# 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 supranational 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.

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S.B. – L.F. – Z.C.R.