of the German Constitution. Importantly, this form of redress is meant to serve a preventive purpose as well. Monetary compensation can only properly serve this aim of prevention if the amount due correlates to the fact that the infringement took place for commercial gain. This does not mean that the forced commercialisation of the Princess' personality right should lead to a complete absorption of profits (*i.e.* a restitutionary remedy [41]) but the profits made should be included as a factor in the calculation of the compensation. Where a famous personality is commercially exploited, the amount awarded must act as a real deterrent. [42]

Missing Out? (Intersentia 2012) 243, 253; Madeleine Tolani, 'US Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public' (2011) 17 Annual Survey of International and Comparative Law 185, 195.

[40] BGH 15 November 1994, BGHZ 128, 1.

[41] Tilman Ulrich Amelung, 'Damages Awards for Infringement of Privacy – The German Approach' (1999) 14 Tulane European and Civil Law Forum 15, 21.

[42] BGH 15 November 1994, BGHZ 128, 1.

When the Court of Appeal of Hamburg reconsidered the case, it followed the *Bundesgerichtshof*'s findings and awarded DM 180.000 in damages. This amount was the highest sum ever awarded in Germany for violation of personality rights as damages in similar cases were up to that point always limited to DM 10.000. [43]

Two points of the judgment require further elaboration. First, the Court took the publisher's motive and his degree of culpability in account when determining whether the violation of Caroline of Monaco's right was grave. This seems inconsistent with the victim-focused method of private law. Second, when setting the level of compensation for the breach of privacy, the German Supreme Court held that courts should consider the profits made by the tortfeasor in order to *deter* the defendant and other tabloids. By introducing the purpose of deterrence in violation of privacy cases the *Bundesgerichtshof* arguably crossed the line between compensation and punishment. Indeed, prevention is traditionally associated with objectives of criminal law. By explicitly making deterrence a factor in a private law dispute, the Court blurred the distinction between civil law and criminal law. [44] If the words of presiding judge Erich Steffen are anything to go by, this dogmatic landslide was intentionally caused. He pointed out in an interview after the case that the damages should be painful for the publisher.

It could, therefore, be argued that the approach taken by the *Bundesgerichtshof* in *Caroline I* does not fit within the traditional framework of compensation but rather corresponds to the ideas behind punitive damages. By focusing on the wrongdoer('s act) and the need to prevent repetition by him or commission by others for the first time, the case breaks away from the orthodox position of loss-restoring and victim-orientated compensation. [45] The use of clear punitive [46] elements in *Caroline I* can thus be seen as breaking down the theoretical walls between private

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[43] Amelung (n 41) 22; Volker Behr, 'Myth and Reality of Punitive Damages in Germany' (2005) 24 J L Comm. 197, 210.

[44] Amelung, (n 41) , 23.

[45] Behr (n 43), 211.

[46] Volker Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts (2003) 78 Chicago-Kent Law Review 105, 136; Behr (n 43) 210. *Contra*: Nils Jansen and Lukas Rademacher, 'Punitive Damages in Germany' in Helmut Koziol and

law and public law and demonstrates the existence of mechanisms close to – or at the very least pursuing the same aims as – punitive damages in German private law.

In our opinion moral damages offer a breeding ground for punitive damages. An inherent characteristic of these extra-patrimonial damages is that they cannot be quantified monetarily in an objective manner. It is, for example, very difficult to place a monetary value on pain and suffering. Judges, therefore, inevitably enjoy freedom when assessing these types of damages. This enables them to consider multiple aspects rather than solely the extent of the harm suffered by the victim. If this theory is correct, then parts of moral damages are in fact covert punitive damages.

In France Jourdain expresses this idea as well. He notes that some French lawyers and academics believe that French courts sometimes calculate damages not exclusively using the harm suffered by the plaintiff. These courts take additional factors into account, such as the behaviour of the wrongdoer. If the courts find the conduct to be a deliberate violation of the victim's rights, they punish the tortfeasor by inflating the moral damages.[47] The difference between the moral damages actually awarded and what the moral damages would have been if the judge had not deemed expansion of the moral damages necessary, is punitive in nature. These additional damages come close to punitive damages as they are measured by the reprehensibility of the defendant's actions.

French courts enjoy a wide discretion to evaluate and set the damages in the cases before them. In that regard they escape the control of the French Supreme Court. The *Cour de cassation* can only quash a decision if it finds that the lower court has not adhered to the principle of *réparation intégrale* (full reparation). French judges are, however, under no obligation to explain how they reached the amount of damages they awarded. They can resort to stating that the harm suffered will be compensated by the damages granted, without any further justification or elaboration. Only in the rare cases[48] where courts do explain

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Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 75, 80 and 81; Magnus (n 39) 253.

[47] Patrice Jourdain, 'Rapport introductif' (2002) Les Petites Affiches 3, 3, No 7.

[48] See, for instance, a judgment of the Cour de Cassation in which the

how they came to the amount of damages and indicate that they took more factors than only the harm into account, will the *Cour de cassation* be able to intervene. [49]

The *réparation intégrale* rule is also a reason why it is by no means easy, if at all possible, to prove the existence of these hidden punitive damages within moral damages. The full reparation standard demands an assessment *in concreto* of the harm suffered. Courts should always look at the facts of the case and cannot fall back on so-called *barèmes*, *i.e.* pre-determined standarised scales of damages, to set the appropriate level of damages. The official admittance of *barèmes* would have opened an opportunity to confirm the existence and measure the size of punitive damages within moral damages. A simple comparison between the *barème* and the amount of moral damages in the judgment would have uncovered the punitive intentions of the judge. [50]

It is very likely that the judges use the *barèmes* unofficially. However, judges will not admit to this in their decision out of fear of having their judgment reversed. We are, therefore, left in the dark as to which of the *barèmes* the court has used (if it has used any at all) and cannot make any comparisons to the amount actually awarded. The prohibition on the use of these *barèmes* thus forms an important obstacle when attempting to prove the presence of punitive elements in moral damage awards. [51]

There are, however, other methods to show that moral damages are sometimes used by courts as a tool to punish the defendant. A study by the French scholar Bourrié-Quenillet, for instance, looked at a number of French cases in which relatives of a deceased person received moral damages. The results of the analysis revealed a difference in the *quantum* of moral damages depending on whether the death was caused by the defendant's fault or not. Bourrié-Quenillet found that the average award for moral damages was higher when the defendant was sued on the

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Cour de Cassation annulled the lower court's decision because damages were set by taking the defendant's fault into consideration: Cass. Civ 8 May 1996, Bull. Civ. II, no. 358.

[49] Jean-Sébastien Borghetti, 'Punitive Damages in France' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 55, 62.

[50] Borghetti (n 49) 63.

[51] Borghetti (n 49) 63.

basis of fault liability than on the basis of strict liability. Admittedly, the study examined only a small sample of decisions, namely 536 judgments from the Court of Appeals of Nîmes, Montpellier, Rennes and Paris. The cases involved 1.765 relatives in total. Despite the relatively limited scale, the work nevertheless seems to indicate the existence of hidden punitive considerations in these types of moral damages. [52]

The presence of these mechanisms (and others [53]) leads to the conclusion that the concept of punitive damages, in itself, can no longer be held to be contrary to international public policy. In sum, the liberal attitude of the Spanish, French and Italian Supreme Courts should become the standard in the European Union. These courts have rejected the traditional (international) public policy objections and have instead opted for an excessiveness analysis. The idea of punitive damages is no longer offensive to the legal system, but the amount of the punitive damages still could be.

5. Excessiveness test: how much is too much?

Stating that *excessive* punitive damages are to be refused is easy, determining *in concreto* what is *too much* is hard. The creation of a bundle of good practices can help national courts when (non-EU) punitive damages judgments come knocking at the door. In what follows we highlight the core guiding principles. [54]

Our suggestion would be to commence from a 1:1 maximum ratio between the punitive and compensatory damages contained in the decision. On both sides of the ocean courts have availed themselves of this 1:1 proportion. [55] Research conducted

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[52] Martine Bourrié-Quenillet, *L'indemnisation des proches d'une victime décédée accidentellement. Étude d'informatique judiciaire* (1983) Ph.D thesis University of Montpellier 1, 97–100.

[53] For a more extensive list see Vanleenhove (n 28) 158-204.

[54] For the full set of guidelines: Cedric Vanleenhove, 'A Normative Framework for the Enforcement of US Punitive Damages in the European Union: Transforming the Traditional '¡No pasarán!'' (2016) 41 Vermont Law Review 347, 377-403

[55] German Supreme Court 4 June 1992*, John Doe v Eckhard Schmitz*, BGHZ 118, 312, NJW 1992, 3096, RIW 1993, 132, ZIP 1992, 1256 (English translation of the relevant parts of the judgment by Gerhard Wegen and James

in the US has revealed that the ratio between punitive and compensatory damages lies between 0.88 and 0.98 to 1 in the vast majority of cases. [56] A European standard of 1:1 thus covers a high number of the punitive damages judgments coming from the country whose awards travel to our territories most frequently: the United States. The 1:1 ratio can prove to be a valuable starting point for the European courts' proportionality test. However, it should not be viewed as an all-embracing or rigid rule. As the excessiveness test invariably requires a case-by-case assessment, there are special circumstances and influencing factors that might call for an adaptation of the ratio.

The first intervening consideration is the level of connection the factual elements of the case have with the country where enforcement is requested. The closer the case's link to the requested forum, the stronger the international public policy exception will be. The more connected the case is to the territory of the requested state in terms of the facts and the parties, the more interest the requested forum has to let the values of its own legal system influence the enforcement decision, and the less deference is given to the foreign court's judgment. The connection between the situation and the forum can be of a personal or a territorial nature. On the contrary, if the link to the forum is weaker, the forum's interest in intervening is less and the level of tolerance toward the foreign judgment is higher. If the level of contacts to the forum being requested to enforce the judgment is low or non-existent, the application of the international public policy clause is softened and more tolerance should, therefore, be granted. [57] In the case of punitive damages, this would mean that the amount deemed acceptable for enforcement should, all other factors being equal, be higher. The European courts' atti-

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Sherer, 'Germany: Federal Court of Justice decision concerning the recognition and enforcement of US judgments awarding punitive damages' (1993) 32 International Legal Materials 1320, 1327; Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v Fountaine Pajot S.A*, no. 09-13303, D 2011, 423; *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 425 (2003); *Exxon Shipping Co. v Baker*, 554 US 471, 476, 515 (2008).

[56] Theodore Eisenberg et al., 'The Predictability of Punitive Damages' (1997) 26 JLS 623, 652; Theodore Eisenberg et al., 'Juries, Judges, and Punitive Damages: An Empirical Study' (2002) 87 Cornell L R 743, 754; Theodore Eisenberg et al., 'Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1886, and 2001 Data' (2006) 3 JELS 263, 278.

[57] Requejo Isidro, (n 8) 246.

tude with regard to US punitive damages awards will thus also depend on the case's factual connection to their territory.

The second intervening factor is the interest at stake in the case. The first factor modulates the strength of the international public policy according to the closeness of the case to the forum. The second one entails that the stronger the interest protected by public policy, the less relevant the link to the forum must be to activate public policy. [58] The opposite is also true. The degree of connection to the forum and the importance of the interest thus act as communicating vessels. Human rights, in particular, form an important interest to consider. But also safeguarding of the environment, freedom, dignity, and legal certainty could be put forward as strong interests. [59]

As an upper limit of acceptance, the constitutional 9:1 ceiling imposed in the United States should be underlined. In *State Farm Mutual Automobile Insurance v Campbell*, the United States Supreme Court, in *dicta*, effectively laid down a 9:1 maximum ratio between punitive and compensatory damages by stating that '*in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due-process*'. [60] The Court's establishment of this upper limit has its ramifications for European courts faced with a request for enforcement of an American punitive damages judgment. If the American legal system has identified double-digit ratios between punitive and compensatory awards as constitutionally unacceptable, it seems only logical that European judges should also treat this 9:1 ratio as an outer limit to be conformed with in order to make the judgment enforceable. [61] It makes no sense for a European court to allow the enforcement

[58] Elena Rodriguez Pineau, 'European Union International Ordre Public' (1994) 3 Spanish YBIL 43, 65.

[59] Requejo Isidro (n 11).

[60] *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 425 (2003).

[61] It should be noted that the Supreme Court in *State Farm v Campbell* also ruled that: 'when compensatory damages are substantial, then a lesser ratio perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee'. It had previously, in *BMW v Gore*, already held that an egregious case with small economic damages could warrant an increase of the maximum ratio: *BMW of North America, Inc. v Gore*, 517 US 582 (1995). The 9:1 ratio is thus not as rigid as it may appear to be at first glance.

of judgments that violate the federal constitution in their country of origin.

6. CONCLUSION

Building on the national reports offered by the four other participants in the panel, this contribution looked at the enforcement of punitive damages from a more overarching perspective. After informing the reader about the situation in Spain, it organised the countries discussed in this book into three groups according to their willingness to embrace foreign punitive damages in the enforcement arena. It was submitted that a complete rejection of punitive damages does not pass muster as the private laws of the investigated countries contain elements closely resembling punitive damages. This does not mean that the openness towards the remedy should be unbridled. Under the (international) public policy exception, any check on the award should be restricted to a verification of the amount of punitive damages granted by the foreign court. The American constitutional 9:1 ratio between punitive and compensatory damages is valuable to establish the initial ballpark in which tolerable punitive damages are situated. Below that upper ceiling, European courts are advised to construe their excessiveness analysis from a 1:1 ratio, with attention for potential upward or downward adjustments depending on the underlying matter's nexus to the forum and the interests at play.

ABSTRACT

In order to formulate a recommended approach with regard to the enforcement of foreign punitive damages judgments, this contribution first outlines the Spanish stance on the matter. It further ranks the countries of Germany, Italy, England, Switzerland, Spain and France according to their degree of hostility towards the remedy. It is argued that an outright refusal to enforce should be frowned upon because the mentioned countries' own legal systems contain private law instruments that are akin to punitive damages or pursue identical or similar goals. An excessiveness analysis is, however, allowed. A number of concrete guiding principles to help requested courts make well-informed decisions are discussed.

Chapter XI

TOWARDS A EUROPEAN CONCEPT OF PUBLIC POLICY REGARDING PUNITIVE DAMAGES?

WOLFGANG WURMNEST *

Contents: 1. Introduction. – 2. The concept of punitive damages. – 3. European influences on public policy. – 3.1. The European Convention on Human Rights. – 3.1.1. Principle of proportionality as yardstick. – 3.1.2. Awarding punitive damages under the Convention? – 3.1.3. Conclusion. – 3.2. European private law. – 3.2.1. Enforcement of EU rights through national law: the principle of effectiveness. – 3.2.2. Remedies of European secondary law. – 3.2.3. Conclusion. – 3.3. European private international law. – 3.3.1. The rules on public policy in the Rome II Regulation. – 3.3.2. Punitive damages disputes as 'civil and commercial matters'. – 3.3.3. The dispute around the qualifier 'punitive damages of an excessive nature'. – 3.3.4. Conclusion. – 3.4. Drawing the strings together. – 4. The comparative perspective. – 4.1. Partial recognition and enforcement (severability). – 4.2. Enforcement of the punitive part of the judgment. – 4.3. The black box: testing for 'excessive' damages. – 4.4. 'Downscaling' excessive punitive damages? – 5. Conclusion.

1. Introduction

Different rules govern the recognition and enforcement of foreign judgments awarding punitive damages in Europe. Judgments in civil and commercial matters from any of the other EU Member States are enforced according to the Brussels Ibis Regulation, [1] whereas judgments from third states will be scrutinized

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[1] Regulation (EU) 1215/2012 on jurisdiction and the recognition and en-

according to the national rules of the state in which enforcement is sought,[2] unless an international treaty applies. But under all rules the courts in the enforcing state can deny recognition and enforcement on grounds of public policy. No state wishes to give foreign judgments any effect if they violate fundamental values of the forum. Traditionally, the concept of public policy was classified as a national concept. National values determined its reach. Over the years, the public policy device, however, has got a 'European coat'.[3] Regarding the recognition and enforcement of EU judgments, the Court of Justice of the European Union (CJEU) held that '[w]hile the Member States remain in principle free [...] to determine, according to their own ideas, what public policy requires', it is up to the Court to watch over the boundaries of the *ordre public*.[4] With regard to judgments of third states, there is at least an indirect European influence on the public policy reservation as European standards forming part of the law of the Member States can influence the interpretation of the reach of the *ordre public* when scrutinizing judgments

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forcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. This regulation also applies to Denmark via an international treaty concluded between the European Union and Denmark.

[2] For a comparison of the prerequisites under German, French and English law, see Helena Charlotte Laugwitz, *Die Anerkennung und Vollstreckung drittstaatlicher Entscheidungen in Zivil- und Handelssachen* (Mohr Siebeck 2016) 97 ff.

[3] On the European influence on the *ordre public* see Jürgen Basedow, 'Die Verselbständigung des europäischen *ordre public*' in Michael Coester, Dieter Martiny and Karl August Prinz von Sachsen Gessaphe (eds), *Privatrecht in Europa, Vielfalt, Kollision, Kooperation: Festschrift für Hans-Joachim Sonnenberger zum 70. Geburtstag* (CH Beck 2004) 291–319; Dieter Martiny, 'Die Zukunft des europäischen *ordre public* im Internationalen Privat- und Zivilverfahrensrecht' in Michael Coester, Dieter Martiny and Karl August Prinz von Sachsen Gessaphe (eds), *Privatrecht in Europa, Vielfalt, Kollision, Kooperation: Festschrift für Hans-Joachim Sonnenberger zum 70. Geburtstag* (CH Beck 2004) 523–548; Michael Stürner, 'Europäisierung des (Kollisions)Rechts und nationaler *ordre public*' in Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (Gieseking 2011) 463–482; Ioanna Thoma, *Die Europäisierung und Vergemeinschaftung des nationalen ordre public* (Mohr Siebeck 2007) passim.

[4] Case C–7/98 *Krombach v Bamberski* ECLI:EU:C:2000:164, para 23 (regarding the Brussels Convention); Case C–559/14 *Meroni v Recoletos Limited* ECLI:EU:C:2016:349, paras 39–40 (regarding the Brussels I Regulation).

from third states. In addition, the interpretation may be influenced by court decisions in other EU Member States.

Against this background, this chapter seeks to explore whether and to what extent a common European concept of public policy regarding punitive damages is emerging. After having defined the concept of punitive damages (para 2), the European gloss on the *ordre public* is evaluated by looking at the European Convention on Human Rights and selected rules of European private and private international law (para 3). For reasons of space, the analysis focuses mainly on the law of delict/tort. It will reveal that European standards flowing from EU law or human rights law have some influence on the disputed question whether a foreign judgment awarding punitive damages can be recognised and enforced. Against this background, the following part of the chapter will highlight the general approaches taken by (selected) national courts with regard to the enforcement of punitive damages judgments from third states to evaluate whether the approaches are in line with the European standards and to what extent a form of common concept of public policy emerges (para 4).

2. The concept of punitive damages

The term 'punitive damages' is not a European term of art. Any analysis, therefore, has to start with a definition of this type of damages. In this chapter, the term punitive damages is understood as in most states of the United States [5] as a form of monetary compensation that is 'awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future'. [6] As far as allowed by law, US courts usually award such damages on top of compensatory or nominal damages as a form of prevention surplus to punish the tortfeasor for his conduct and to redistribute gains from unlawful behaviour to a certain extent. [7] In addition, the

[5] It has to be noted that the law in the different States of the US varies considerably as some restrict the award of punitive damages or even prohibit common law punitive damages, see Anthony J Sebok, 'Punitive Damages in the United States' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 155 ff.

[6] § 908(1) Restatement (Second) of Torts (1979).

award of such damages shall in some areas 'induce private litigation to supplement official enforcement that might fall short if unaided'. [8] The latter is the case, for example, in US antitrust law where plaintiffs can recover treble damages for antitrust law violations, [9] even though from a technical point of view multiple damages are a distinct type of damages. [10] In sum, under US law, the concept of punitive damages is to a certain extent part of a law enforcement scheme in which private plaintiffs aid public prosecutors to ensure a better enforcement of the law.

Not every unlawful behaviour may, however, trigger an award for punitive damages. Usually the law demands that the wrongdoer has caused the damage intentionally or maliciously or by some other form of reckless disregard for the rights and interests of the damaged person; negligence does not suffice for an award of punitive damages. [11] For a breach of contract, punitive damages usually cannot be awarded 'unless the conduct constituting the breach is also a tort for which punitive damages are recoverable'. [12] The latter can be the case, for instance, when a party deliberately breaches the contract in a fraudulent manner.

The amount of the punitive damages award is assessed by looking at the culpability of the defendant's behaviour and the context of the case. [13] Higher punitive awards are justifiable 'when wrongdoing is hard to detect ([as this increases the] chances of getting away with it) [...] or when the value of injury and

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[7] *State Farm Mutual Automobile Insurance Co v Campbell* 538 US 408, 416 (2003) ('[P]unitive damages ... are aimed at deterrence and retribution'); *Exxon Shipping Co v Baker* 128 SCt 2605, 2621 (2008) ('Regardless of the alternative rationales over the years, the consensus today is that [punitive damages] are aimed not at compensation but principally at retribution and deterring harmful conduct').

[8] *Exxon Shipping Co v Baker* (n 7) 2622.

[9] See s 4 of the Clayton Act (which replaced s 7 of the Sherman Act), 15 USC § 15(a). On the goals of private antitrust law enforcement in the US see Clifford A Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999) 80–84.

[10] Geoffrey C Cheshire, Peter North and James Fawcett, *Private International Law* (15th edn, OUP 2017) 868.

[11] Sebok (n 5) 155.

[12] S 355 Restatement (Second) of Contracts (1979); Renée Charlotte Meurkens, *Punitive Damages: The Civil Law Remedy in American Law, Lessons and Caveats for Continental Europe* (Kluwer 2014) 56.

[13] For details see Sebok (n 5) 180 ff.

the corresponding compensatory award are small ([as this provides] low incentives to sue)'. [14] Over the last years, US courts and also the state legislatures have undertaken various efforts to restrict the award of punitive damages. [15]

3. European influences on public policy

3.1. *The European Convention on Human Rights*

The Europeanisation of the *ordre public* may flow from different sources. Given that constitutional values play an important role when assessing the reach of the *ordre public*, first a look at the case law of the European Court of Human Rights seems warranted.

3.1.1. *Principle of proportionality as yardstick*

The European Court of Human Rights has held that in cases concerning the freedom of expression, an 'award of damages [...] must bear a reasonable relationship of proportionality to the injury to reputation suffered'. [16] Excessive awards are thus not in line with the Convention. The Court, for example, decided that the awards of 35,000 and 40,000 GBP (approximately 51,000 and 58,000 EUR at that time) against two environmental activists who had distributed a defamatory leaflet entitled 'What's wrong with McDonald's?' was disproportionate. The amount awarded violated the right to free expression enshrined in article 10 ECHR given the limited resources of the activists and because it remained unclear to what extent McDonald's

[14] *Exxon Shipping Co v Baker* (n 7) 2622.

[15] Sebok (n 5) 155 ff. For empirical information on the size of punitive damages awards see Renée Charlotte Meurkens' chapter, at 2.2.

[16] *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995), para 49; *Rumyana Ivanova v Bulgaria* App no 36207/03 (ECtHR, 14 February 2008), para 69; *Europapress Holding DOO v Croatia* App no 25333/06 (ECtHR, 22 October 2009), para 54; *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 53; *Tavares de Almeida Fernandes and Almeida Fernandes v Portugal* App no 31566/13 (ECtHR, 17 January 2017), para 77; see also *Independent News and Media and Independent Newspapers Ireland Ltd. v Ireland* App no 55120/00 (ECtHR, 16 June 2005), para 110.

was affected by the campaign. [17] In a similar manner, the Court held that the award of 20,000 PLN (approximately 5,000 EUR at that time) that a Polish applicant had to pay to a politician and to a charitable organisation was excessive and thus a violation of article 10 ECHR. The applicant had distributed a defamatory 'open letter' directed against the politician that portrayed him as being incompetent for the position for which he was running. As the awarded compensation was the highest that a court could grant under Polish election laws in force at that time and as the sum was more than sixteen times the average monthly wage in Poland at that time, the European Court of Human Rights held that it was disproportionate and thus not serving a legitimate aim. [18]

In particular circumstances, however, the Court approved rather high amounts of damages. In *Krone Verlag v Austria*, the Court held that the award of 130,000 EUR against a newspaper publisher who had infringed the personality rights of a child by reporting about his family life and the custody litigation of his parents, did not violate article 10 ECHR. The Court found this award was not disproportionate as the newspaper had published a series of articles 'capable of creating a climate of continual harassment inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution' and that the newspaper had a particular wide circulation across the country. [19]

Even though the Court developed the proportionality threshold in the area of protection of personality rights, it is a general yardstick for measuring damages under this body of law. It should thus apply, in principle, to other losses as well. Awards of an excessive nature, such as excessive amounts of punitive damages, may therefore be in conflict with values protected by the European Convention of Human Rights. The proportionality test does not however ban all forms of high or

[17] *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005), para 96.

[18] *Kwiecién v Poland* App no 51744/99 (ECtHR, 9 January 2007), paras 56–57.

[19] *Krone Verlag v Austria* App no 27306/07 (ECtHR, 19 June 2012), paras 59–60. This case is cited as example for the Court to have embraced the idea that damages might also serve punitive purposes, see Meurkens (n 12) 253.

supra-compensatory damages awards but only those that are out of proportion.

3.1.2. *Awarding punitive damages under the Convention?*

The fact that the Court of Human Rights itself has not openly awarded punitive damages under the European Convention of Human Rights so far supports the argument that excessive awards of damages may infringe the Convention. Under article 41 ECHR, the Court is entitled to grant compensation in money ('just satisfaction') to victims that have established a violation of the Convention or its Protocols that national law cannot adequately remedy.[20] Just satisfaction can compensate the victim for pecuniary and non-pecuniary losses as well for costs and expenses incurred in pursuing his or her right.[21] The amount a state has to pay is principally based on the maxim *restitutio in integrum*.[22] Whether or not an award should also punish the infringing Convention state, and therefore grant a victim an additional compensation on top of his or her actual damage, is subject to debate. The majority of scholars argue that so far punitive damages have not played a role when assessing the amount of just satisfaction,[23] even though the European Court

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[20] On remedial measures to secure non-financial redress ordered by the Court (which today are no longer based on art 41 ECHR but on art 46 ECHR) see Marten Breuer in Ulrich Karpenstein and Franz C Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar* (2nd edn, CH Beck 2015), Artikel 46 para 6; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights L Rev 451–478.

[21] Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 389; Paulo Pinto de Albuquerque and Anne van Aaken, *Punitive Damages in Strasbourg*, University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper no 2016-05 (May 2016) 3.

[22] Practice Direction (Just satisfaction claims) issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 (Version of 1 August 2018) para 10 (regarding pecuniary loss); given that non-pecuniary losses cannot be calculated precisely, the assessment of the award has to be made on an equitable basis, ibid para 14.

[23] Meurkens (n 12) 273 and 275 (although seeing signs that the Court might depart from this standpoint); Jens Meyer-Ladewig and Kathrin Brunozzi in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention: Handkommentar* (4th edn, Nomos 2017), Artikel 41 para 4; Nicola Wenzel in Ulrich Karpenstein and Franz C

of Human Rights has mentioned such damages in some judgments, [24] and awards higher amounts when the conduct of the state has aggravated the suffering of the victim. An example of the latter is a state not fully abiding by a Court's judgment so that the victim has to seek relief 'through time-consuming international litigation before the [European Court of Human Rights]'. [25] There are some voices, however, arguing that the just satisfaction remedy is – at least – impliedly used to punish the Convention State. [26]

The latter view has however not garnered much support in the case law. Referring to the case of *Cyprus v Turkey,* [27] decided by the Grand Chamber of the European Court of Human Rights in 2014, one cannot question the fact that US style punitive damages have not been awarded under article 41 ECHR as yet. This

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Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar* (2nd edn, CH Beck 2015) Artikel 41 para 10; Vanessa Wilcox, 'Punitive Damages in the Amory of Human Rights Arbiters' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 499, 500. From the case law see *Orhan v Turkey* App no 25656/94 (ECtHR, 18 June 2002), para 448: 'The Court notes that it has rejected on a number of occasions, recently and in Grand Chamber, requests by applicants for exemplary and punitive damages'; *B.B. v UK* App no 53760/00 (ECtHR, 10 February 2004), para 36: 'The Court recalls that it does not award aggravated or punitive damages'; *Wainwright v UK* App no 12350/04 (ECtHR, 26 September 2006), para 60: 'The Court does not, as a matter of practice, make aggravated or exemplary damages awards ....'); see also *Menteş and Others v Turkey* App no 23186/94 (ECtHR, 24 July 1998), para 21: '[The Court] rejects the claims for punitive and aggravated damages'.

[24] See, for example, *Hood v UK* App no 27267/95 (ECtHR, 18 February 1999), para 88: 'The Court finds no basis, in the circumstances of the present case, for accepting this claim [for punitive damages]'; *Greens and M.T. v UK* App nos. 60041/08 and 60054/08 ECtHR (23 November 2010), para 97 '[T]he Court does not consider that aggravated or punitive damages are appropriate in the present case.'

[25] *Burdov v Russia (no 2)* App no 33509/04 (ECtHR, 15 January 2009), para 156; for further examples see Wenzel (n 23) Artikel 41 para 10.

[26] Pinto de Albuquerque and van Aaken (n 21) 2 ff; see on this discussion also Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 410–420 (also on the case law of other international tribunals); Wolfgang Peukert in Jochen Abr. Frowein and Wolfgang Peukert (eds), *Europäische MenschenRechtsKonvention: EMRK-Kommentar* (3rd edn, N.P. Engel 2009), Artikel 41 para 6 (arguing that punitive damages could be awarded for severe and intentional violations of the Convention).

[27] *Cyprus v Turkey* (Just Satisfaction) App no 25781/94 (ECtHR, 12 May 2014). The Court had already decided in 2001 that Turkey had infringed various rights enshrined in the European Convention of Human Rights, see *Cyprus v Turkey* (Merits) App no 25781/94 (ECtHR, 10 May 2001).

case received a lot of attention because it established that Convention states might claim 'just satisfaction' from other Convention states for human rights violations on behalf of their citizens. The background of the dispute was the Turkish invasion of northern Cyprus in 1974. In the course of this operation, various Greek-Cypriot citizens went missing and others were enclaved on a peninsula occupied by Turkish troops. The Court awarded the Cypriot Government 30 million Euro as compensation for non-pecuniary losses arising from approximately 1,500 missing persons, and 60 million Euro to compensate non-pecuniary damages suffered by thousands of enclaved Greek-Cypriots (plus possible taxes owed for these amounts). In addition, the Cypriot Government was ordered to distribute these sums to the individual victims of the violations found. The Court decided to award compensation to Cyprus with a vote by the judges of 15:2. As the issue of applying article 41 ECHR to state applicants raised complex legal questions, there were concurring opinions and even a dissenting one. One of the concurring opinions, written by Judge Pinto de Albuquerque – a proponent of punitive damages as means of enforcing human rights [28] – stressed the fact that the damages awarded by the Court were of a punitive nature:

> The punitive nature of this compensation is flagrant. [...] When the Court awards compensation in an amount higher than the alleged damage or even independently of any allegation of damage, the nature of the just satisfaction is no longer compensatory but punitive. [...] The fundamental purpose of that remedy is hence to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention. [29]

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[28] See *Krupko and Others v Russia* App no 26587/07, (ECtHR, 26 June 2014), Concurring opinion of Judge Pinto de Albuquerque para 13: 'While the failure to implement *Kuznetsov and Others* for such a long period can hardly be justified, any additional delay would be unforgivable in the light of the present judgment, and would leave the door open for the award of punitive damages in the event of new similar violations' (footnote omitted); Pinto de Albuquerque and van Aaken (n 21) 3–6.

[29] *Cyprus v Turkey* (Just Satisfaction) (n 27) Concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić para 13 (footnotes omitted).

The majority opinion, however, did not share these clear words but assessed the amount of damages on an equitable basis instead.[30] This reasoning is also reflected by the Practice direction of the Court on article 41 ECHR, which states:

> The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as 'punitive', 'aggravated' or 'exemplary'.[31]

In addition, the examples Judge Pinto de Albuquerque cited in his opinion of other 'punitive damages' cases decided by the European Court of Human Rights (ordering compensation although not being claimed or specified by the applicant, awarding a higher amount than the applicant claimed)[32] demonstrate that his understanding of punitive damages is much broader than the definition followed here. The current discussion on punitive effects is, however, a clear indication that the European Court of Human Rights should put more effort into explaining the basis and the amount of monetary compensation awarded under article 41 ECHR to ensure consistency and legal clarity. The old critique that any 'student of the Court's practice is left wondering whether the process by which the Court arrives at its judgments is anything more sophisticated than sticking a finger in the air or tossing a coin'[33] still holds true in this regard.

3.1.3. *Conclusion*

The case law of the European Court of Human Right gives

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[30] *Cyprus v Turkey* (Just Satisfaction) (n 27) para 58.

[31] Practice Direction (n 22) para 9. Some scholars argue that this Direction is no longer up to date, see Pinto de Albuquerque and van Aaken (n 21) 2.

[32] *Cyprus v Turkey* (Just Satisfaction) (n 27) Concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić para 13.

[33] Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell 2000) 145.

only a few hints regarding the treatment of punitive damages awards. The rulings on the impact of damages claims on the right to free speech indicate that an award of damages has to comply with the principle of proportionality. In line with this reasoning, the European Court of Human Rights so far has not awarded excessive punitive damages in addition to compensatory damages when assessing claims for just satisfaction according to article 41 ECHR. The proportionality threshold however does not ban all forms of supra-compensatory damages from the law. Rather, only disproportionate damages awards must be avoided.

3.2. *European private law*

Looking at the body of European tort law, there is a broad consensus that its rules serve a compensatory function: to return the injured party to the position where he or she was before the wrongful behaviour, as far as money can remedy the wrong.[34] In addition – at least in some areas, like market regulation – EU law serves the aim of prevention[35] and accepts damages awards that are – from a traditional point of view – supra-compensatory. Against this background, a heated debate has emerged in the last decades as to the extent to which EU law already incorporates punitive damages or at least traces of a punitive function of (tort) law.[36] The discussion is fuelled by the fact that European law is rather ambiguous[37] or – in the eyes of

[34] Cees van Dam (n 21) 360; Wolfgang Wurmnest and Christian Heinze, 'General Principles of Tort Law in the Jurisprudence of the European Court of Justice' in Rainer Schulze (ed), *Compensation of Private Losses: The Evolution of Torts in European Business Law* (sellier european law publishers 2011) 39, 53–56.

[35] On the foundations of enforcing market regulation rules through private plaintiffs see Jens-Uwe Franck, *Marktordung durch Haftung: Legitimation, Reichweite und Steuerung der Haftung auf Schadensersatz zur Durchsetzung marktordnenden Rechts* (Mohr Siebeck 2016) 15 ff.

[36] The view that EU (private) law has embraced punitive damages is advocated by Pinto de Albuquerque and van Aaken (n 21) 11; see also Cedric Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Intersentia, 2016) 165, 175 (arguing that there are traces of punitive damages in EU law).

[37] Helmut Koziol, 'Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation?' in Helmut Koziol and Vanessa Wilcox (eds),

some – even 'self-contradictory'. [38] The following overview will use selected examples to show that EU law does not embrace punitive damages in a similar manner as US law but that this body of law is inclined to broaden the scope of traditional remedies to pave the path for an effective private enforcement of European rules. [39]

3.2.1. *Enforcement of EU rights through national law: the principle of effectiveness*

The issue whether EU law embraces 'punitive damages' or traces thereof first arose with the (older) case law of the Court of Justice of the European Union on the principle of effectiveness. EU law often confers rights upon individuals but leaves the enforcement of those rights to the law of the Member States. To avoid enforcement gaps caused by national law, the Court obliges the Member States to provide for effective and non-discriminatory remedies for the enforcement of EU rights. [40] In *von Colson and Kamann*, a case concerning damages claims for the violation of the principle of equal treatment in the employment sector (a principle enshrined in an EU Directive), the Court stated that

> if a Member State chooses to *penalize* breaches of [an EU] prohibition by the award of compensation, then in order to ensure that [the remedy] is effective and that it has a *deterrent effect*, that compensation must in any event be *adequate in relation to the damage sustained* and must therefore amount to more than purely nominal compensation [...]. [41]

Punitive Damages: Common Law and Civil Law Perspectives (Springer 2009) 275, 288 ('inconsistent'); Meurkens (n 12) 256 ('uncertain and inconsistent position of the EU legislator').

[38] Gerhard Wagner, 'Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden: Gutachten A für den 66. Deutschen Juristentag' in *Verhandlungen des 66. Deutschen Juristentages: Stuttgart 2006*, Vol I (CH Beck 2006), Part A, 71 ('Die Haltung der EU zum Strafschadensersatz ist nicht nur ambivalent, sondern evident widersprüchlich').

[39] On the background for this trend towards more private enforcement see Meurkens (n 12) 209–235.

[40] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5.

Even though the Court refers to the 'deterrent effect' of the damages action in order to 'penalize breaches' of anti-discrimination law, the emphasis of the judgment lies on the requirement that the compensation awarded 'must in any event be adequate in relation to the damage sustained' – so a symbolic or nominal compensation does not suffice. The German law at that time clearly failed this test as the legislature had limited the damages in case of employment related discrimination to reliance losses, such as costs for sending an application or costs to travel to the job interview. The case law following *von Colson and Kamann* on the effective enforcement of equality rights confirms that the Court puts the emphasis more on the compensatory character of the damages claim even though it did not neglect the preventive effect flowing from such claims. [42] The CJEU for example ruled that certain liability caps would bar plaintiffs from bringing violations of the Community rights to court [43] and that the principle of adequate compensation also demands the payment of interest. [44]

This case law is essentially grounded on the argument that the enforcement of EU law would be impaired if the national legislator restricted claims for compensation to such a minimal level that it is not worth going to court. [45] This reasoning is, in my eyes, different from the reasoning that explains US style punitive damages, even though the 'dissuasive effect' of the damages remedy was later incorporated into the Equal Treatment Directive. [46] That EU law does not call for punitive dam-

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[41] Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 28 (emphasis added). See also Case 79/83 *Harz v Deutsche Tradax* [1984] ECR 1921, para 28.

[42] Case C–271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I–4367, paras 24–26; Case C–460/06 *Paquay v Société d'architectes Hoet + Minne* ECLI:EU:C:2007:601, paras 45–46.

[43] Case C–180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I–2195, para 40.

[44] *Marshall v Southampton and South-West Hampshire Area Health Authority* (n 42) para 32.

[45] Wurmnest and Heinze (n 34) 63 (regarding *von Colson and Kamann*).

[46] The dissuasive effect of sanctions was first enshrined in European Parliament and Council Directive 2002/73/EC of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condi-

ages in discrimination cases was recently confirmed by the CJEU. The Court clarified in *Arjona* that

> the genuine deterrent effect sought by [the EU Directives] did not involve awarding, to the person injured as a result of discrimination on grounds of sex, punitive damages which go beyond full compensation for the loss and damage actually sustained [...]. [47]

In other words, EU law 'allows, but does not require' Member States to grant to the person who has suffered from gender discrimination a claim for punitive damages. [48]

Another example showing that the CJEU is not willing to force EU Member States to introduce punitive damages is the *Manfredi* case decided in 2006. This case concerned an action for damages brought by Italian consumers against insurance companies for damages resulting from an unlawful cartel violating article 101 TFEU. The CJEU held that it is not necessary to award punitive or exemplary damages in competition cases to comply with the principle of effectiveness, as it is settled law that national courts are entitled to take steps to avoid an unjust enrichment of persons benefitting from EU rights. [49] The Court regarded punitive damages thus as a form of unjust over-compensation. To comply with the principle of effectiveness it is sufficient that victims of anti-competitive conduct can claim the actual loss, loss of future profits and a proper amount of interest. [50]

That the *Manfredi* case is a powerful example of the Court's reluctance to impose punitive damages on the Member States becomes apparent, when one recalls that the same Court had un-

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tions [2002] OJ L269/15. Under the current legal framework the relevant provisions calling for 'dissuasive and proportionate' measures to remedy discrimination and to oblige the Member States to provide for 'penalties, which may comprise the payment of compensation to the victim, [that are] effective, proportionate and dissuasive' are found in European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23, arts 18 and 25.

[47] Case C–407/14 *Arjona Camacho v Securitas Seguridad España* ECLI:EU:C:2015:831, para 34.

[48] ibid para 40.

[49] Joined cases C–295/04 to C–298/04 *Manfredi v Lloyd Adriatico Assicurazioni* ECLI:EU:C:2006:461, paras 92–94.

[50] ibid para 100.

derscored some years before in *Courage v Crehan* that 'actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community'. [51] Supra-compensatory damages would certainly enhance the incentives for the enforcement of EU competition law as a comparison with US law shows. In the US, private enforcement of antitrust law has been very effective for many years, inter alia because victims of anti-competitive behaviour can claim treble damages for violation of the US antitrust rules. [52] At the time the judgment in *Manfredi* was handed down, there were voices calling for the introduction of 'double damages' to give plaintiffs a windfall-profit as an incentive to bring complex antitrust cases to court. [53] The Court, however, practiced judicial restraint and did not call for over-compensatory damages to deter undertakings from infringements of competition law. This approach was finally enshrined in the so-called Antitrust Damages Directive, which rules out the possibility that Member States may introduce over-compensatory damages. [54]

Summing up, despite some ambiguous language used by the CJEU, the principle of effectiveness does not demand the award of US style punitive damages. EU law does, however, not preclude Member States from introducing such type of damages. If such damages were introduced at the national level for infringements of national rules, the European twin to the principle of effectiveness, the principle of equivalence demands that national courts also award those damages to safeguard similar European rights. [55]

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[51] Case C–453/99 [2001] ECR I–6297, para 27.

[52] See text accompanying supra n 9.

[53] Monopolkommission, *Sondergutachten 41: Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle* (Nomos 2004) para 83.

[54] European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 3(3) states: 'Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages'.

[55] *Manfredi* (n 49) para 99; *Arjona* (n 47) para 44.

3.2.2. *Remedies of European secondary law*

In newer Directives and Regulations, the European legislature often defines remedies for violations of EU rights more precisely in order to achieve a higher level of harmonisation. However, even in this body of law, one cannot find punitive damages as awarded in the US. But at the same time it is undeniable that the preventive function enshrined in some rules leads to the adjudication of an amount of damages that – from the view of traditional tort law – goes beyond mere compensation. As this effect has been scrutinised in detail in a recent *Habilitationsschrift* [56] and other contributions [57], I want to limit myself to few examples. [58]

My first example concerns the enforcement of Intellectual Property Rights. Article 13(1) of the IP Enforcement Directive 2004/48 [59] allows national courts to award 'damages appropriate to the actual prejudice suffered' in the case that an IP right was knowingly infringed (or with reasonable grounds for knowing). The law further states that the calculation shall take into account 'all appropriate aspects', including 'any unfair profits made by the infringer'. Recovery of the tortfeasor's profits is not a remedy classically seen as a tort claim. [60] European law thus broadens the scope of claims to strengthen the preventive effect and to provide incentives to avoid IP rights infringements. Victims will be more likely to enforce the EU

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[56] Christian Heinze, *Schadensersatz im Unionsprivatrecht: Eine Studie zu Effektivität und Durchsetzung des Europäischen Privatrechts am Beispiel des Haftungsrechts* (Mohr Siebeck 2017). This study analysed various directives and regulations in the areas of product liability, travel and transportation law as well as competition law enforcement.

[57] See Bernhard A Koch, 'Punitive Damages in European Law' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 197 ff (with further references therein).

[58] The following analysis draws from Wurmnest and Heinze (n 34) 57–58.

[59] European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45, corrigendum in [2004] OJ L195/16.

[60] Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek 2012), para 2/45: A claim for disgorgement of profits is a claim 'in the interim area between the law of tort and of unjust enrichment'.

rules when higher awards are at stake. At the same time, the Enforcement Directive states in its recital 26 that the EU Member States are under no obligation to introduce punitive damages. The law, thus, goes beyond mere compensation but not as far as to call for true punitive damages. [61]

The same holds true for my second example. It relates to the introduction of 'standardized damages' which are on the rise in EU law. A prominent example is Regulation 261/2004 on compensation to airline passengers denied boarding and in the event of cancellation or long delay of flights. Depending on the flight distance, passengers can claim different amounts of compensation from the operating air carrier without having to prove any actual losses. This type of compensation should not only remedy non-material losses such as waste of time or stress. It should also create an incentive for flight operators to provide better service. [62] Given that in many jurisdictions a loss of time at an airport is not recoverable under traditional tort remedies, EU law widens the scope of tort/damages law and the standardisation may lead to the result that in some cases a victim will receive more than he or she would have received if a judge had to precisely assess the loss suffered. This broader connotation of compensation serves as a means to prevent further wrongdoings.

My third example is taken from the area of general contract law. In order to deter late payment in commercial transactions the EU has enacted the Late Payment Directive. [63] It obliges Member States to set a default rate of interest for late payments which equals the sum of the 'reference rate' (a given rate of the European Central Bank or the equivalent of a national central bank) [64] and at least eight percentage points. [65] In addition, Member States must ensure that the creditor entitled to interest

[61] As the Directive follows a minimum harmonisation approach, it does, however, not preclude Member States from introducing 'double royalties' to remedy breaches of rights protected by the Directive, see Case C–367/15 *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich* ECLI:EU:C:2017:36, paras 23–33.

[62] Wurmnest and Heinze (n 34) 57.

[63] European Parliament and Council Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (Late Payment Directive) [2011] OJ L48/1.

[64] Cf art 2(7) Late Payment Directive.

[65] Cf art 2(5), (6), art 3(1), art 4(1) Late Payment Directive.

can also claim as minimum damages, a fixed sum of 40 EUR from the debtor, as a lump sum for damages regularly occurring in the context of recovery late payments.[66] Both rules (interest of eight percent over the reference rate and the lump sum of 40 EUR) can lead to an overcompensation of the creditor, a threat that should spur a debtor to fullfill his or her contractual obligations in a timely manner.[67]

3.2.3. *Conclusion*

Summing up, EU law does not impose a requirement for the implementation of US style punitive damages upon the Member States. In some areas of EU law, namely in the field of market regulation and anti-discrimination law, the goal of prevention leads however to a widening of traditional concepts of law, thus allowing for compensation that from a traditional viewpoint of tort law could not be awarded. In other words, European law allows for damages that are not purely compensatory. This development brings European law closer to US law without however embracing punitive damages as a general concept. In my view, it is not correct to characterize the references on the dissuasive or preventive function of EU law as equivalent to US style punitive damages.[68]

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[66] Cf art 6(1) Late Payment Directive. In case higher compensation is claimed, the lump sum of 40 EUR can be off-set, cf art 6(3) Late Payment Directive.

[67] On the interest rate see Vanleenhove (n 36) 174–175. On the claim for 40 EUR which Germany has transposed in § 288(5) BGB see Wolfgang Ernst in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol II (7th edn, CH Beck 2016), § 288 BGB para 29 ('Anspruch [ist] am ehesten als Strafschadensersatz einzuordnen.'; Marc-Philippe Weller and Charlotte Sophie Harms, 'Die Kultur der Zahlungstreue im BGB: Zur Umsetzung der neuen EU-Zahlungsverzugsrichtlinie ins deutsche Recht' [2012] WM 2305, 2312 ('[Anspruch hat] pönalen Anstrich').

[68] Similarly Jan von Hein, 'Punitive Damages in European and Domestic Private International Law' in Alexander Bruns and Masabumi Suzuki (eds), *Preventive Instruments of Social Governance* (Mohr Siebeck 2017) 143, 146 (regarding German law).

3.3. *European private international law*

3.3.1. *The rules on public policy in the Rome II Regulation*

The issue of whether there are European standards to assess the *ordre public* with regard to punitive damages is also relevant in private international law. Non-compensatory damages received special attention in the legislative process leading to the Rome II Regulation.[69] Like all other regulations on private international law, the Rome II Regulation contains a general public policy clause, which allows a court to refuse the application of foreign law 'if such application is manifestly incompatible with the public policy (*ordre public*) of the forum' (article 26 Rome II Regulation). In addition, recital 32 of the Rome II Regulation states that a court may, 'depending on the circumstances of the case and the legal order of the Member State of the court seised', deny the application of a foreign law for violating the *ordre public* whenever the application of that law would lead to the award of 'non-compensatory exemplary or punitive damages of an excessive nature'.

3.3.2. *Punitive damages disputes as 'civil and commercial matters'*

Recital 32 is a clear indication that claims for punitive or exemplary damages are 'civil and commercial matters' according to article 1(1) Rome II Regulation. Otherwise, clarifying that such damages may be contrary to the forum's public policy in a recital would not make sense given that the public policy reservation only applies to claims that qualify as 'civil and commercial matters'.[70] The view excluding punitive damages from the scope of the Rome II Regulation[71] cannot be maintained any

[69] European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[70] Von Hein (n 68) 155; Helena Isabel Maier, *Marktortanknüpfung im Internationalen Kartelldeliktsrecht: Eine internationalzuständigkeits- und kollisionsrechtliche Untersuchung unter Einbeziehung rechtsvergleichender Überlegungen zum englischen Recht* (Peter Lang 2011) 361.

longer. As the concept of 'civil and commercial matter' is a general concept in EU private international law, this finding holds true for other regulations in this area of law. Hence, punitive damages awards are 'civil and commercial matters' and cannot be classified as a form of a penal judgment, which cannot be enforced abroad under the rules of civil procedure.

3.3.3. *The dispute around the qualifier 'punitive damages of an excessive nature'*

A more difficult question to answer is whether recital 32 Rome II Regulation – a compromise that was found in the conciliation committee at the very last stage of the drafting process [72] – establishes some form of European standard for public policy or whether it does not alter the general principle of the forum law defining the content of the *ordre public*.

One can trace back the reference to 'excessive' punitive damages in the recital to the position of the EU Commission and the European Parliament. Originally, the Commission had proposed to introduce a specific rule that regarded all non-compensatory damages incompatible with the Community public policy. [73] This clause would have sat alongside the general public policy reservation. [74]

After severe criticism, [75] the Commission changed its position in the 2006 Amended Proposal. [76] The rule for non-compen-

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[71] Juliana Moersdorf-Schulte, 'Spezielle Vorbehaltsklausel im Europäischen Internationalen Deliktsrecht?' (2005) 104 ZVglRWiss 192, 248.

[72] Rolf Wagner, 'Das Vermittlungsverfahren zur Rom II-Verordnung' in Dietmar Baetge, Jan von Hein and Michael von Hinden (eds), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag* (Mohr Siebeck 2008) 715, 727.

[73] Art 24 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') (hereafter: '2003 Proposal'), COM(2003) 427 final: 'The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy'.

[74] The proposal even contained a third reservation (art 23(1) 3rd indent 2003 Proposal) which dealt with the issue of the public policy of the Community. This reservation was dropped in its entirety during the legislative process. Given that the forum's public policy must protect Community values, the specific reservation was regarded as superfluous, see von Hein (n 68) 152–155.

[75] For details see Richard Plender and Michael Wilderspin, *The European*

satory damages was significantly altered and annexed to the general public policy clause. Article 23, 2nd sentence of the 2006 Amended Proposal stated:

> In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum.

Thus, the Commission did not only drop the clear-cut prohibition on applying foreign punitive damages rules *in toto* but also abandoned the reference to the Community public policy. In its explanatory memorandum, however, the commission stressed that 'punitive damages are not *ipso facto* excessive'. [77] Article 23, 2nd sentence of the 2006 Amended Proposal mirrored this by referring to 'excessive' non-compensatory damages. The Council did however not accept the special reservation for non-compensatory damages. [78] In the final stage of the legislative proceedings, the decision was taken to retain the general public policy clause in the Regulation (article 26 Rome II Regulation) and to shift the rule on non-compensatory damages, with minor linguistic changes, to the recitals.

The legislative history shows that punitive damages do not violate the *ordre public per se* and that it is up to the law of the forum to define the content of public policy. The latter is also bolstered by the fact that even recital 32 Rome II Regulation refers to the 'circumstances of the case and the legal order of the Member State of the court seised' as the yardstick for dealing with the issue of public policy. Against this background, many scholars take the view that the Regulation does not constrain na-

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Private International Law of Obligations (4th edn, Sweet & Maxwell 2015) paras 27-032–27-033.

[76] Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II'), COM(2006) 83 final.

[77] ibid 5.

[78] The special rule on punitive damages was deleted in art 26 of the Common Position no 22/2006 adopted by the Council on 25 September 2006 with a view to the adoption of a Regulation of the European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II') [2006] OJ C289E/68.

tional court's powers to reject non-compensatory damages (unless warranted by EU private law) based on domestic public policy considerations.[79] But the qualifier 'excessive' can also be interpreted as a hint that European private international law is more open to supra-compensatory damages than the rules of certain national conflict-of-law rules, as not all forms of supra-compensatory damages should be regarded as contrary to the *ordre public*. However, defining which damages are excessive cannot be done entirely from a European perspective. Against this background, scholars are divided on the matter. Some argue that essentially all damages awarded on top of compensatory damages are excessive (unless they serve as a vehicle to recover profits gained unlawfully at the expense of the victim).[80] Others take a more liberal stance and call for the application of foreign punitive damages rules within certain limits.[81] In detail, practice varies from jurisdiction to jurisdiction. Nevertheless, given that the CJEU has claimed the right to watch over the boundaries of the *ordre public*,[82] it is likely that some European guidance regarding the application of punitive damages will emerge over time.[83] For the sake of legal certainty, national courts con-

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[79] Von Hein (n 68) 156; Koch (n 57) 199; Gerhard Wagner, 'Die neue Rom II-Verordnung' IPRax 2008 1, 16–17; see also Paul Beaumont and Zheng Tang, 'Classification of Delictual Damages – *Harding v. Wealands* and the Rome II Regulation' (2008) 12 Edinburgh L Rev 131, 136 (pointing out that the aim of recital 32 is to bar the CJEU from giving a uniform interpretation under which circumstances damages are excessive and therefore contrary to public policy).

[80] Helmut Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana L Rev 741, 750; a similar view seems to be taken by Mihail Danov, 'Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases with an International Element – The Rome II Regulation and the Commission's White Paper on Damages' (2008) 29 ECLR 430, 436.

[81] Vanleenhove (n 36) 241–242 (advocating a 1:1 ratio as general yardstick, so that a court – subject to certain qualifications – could award the same amount as punitive damages that was awarded as compensatory damages).

[82] Case C–38/98 *Renault v Maxicar* [2000] ECR I–2973, para 28 (regarding the Brussels Convention); *Meroni v Recoletos* (n 4), para 39 (regarding the Brussels I Regulation).

[83] That recital 32 might serve as a sort of anchor for the CJEU to set forth some general European standards on the assessment of punitive damages (although views are divided on the extent the CJEU can and will interfere and what damages should be considered to be 'excessive') is advocated by Thomas Ackermann, 'Antitrust Damages Actions under the Rome II Regulation' in Mielle Bulterman and others (eds), *Views of European Law from the Mountain:*

fronted with the application of foreign punitive damages rules should initiate a preliminary reference proceeding to give the CJEU the chance to clarify the scope of recital 32.

Case law on the application of punitive damages rules under the Rome II Regulation is scarce. In an often cited case, the Rechtbank Amsterdam took a rather liberal approach towards punitive damages. In a *kort geding* proceeding about a form of online stalking, the court applied Californian law and awarded each plaintiff 5,000 EUR as '*voorschot wegens punitieve schade*' on top of compensatory pecuniary and non-pecuniary damage to remedy the wrongdoing. [84] The court did not consider awarding punitive damages to be a violation of Dutch public policy – without however referring to or discussing recital 32. [85] But this approach does not seem to be common ground in the Netherlands. The Rechtbank Utrecht refused to award punitive damages under Israeli law for violation of the Dutch *ordre public* in a case in which the Rome II Regulation was not applicable ratione temporis. [86]

3.3.4. *Conclusion*

Recital 32 of the Rome II Regulation clarifies that European private international law does not consider supra-compensatory damages contrary to the *orde public* but rather damages that are of an excessive nature. This restriction was necessary as some European jurisdictions award exemplary damages and the EU has also enacted rules under which damages can be claimed that go beyond mere compensation. The standards to test for 'excessive damages' are not yet settled and even within a single jurisdiction views can diverge on how courts

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Liber Amicorum for Piet Jan Slot (Wolters Kluwer 2009) 109, 118; Marta Requejo Isidro, 'Punitive Damages: How do They Look Like When Seen From Abroad?' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 311, 319–322; Plender and Wilderspin (n 75) para 27–034; Vanleenhove (n 36) 81; see also Cheshire, North and Fawcett (n 10) 868 (indicating that only excessive damages will violate the *ordre public*).

[84] Rb Amsterdam ECLI:NL:RBAMS:2012:BW9838, paras 5.5–5.6.

[85] ibid para 4.14.

[86] Rb Utrecht ECLI:NL:RBUTR:2012:BW1631, para 4.21.

should deal with certain damages with punitive elements under the Rome II Regulation.

3.4. *Drawing the strings together*

To draw the strings of the foregoing analysis together, three findings must be highlighted:

First, it is important to note that awards must comply with the principle of proportionality to be in line with the European Convention of Human Rights. US style punitive damages cannot be found in the case law of the European Court of Human Rights but, at the same time, the Court has not banned supra-compensatory forms of damages as such.

Second, EU private law does not embrace US style punitive damages but is receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages. These rules cannot be qualified as single exceptions. Damages beyond mere compensation are frequent in the area of market regulation, especially when private enforcement is seen as important tool to safeguard Community rights. Yet not all areas of European law embrace this widened concept of tort law. For example the Products Liability Directive strictly follows the principle of compensation.

Third, under the Rome II Regulation, supra-compensatory damages are not qualified as *per se* repugnant to the *ordre public*.

Taking these general findings into account it is submitted that European values require a nuanced approach towards the recognition and enforcement of punitive damages awards. As a starting point, it is safe to say that European values do not allow a complete ban of non-compensatory damages. If EU law for example recognises such damages in certain areas of law, the recognition and enforcement of judgments from other EU countries awarding such damages based on these rules could not be rejected by relying on the public policy reservation as national courts have to safeguard rights arising out of EU law. [87]

Much more difficult to answer is the question as to the extent to which other forms of over-compensatory awards must be accepted by national courts, especially when it comes to US style punitive damages. The case law of the ECtHR as well as recital 32 Rom II Regulation points towards a form of proportionality test as only excessive non-compensatory damages shall be set aside on the ground of public policy. Given that so far the CJEU has exercised much constraint in mapping the contours of the forum's public policy and Member States have introduced supra-compensatory damages in their national laws to very different degrees, the answer to the question of what damages ought to be regarded as excessive will certainly vary in the different Member States.

It has however to be noted that neither the European Court of Human Rights nor the Court of Justice of the European Union has embraced the concept of non-compensatory damages in a manner comparable to US courts. Further, the forms of non-compensatory damages that are accepted in EU law are in general rather modest as compared to the US, a finding that might be different when one looks into national law.

The fact that European law has not embraced the concept of punitive damages but merely broadened traditional tort law doctrines in a rather modest way speaks in favour of a relatively narrow proportionality standard. The more the concept of non-compensatory damages spreads in EU law, however, the more difficult it will be to reject recognition and enforcement of similar awards in other areas of the law, including non-harmonised areas of law – at least if one regards the area of the law of tort/damages as a coherent system of law. The spread of such damages in EU law would also make it difficult to argue that punitive damages judgments from third states must be denied recognition and enforcement in Europe based on national reservation clauses.

4. The comparative perspective

The following section will turn to the national perspective. It will highlight the basic approaches developed by selected national courts to see whether and to what extent common Euro-

[87] Von Hein (n 68) 156 (with regard to the Rome II Regulation).

pean standards have emerged. [88] For reasons of space, I will focus on the recognition and enforcement of US style punitive damages judgments, ie judgments from non-EU countries, although parts of the analysis also applies to EU judgments awarding supra-compensatory damages.

4.1. *Partial recognition and enforcement (severability)*

A first common European standard concerns the possibility of limiting the recognition and enforcement to the non-punitive (and non-excessive) part of the judgment at the plaintiff's request. Thus, awarding compensation for different heads of damages, some of them having a punitive and others having a compensatory character, does not necessarily render the entire judgment unenforceable. At least, this is so when the foreign court has clearly distinguished the amount of damages awarded for the different heads of damages in the judgment and the plaintiff has demanded that only a part of the total damages amount should be recognised and enforced. [89]

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[88] For a more comprehensive analysis see the (comparative) annotations to the Italian *Axo v Nosa* case by Barbara Pozzo, 'The Enforcement of Foreign Decisions Concerning Punitive Damages' [2018] ERPL 661–667; Cedric Vanleenhove, 'Punitive Damages in the Belgian Perspective' [2018] ERPL 674-680; Lotte Meurkens, 'Axo v. Nosa from a Dutch Law Perspective' [2018] ERPL 681–689; André Janssen, 'Die Anerkennung und Vollstreckbarkeit von US-amerikanischen Strafschadensurteilen in Deutschland und in Italien: Auf ewig entzweit?' [2018] ERPL 690–696; Natalia Alvarez Lata, 'Are Punitive Damages Incompatible with the Spanish Legal System?' [2018] ERPL 697–702; see also Vanleenhove (n 36) 87–146 (on the law prior to *Axo v Nosa*).

[89] *England:* See Alex Mills' chapter, at 3.1. (a probable exception might apply to judgments falling under the Protection of Trading Interests Act 1980); *France:* Benjamin West Janke and François-Xavier Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) 60 AJCL 775, 803 (in the *Fountaine Pajot* case, the plaintiffs did not demand an *exequatur partiel* so the *Cour de cassation* had to refuse recognition and enforcement of the entire judgment based on public policy considerations); *Germany:* BGH NJW 1992, 3096, 3100–3102 (partial exequatur regarding compensatory damages granted); *Greece:* Aeropag no 17/1999, Elliniki Dikaiosini 1999, 1288 (in this judgment the recognition and enforcement of the non-punitive damages was not called into question; I thank Dimitrios Tzakas for explaining this judgment to me); *Italy*: Zeno Crespi Reghizzi, 'Sulla contrarietà all'ordine pubblico di una sentenza straniera di condanna a punitive damages' (2008) 38 RDIPP 977, 990; *Spain*: Francisco Ramos Romeu, 'Litigation Under the Shadow of

To distinguish the compensatory from the punitive part, the foreign court's classification serves as starting point, but it is not necessarily binding. This approach, which at least German courts have endorsed, might help the foreign plaintiff enforcing certain types of damages that the foreign court classified as 'punitive' in those European States that are hostile towards this type of damages if the court of the enforcing state attributes a compensatory aim to those damages. Against this background, the German *Bundesgerichtshof* has accepted that damages labelled punitive can be enforced when they were awarded 'as a lump sum to compensate for economic losses that were not remedied otherwise or that are difficult to prove' or to 'recover profits made by the tortfeasor from the tortious act'. [90] In practice, however, this exception is difficult to apply. A re-classification is possible according to the German *Bundesgerichtshof* when the foreign court or jury provides sufficient information that the damages awarded under the punitive label actually serve a compensatory aim, which presupposes the disclosure of the reasons why a certain amount of damages was awarded. [91] Such reliable indications are often difficult to trace. Foreign plaintiffs would be better off if courts operated with certain general assumptions, for example, that in jurisdictions in which the winning party cannot recover attorney's fees, courts grant punitive damages to a certain extent to ensure compensation for expenses occurred. [92] This line of argument was rejected by the *Bundesgerichtshof* in its 1992 decision, but given that since then in the US the consideration to compensate the plaintiff by means of punitive damages for legal cost incurred has gained more importance, a more nuanced approach seems warranted. [93]

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an Exequatur: The Spanish Recognition of US Judgments' (2004) 38 Intl Lawyer 945, 968.

[90] BGH NJW 1992, 3096, 3103: 'Anders kann es sich möglicherweise verhalten, soweit mit der Verhängung von Strafschadensersatz restliche, nicht besonders abgegoltene oder schlecht nachweisbare wirtschaftliche Nachteile pauschal ausgeglichen oder vom Schädiger durch die unerlaubte Handlung erzielte Gewinne abgeschöpft werden sollen'. See also the Swiss judgment to which the *Bundesgerichtshof* referred: Zivilgericht Basel, Basler Juristische Mitteilungen 1991, 31, 36–37 (regarding the disgorgement of profits).

[91] For details see Astrid Stadler's chapter, at 3.3.

[92] Ernst C Stiefel and Rolf Stürner, 'Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe' [1987] VersR 829, 842.

[93] See Astrid Stadler's chapter, at 3.3.

4.2. *Enforcement of the punitive part of the judgment*

With regard to the enforcement of punitive damages (ie damages that cannot be in some way regarded as serving compensatory purposes), there are still considerable differences in Europe although more and more jurisdictions have opened the door to the recognition and enforcement of such damages.

French [94] and Italian [95] courts have held that punitive damages are not *per se* repugnant to the *ordre public*. The Greek Aeropag [96] seems to follow a similar approach, as does the Spanish Supreme Court, the latter at least in cases of intentional IP law infringements. [97] In addition, one lower Swiss court has ruled that punitive damages are not *per se* a violation of the *ordre public* [98] and there is no complete enforcement ban in England either. [99] Recognition and enforcement is only denied if certain prerequisites are met, in particular when the amount of damages awarded is excessive. This openness is in line with the European development in the area of tort law, which led to a widening of traditional damages remedies. One should note, however, that this openness towards the recognition and enforcement of punitive damages awards is a rather new development. Early forerunners were judgements in Switzerland (1989), Greece (1999) and Spain (2001). [100] The *Fountaine Pajot* case

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[94] Cass civ (1) 1 December 2010 no 1090 (09-13.303) *X & Y v Fountaine Pajot* [2010] Bull civ 248.

[95] Cassazione civile, Sezioni unite, 5 July 2017, no 16601, *Axo v Nosa* [2017] Italian LJ 278 (English translation by Francesco Quarta).

[96] Aeropag no 17/1999, Elliniki Dikaiosini 1999, 1288 (I thank Dimitrios Tzakas for explaining this complex judgment to me). On this judgement see Christos D. Triadafillidis, 'Anerkennung und Vollstreckung von 'punitive damages'-Urteilen nach kontinentalem und insbesondere nach griechischem Recht' [2002] IPRax 236–238.

[97] Tribunal Supremo 13 November 2001, JUR 2002/608 – *Miller Import Corp. v Alabastres Alfredo, S.L.*, Aedipr 2003, 914 = (2004) 24 J L Comm 225, 231–243 (English translation by Scott R. Jablonski).

[98] Zivilgericht Basel (n 90) 36–37; a different approach (*per se* violation of public policy) was taken by the Bezirksgericht Sargans in 1982. Excerpts of the latter judgment are cited by Jens Drolshammer and Heinz Schärer, 'Die Verletzung des materiellen *ordre public* als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen « punitive damages-Urteils » (Urteilsanmerkung)' [1986] SJZ 309, 310–311.

[99] See Alex Mills' chapter, at 3.2. and 5.

[100] Zivilgericht Basel (n 90) 31; Aeropag (n 96) 1288; Tribunal Supremo (n 97) 914.

opening the door to enforce such judgments in France was decided by the *Cour de cassation* in 2010 [101] and the Italian *Corte di cassazione* reversed its hostile approach towards punitive damages only in 2017 (*Axo v Nosa*). [102]

In sharp contrast, Germany still takes a very hostile stance towards punitive damages. In its 1992 decision, the German *Bundesgerichtshof* ruled that punitive damages (unless these damages were actually awarded for compensatory purposes) are contrary to German public policy provided that there is a strong link with the German forum (*Inlandsbezug*). This is so according to the Court because the German law of damages is based on the principle of compensation, not enrichment of the plaintiff. From a German perspective, damages awarded to punish the defendant pursue an aim that is limited to sanctions in criminal law. [103] In addition, the *Bundesgerichtshof* held that the enforceability of punitive damages awards would lead to an unequal treatment of domestic and foreign creditors as the foreign creditors would have better access to the debtor's assets located in Germany even though they might have sustained smaller actual losses than the domestic creditors. [104] It has to be noted that the decision of the *Bundesgerichtshof* is rather old and, in light of the European developments, it is doubtful whether the rejection of punitive damages awards would be as outright today as it was expressed nearly three decades ago. [105]

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[101] *X & Y v Fountaine Pajot* (n 94).

[102] *Axo v Nosa* (n 95).

[103] BGH NJW 1992, 3096, 3103–3104 = (1993) 32 Intl L Materials 1320 (excerpted English translation by Gerhard Wegen and James Sherer).

[104] ibid 3104.

[105] Doubts are raised by Astrid Stadler in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (15th edn, Vahlen 2018), § 328 ZPO para 25; Wolfgang Wurmnest and Maximilian Kübler-Wachendorff, 'The Constitutionalization of Public Policy in Private International Law' in Charles Hugo and Thomas M J Möllers (eds), *Legality and Limitation of Powers: Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (Nomos forthcoming). There are also scholars arguing for a more liberal approach towards the recognition and enforcement of punitive damages judgements in Germany, see Volker Behr, 'Punitive Damages in America and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts', (2003) 78 Chicago-Kent L Rev 105, 159–160; Dirk Brockmeier, *Punitive damages, multiple damages und deutscher ordre public* (Mohr Siebeck 1999) 206; Janssen (n 88) 695–696. But it has to be noted that there are also voices defending the status quo, for details see Astrid Stadler's chapter, at 3.2.

4.3. *The black box: testing for 'excessive' damages*

The tests developed by those courts which do not reject punitive damages *per se* in order to filter out judgments that are contrary to the *ordre public* vary in detail. At their core lies, however, a form of proportionality test. Apart from the general rule that testing for excessiveness has to be done on a case-by-case basis, so far no general yardstick has emerged on how to distinguish between punitive damages that are proportional and those that are excessive. The case law gives very little guidance regarding this important matter.

The first question concerns the applicable law according to which the analysis must be conducted. Do foreign standards matter so that a judge would have to analyse whether the award is proportional according to foreign law, or is a domestic standard the relevant benchmark so that the lex fori determines what amounts are proportional? In my view, a judge in Europe must take note of the context in which the foreign judgment was rendered, but must control the issue of excessiveness at the end of the day according to a 'domestic' standard.[106] That, however, does not mean that the enforcing judge should apply domestic law to the case to evaluate the (maximum) reasonable amount. Rather, a more abstract view is necessary that, for example, takes into account the protected interests and the ratio between the compensatory and the punitive damages.

The second question concerns whether there are some European rules of thumb guiding the lower courts. So far one would look in vain for clear guidance. To give two examples: The *Corte di cassazione* demands very generally that there be 'proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct' given that the '[p]roportionality of damages [... is a cornerstone] of civil liability law.'[107] And the *Cour de cassation* stated in *Fountaine Pajot* that the excessiveness has to be judged with an eye to the actual damages sustained and – at least in contrac-

[106] In a similar direction Mauro Tescaro, 'Das "moderate" Revirement des italienischen Kassationshofs bezüglich der US-amerikanischen punitive damages-Urteile' [2018] ZEuP 459, 476 (assessment should be primarily done from the perspective of foreign law, but domestic standards should determine which amounts are grossly excessive).

[107] *Axo v Nosa* (n 95) (cited translation by Francesco Quarta).

tual matters – the obligation breached by the debtor.[108] Some scholars understand the French Supreme Court as advocating, in principle, a 1:1 standard so that (unless certain exceptions apply) a judgement can be enforced if the amount of punitive damages is below or about the same amount as compensatory damages.[109] Whether the *Cour de cassation* has actually embraced such a standard is however not clear.

An assessment that takes a certain ratio as general benchmark into account is helpful to attain a greater degree of legal certainty. From the EU law perspective, this ratio must be set rather low given that, under the European approach, damages that can be labelled (from the traditional perspective) as overcompensatory are usually of a very modest size. Therefore, a strong deviation from the compensatory level cannot be sustained. Hence, accepting awards in which the punitive part is double or triple the compensatory part would not be in line with EU standards unless special areas of business law are concerned, such as the infringement of IP rights. Even the 1:1 ratio advocated by certain scholars might be too recognition-friendly from a purely European perspective. But given that the reach of the *ordre public* is driven largely by national values, courts in jurisdictions with strong punitive damages elements set forth in the autonomous (ie non-European) law can embrace such a ratio or even higher ones more easily as general yardstick (like 1:2, 1:3 etc.). It goes without saying that such benchmarks serve only as a starting point and must be adjusted to the facts of the case at hand.

4.4. *`Downscaling' excessive punitive damages?*

An important issue for a plaintiff, wanting to enforce a punitive damages judgment abroad, is whether the part of the judgment that does not pass the respective 'enforcement test' – because the amount awarded is excessive and thus contrary to

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[108] *X & Y v Fountaine Pajot* (n 94),.`Mais attendu que si le principe d'une condamnation à des dommages-intérêts punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur'.

[109] Vanleenhove (n 36), 220.

the public policy of the forum – cannot be enforced at all, or whether the judge in the enforcing state has the power to enforce the punitive part of the judgment up to the amount that would be reasonable according to the applicable public policy standard. The latter approach would be very convenient for the plaintiff as it avoids an 'all-or-nothing' approach. In *Fountaine Pajot*, the *Cour de cassation* did not reduce the amounts to a reasonable level but rejected the recognition and enforcement of the judgment in its entirety (even in regard to the compensatory part, as the plaintiff had not demanded a partial exequatur). [110] But even if the plaintiffs had asked the *Cour de cassation* to issue an exequatur up to a 'reasonable' amount of the punitive damages awarded, the Court would presumably would have rejected this claim. Also the *Bundesgerichtshof* has held that a partial recognition and enforcement of the amount awarded as punitive damages at the discretion of the German judge is not feasible. [111]

Any call for reducing the amount of awarded damages to a reasonable level at the discretion of the enforcing judge has to deal with the objection that a *révision au fond* is not warranted. Contrary to arguments raised in France, [112] in those jurisdictions assessing the enforceability of foreign punitive damages judgments based on a proportionality test it is very difficult to argue against a partial recognition and enforcement in the form of a 'reductive partial exequatur'. [113] Put simply, the *ordre public* control comes close to a *révision au fond*, as the enforcing judge assesses the outcome of the foreign litigation from the perspective of domestic law, [114] even though he or she does not control the merits or the facts of the case, so that it is technically possi-

[110] *X & Y v Fountaine Pajot* (n 94).

[111] BGH (n 103) 3104; concurring Herbert Roth in Friedrich Stein and Martin Jonas (founders), Kommentar zur Zivilprozessordung (23th edn 2015, Mohr Siebeck) § 328 ZPO para 108: '[Keine] Möglichkeit einer geltungserhaltenden Reduktion auf einen angemessenen Teil'. Things are different if the foreign judgment itself indicates how the amount awarded as punitive damages can be split into different parts. In such a case, the German judge can assess whether certain of these parts can be recognised and enforced in Germany.

[112] On this discussion see Olivera Boskovic's chapter, at 3.2., who rejects this argument.

[113] This term was coined by Janke and Licari (n 89) 803.

[114] Stiefel and Stürner (n 92) 842 (arguing that the *ordre public* control is a type of accepted révision au fond).

ble to distinguish the *ordre public* from the traditional *révision au fond*.[115] If the *ordre public* control demands assessing whether the amount of punitive damages awarded is reasonable or not (which presupposes that the judge looks at the facts of the case, the interest protected and the law of the forum to generate proper standards for the control), it is a small step to oblige him or her (at the request of the plaintiff) to set forth a precise sum up to which the judgment can be partially recognised and enforced.[116]

5. Conclusion

Two decades ago, the view prevailed 'that the chances of getting a foreign court to recognize a substantial punitive judgment rendered by a US court are virtually nil.'[117] Since then, the chances of plaintiffs of enforcing such awards in Europe have increased. Many European jurisdictions have taken a more receptive stance towards the recognition and enforcement of punitive damages awards. This development was driven by the fact that European law as well as many national jurisdictions have become more and more receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages. In line with European principles, these jurisdictions do not reject punitive damages judgments *per se* for violation of the *ordre public* but only in cases in which excessive amounts are awarded. By contrast, German courts still cling to the traditional view that punitive damages are repugnant to the *ordre public*.

Even though the pendulum has swung towards a more liberal approach regarding the enforcement of punitive damages, it is too early to evaluate how much the door has been opened

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[115] This is so at least from the German perspective, see Haimo Schack, *Internationales Zivilverfahrensrecht* (7th edn, CH Beck 2017) para 958.

[116] That the enforcing judge may issue a reductive partial exequatur is advocated by Georges AL Droz, 'Variations Pordea' [2000] RCDIP 181, 194–196; Janke and Licari (n 89) 803; Vanleenhove (n 36) 230–233. See also Stiefel and Stürner (n 92) 842 (arguing that a court must *ex officio* issue a partial exequatur to allow an enforcement of those parts of the awarded punitive damages that are not repugnant to the German concept of public policy).

[117] Patrick J. Borchers, 'Punitive Damages, Forum Shopping, and the Conflict of Laws' (2010) 70 Louisiana L Rev 529, 540.

in Europe. So far, no clear standards have emerged on how to analyse whether the awarded damages are excessive. In light of the developments in EU law, however, it seems very likely that only rather low amounts of punitive damages will be recognised and enforced in Europe. Further, enforcement chances will be better in areas in which European or national law also provides for remedies that shall pursue a strong deterrent effect. The figures of recognised punitive damages judgments would significantly rise if courts would grant 'reductive partial exequaturs' up to amounts of punitive damages that are deemed non-excessive – but so far, courts have declined to do so. Against this background, it seems the recent shift towards a more liberal enforcement approach will not turn things entirely upside down.

ABSTRACT

This chapter seeks to explore whether and to what extent a common European concept of public policy regarding the recognition and enforcement of punitive damages judgments is emerging. After having highlighted the basic contours of punitive damages, the impact of European standards on the interpretation of the ordre public *is analysed. A closer look at the case law of the European Court of Human Rights reveals that awards must comply with the principle of proportionality to be in line with the European Convention of Human Rights. The analysis of EU private law makes clear that EU law does not embrace US style punitive damages but is receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages, so that a per se ban of judgments awarding non-compensatory damages cannot be maintained any longer. This finding is also supported by the interpretation of the* ordre public *under the Rome II Regulation. The final part of the chapter compares the general approaches taken by selected national courts with regard to the enforcement of judgments from third states and evaluates whether these approaches are in line with the European standards.*

CHAPTER XII

TOWARDS THE EUROPEANIZATION OF PUBLIC POLICY REGARDING PUNITIVE DAMAGES: AN INQUIRY BETWEEN THEORY AND PRACTICE

ORNELLA FERACI *

CONTENTS: 1. Introduction: about the difficulty of observing an incomplete stop-motion sequence of an 'unruly galloping horse'. – 2. The methodology. – 3. The theory: the need for a re-conceptualization of the public policy exception? – 3.1. The interplay between the EU public policy and the national public policy – 3.1.1. Integration (and primacy) v coexistence (and subsidiarity). – 3.2. Negative and 'positive' function of the EU public policy. – 3.3. In search of fundamental principles of EU public policy. – 3.3.1. a) in the EU secondary law in light of the ECJ's case law: from *Manfredi* to *Kablowa* case. – 3.3.2. b) in the EU primary law: the principles of legality and proportionality. – 3.4. The consequences of its application: full or partial refusal of enforcement. – 3.5. The impact of the EU public policy regarding punitive damages in the field of conflict-of-laws (Rome II). – 3.6. The scope of the UE public policy towards punitive damages: the proximity criterion. – 4. The practice: the 2017 Italian Supreme Court's judgment as a case study. – 4.1. A first level of interpretation. – 4.2. A second level of interpretation. – 5. Conclusion.

1. INTRODUCTION: ABOUT THE DIFFICULTY OF OBSERVING AN INCOMPLETE STOP-MOTION SEQUENCE OF AN 'UNRULY GALLOPING HORSE'

At the end of the 19th century the English photographer Eadweard Muybridge revolutionised the world of photography and inspired the following invention of cinematography through

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his pioneering work in photographic studies of motion. By using multiple cameras to capture motion in stop–motion photographs, and a zoopraxiscope – a rudimentary device for projecting motion pictures – he showed the optical illusion generated from observing a horse while galloping. For the first time he proved that a horse in motion is completely aloft with its hooves for a brief moment during a stride. The discovery of this optical illusion, imperceptible to the naked eye, marked a new phase for figurative arts where until then artists were used to reproduce galloping horses with all four hooves off the ground simultaneously, with the front legs extended forward and the hind legs extended to the rear.

This suggestion, taken from visual arts, is helpful for describing, in its essence, the difficulty of addressing the topic of this chapter.

Scholars have always perceived the doctrine of public policy in Private International Law (PIL) as a sovereign tool specifically devised for guaranteeing the closure of the forum every time its PIL rules (ie, rules on the recognition and/or enforcement of judgments or conflict-of-laws rules) allow for the application of unacceptable foreign values. Due to its intrinsic nature such clause is inclined, per se, to raise concerns of uncertainty. In 1824 Mr. Justice Burrough lyrically described such risks by defining public policy as 'a very unruly horse and when once you get astride it you never know where it will carry you'. [1]

In this chapter I will attempt to demonstrate that the 'EU public policy' regarding punitive damages looks like a 'galloping horse' which has just begun running its race and that its movements are less unruly than we might think while observing its strides with the naked eye.

In my view, an inquiry over the Europeanization of public policy regarding punitive damages can be conducted only in terms of analysis of some initial frames of images depicting the flow of an on-going and complex legal trend, which has only recently started to develop at the European level. Not only. This process does not amount to a mere unidirectional motion, but it rather flows from two simultaneous and intertwined movements. The phenomenon can be regarded, in fact, as a 'trend in the

[1] *Richardson v Mellish* [1824] 2 Bing 229.

trend', which arises out of the combination of two different perspectives of analysis. On the one hand, it stems from investigating in which way, and to what extent, the doctrine of punitive damages complies with the domestic public policy of a given EU Member State, ie how the national public policy reacts to punitive damages, in particular when the recognition and/or enforcement of extra-EU judgments (or of EU judgments coming from common-law legal systems) [2] is sought before a European civil law court. On the other hand, it derives from assessing in which way EU law, in general, affects the application of the public policy exception when punitive damages are concerned, both in the field of national PIL (ie, the recognition and/or enforcement of foreign judgments) and in the field of EU PIL (conflict-of-laws).

At the same time, such inquiry calls for a high degree of abstraction over the possible future projections of the phenomenon, which – unfortunately – is to be grounded on poor and sporadic jurisprudential evidence. Accordingly, it is not just a matter of holding time still and capturing the moment in a seemingly permanent form, but it is rather the question to predict a movement that has not come into existence yet, simply relying on some initial frames and observing both the details of the motion and the sequence of the available images as a whole.

The contributions gathered in this volume comprehensively show a slow and progressive (albeit still partial) trend of erosion of the prevailing view under which the awarding of punitive damages is generally denied in the European countries, given that the purposes of punishment and deterrence of the wrongdoer, which are implicit in them, are generally deemed to be contrary to the basic values inspiring the essence of civil liability of the EU Member States. [3] Such development could mark the rise of a new season for the interplay between the doctrine of punitive damages and the European legal systems, individually, along with a brand-new shared approach on the matter.

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[2] In Europe only the common law countries of England, Wales, Ireland, Northern Ireland and the mixed system of Cyprus allow for restricted forms of punitive or exemplary damages and provide for them at the domestic level.

[3] See Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009).

2. THE METHODOLOGY

In reflecting over the frames of the mentioned 'incomplete stop-motion sequence', it seems to me crucial to first clarify the meaning of the term 'Europeanization', which appears in the title of this contribution.

In the first place, it clearly evokes a trend of harmonization – at the substantive law level – of fundamental values shared by EU Member States. Such development should be detected in the Member States' practice, firstly, under a comparative perspective, and in the EU law and European Court of Justice's (ECJ) case law, secondly, in situations where not purely compensatory damages are awarded through extra-EU judgments. Several scholars have already investigated this aspect under both directions, included some authors of this book. [4]

Secondly, the word 'Europeanization' should be interpreted in strict connection with the technical nature of the public policy exception as a conflict-of-laws tool, thus in light of the more general process of Europeanization of PIL, which has developed after the entry into force of the Amsterdam Treaty. [5] The issue in this case should be framed into a more comprehensive legal scenario where the evolution of the exception concerns all areas that are governed by EU measures adopted in the field of judicial cooperation in civil matters (in accordance with article 81 TFEU). Moreover, the latter calls also for an assessment over the repercussions of this evolution on the operation of the national PIL rules of Member States, which are applicable, for the most part, with regard to the doctrine of punitive damages.

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[4] See, in particular Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages - Is Europe Missing Out?* (Intersentia 2012); Cedric Vanleenhove, *Punitive Damages in Private International Law. Lessons for the European Union* (Intersentia 2016); Michael Komuczky, 'Punitive Damages and Public Policy in the EU' [2017/2018] YPIL 509.

[5] *Ex multis* Jürgen Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam' [2000] Common Market L Rev 687; Fausto Pocar, 'La comunitarizzazione del diritto internazionale privato: una "European conflict of laws revolution?"'[2000] RDIPP 873; Katharina Boele Woelki and Ronald Van Ooik, 'The Communitarization of Private International Law' [2002] YPIL 1; Riccardo Luzzatto, 'Riflessioni sulla cd. comunitarizzazione del diritto internazionale privato', in Stefania Bariatti and Gabriella Venturini (eds), *Nuovi strumenti del diritto internazionale privato - Liber Fausto Pocar (vol. II)* (Giuffré 2009) 613.

It is precisely in this second direction that I intend to explore the matter. In particular, I will examine this raising development – which is highlighted by the first form of Europeanization – from the peculiar perspective of PIL, with the aim of detecting the legal implications stemming from the (presumed) Europeanization of the public policy exception in the context of punitive damages. In that regard, I will develop my reasoning in a two-fold perspective.

I will first address the issue in abstract terms, from a theoretical point of view, by providing a comprehensive framework of the various PIL issues arising out of the classic theory of public policy in light of the impact of EU standards in this matter.

Second, I will analyse the Europeanization process in practical terms, by examining in which way, and to what extent, the emerging European public policy has affected the findings of transnational cases involving punitive damages. In that regard, I will take the judgment no 16601 of 5 June 2017 (Joint Divisions) issued by the Italian Supreme Court (*Corte di Cassazione*) as a case study.[6] In fact, it is in this decision that the *Corte di Cassazione* surprisingly reviewed its negative approach on the matter, both by recognizing – for the first time – the awarding in Italy of US punitive damages (under certain conditions) and by invoking in that regard – again for the first time – the European dimension of public policy.

3. THE THEORY: THE NEED FOR A RE-CONCEPTUALIZATION OF THE PUBLIC POLICY EXCEPTION?

From a theoretical point of view, it is crucial to investigate whether the current tension between EU standards as potential grounds of public policy and the enforcing in the European territory of punitive damages awards granted by extra-EU (or common law Member States') courts does entail or not a structural reconsideration of the public policy exception as traditionally known in the field of private international law. The question of a new theoretical foundation of public policy at the European level is actually wider and has a general character since it affects all foreign situations where the court of a Member State is re-

[6] *Axo Sport spa v Nosa Inc* [2017] Dir comm int 709.

quested to recognize and/or to enforce a foreign judgment or to apply the foreign law as determined by the conflict-of-laws rules of the forum (*lex causae*), irrespective of whether punitive damages are concerned or not. The above issue ultimately results in the need to establish if the traditional structures of the public policy exception [7] can be adapted to the peculiarities of the on-going Europeanization of PIL or if, on the contrary, it is necessary to rethink them – or, at least, to reshape them – in light of the characteristics of the supranational legal framework to which the exception at stake belongs.

It is not possible here to recall all structures of the theory of public policy. For the sake of brevity and for the purposes of this chapter, in the following paras I will shed some light on three different aspects: 1) the functions of public policy 2) the content of the latter and 3) the consequences of its application.

It is apparent from the previous contributions that the public policy to be taken into account when assessing the compatibility of punitive damages with the fundamental values of the European countries is (still) the public policy of the forum, ie the national public policy of each EU Member State. This preliminary (and apparently banal) consideration is not surprising at all, given that the public policy clause represents the 'last bastion' of domestic sovereignty, by virtue of which every national legal system aims at preserving its own core values. Accordingly, it is for the national court of enforcement to scrutinize whether the result of enforcing a foreign decision complies with the fundamental principles of the forum (result-oriented nature of public policy). [8] Moreover, in respect to punitive damages, this 'domestic-centred approach' is imposed by the lack of harmonization of the substantive tort law among Member States, provided

[7] *Ex multis*: Thomas H. Healy, 'Théorie générale de l'ordre public' [1925] Recueil des Cours 411; Paul Lagarde, *Recherches sur l'ordre public en droit international privé (LGDJ 1959)*; Paul Lagarde*, 'Public Policy', International Encyclopedia of Comparative Law III* (1991) ch 11; Giuseppe Barile, '*Ordine pubblico (diritto internazionale privato)*' in (1980) XXX Enc Dir 1106; Andreas Bucher, 'L'ordre public et le but social des lois en droit international privé' [1993] Recueil des Cours 9; Giuseppe Barile, *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (L'ordine pubblico internazionale)* (Cedam, 1969); Nicola Palaia, *L'ordine pubblico internazionale* (Cedam 1974).

[8] See for this term Komuczky (n 4) 518.

that this matter is still confined within the domain of every single internal law.

It is then pivotal to verify if the EU standards penetrate the national legal system of the forum in a way as to integrate the core values of the latter, even for the purposes of the national public policy, or if, on the contrary, they call for a different means of protection to be added to the existing national one. In other words, it is necessary to investigate whether some European minimum uniform standards of protection can be guaranteed by the national public policy of each Member State by the same token as the national values of the forum are or, on the contrary, whether they need to be enforced – in each national legal system – through a different public policy clause, which is exclusively devised for guaranteeing the respect of European fundamental principles.

3.1. *The interplay between the EU public policy and the national public policy*

In the lack of a clear and settled practice over the interplay between the European and the domestic dimension of public policy in this matter, we can only speculate over the matter. In particular, we may hypothesize at least three different options.

In the first place, we could imagine that the EU standards prevail over the national fundamental values and merely substitute them (substitution). [9] It is apparent that this first approach is too restrictive and unrealistic since it would completely neutralize the sovereign determinations of each Member State in admitting or refusing the recognition of foreign judgments or the application of a rule of foreign law awarding non-compensatory damages. Moreover, it would be ontologically unacceptable given that tort law is not a competence of the European Union.

Rather, two other possibilities could be reasonably purported.

In particular, we could first assume that the EU standards simply integrate the core values of the forum with the aim of en-

[9] Yvon Loussouarn and Jean-Denis Bredin, *Droit du commerce international* (Sirey 1969) 507; Raymond Van Der Elst, *Droit international privé belge et droit conventionnel international, t. 1, Conflits de lois* (Bruylant 1983) 258.

riching the public policy's content 'from the inside'. Accordingly, the national public policy would incorporate both purely domestic values and European common standards (integration). [10] The latter, in this manner, would retain their autonomy, since it would be for the European legal order to define which common values amount to principles of EU public policy.

Secondly, we could argue that the EU standards retain their own autonomy: they closely interact with the national values but they coexist with the latter (coexistence). [11]

This approach would find a theoretical justification not in the principle of primacy of the EU law on the internal law but rather in the delimitation of the respective spheres of competence between Member States and the Union (principle of conferral). In light of the current level of integration reached by the European Union, I find this solution the most convincing and balanced one, since it respects the pluralism of the national identities of Member States, as declined under the national public policy; likewise it supports the European integration process.

3.1.1. *Integration (and primacy) v coexistence (and subsidiarity)*

If we reconstruct the interaction between the EU public policy and the national public policy in terms of integration, it follows that the notion of EU public policy as such does not exist. It would represent just a way to indicate – under a PIL perspective – some fundamental values of the forum, which derive from

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[10] See *ex multis* Pierre Mayer, *Droit international privé* (5th edn, LGDJ 1994) 664; Giacomo Biagioni, 'L'art. 6 della Convenzione europea dei diritti dell'uomo e l'ordine pubblico processuale nel sistema della Convenzione di Bruxelles' [2001] RDI 723, 731; Luigi Fumagalli, 'L'ordine pubblico nel sistema del diritto internazionale privato comunitario' [2004] Dir comm int 645, 652; Philippe Schmit, 'La communautarisation de l'ordre public en droit international privé' in *Annales du droit luxembourgeois* (Bruylant 2005) 335, 350-351; Nerina Boschiero, 'L'ordine pubblico processuale comunitario ed "europeo"' in Patrizia De Cesari and Marco Frigessi di Rattalma (eds), *La tutela transnazionale del credito* (Giappichelli 2007) 163, 172, 176; Petra Hammje, 'L'ordre public international et la distinction entre États membres et États tiers', in Sandrine Sana Chaille De Nere (ed), *Droit international privé, États membres de l'Union européenne et États tiers* (LexisNexis 2009) 65, 66, 69.

[11] Ornella Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (Giuffré 2012) 354–356.

the EU membership. The phrase EU public policy would rather describe a component of the national public policy. This implies that if a conflict between fundamental values arises, the EU standards should override the domestic ones, in accordance with the principle of primacy of EU law (primacy).

On the contrary, if we accept the view that the emerging EU public policy and the national public policy are autonomous in nature and they do coexist (coexistence), we must conclude that two separate tools operate internally in each domestic legal order: respectively, one aimed at protecting the domestic values (including the ones stemming from international treaties or international customary law by virtue of their implementation into the national legal order) and one aimed at protecting the EU common values.

Accordingly, the EU public policy should be invoked on a subsidiary basis, after the national public policy has been applied (subsidiarity). [12] If the national public policy collides with the awarding of punitive damages so as to preclude it in the forum, then there would be no need to invoke the EU public policy at all. By contrast, if the national public policy allows for the granting of punitive damages in a certain Member State, then it would be necessary to scrutinize whether the effects of the application of the foreign *lex causae* or of the enforcement of the foreign judgment involved, allowed by the national tool, comply or not with the EU standards. If the collision amounts to a manifest (and disproportionate) infringement, then the EU public policy should prevail and, consequently, preclude the awarding of punitive damages. In this way the EU public policy would serve as a truly 'safety net' [13] to the Member State's choice-of-law rules and rules governing the recognition and enforcement of foreign judgments, defining the outer limits of the 'tolerance of difference' implicit in such rules [14]. Correspondingly, the sovereign powers of Member States would be preserved in this subject matter, given that the operation of the national public policy is guaranteed on a preliminary basis. It is apparent that the principle of subsidiarity offers a normative justification for

[12] See, in general terms ibid 344–348 and 355.

[13] Alex Mills, 'The Dimensions of Public Policy in Private International Law' [2008] JPIL 201, 202.

[14] Ibid 202.

the reservation of a margin of appreciation to States within the framework of the European legal order to protect its own community interests and institutions. At the same time, it provides that, in certain situations, overarching common values that are shared by Member States should be able to override the national policies of protection. [15]

In effect, the idea of a possible coexistence between national public policy and EU public policy, in this subject matter, is retrievable in the drafting history of (EC) Regulation no 864/2007 on the law applicable to non-contractual obligations (Rome II). In particular, article 24 of the European Commission's proposal of 22 July 2003, [16] which was specifically devoted to the 'Community public policy', stated: 'The application of a provision of the law designated by this regulation which has the effect of causing non-compensatory damages such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy'. The rule was drafted as a separate provision from the general one on public policy of the forum as enshrined in article 22 of the 2003 proposal. Article 24 was meant to envisage a different and autonomous nature of the European core values to be opposed to the national core ones. The latter provision originated from the consideration that, during the preliminary written consultation of the stakeholders that had preceded the drafting of the European Commission's proposal, several contributions had expressed concerns in respect of the application of a third State's law providing for the awarding of money not exclusively directed to compensate the injured party. Accordingly, it was purported the idea to pass a specific rule on the matter, [17] which was directly inspired by article 40 para 3(1) of the Introductory Act to the German Civil Code (EGBGB).

As it was pointed out by some commentators, [18] this provi-

[15] On the relevance of the principle of subsidiarity in the framework of the principles providing for the theoretical justification of the public policy doctrine see Kenny Chng, 'A theoretical perspective of the public policy doctrine in the conflict of laws' (2018) 14 JPIL 130, 154–155.

[16] COM (2003) 427 final.

[17] Explanatory Report of the proposal of 'Rome II' Regulation of 22 July 2003, 31.

[18] The Hamburg Group for Private International Law, doc. 'Comments on the European Commission's draft proposal for a Council regulation on the law applicable to non-contractual obligations', 59.

sion clearly referred to 'some directly applicable rules of primary Community law' and to the fundamental rights as enshrined in the ECHR. Nevertheless, the rule was subsequently removed from the Rome II's final version, which exclusively gives relevance to the public policy of the forum. [19]

Scholars have strongly criticized the rule concerning the 'Community public policy'. In particular, it has been contended that the latter lacked specificity as to the types of non-compensatory damages to be excluded (eg restitutionary damages). Secondly, the provision appeared too strict in its contents and it was apparently conducive to illogical consequences in relation to those Member States that provide for punitive damages, such as England and Ireland, given that, for example, by applying the latter, an English court would have refused the application of a foreign law granting punitive damages and replaced it by its own domestic law (*lex fori*), which, as is known, awards such damages at the domestic level. [20]

Personally, I share the view that the wording of article 24 of the 2003 Rome II proposal was too restrictive and partially unsatisfactory: if it had been kept in that formulation, it would have precluded any evolution at the European level on the matter under the PIL perspective. Moreover, it would have not either reflected the sensitivity both of the EU, which does not prohibit punitive damages as such in absolute terms, and of Member States. However, as I will attempt to prove in the next paras, the suppression of the above rule from the final text of the Rome II Regulation does not mean either that the category of EU public policy does not exist in this matter (or in general) or that some fundamental European standards do not need to be uniformly applied at the European level in order to modulate the application of a foreign rule of law or the recognition of a foreign decision providing for the awarding of punitive damages when the public policy of the forum has allowed for the latter. In my opinion, the rule should be read as a first attempt (albeit, undoubtedly, premature and rough) to shed some light over the inevitable Europeanization of public policy and to highlight this

[19] `Rome II' Regulation, art 26 and recital 32.

[20] Cedric Vanleenhove, 'Punitive Damages and European Law: Quo Vademus?', in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages - Is Europe Missing Out?* (Intersentia 2012) 337, 339.

future perspective in the first uniform and directly applicable instrument on conflict-of-laws at the European level. Article 24 may also be interpreted as an embryonic way to reconstruct the interplay between national public policy and EU public policy in terms of coexistence (subsidiarity) instead of integration (primacy).

It is worth noting that the Italian *Corte di Cassazione*'s judgment no 16601/2017 has expressly purported the argument of the coexistence between the EU and the national public policy. The Court also grounded this view on article 67 TFUE, which, as is known, serves as the cornerstone of all measures adopted in the area of freedom, security and justice within the EU:

> È stato pertanto convincentemente detto che il rapporto tra l'ordine pubblico dell'Unione e quello di fonte nazionale non è di sostituzione, ma di *autonomia e coesistenza*. Le Sezioni Unite ne traggono riprova dall'art. 67 del Trattato sul funzionamento dell'Unione Europea (TFUE), il quale afferma che "l'Unione realizza uno spazio di libertà, sicurezza e giustizia nel rispetto dei diritti fondamentali nonché dei diversi ordinamenti giuridici e delle diverse tradizioni giuridiche degli Stati membri". [21]

Furthermore, the Italian Supreme Court has highlighted the persisting importance of national diversity among Member States, where the existing differences in national Constitutions and legal traditions still represent 'living limits', [22] thus supporting the view that the national public policy still retain its impor-

[21] *Axo Sport* (n 6) para 6. Emphasis added. For the English version: see Italian Corte di Cassazione 5 July 2017 no 16601, para 6, translation by Francesco Quarta [2017] The Italian Law Journal 277, 286: 'It has convincingly been observed that the relationship between EU public policy and national public policy does not entail substitution, but rather autonomy and coexistence. According to the Joint Divisions, evidence of this can be derived from article 67 of the Treaty on the Functioning of the European Union (TFEU), stating that 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.

[22] Quarta (n 21) 286. *Axo Sport* (n 6) para 6.

tance and autonomy while the exception develops at the European level.

3.2. *Negative and 'positive' function of the EU public policy*

After having clarified the preliminary feature concerning the nature of the EU standards in the context of the emerging European public policy, we can now address the first issue of general character involving the evolution of the exception at European level: ie the objectives that the latter may pursue.

Traditionally it is admitted by scholars that the public policy exclusively serves a negative function, ie the protection of the internal harmony of the legal order of the forum, by preventing the recognition and/or the enforcement of foreign judgments or the application of a foreign *lex causae,* when the results of their enforcement or of its application would be manifestly unacceptable for the forum. [23]

However, it is controversial whether public policy serves a positive function too, ie favouring the application of mandatory rules of the *lex fori*. [24] This teleological perspective dates back to the thought of Pasquale Stanislao Mancini [25] and has been recently re-launched in Italy by a rising trend towards the 'constitutionalization' of public policy, which has been inaugurated in 2016 by the Italian *Corte di Cassazione* in matter of recognition of parental status acquired abroad as a result of the recourse to Artificial Reproductive Techniques (ARTs). [26]

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[23] The negative function of public policy is unanimously purported by scholars and dates backs to Friedrich Karl von Savigny, *System des heutigen römischen Rechts* (Veit 1840).

[24] Roberto Quadri, *Lezioni di diritto internazionale privato* (Liguori 1983) 309. See also the theory on the 'ordre public de rattachement' under which the positive function of public policy should imply the general competence and application of the legal forum as a whole: Petra Hammje, 'L'ordre public de rattachement' [2006-2008] Travaux du Comité français de droit international privé 153, 154. Personally, I interpret the 'orthodox' positive function of the public policy as a misconception, which should be exclusively referred to the overriding mandatory rules: Feraci (n 11) 62.

[25] Pasquale Stanislao Mancini, 'Utilità di rendere obbligatorie per tutti gli Stati, sotto la forma di una o più trattati, alcune regole del diritto internazionale privato per assicurare la decisione uniforme dei conflitti tra le differenti legislazioni civili e criminali' (1959) XIII Diritto internazionale 375.

[26] Francesco Salerno, 'I diritti fondamentali della persona straniera nel

Consequently, in accordance with the ontological nature of the public policy exception, the primary function of the EU public policy concerning the punitive damage should consist in the protection of the internal coherence of the EU legal system. However, besides this negative function, it seems to me reasonable arguing that the latter should also be meant as a tool for promoting uniform legal standards at the European level, in the sense that it would guarantee, in general terms, the compliance with certain fundamental principles of the European legal order with the ultimate aim of advocating the European integration and the basic values of the Union, especially (but not exclusively) towards third States. [27] In this perspective the positive connotation of the EU public policy should be recognized not in its pure version, but rather under an 'integration-oriented' approach inspired by material considerations, which is ultimately requested by the peculiar nature of the European integration itself.

As I have already argued some years ago, I am more and more convinced that this heterodox 'positive' function should be developed in a two-fold direction: 1) a promotional function, operating, on a subsidiary basis, towards the Member States and 2) a promotional function, operating, on an expansive basis, towards third States but only when the situation at stake, in light of all relevant circumstances of the case, is strongly connected with the EU. That would avoid the extraterritorial application of the EU law, like it could occur, for instance, in respect of a strong subjective connection of the wrongdoer with the European Union (eg habitual residence in a Member State). [28]

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diritto internazionale privato: una proposta metodologica' [2014] RDIPP 786; Francesco Salerno, 'La costituzionalizzazione dell'ordine pubblico internazionale' [2018] RDIPP 259, 278-280.

[27] Feraci (n 11) 341-344; Fumagalli (n 10) 647; Elena Rodriguez Pineau, 'European Union International Ordre Public' [1993–1994] Spanish YBIL 64; Marc Fallon, 'Les conflits de lois et de juridictions dans un space economique integre. L'experience de la Communaute Européenne' (1995) 253 Recueil des Cours 243, 256, who holds that the Community public policy should have a 'vocation essentiellement positive'; Nerina Boschiero, 'I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla "conflict involution" europea in materia contrattuale' in Nerina Boschiero (ed), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)* (Giappichelli 2009) 67, 134–135.

[28] Feraci (n 11) 342–344.

The need to pursue both objectives clearly emerges, again, from the text of the 2017 Italian Supreme Court judgment:

> La dottrina ha spiegato che l'effetto principale recato dal recepimento e dall'interiorizzazione del diritto sovranazionale non è la riduzione del controllo avverso l'ingresso di norme o sentenze straniere che possono 'minare la coerenza interna' dell'ordinamento giuridico. ... a questa storica funzione dell'ordine pubblico si è affiancata, con l'emergere e il consolidarsi dell'Unione Europea, una funzione di esso promozionale dei valori tutelati, che mira ad armonizzare il rispetto di questi valori, essenziali per la vita e la crescita dell'Unione. [29]

3.3. *In search of fundamental principles of EU public policy*

To avoid the emerging notion of EU public policy concerning punitive damages resulting in a purely academic speculative exercise, it is pivotal to identify its possible content. In that regard, some general and brief remarks over the structural aspects of the theory of the international public policy should be, first, pointed out.

In the first place, it is accepted that the public policy, for its own nature, can be described only in terms of vagueness and uncertainty: even though it is a normative tool, it needs to be actualized through the judicial appreciation. Similarly, the emerging European public policy on punitive damages requires that it will be for the national courts to determine and to enhance the European 'threshold of tolerance' that cannot be exceeded by foreign punitive damages.

In the second place, the public policy exception is deemed

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[29] *Axo Sport* (n 6) para 6. See here the English version: 'Scholars have explained that the main effect of the reception and internalization of supranational law is not that of a diminished control over the accessibility of foreign rules or judgments that may 'undermine the internal coherence' of the legal system. As already mentioned, this historical function of public policy has been complemented, after the establishment and consolidation of the European Union, by the function of promoting shared values, with a view to harmonizing the observance of such values, which are essential to the existence and growth of the Union'. Quarta (n 21) 286.

to be relative in time and space.[30] In my view, this characteristic can be hardly transferred to EU standards, which are in principle shared and observed by Member States since their adhesion to the European Union. Their interpretation may actually change over the years but not to the point to distort the EU basic values.

In the third place, the public policy exception must be invoked restrictively, as an exception to the ordinary functioning of PIL rules (necessity test), only when the foreign values manifestly collide with the forum (seriousness of the breach). It is reasonable to deem that even the EU public policy should apply only in serious and limited cases.

When assessing the EU public policy concerning punitive damages, it is apparent that the latter affects the substantive public policy, not the procedural one (fair trial). This aspect is not irrelevant, since the ECJ has ruled so far over the evolution in European sense of the public policy exception exclusively in regard to the procedural dimension, by investigating the role of the defendant's right to be heard as a ground for refusing the recognition and/or enforcement of foreign judgments in civil and commercial matters among Member States (from the 1968 Brussels Convention to the 2012 Brussels I-bis Regulation).[31] In particular, according to a well-settled case law, it held that, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may resort to that concept for the purpose of refusing recognition to a judgment rendered by a court in another Member State.[32] In that regard, the ECJ explained that the public policy clause can be invoked only where the recognition or enforcement of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of

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[30] Hans Verheul, *Public Policy and Relativity* (1979) 26 NILR 112; Bernard Dutoit, 'L'ordre public: cameleon du droit international prive? Un survol de la jurisprudence suisse', in Bernard Dutoit, Josef Hofstetter and Paul Piotet (eds), *Melanges Guy Flattet* (Payot 1985) 472.

[31] European Parliament and Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I*bis*), OJ L 351/1. See, to that effect, Case C–7/98 *Krombach v Bamberski* [2000] ECR I–1935, paras 38 and 39 and Case C–394/07 *Gambazzi v DaimlerChrysler* [2009] ECR I–2563, paras 28 and 48.

[32] *Krombach* (n 31), para 23; *Gambazzi* (n 31), para 26.

the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In particular, the infringement should constitute a manifest breach of a rule of law regarded as essential in the legal order of the State of enforcement or of a right recognised as being fundamental within that legal system. [33] It is reasonable to deem that such general guidelines should also inspire the assessment over the EU public policy regarding punitive damages, notwithstanding that the latter affects the substantive public policy's dimension.

3.3.1. *a) in the EU secondary law in light of the ECJ's case law: from Manfredi to Kablowa case*

EU law does not regulate punitive damages. This does not imply that it prohibits Member States from awarding them [34] and does not mean either that it requires Member States to grant punitive damages in specific subject matters governed under EU secondary law. More simply, the EU currently leaves discretion to the Member States to take measures providing for the payment of non-compensatory damages in case of breach of rules of EU law, especially when that is required by the principle of equivalence – according to which remedies that are available for the protection of EU rights by national law must not be less favourable than those available for similar domestic rights – and by the principle of effectiveness. The analysis of the relevant ECJ's case law confirms this tolerant approach. In *Manfredi,* [35] for example, the Court held that national courts are entitled to grant punitive damages for violations of Community law, in particular in respect of an infringement of article 81 EC (now article 101 TFEU), if their national legal systems granted such damages for domestic claims. [36] More recently, the ECJ applied the same reasoning in *Arjona Camacho,* [37] which concerned a claim

[33] *Krombach* (n 31), para 37; *Gambazzi* (n 31), para 27.

[34] Case C–367/15, *Kablowa v Stowarzyszenie Filmowców Polskich* [2017] ECLI:EU:C:2017:36, paras 28 and 33.

[35] Joined Cases C–295/04 to C–298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR 2006 I–6619.

[36] Ibid, para 92.

[37] Case C–407/14, *Arjona Camacho v Securitas Seguridad España* [2015] ECLI:EU:C:2015:831, paras 42 and 43.

brought in Spain by a Spanish woman seeking for the awarding of punitive damages following her dismissal which was deemed as constituting discrimination on grounds of sex. The case affected, in particular, the interpretation of article 18 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. [38] The Court clarified then that, since the Spanish law does not allow for punitive damages domestically to a person injured by discrimination on grounds of sex, article 25 of Directive 2006/54 does not provide that a national court can, on its own, require the person responsible for the discrimination to pay such damages. [39]

A thorough scrutiny of EU private law also reveals that even if the latter does not provide for punitive damages, however it contains several normative provisions, which can be regarded as pursuing a punitive and deterrent objective and which substantially consist of imposing economic sanctions whose amount is higher than the actual damage suffered by the victim. [40]

For the purposes of this chapter, the above considerations lead us to conclude that EU secondary law as such is not suitable to provide any fundamental values that can be invoked as grounds of a European public policy towards foreign punitive damages.

3.3.2. *b) in the EU primary law: the principles of legality and proportionality*

The role of the higher sources of EU law in the application of the EU public policy regarding punitive damages is significantly higher. In particular, two principles come into consideration in that regard: respectively, the principle of legality (*nulla poena sine lege*) and the principle of proportionality (reasonableness test). It is well known that, as a general rule, both legality and proportionality apply in respect of criminal offences and

[38] Ibid para 40.

[39] Ibid paras 42–43.

[40] See, for instance, Regulation 1768/95 implementing the agricultural exemption, art 18. For a detailed investigation on the matter see: Vanleenhove (n 4) 147–205.

penalties and are regarded as general principles of EU law, stemming from the constitutional traditions common to the Member States and the ECJ's case law.[41] They are also enshrined in article 49 of the EU Charter of fundamental rights – respectively, the principle of legality under article 49 (1) and (2), which reproduce the wording of article 7 ECHR, and the principle of proportionality under article 49 (3).[42] Thus, since the entry into force of the Lisbon Treaty, they enjoy the highest normative and binding status of the EU sources of law (primary law).

It is a general rule that criminal offences and penalties for the purposes of article 49 must be defined on the basis of substantive rather than merely formal criteria.[43] The field of application of the principle of legality, while being related to criminal law, can be extensively interpreted by virtue of a 'substantive test', which is essentially grounded on the nature of the sanction and of the severity's degree of the latter. Such test derives from the Strasbourg Court's case law concerning the interpretation of the scope of the principle of legality as enshrined in article 7 ECHR,[44] pursuant to article 52(3) of the Charter, and it should be applied with the aim of determining whether a sanction under national law is criminal for the purposes of article 49(1) and (2) of the Charter. Accordingly, by giving relevance to the objectives pursued by punitive damages, we could infer that such provisions include the doctrine of punitive damages since they meet the 'Engel criteria' set out by the ECHR in criminal matters.[45] The same substantive approach could be applied, by way of analogy, to the proportionality principle, though it is not specifically enshrined in article 7 ECHR.

In my view, the principle of proportionality occupies a

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[41] See the Explanation of the EU Charter, art 49.

[42] `The severity of penalties must not be disproportionate to the criminal offence'.

[43] Valsamis Mitsilegas, 'Article 49 – Principles of Legality and Proportionality of Criminal Offences and Penalties' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary (English Edition)* (1st edn 2014, Hart/Beck) 1351.

[44] `Art. 7: *nulla poena sine lege*', in Sergio Bartole, Pasquale De Sena and Vladimiro Zagrebelsky (eds), *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali* (Cedam 2012) 259.

[45] *Engel and Others v Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/728 (ECHR, 8 June 1976), para 82.

prominent role in the application of EU public policy regarding punitive damages, [46] being the latter a core value of civil liability law, which basically aims at precluding the unjust enrichment of the injured party. Accordingly, it resorts to an excessiveness review of punitive damages granted abroad and it leaves room for their enforcement only when they are reasonable and proportionate.

In my opinion, the centrality of this value in this subject matter should stem from, at least, two considerations.

In the first place, it is a general rule that EU law requires that any sanction to be imposed under national law must be 'effective, proportionate and dissuasive'. [47] This requirement, therefore, is a key component of criminalisation at EU level, in general.

In the second place, recital 32 of (EC) Regulation no 864 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), while leaving discretion to Member States as to accept or refuse punitive damages, explicitly subjects their admissibility, on public policy grounds, to a proportionality test: 'Considerations of public interest justify giving the courts of the Member States the *possibility*, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an *excessive nature* to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum'. [48] The recital does not have, per se, immediate prescriptive effect but it plays, however, a crucial role in interpreting and integrating the content of the binding rules of the Regulation. In particular, article 26 of Rome II, concerning the public policy of the forum, should be read in

[46] Gerardo Broggini, 'Compatibilità di sentenze statunitensi di condanna al risarcimento di "punitive damages" con il diritto europeo della responsabilità civile' [1999] Europa e diritto privato 479, 504, who stresses that the principle of proportionality represents a fundamental value of the European public policy.

[47] Such principle stems from Case 68–88 *Commission v Hellenic Republic* [1989] ECR I–2965, para 24. On the point see Mitsilegas (n 43) 1366.

[48] Emphasis added.

light of the need to guarantee an excessiveness test when it comes to assess the compatibility of foreign punitive damages with the fundamental values in force in a Member State. Moreover, as it has been highlighted, such recital enables the ECJ to draw the line as to what amounts to an excessive non-compensatory award, thereby defining the boundaries of public policy.[49] A uniform interpretation of the excessiveness test should be indeed desirable in order to avoid that too diversified criteria may develop at the national level.

In recent years, the national courts of some Member States have refused to enforce foreign judgments awarding punitive damages whose amount was grossly excessive. In the *Fountaine Pajot* case,[50] in fact, the *Cour de Cassation* held that a US (Superior Court of California) award, condemning a French enterprise to pay 1,39 million US dollars as compensatory damages and a further 1,47 US dollars as punitive damages, could not be recognized and enforced in France because the sum awarded was disproportionate to the harm sustained and to the contractual breach:

> ... le principe d'une condamnation à des dommages et intérêts punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur.

Other national courts, such as the *Areios Pagos*[51] in Greece, the *Bundesgerishof* in Germany[52] and the *Tribunal Supremo* in Spain[53] have placed a similar emphasis on the proportionality test in the framework of the assessment of public policy towards

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[49] Vanleenhove (n 20) 340.

[50] Cour de Cassation 1st December 2010, D 2011, 423. See on the topic: Matthew Parker, 'Changing Tides: The Introduction of Punitive Damages into the French Legal System' [2013] Georgia J Intl & Comp L 390; François Xavier Licari, 'La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil de la Cour de Cassation?' D 2011 423.

[51] Benjamin West Janke and François Xavier Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) AJIL 775, 777, n 9.

[52] BGH 4 June 1992 (1992) NJW 3104.

[53] Tribunal Supremo 13 November 2001, *Miller Import Corp v Alabastres Alfredo SL* (2003) AEDIPR 914.

foreign punitive damages. More recently, in 2017, the Italian Supreme Court too, as we shall see, has highlighted the importance of proportionality in that regard.

However, the concrete application of the proportionality test raises two different issues.

In the first place, it is unclear in which way the national courts should carry out the judicial scrutiny on the excessiveness test in the lack of uniform standards or guidelines. It is to be noted that, during the last decades, a trend has emerged in the United States of America both at the federal and at the State level, with legislative and judicial efforts, aimed at limiting the number and amount of punitive damages.[54] This has led to establish some mathematical threshold for the calculation of the punitive damages amount. In particular, the US Supreme Court in *BMW of North America, Inc. v Gore*[55] set out three different criteria for determining whether a punitive damages award is 'grossly excessive' under the Constitution's Due Process Clause: 1) the reprehensibility of the defendant's conduct, 2) the ratio between the punitive and compensatory damages awarded and 3) a comparison of punitive damages to the criminal penalties that could be imposed for similar misconduct.[56] Subsequently, the Supreme Court introduced the single-digit rule (9:1), prohibiting punitive-to-compensatory damages ratios exceeding such threshold.[57] Some years later, the latter laid down a maximum punitive-to-compensatory damages ratio of 1:1 for federal maritime tort cases.[58] Although such criteria are not binding for the European courts, they could be taken into account, as an initial inspiration source, when evaluating the excessiveness of the amount even at the European level.

Following this trend some scholars have also attempted to formulate specific guidelines for the EU Member States' courts to be applied when called upon to determine the proportionality

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[54] Vanleenhove (n 4) 29–42.

[55] [1995] 517 U.S. 559.

[56] In particular, the US Supreme Court emphasized the role of the first guidepost and provided guidance on how to assess it by developing five probative questions, among which the nature (physical or economic) of the harm and the degree of financially vulnerability of the victim.

[57] *State Farm Mutual Automobile Insurance Co. v Campbell et al*. [2003] 538 U.S. 422.

[58] *Exxon Shipping Co. v Baker* [2008] 554 U.S. 471.

of US punitive damages amount both at the stage of recognition and enforcement of foreign judgments and at the stage of application of US law. [59]

In the second place, it is controversial how to reconcile the principle of proportionality with the prohibition to review the merit (*révision au fond*), given that the proportionality test would inevitably entail, at least, an indirect reassessment of the facts of the case, although limited to the calculation of damages. According to some authors, this concern is excessive and not well-founded, since the court of the forum would not adjudicate the findings of the judgment in fact and/or in law but would merely operate a mathematical calculation, which is imposed by the level of tolerance of the forum. [60] Other scholars, however, purport the view that the reduction of the punitive damages would in any case amount to an unacceptable *révision au fond*, [61] which is generally prohibited both at the EU PIL's level and at the national PIL's level.

3.4. *The consequences of its application: full or partial refusal of enforcement*

Following the above reasoning, the enforcement of a foreign judgment providing for punitive damages might be refused under the public policy doctrine, first, at the national level. Under my theoretical reconstruction, that scrutiny should correspond to the preliminary issue concerning the question as to whether the decision involved (or the foreign competent law) can be recognized or not (or can be applied or not). Once the foreign punitive damages award is found compatible with the national public policy, it will undergo a second level of assessment to be carried out, again, by the national court of the forum, in light of the EU public policy. That phase would amount to the subsidiary issue concerning the *quantum* of the punitive damages awardable in the forum. In that regard, it might occur that the amount of the latter, as granted in the State of origin, turns

[59] Vanleenhove (n 4) 207–236.

[60] Vanleenhove (n 4) 232.

[61] This view has been expressed in the context of the Brussels I Regulation by Hélène Gaudemet-Tallon, *Compétence et execution de jugements en Europe* (3rd edn, LGDJ 2010) 489.

out to be proportionate: in such a case, not being any collision with the EU public policy, the *exequatur* shall be granted (full enforcement). On the contrary, it might also happen that the amount of punitive damages results manifestly and excessively disproportionate. In such a case, two possibilities should derive: 1) a full refusal of enforcement of the whole punitive damages heading and of the compensatory damages heading; 2) a partial refusal of enforcement – in case the judgment is rendered in terms of special verdict – which could consist in two different modalities (a) the head of compensatory damages is declared enforceable and only the head of punitive damages is refused enforcement: 'selective partial *exequatur'* or (b) both the compensatory damage and the punitive damages headings are enforced, but the latter only up to the amount compatible with the proportionality test in light of the EU public policy: 'reductive partial *exequatur*'. [62]

The option for a partial enforcement of the foreign punitive damages award, as a result of the application of the EU public policy, relies on the assumption that any part of the punitive damages award that fulfils a compensatory nature does not raise any concerns under the public policy and should be then admitted in the forum and enforced.

EU law admits the partial *exequatur,* in general, where the judgment involved contains more separated headings, which are autonomous in nature, in the framework of civil and commercial matters. [63] Moreover, it is to be noted that this solution can be retrieved in some national case law too, in respect of the national public policy. In Italy, for example, the Court of Appeal of Trento, section of Bolzano of 16 August 2008 [64] refused the recognition of a US judgment in the part where it condemned the defendant to punitive damages being the latter contrary with public policy. [65]

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[62] See for the terms 'selective partial exequatur' and 'reductive partial *exequatur'* Janke and Licari (n 51) 803.

[63] Olivia Lopes Pegna, *I procedimenti relativi all'efficacia delle decisioni straniere in materia civile* (Cedam 2009) 260-261; Pierre Mayer, *Droit international privé* (6th edn, LGDJ 1998) 276.

[64] Corte d'Appello di Trento 16 August 2008 (2009) RDIPP Proc 448–451.

[65] See also on the possibility of partial *exequatur* in respect of punitive damages: Zeno Crespi Reghizzi, 'Sulla contrarietà all'ordine pubblico di una

A similar approach has been applied in Germany. [66]

The possibility of a partial *exequatur* of punitive damages awards could also be grounded on article 11 of the Hague Choice of Court Convention where recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. The provision also specifies that, in addressing this issue, the court of enforcement shall take into account 'whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings'. [67]

3.5. *The impact of the EU public policy regarding punitive damages in the field of conflict-of-laws (Rome II)*

The issue of the compatibility of punitive damages with public policy may also arise, although much less frequently, when a claim including the request for punitive damages is submitted before the court of a civil law Member State, where punitive damages are not domestically allowed and such claim has an international character. In such situation the court could be requested to apply a foreign law governing the substance of the dispute – as designated by the conflict-of-laws of the forum – which allows for the awarding of punitive damages.

At the European level, the characterization of the claim should usually lead to tort and, more in general, to non-contractual obligations, which, as to the law applicable, are governed under the Rome II Regulation. Its universal character implies that the general conflict rules (article 4 or article 14) or the special ones provided for by the Regulation could determine as the law applicable to the case the law of a third State or the law of a Member State. In that context, article 26 of Rome II would serve

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sentenza straniera di condanna a punitive damages' [2002] RDIPP 977, 990 in relation to the *Fimez* case (Corte di Appello di Venezia 15 October 2001 [2002] RDIPP 2021). Although the Court of Appeal did not specifically address this issue, the Author noted that a partial *exequatur* was not possible in that case since the US judgment did not contain a special verdict, ie it did not specify the amounts of compensatory and punitive damages. However, it expressed the view that, in case of special verdict (ie when the US judgment specifies the two headings of damages) a partial *exequatur* should be admitted.

[66] Bundesgerichtshof, 4 June 1992 [1992] NJW 3096.

[67] Convention of 30 June 2005 on Choice of Court Agreements, art 11(2).

as the legal basis for invoking the EU public policy and supporting, if necessary, the exclusion of the foreign rule of law. The applicability of Rome II in relation to punitive damages can also be inferred by article 15 (c) of the instrument, which states that the law applicable to non-contractual obligations shall govern in particular 'the existence, the nature and the assessment of damage or the remedy claimed', thus supporting the view that, in the framework of the Regulation, tort is not exclusively inspired by the principle of integral reparation. [68] However, it is to be noted that other instruments could come into play for determining the law applicable in that regard, especially when the claim involved does not fall within the scope of the Regulation or is classified in terms of a non-contractual obligation excluded by Rome II's material scope. In the latter case, conventional or national conflict-of-laws rules should be applied. [69]

When a foreign law providing for punitive damages needs to be directly applied by a civil law Member State's court, both the negative and 'positive' functions of the EU public policy should be strengthened, since the court would be called upon to apply a foreign legislation and to rule over the matter, ie to create a legal situation that is destined to produce its effects primarily in the forum. Accordingly, it could be hypothesized that the EU public policy could operate in light of the French doctrine of the so called *effet attenué de l'ordre public* [70] so as to lead to an *effet plein* of the EU public policy, in respect of a significant connection with the EU. The situation, however, is merely speculative for the moment since the practice on the point is still lacking. [71] So far, in fact, there is only one reported case of the District Court of Amsterdam where the Rome II has been applied in this subject matter. [72] On that occasion, the law

[68] Marta Requejo Isidro, 'Punitive Damages: How Do They Look Like When Seen From Abroad?' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 311–336, 315.

[69] See art 40 III 2 of the German EGBGB, which specifically refuses US punitive damages; similarly see art 116 and art 119 of the Romanian International Private Law Act (Law no 105/1992) or para 52 of the Estonian International Private Law Act of 2002.

[70] Feraci (n 11) 343.

[71] Requejo Isidro (n 68) 315.

[72] Rechtbank Amsterdam 15 June 2012 cited in Vanleenhove (n 4) 82.

of California – the *lex loci damni* under article 4(1) of Rome II Regulation – was regarded as compatible with public policy and the principles of reasonableness and fairness. In my view, it seems reasonable that in the opposite case, where the foreign rule of law should collide with EU standards, the *lex fori* (ie the substantive law on civil liability of the forum) would apply as a last resort. By contrast, the *lex fori* should not apply when other subsidiary connecting factors are available in the relevant conflict-of-laws rule and they recall a foreign law providing for punitive damages (1), which is compatible with the national and the EU public policy (2).

3.6. *The scope of the UE public policy towards punitive damages: the proximity criterion*

From a theoretical point of view, a final hurdle needs to be addressed. By virtue of article 51 of the EU Charter we could invoke the fundamental rights of the latter instrument – in particular, as to punitive damages, article 49(3) – only when the situation at stake falls within the scope of EU law, ie when the Member States 'are implementing the EU Law'. [73] That would occur when a EU PIL instrument applies (ie the 'Rome II' Regulation, as indicated above, or the Brussels I-bis Regulation, [74] when it comes to enforce a EU common law Member State's judgment granting for punitive damages in a civil law Member State), but not when the national rules on recognition or enforcement of extra-EU judgments are to apply. It is contended [75] then that, in the latter situation, invoking the EU Charter as a ground of public policy would be a misconception.

This issue raises the wider question of the scope of the EU public policy, in general. Personally, I deem that the application of the latter must be imagined and modulated in connection with the proximity principle. It is admitted by several scholars and certain domestic courts that the intensity of the international

[73] EU Charter, Art 51.

[74] In particular Regulation (EU) 1215/2012, Art 45(1)(a).

[75] In that regard Omar Vanin, 'L'incidenza dei diritti fondamentali in materia penale sulla ricostruzione dell'ordine pubblico internazionale: il caso del riconoscimento delle decisioni straniere attributive di punitive damages' [2017] RDIPP 1193, 1194.

public policy may be declined in light of the connection between the situation at stake and the forum: the more the situation is linked (with objective and/or subjective factors) to the State's court seised – as resulting by the examination of all relevant circumstances of the case – the more it is necessary to protect its own core values from the interference of unacceptable foreign values (so called *Inlandsbeziehung*[76] or *ordre public de proximité*).[77] Accordingly, I purport the idea that the scope of the EU public policy must be delimited in light of the proximity theory, as to justify the application of EU standards even in respect of situations connected with non-EU Member States, provided that the case is strongly connected with the EU. A Member State remains a Member State even when it applies its own national rules on recognition and enforcement for assessing the compatibility with an extra-EU punitive damages award. Its core values do not change and their protection remains crucial. It is clear then that being part to the EU implies that certain minimum standards of protection, which are mandatory in nature, must be observed by Member States even when the situation at stake is not purely intra-EU,[78] provided that, however, a sufficiently strong link exists with the Union. In that regard, it suffices to recall how the ECJ extended the scope of EU PIL in respect of situations involving only one Member State and a third State, ie the *Owusu* doctrine,[79] for delimiting the territorial scope of the 1968 Brussels Convention, or the *Ingmar* case,[80] when it required the application of some EU overriding mandatory provisions irrespective of the third-State law applicable to the case. It is true that, when considering the enforcement of

[76] *Ex multis* Natalie Joubert, *La notion de liens suffisants avec l'ordre juridique (Inlandsbeziehung) en droit international privé* (LexisNexis 2008).

[77] Paul Lagarde, 'Le principe de proximité dans le droit international privé contemporain' (1986) 196 Recueil des Cours 9; Patrick Courbe, 'L'ordre public de proximité', in *Le droit international privé: esprit et méthodes. Melanges en l'honneur de Paul Lagarde* (Dalloz 2005) 227.

[78] Jürgen Basedow, 'Recherches sur la formation de l'ordre public européen dans la jurisprudence', in *Le droit international privé. Esprit et méthodes. Mélanges en l'honneur de Paul Lagarde* (Dalloz 2005) 55, 68, who stresses that the Community public policy operates with higher intensity in respect to judgments delivered by third States' courts.

[79] Case C–281/02, *Owusu v Jackson* [2005] ECR I–01383, para 35.

[80] Case C–381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc*. [2000] ECR I–09305, para 26.

an extra-EU punitive damages judgment, the case stands technically beyond the scope of application of the EU, as prescribed by article 51 of the Charter. However, if we denied the applicability of the EU standards through the EU public policy, we would render the tool meaningless and redundant, since the situations where the need for observing the EU fundamental values is more urgent are precisely those where potential serious breaches of EU principles are carried out by third States.

In effect, the idea of modulating the level of tolerance of the public policy of a Member State in light of the proximity criterion has been argued in some jurisprudential practice at the national level in the framework of punitive damages, where it has been attached importance to the case's proximity to the forum. [81]

However, it is also to be noted that the principle of proportionality between penalties and criminal offences as enshrined in article 49(3) of the EU Charter amounts to a general principle of the EU, which is set out in the constitutional traditions common to Member States and in the ECJ's case law. As such, its scope should not be strictly limited by the territorial requirement of article 51 of the Charter and it should then operate as a ground of the EU public policy.

4. The practice: the 2017 Italian Supreme Court's judgment as a case study

The *Corte di Cassazione*'s judgment of 5 July 2017, no 16601 (Joint Divisions) stands as a landmark decision in the assessment over the compatibility of punitive damages with the Italian legal system. The latter has been widely discussed by scholars, also in some contributions of this volume. [82] Hence, I will merely develop a few considerations on the matter, by shifting the focus on a different perspective, ie highlighting in which way, and to what extent, the EU public policy has affected the findings of the Court.

From a practical point of view, I will then attempt to enlarge the 'snap-shots' of some passages of the judgment (precisely,

[81] Bundesgerichtshof (n 52) 3104 and Tribunal Supremo (n 53) 914.

[82] See the chapters by Giacomo Biagioni and Giulio Ponzanelli in this book.

paras 6 and 7) in order to verify the repercussions of my theoretical reconstruction in the Italian *revirement*.[83] From a methodological point of view, I will take the above judgment as a case study, because it is on that occasion that the Italian Supreme Court emphasised, for the very first time, the European dimension of public policy in relation to punitive damages, without being the Court however completely aware of the implications stemming from such development.

4.1. *A first level of interpretation*

When reading the decision, one may get the impression that the EU public policy is merely mentioned by the Court, without the intention of deriving any concrete implication for the findings of the case. At first sight, it seems that the new Italian 'tolerant approach' towards punitive damages simply stems from the 'inside' of the Italian legal system, in particular from the reconsideration of the notion of civil liability in the framework of the current Italian substantive private law and of the general need for protection of some constitutional parameters, in particular the one deriving from articles 23 and 25 of the Italian Constitution providing for the principle of legality. As it is known, the Court found that the notion of civil liability in the Italian legal system has developed over the years in a way that it has now acquired a multi-functional nature: it may serve different functions, both granting compensation to the injured party and ensuring deterrence and punishment of the wrongdoer. This conclusion is confirmed by the most recent developments both at the legislative level – where several provisions already confer to compensation a scope that goes beyond the mere restoration of the prejudice suffered by the victim – and at the jurisprudential level.[84] Consequently, in light of this renewed legal scenario the Court found that the American doctrine of punitive damages

[83] Giovanni Zarra, 'L'ordine pubblico attraverso la lente di ingrandimento del giudice di legittimita`: in margine a Sezioni Unite 16601/17' (2017) 3 Dir comm int 709; Elena D'Alessandro, 'Reconocimiento y exequátur en Italia de sentencias extranjeras que condenan al pago de daños punitivos' (2018) 34 Rev der priv 313; Vanin (n 75) 1193; Giulio Ponzanelli 'Polifunzionalità tra diritto internazionale privato e diritto privato' [2017] Danno resp 435.

[84] *Axo Sport* (n 6) paras 5.2 and 5.3.

is not ontologically contrary to the Italian legal system. However, according to a sort of 'conditional compatibility', the recognition of a foreign judgment awarding such damages is currently subject to the condition that the judgment has been rendered in accordance with some legal provisions of the foreign law, which guarantee the standardization of cases where they may be awarded (*tipicità*), their predictability, and their outer quantitative limits (proportionality). [85]

The findings of judgment no 16601/2017 are admittedly rooted on a brand-new strict interpretation of public policy, which is conceived as a set of principles deriving from the core values of the Italian Constitution, in particular articles 23 and 25, and the fundamental rights enshrined in the EU Charter. [86] This approach echoes the *Corte di Cassazione*'s judgment no 19599/2016 (First Section), which was issued one year before over the recognition of a parental status lawfully created abroad through ARTs (in Spain) in favour of two mothers (female sex couple) [87] and the *ordinanza di remissione* No. 9978/2016 to the Joint Divisions. [88] According to the latter jurisprudential approach, the principles of public policy should be exclusively retrieved in the supreme values of the Italian Constitution (so called 'constitutionalization' of public policy).

Under a first reading of the judgment, we may conclude that the recognition of the US award has been granted on the grounds that the Italian public policy has developed and changed over the years in a way that the constitutional parameters that are now re-

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[85] Ibid, para 8.

[86] Ibid, para 6: '(l'ordine pubblico)... è divenuto il distillato del sistema di tutele approntate a livello sovraordinato rispetto a quello della legislazione primaria, sicché occorre far riferimento alla Costituzione e, dopo il trattato di Lisbona, alle garanzie approntate ai diritti fondamentali dalla Carta di Nizza, elevata a livello dei trattati fondativi dell'Unione Europea dall'art. 6 TUE'. See here the English version: '(the public policy)... has evolved into the sum of 'safeguards set forth by higher-level sources (higher than primary legislation), thus requiring reference to be made to the Constitution and, after the Treaty of Lisbon, to the protections accorded to fundamental rights by the Charter of Nice, having the same authority as the founding Treaties of the European Union by way of art 6 of the TEU'. Quarta (n 21) 286.

[87] Ornella Feraci, 'Ordine pubblico e riconoscimento in Italia dello status di figlio "nato da due madri" all'estero: considerazioni critiche sulla sentenza della Corte di cassazione n. 19599/2016' [2017] RDI 173.

[88] [2016] Foro it 1976.

garded as necessary to respect the internal harmony of the forum in that regard serve as conditions for the admissibility or the refusal of foreign punitive damages.

Accordingly – to the naked eye – the impact of the EU public policy would seem practically immaterial.

4.2. *A second level of interpretation*

However, if we capture the relevant 'moments' of paras 6 and 7 of the decision and we examine the stop-motion sequence of these passages we may detect a different level of reasoning of the Court – albeit in filigree admittedly – which is imperceptible to the naked eye – and which suggests, in my view, an indirect (rectius, subsidiary) relevance of the European dimension of public policy in that regard.

In fact, by relying on the above strict notion of public policy, it emerges that the national public policy and the European one contribute (together) to define the renewed Italian approach on the matter. The Italian Supreme Court found, in fact, that the EU Charter of fundamental rights stands as a further legislative standard for delimiting the contours of the international public policy.[89] In effect, the compatibility of punitive damages with the Italian public policy is affected both by the Italian constitutional principle of legality (to be declined under the corollaries of *tipicità* and *prevedibilità*) and by the European principle of proportionality. The latter condition stems from both the principle of law as laid down in para 8 of the judgment and an *obiter dictum* expressed in para 7 of the same judgment, which makes an explicit reference to article 49(3) of the EU Charter and recalls

[89] Personally, I disagree with the view under which the Joint Divisions have confirmed the 'constitutionalization' of the Italian public policy. The Supreme Court, in fact, in defining the contours of the exception, made reference not only to the principles of the Italian Constitution but also to those laws that, like 'nervature sensibili, fibre dell'apparato sensoriale e delle parti vitali di un organismo, inverano l'ordinamento costituzionale' see *Axo Sport* (n 6), para 6. Zarra (n 83) 727 shares the same view. See the English version of the passage quoted: 'A foreign judgment which makes application of a legal institution not regulated by domestic law, even if not outlawed by the European rules, shall always have to be weighed against the principles of the Constitution and those laws that, like sensitive nerves, fibers of a sensorial system and vital parts of an organism, serve to reinforce the constitutional order'. Quarta (n 21) 286.

the pivotal role of proportionality in civil liability.[90] It remains unclear, however, in which way the lower courts should carry out this second stage of assessment over proportionality, which would correspond, in my view, to the functioning of the EU public policy. Regrettably, the Supreme Court completely failed to provide for some guidance in that regard:[91] it merely pointed out that the application of the principle of proportionality requires that the control to be carried out by the Courts of Appeal is directed to check the proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct, in order to shed light on the nature of the sanction/punishment inflicted.[92] In that respect, the Court merely referred to the evolution of the US Supreme Court's jurisprudence as to avoid grossly excessive punitive damages[93] and to the Florida Statute where the State legislature has introduced limitations to the phenomenon of multiple liability, without deriving, however, any useful threshold for calculating the maximum amount of punitive damages, which is tolerated in the Italian legal order.

5. Conclusion

The embryonic trend aimed at tempering the traditional idiosyncrasy of the European civil law countries in respect of the doctrine of punitive damages seems to coincide with a raising evolution, at the European level, of the public policy exception, as a ground for refusing the recognition and enforcement of foreign judgments or the application of the *lex causae* in this subject matter. The process is still incomplete and controversial and can be grounded only on poor and sporadic practice. However, in my view, as this trend slowly unfolds at the jurisprudential level it seems to call for a re-shaping of the traditional theoretical structures of the public policy exception. The recent development of the Italian case law would confirm such need.

Nonetheless it is indisputable that the role of the emerging

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[90] *Axo Sport* (n 6), para 7.

[91] D'Alessandro (n 83) 322.

[92] *Axo Sport* (n 6), para 7.

[93] Ibid, para. 7.1. *BMW* (n 54); *Philip Morris USA v Williams (Philip Morris II)* [2007] 549 U.S. 346; *Exxon Shipping Co. v Baker* [2008] 554 U.S. 471.

EU public policy with regard to punitive damages is less significant than in other subject matters (eg procedural public policy: due process of law). Though the national public policy still retains its centrality in establishing the degree of openness or closure of each Member State in respect of punitive damages, the subsidiary role of the EU public policy is likely to emerge with more clarity in the coming years as the Europeanization of PIL, as a whole, will – hopefully – become more solid and coherent: ie when the horse will have completed its race.

ABSTRACT

The chapter reflects over a possible European dimension of the public policy exception specifically affecting punitive damages – which is perceived by the Author as an 'incomplete stop-motion sequence' – and is largely inspired by the suggestions stemming from the Italian Court of Cassation's judgment no 16601/2017 (Joint Divisions). The process towards the Europeanization of public policy in relation to punitive damages is still embryonic and poor of evidence. The contribution highlights how this trend would not only affect the content of the traditional Private International Law (PIL) exception but it would rather entail the reconsideration of the theoretical approach on the matter. The Author argues that the interplay between the EU public policy and the national one should be interpreted in terms of coexistence: as such, the EU public policy should be invoked on a subsidiary basis, after the national public policy has been applied. Moreover, the European PIL tool would serve a twofold function: along with the traditionally negative one, leading to the refusal of unacceptable foreign values, a new heterodox 'positive' function would come into play (according to an 'integration-oriented' approach). In concrete terms, in this matter, the EU public policy would resort to a subsidiary proportionality test on the suitability of the amount of the awarded foreign punitive damages. Such assessment should be carried out in light of the necessity principle and only after the national legal order has allowed for the recognition and/or enforcement of foreign judgments or the application of the foreign rule of law providing for punitive damages.

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