The Enforcement of Foreign Decisions Concerning Punitive Damages

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1. Introduction

On 5 July 2017, the United Sections of the Italian Supreme Court of Cassation[1] delivered an interesting decision in which – for the first time – the Court opened the doors to punitive damages in the Italian legal system.[2]

In recent years, scholars have long debated on the role of punitive damages on the availability of punitive damages in the legal systems of the European Union.

The case, which is obviously very interesting for the Italian perspective, offers at the same time the opportunity to understand if and under which circumstances punitive damages are admitted by case law also in other civil law countries.[3]

2. The Situation in Italy: the Previous Case Law on the Possible Enforcement of Punitive Damages Judgments

In past years, Italian justices had supported a thesis, according to which punitive damages were to be considered contrary to the public order and therefore not

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1 Cassazione Civile, Sezioni Unite, 5 July 2017, n. 16601, *Axosport S.P.A. c. Nosa INC.* The Italian Supreme Court of Cassation is the court of last resort in Italy. Cases appealed to the Supreme Court are normally heard by a panel of five judges (simple section). In more complex cases, especially those concerning matters of statutory interpretation, an extended panel of nine judges ('*united sections*') hear the case. On the tasks of Italian Court of Cassation, see M. Taruffo, *Civil Procedure and the Path of a Civil Case*, in J.S. Lena & U. Mattei (eds), *Introduction to Italian Law* (The hague: Kluwer 2002), s. 175.

2 The translation in English by Francesco Quarta of the decision of the Italian Corte di Cassazione 5 July 2017 n. 16601 is published on-line in 3. *The Italian Law Journal*, 2017(2), p 277, www.theitalianlawjournal.it/editors/

3 See the annotations by Michel Cannarsa, Cedric Vanleenhove, R.C. Meurkens, André Janssen & Natalia Alvarez Leta.

admissible in Italian law. In a series of judgments the Corte di Cassazione had in fact refused the enforcement of American punitive damages-judgments because punitive damages were held alien to the Italian legal system.[4] In a decision of 2007,[5] the Court held that:[6]

> *In the current legal system, the idea of punishment is alien to any award of civil damages. The wrongdoer's conduct is also considered irrelevant. The task of civil damages is to make the injured party whole by means of an award of a sum of money, which tends to eliminate the consequences of the harm done. The same holds true for any category of damages, moral and non-economic damages included, whose award not only is unresponsive to both the injured parties' conditions and defendants' wealth, but it also requires that plaintiffs prove the existence of a loss stemming from the offense, resorting to concrete, factual evidence, on the assumption that such evidence cannot be considered in re ipsa.*

The idea that Italian civil liability law was strictly compensatory and not punitive was reaffirmed by the Court in a decision of 2012,[7] where the Italian justices remained anchored to the principle that according to the current Italian legislation, the right to compensation for the damage arising out of a violation to a subjective right cannot have punitive purposes, but is aimed at

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4 Corte di Cassazione 9 January 2007, n. 1183, in *Foro italiano* 2007, I, 1460 with a comment by G. Ponzanelli, 'Danni punitivi? No grazie'. This decision was further analysed by S. Oliari, 'I danni punitivi bussano alla porta: la Cassazione non apre', in *Nuova giurisprudenza civile commentata* 2007, I, 981; P. Fava, 'Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco', in *Corriere giuridico*, 2007, 1126; R. Pardolesi, 'Danni punitivi all'indice?', in *Danno e responsabilità* 2007, s. 1126; A. De Pauli, 'L'irriconoscibilità in Italia per contrasto con l'ordine pubblico di sentenze statunitensi di condanna al pagamento dei danni "punitivi"', in *Responsabilità Civile e Previdenza* 2007, 10, p 2100B; E. D'Alessandro, 'Pronunce americane di condanna al pagamento di punitive damages e problemi di riconoscimento in Italia', in *Rivista di Diritto Civile* 2007(3), p 383; A. Di Majo, 'La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente', in *Europa e diritto privato* 2008(2), p 289; F.D. Busnelli, 'Deterrenza, responsabilità civile, fatto illecito, danni punitivi', in *Europa e diritto privato* 2009(4), p 909; F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto', in 31. *Hastings International and Comparative Law Review* 2008, p 753.

5 Corte di Cassazione, Sez. III, 19 January 2007, n. 1183 (*Glebosky v. Fimez).*

6 F. Quarta, in 31. *Hastings International & Comparative Law Review* 2008, p 782, with an English translation of the Italian decision.

7 Corte di Cassazione, 8 Febbraio 2012, n. 1781, *Danno e responsabilità* 2012, p 609, with a comment by G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio'; also published in *Corriere giuridico* 2012, p 1068, with a comment by P. Pardolesi, 'La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!'.

restoring the prejudice suffered. the idea of punishment and sanction were to remain foreign to the internal legal system, and the evaluation of the tortfeasor's conduct irrelevant. In the ruling of 2012, the exclusion of any punitive purpose from the law of civil liability was more explicitly associated with the need to '*control the compatibility of the foreign damage award with the Italian legal system'.*

3. The Tasks of Civil Liability and the Enforcement of Decisions Related to *Astreintes*

A different attitude towards the purposes of civil liability in Italy was taken by the Court of Cassation in a judgment of 2015,[8] concerning the enforcement in Italy of a Belgian decision related to *astreintes.* An *astreinte* is a sum a money that a court may require a judgment debtor to pay to the judgment creditor should he fail to comply voluntarily with the obligation imposed on him in the judgment.[9] It is thus a penalty that a court may threaten to levy on the judgment debtor and thereby motivate him to comply with the judgment.[10] In particular, the Belgian decision in question, applied Article 1385 bis, 1st paragraph, of the Belgian *Code judiciarie*, according to which:

> *Le juge peut, à la demande d'une partie, condamner l'autre partie, pour le cas ou il ne serait pas satisfait à la condamnation principale, au paiement d'une somme d'argent, dénommée astreinte, le tout sans préjudice des dommages-intérêts, s'il y a lieu. Toutefois, l'astreinte ne peut être prononcée en cas de condamnation au paiement d'une somme d'argent, ni en ce qui concerne les actions en exécution de contrats de travail.*

In order to verify the compatibility of the *astreinte* with the Italian public order,[11] the judges analysed the concept of *public order* in the light of the international doctrinal and jurisprudential tendencies, stating that it consists in the basic principles of the legal system that also characterize the social ethical structure of the national community in a specific historical context. The Court eventually admitted the recognition of the *astreinte*, also because a very similar institute had

8 Cass. civ. Sez. I, 15 aprile 2015, n. 7613.

9 In Italy, there has been a lot of attention on the use and application of *astreintes.* See Marcel Storme, 'L'"astreinte" nel diritto belga: sei anni di applicazione', in *Rivista Trimestrale di Diritto e Procedura Civile* 1986, p 603. See further M. Vitali, 'L'introduzione delle astreintes in Belgio', in *Rivista di Diritto Processuale* 1983, p 272.

10 G.E. Glos, 'Astreinte in Belgian Law', 13. *International Journal of Legal Information* 1985, p 17.

11 F. Benatti, 'Dall'astreinte ai danni punitivi: un passo ormai obbligato', in *Banca Borsa Titoli di Credito* 2015(6), p 679.

been introduced in Italy[12] by Article 614 bis of the Italian Code of Civil Procedure in specific sectors.[13] In the end, this specific decision opened the way to a reconsideration of the functions of the civil liability system, towards wider sanctioning and deterrence goals, though the Court maintained the existence of a profound difference between *astreinte* and *punitive damages.*[14]

4. The Decision of the United Sections of the Italian Supreme Court of Cassation 5 July 2017

Against the background of this reconstruction, the facts of the present decision take place.[15] A biker (Charles Duffy) suffered severe brain injuries

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12 Art. 614 bis of the Italian Code of Civil Procedure has been introduced in Italy by Law 69/2009 (Legge 18 giugno 2009, n. 69, *Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile*, published in *Gazzetta Ufficiale* n. 140 del 19 June 2009 – Ordinary Supplement n. 95).

13 Art. 614 bis Italian Codice di Procedura Civile – Misure di coercizione indiretta: '*Con il provvedimento di condanna all'adempimento di obblighi diversi dal pagamento di somme di denaro il giudice, salvo che ciò sia manifestamente iniquo, fissa, su richiesta di parte, la somma di denaro dovuta dall'obbligato per ogni violazione o inosservanza successiva, ovvero per ogni ritardo nell'esecuzione del provvedimento. Il provvedimento di condanna costituisce titolo esecutivo per il pagamento delle somme dovute per ogni violazione o inosservanza. Le disposizioni di cui al presente comma non si applicano alle controversie di lavoro subordinato pubblico e privato e ai rapporti di collaborazione coordinata e continuativa di cui all'articolo 409.*

Il giudice determina l'ammontare della somma di cui al primo comma tenuto conto del valore della controversia, della natura della prestazione, del danno quantificato o prevedibile e di ogni altra circostanza utile'.

14 See F. Benatti, in *Banca Borsa Titoli di Credito* 2015, where this differentiated treatment is criticized.

15 The decision of 2017 has been commented from different points of view, underlining the importance of the turning point that the justices have introduced: A. Briguglio, 'Danni punitivi e delibazione di sentenza straniera: turning point «nell'interesse della legge', in *Responsabilità Civile e Previdenza* 2017(5), p 1597; A. Di Majo, *Principio* 'di legalità e di proporzionalità nel risarcimento con funzione punitiva', in *Giurisprudenza Italiana* 2007(7-8), p 1792; A. Gambaro, 'Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali', in *Nuova Giurisprudenza Civile Commentata* 2017, p 1405; C. Consolo, 'Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sopracompensativi, se in regola con il nostro principio di legalità (che postula tipicità e financo prevedibilità e non coincide pertanto con il, di norma presente, due process of law)', in *Corriere Giuridico* 2017, 8/9, p 1050; C. Castronovo, 'Diritto privato e realtà sociale. sui rapporti tra legge e giurisdizione a proposito di giustizia', in *Europa e Diritto Privato* 2017, 3, p 764; M. La Torre, 'Un punto fermo sul problema dei "danni punitivi"', in *Corriere Giuridico* 2017(4), p 421; G. Corsi, 'Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages', in *Corriere Giuridico* 2017(4), p 429; G. Ponzanelli, 'Polifunzionalità tra diritto internazionale privato e diritto privato', in *Corriere Giuridico* 2017(4), p 435; P.G. Monateri, 'Le Sezioni Unite e le funzioni della responsabilità civile', in *Corriere Giuridico* 2017 (4), p 437; F. Benatti, 'Benvenuti danni punitivi ... o forse no!', in *Banca Borsa Titoli di Credito*

because of a crash that occurred while he was driving a motorcycle during a motocross race. Considering that the cause of the accident was due to the defective manufacture of the helmet, the rider sued the American seller company based in Florida (NOSA) as well as the Italian manufacturing company (AXO) of the helmet.

During the proceeding in front of the American Court, the seller company reached a settlement agreement with the victim, agreeing to pay damages in the amount of one million dollar. The District Court of Appeal of Florida further decided that AXO had to indemnify NOSA against that amount of money.[16]

As AXO did not proceed with the payment, NOSA addressed the Italian Court of Appeal territorially competent by requesting the exequatur of the US judgment. The Court of Appeal of Venice upheld the NOSA request, excluding the contrast of US judgment with public order.

In the decision of the Court of Venice, the Italian judges argued that the ground for condemning AXO was to find in the failure of paying NOSA, and not in the obligation to pay damages to the injured biker. They further stated that the US decision focused on the obligation of AXO to pay to NOSA the amount agreed by the parties, without specifying if punitive damages were included.

The Italian company decided to appeal to the Supreme Court, alleging, *inter alia*, the violation of the principle of Italian Private International Law, that states that '*A judgement rendered by a foreign authority shall be recognized in Italy without requiring any further proceeding, if the provisions of the judgement do not conflict with the requirements of public policy (ordre public)*'.[17]

2017(5), p 575; A. Palmieri & R. Pardolesi, 'I danni punitivi e le molte anime della responsabilità civile', 142. *Il Foro Italiano* 2017, p 2630; E. D'Alessandro, 'Riconoscimento di sentenze di condanna a danni punitivi: tanto tuonò che piovve', 142. *Il Foro Italiano* 2017, p 2639; R. Simone, 'La responsabilità civile non è solo compensazione: punitive damages e deterrenza', 142. *Il Foro Italiano* 2017, p 2644; P.G. Monateri, 'I danni punitivi al vaglio delle sezioni unite', 142. *Il Foro Italiano* 2017, p 2648; G. Ponzanelli, 'Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno', in *Nuova Giurisprudenza Civile Commentata* 2017, 10, p 1413; M. Grondona, 'Le direzioni della responsabilità civile tra ordine pubblico e punitive damages', in *Nuova Giurisprudenza Civile Commentata* 2017, 10, p 1392; M. Lopez de Gonzalo, 'La Corte di Cassazione cambia orientamento sui punitive damages', in *Diritto del Commercio Internazionale* 2017(3), p 714; R. Savoia, 'Le Sezioni Unite aprono la strada al riconoscimento in Italia di sentenze straniere che contengano risarcimenti punitivi', in *Diritto & Giustizia* 2017, 118, p 7.

16 *Axo Sport S.P.A.* v. *Nosa, Inc.* Court of Appeal of Florida, Fourth District, 41 So. 3d 910; 2010 Fla. App. Lexis 11878, August 11 2010.

17 Art. 64(g) of Law of 31 May 1995, no. 218, Reform of the Italian system of private international law.

According to AXO, the Court of Venice had neglected the circumstance that the American decision had authorized the payment of punitive damages, which had – until then – been considered against the Italian conception of *ordre public.*[18] The settlement proposed by NOSA and accepted by the motorcyclist provided, in fact, for a comprehensive amount '*in full satisfaction of all damages claims raised by Mr. Duffy, including those for punitive damages*'.

The United Sections of the Court of Cassation rejected the appeal, introducing a *distinguishing* with reference to the prior cases decided by the same Court, stating that the American decisions for which the exequatur was requested, didn't deal with punitive damages, but with a settlement reached with the victim: '*The applicant's plea is inadmissible, since it is based on the false assumption that the amount charged to the guarantor included an award of punitive damages in favor of the accident victim'.*

Notwithstanding the dismissal of the appeal, the Joint Divisions decided to rule on the subject matter, on the ground of Article 363, para. 3, of the Code of Civil Procedure,[19] that allows the Supreme Court to express the relevant principle of law governing the matter, even if the appeal is to be rejected in its entirety, provided that the principle of law is one of particular importance.

It is important to note, that the Court justified the statement of a principle of law, in consideration of '*the extended scholarly debate which has for some time urged an overruling intervention by this Court'.*

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18 In the wording of the Court: '*The third plea of the applicant alleges infringement of Art 64 of Law n. 218/95 and defective reasoning on the part of the Venetian Court, which purportedly failed to ascertain that the award issued by the US court in favor of the injured party accounted also for punitive damages, without providing any specific reasoning as to the nature of the injuries forming the basis of compensation. The settlement proposed by NOSA and accepted by the motorcyclist provided, in fact, for a comprehensive amount "in full satisfaction of all damages claims raised by Mr. D., including those for punitive damages"*'.

19 Art. 363 of the Italian Code of civil procedure states: *Principle of law in the interest of the law*: '*When the parties did not file the motion before the Court of Cassation by the time limits provided by the applicable law provisions, or they renounced to file such motion, or when the decision may not be challenged before the Court of Cassation and cannot be challenged otherwise, the Public Prosecutor at the Court of Cassation may request to the same court to issue, in the interest of the law, the principle of law to which the judge of the merits of the case should have complied with.*

The request by the Public Prosecutor, containing a concise statement of fact and of legal grounds of the it addressed to the first President, who may order that the Court of Cassation sitting en banc decides upon such request, when the latter is of particular relevance.

When the motion filed by the parties is declared inadmissible but the Court deems that the issue decided is of particular interest, it may also issue the principle of law ex officio.

The Court's decision has no effect on the decision of the trial judge'

The Court based this reasoning on the existence of provisions in Italian law already pursuing a punitive aim. The Justices formulated the principle according to which '*in the present system, civil liability has not merely the task of compensating the subject who was injured, since the deterrence and the sanctioning functions are part of the system itself. Therefore, punitive damages are not ontologically incompatible with the Italian legal system'.*

5. The Current Admissibility of Punitive Damages in Italy

The decision of the Court of Cassation does not imply that foreign judgments on punitive damages will be given unhindered access to the Italian territory. According to the Court, '*having removed the obstacle connected with the nature of the damages award, the scrutiny must be focused on the requirements that such award must satisfy in order to be imported into our national legal system without infringing the underlying values of the matter, which can be derived from Arts 23 to 25 of the Constitution'.*[20]

The Court of Cassation has indicated some conditions in order to recognize foreign decisions that introduce punitive damages: '*the recognition of a foreign judgment awarding such damages is subject to the condition that the judgment has been rendered in accordance with some legal provisions of the foreign law guaranteeing the standardization of cases in which they may be awarded, their predictability, and their outer quantitative limits'.*

Eventually, the decision of the Court of Cassation examined the recent development of US case law on punitive damages, pointing out that US Courts now expressly repeal 'grossly excessive' punitive damages, which do not preserve any proportionality between the loss suffered and the compensation received, since they could be *arbitrarily* quantified by juries. This kind of punitive damages would not be compliant with the Italian public order. But since the US Supreme Court limited in the last years the quantification of punitive damages, establishing that they should not exceed the compensation granted for the loss suffered, punitive damages under US case law are no longer conflicting with principles shaping civil liability and damage compensation under Italian law and thus do not conflict with the public order.

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20 The articles of the Italian Constitution state as follows. Art. 23: *No obligation of a personal or financial nature may be imposed on any person except by law.* Art. 24: *Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.* Art. 25: *No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law.*

The French Perspective on Punitive Damages

Michel Cannarsa*

1. Introduction

The Italian Supreme Court decision of 5 July 2017 on punitive damages[1] raises interesting questions that can be transposed to a large extent in the French context. As underlined by Professor Pozzo,[2] and in the context of an exequatur request of a US judgment regarding a products liability case, the Italian Supreme Court addresses the question of the eligibility of punitive damages in the Italian legal system. The Italian judges considered that '*punitive damages are not ontologically incompatible with the Italian legal system*' and that the US judgment could be enforced provided that certain conditions were met.[3] The same assumption can apply in the French legal system for several reasons. Firstly, because the French Supreme Court (*Cour de cassation*) considers that the enforcement of a foreign award of punitive damages is not in itself in contradiction with French public policy.[4] There would however be an obstacle to recognition if the amount of punitive

1 Corte di cassazione, sez. Unite Civili, 5th July 2017, n. 16601.

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3 *'The recognition of a foreign judgment containing a ruling of this kind must, however, commit to the following conditions: that the foreign decision was rendered on grounds that guarantee that punitive damages were expressly admitted for the case in question, their foreseeability and their quantitative limits, having regard, in the exequatur, solely to the effects of the foreign decision and to their compatibility with public order*'.

4 See Decision of 1 December 2010, n. 1090, French *Cour de cassation*, First Civil Chamber. Commentary by H. Gaudemet-Tallon, *Revue critique de droit international privé* 2011, p 93. See the anticipation by G. Cavalier, 'Punitive Damages and French Public Policy', Lyon Symposium, October. 2007 (hal-00325829). Recital 32 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007on the law applicable to non-contractual obligations (Rome II) would however allow national courts to reject said enforcements: '*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*'.

damages is 'disproportionate'. From this perspective, the two Supreme Courts seem to reach the same solution.[5]

Secondly, and at a more theoretical level, the debate about the admission of punitive damages in France is not new.[6] It even gained new attention in the past year due to a proposal to reform French extra-contractual liability rules.[7] This note will focus on this dimension, in other words the possible introduction of punitive damages into the French domestic legal order and the theoretical and practical discussions surrounding it. We shall start with a short overview of the major source inspiration in the field of punitive damages, this is to say US law.

2. Punitive Damages in their 'natural' Environment

Going to the origins of punitive damages in US Law,[8] Section 908 of the American Law Institute's Restatement (Second) of Torts gives a quite consistent view of the situation in US Law.[9] According to the said provision,

> *(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*

5 C. Duclercq & T. Aronowicz, 'Quand les pays de civil law reconnaissent les dommages et intérêts punitifs', https://actuarbitragealtana.wordpress.com/2018/01/12/quand-les-pays-de-civil-law-reconnaissent-les-dommages-et-interets-punitifs/.

6 See *inter alia*, S. Carval, *La responsabilité civile dans sa fonction de peine privée* (Paris, LGDJ, coll. Bibl. dr. Privé, t. 250, 1995); 'Le projet de réforme du droit de la responsabilité civile', *La Semaine juridique*, 2017, p 401; J.S. Borghetti, 'Punitive Damages in France', in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna, Springer 2009); L. Ferry & D. Lapillonne, 'Réforme de la responsabilité civile: influence des principes issus de la Common Law', *La Semaine juridique Entreprise et Affaires* n. 46, 2016, 1598.

7 Reform Bill on Civil Liability, Presented on the 13 March. 2017 by Jean-Jacques Urvoas, garde des Sceaux, Minister of Justice following a public consultation undertaken between April and July 2016 (Translated into English by S. Whittaker, in consultation with J.S. Borghetti).

8 For an early illustration, see *Day v. Woodworth*, 54 U.S. 363, p 371 (1852), quoted in R.A. Epstein, *Cases and Materials on Torts*, (New York, 7th edn, 2000), p 912.

9 Restatement (Second) of Torts s. 908 (1979), Division Thirteen. Remedies, Chapter 47. Damages.

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.

The comment to this provision shows clearly that the purposes of awarding punitive damages are to '*punish the person doing the wrongful act and to discourage him and others from similar conduct in the future*'.[10] Punitive damages are not aimed at compensating the plaintiff. It is also indicated that the purposes of punitive damages are the same of that of a fine imposed after a conviction of a crime, but the effect is not the same as it relies on a civil judgment and the successful plaintiff and not the state is entitled to the money paid by the defendant.[11] In this US perspective, and as we will highlight in the next part, punitive damages are therefore not 'civil penalties'.[12]

As to the defendant's conduct, it has to involve '*some element of outrage similar to that usually found in crime*'.[13] Regarding the harm suffered, its extent 'may be considered in determining their amount', even though '*it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.*'[14]

Beyond these substantive aspects, one has to take into consideration the 'multiplier' effect of other aspects of the American tort process like the presence of a jury in civil cases, lawyers' aggressive litigation strategy, disclosure duties, etc.

Legal cultures differences can explain why the US-type punitive damages do not fit easily within most European domestic legal systems, including France. When we look at the functions/objectives of punitive damages, i.e. punishment of particularly outrageous wrongdoers, they are traditionally assigned to criminal law and to public prosecutors in France. This is major difference between the US legal system and the French legal system. According to Professor D.G. Owen,[15] punitive damages have multiple functions, some towards the victims and some towards society at large. The first functions assigned to punitive damages are, according to Professor Owen, to punish[16]

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10 Comment (a), Restatement (Second) of Torts s. 908.

11 *Ibid.*

12 *Ibid.*

13 Comment (b), Restatement (Second) of Torts s. 908. '*The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others.*'

14 Comment (c), Restatement (Second) of Torts s. 908.

15 D.G. Owen, 'Punitive Damages in Products Liability Litigation', 74. *Michigan State Law Review* (1976), 1257.

16 The US Supreme Court states it clearly as well (see for example: *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 408 (2003).

and deter. Victims are also looking for truth and, probably to a certain extent as well, inflict some pain on the wrongdoer. This quest for truth is traditionally assigned to criminal jurisdictions in continental jurisdictions. Professor Owen stresses however the fact that criticizing the invasion of criminal law by civil judgments does not necessarily take into account the connections that existed between criminal and civil liability in the nineteenth century.[17] According to Professor Owen, punitive damages can also allow to reach full compensation as compensatory damages do not always fully compensate the actual damage.

3. Proposal for the Introduction of Civil Penalties in French Law

In the light of the above general description of US law in the area of punitive damages, we will see whether French Law is leaning towards a similar approach or is going its own way. The above mentioned proposal to reform French extra-contractual liability rules[18] contains a new provision, Article 1266-1:[19]

> *Civil penalty*
>
> *In extra-contractual matters, where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money, a court may, at the request of the victim or the ministère public*[20] *and by specially justified decision, condemn him to the payment of a civil penalty.*
>
> *Such a penalty is proportionate to the seriousness of the fault committed, to the ability to pay of the author of the harm, and to any profits which he may have made from it.*
>
> *The penalty cannot be higher than ten times the amount of any profit made.*
>
> *If the person liable is a legal person, the penalty can be as high as 5% of the highest amount of its revenue excluding value-added tax realised in France in the course of one of the fiscal years ending after the fiscal year before the one in the course of which the fault was committed.*

17 *Ibid.*

18 See n. 8.

19 Chapter IV, The Effects of Liability, Section 1-Principles, Sub-section 5. Civil penalty.

20 '*The ministère public (sometimes called the parquet) is a particular category of magistrat (broadly, a member of the judiciary) whose role in civil matters is to join proceedings (and sometimes initiate them) and submit oral or written arguments to the "sitting" judges (the magistrats du siège) as a matter of the public interest. The ministère public is answerable to the Minister of Justice.*' (note by the translator, Simon WHITTAKER).

Such a penalty is allocated to the financing of a compensation fund related to the nature of the harm suffered or, if not, to the public Treasury.

It is not insurable.

This new civil penalty has been considered as a compromise between real punitive damages and the *statu quo.*[21] The said comprise has however not been considered as the best option in the context of the on-going reform.[22] Punitive damages seem to be in contradiction with the principle of 'full compensation' (full compensation meaning that the entire harm must be compensated, but nothing more than the harm suffered). Damages going beyond the actual harm are therefore not admitted and would lead to unjust enrichment. The allocation of the penalty to the '*financing of a compensation fund related to the nature of the harm suffered or, if not, to the public Treasury*' allows to circumvent this last obstacle. A central requirement in this new provision is a 'deliberate' fault, also called 'lucrative fault'.[23] This requirement might raise some uncertainties as it is unsure whether the said fault must be intentional. It seems that the intention to make a gain or to save money will be sufficient, even if the author of the harm didn't have the intention to cause the harm.[24] One could also assume that the actual gain must go beyond the amount of compensatory damages in order to impose a civil penalty.[25]

This proposed new provision raised a significant number of criticisms.[26] Some critics tend to target its content, for example the disproportionate amount of the penalty (possibly ten times the amount of any profit made or, for legal persons, up to 5% of the annual revenue in France) and the inconsistency between this amount and the 'proportionality' requirement in paragraph 2 of the article.[27] Other critics rely on more theoretical considerations, and mainly on the fact that the objective and effect of the civil penalties are traditionally, and must therefore remain, assigned to criminal legal rules and tools.[28] In addition, the fact that the penalty is 'civil' in its form, doesn't mean that it is

21 M.A. Chardeaux, 'L'amende civile', *Les Petites Affiches* 2018(22), p 6.

22 E. Juen, 'Vers la consécration des dommages-intérêts punitifs en droit français – Présentation d'un régime', *Revue Trimestrielle de Droit Civil* 2017, p 565: the author considers that civil penalties and punitive damages have the same objective, i.e. punish, deter and moralise; in her view, punitive damages are more consistent with this objective, especially taking into consideration the role played by the victim.

23 M.A. Chardeaux, *supra* n. 41.

24 *Ibid.*

25 *Ibid.*

26 E. Juen, *supra* n. 42.

27 M.A. Chardeaux, *supra* n. 41.

28 N. Rias, 'L'amende civile: une fausse bonne idée?', *Recueil Dalloz* 2016, p. 2072.

not 'criminal' in its substance, triggering therefore the respect of key principles applying in the realm of criminal law: the principle of legality and the *non bis in idem* principle.[29] These concerns are very similar to those expressed in the Italian Supreme Court decision.

4. Conclusion

Even though the proposed civil penalty has some flaws, it would in any case be a real innovation in French extra-contractual liability rules. The objectives of the said civil penalty being to punish and deter 'lucrative faults', it would constitute a partial transplant of US-modelled punitive damages. This means among others that recognition of foreign awards of punitive damages shouldn't raise difficulties in France in the future. This is not to say that questions like proportionality of the damages awarded, foreseeability, etc. will be completely disregarded. But legal categories in the different jurisdictions (i.e. USA and continental jurisdictions) will obviously be more compatible.

Whether this new Article 1266-1 will be introduced into the French Civil Code remains to be seen. Indeed, it is apparently on a disruptive path compared to the French legal tradition. Private enforcement of criminal-law or administrative-law oriented sanctions is in large part alien to the said tradition. This is probably of the main reasons why the allocated penalty will not be allocated to the victim.

However, the possible consistency of civil penalties with central principles of French extra-contractual liability rules, for example full compensation, should not be neglected. Compensatory damages do not always cover all the expenses incurred by wrongdoings, especially in a country like France where the welfare State implies that many indirect costs of wrongdoings are supported by medical and social security public spending, and therefore by the society at large. A fair allocation of costs of damages will be crucial in the context of new technologies, the internet of things, autonomous products etc. The proposed French civil penalties might play a significant role in this perspective.

29 *Ibid.*; F. Graziani, 'La généralisation de l'amende civile: entre préjugés et confusions – Commentaire de l'article 1266-1 du projet de réforme de la responsabilité civile', *Recueil Dalloz* 2018, p 428.

Punitive Damages in the Belgian Perspective

Cedric VANLEENHOVE*

1. Introduction

The judgment of the Italian *Corte di Cassazione* (Supreme Court) of 5 July 2017 in *AXO v. NOSA* adds another chapter to the story of the exequatur of (American) punitive damages in Europe. The case involved a motorcyclist who had suffered brain injury in an accident which occurred during a motocross race in the United States. Blaming an alleged defect of his crash helmet, he brought a claim in the Circuit Court of the Seventeenth Judicial Circuit for Broward County (Florida) against the Italian manufacturer (AXO), the distributor (Helmet House) and the American reseller (NOSA). NOSA reached a settlement with the victim, resulting in a payment of USD 1 million. With three judgments the Circuit Court and the District Court of Appeal of the State of Florida then granted NOSA's request to be indemnified by AXO for the amount paid to the victim. Subsequently, NOSA sought to enforce the judgments in Italy against the assets of AXO. The Venice Court of Appeal, the first instance court for exequatur proceedings, allowed the enforcement of the American decisions. In particular, it found no violation of Italian (international) public policy,[1] a defense consistently raised against foreign punitive damages judgments. On appeal before the Italian Supreme Court, the issue of the compatibility of foreign punitive damages with Italian (international) public policy unsurprisingly resurfaced. For the first time, the *Corte di Cassazione* 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 should serve as an influential example for Belgian judges confronted with similar applications for exequatur.

2. Traditional antipathy

The facts of the *AXO v. NOSA* case are reminiscent of the seminal judgment of the Italian *Corte di Cassazione* in *Glebosky v. Fimez.*[2] In that matter a fifteen year old

1 It should be noted from the outset that in private international matters we deal with a more restricted form of public policy, namely international public policy: A. MILLS, 'The Dimensions of Public Policy in Private International Law', 4. *Journal of Private International Law* 2008, p 213. This derivative from domestic public policy contains only the most fundamental values of the forum and is, therefore, narrower in scope than its internal counterpart. In this comment 'public policy' and 'international public policy' are used interchangeably to refer to 'international public policy' and not to 'domestic public policy'.

2 Corte di Cassazione 19 January 2007, no. 1183, *Rep Foro it* 2007 *v Delibazione* no. 13 and *v Danni Civili* no. 316; *Corr. Giur.*, 2007, 4, 497; translated by F. QUARTA, 'Recognition and Enforcement of

boy got involved in a traffic accident in the city of Opelika, Alabama. A car did not give way and hit the boy's motorcycle, causing him to be thrown off his bike. The buckle of his helmet failed and his unprotected head hit the pavement, resulting in instant death. His mother, Judy Glebosky, sued the driver, the American distributor of the helmet as well as some additional defendants for the amount of USD 3 million before the District Court of Jefferson County in Alabama. Fimez SpA, the Italian manufacturer of the helmet, was later also brought into the proceedings. At trial all parties agreed to a settlement, the amount of which remains undisclosed. Fimez SpA, however, had abandoned the case before this settlement agreement. In a judgment of 14 September 1994 the District Court of Jefferson County in Alabama held the defendant liable for the negligent design of the defective crash helmet.[3] The District Court awarded the victim's mother USD 1 million in damages, without further specification. Mrs. Glebosky then sought execution of that decision in Italy.

When the case reached Italy's highest court in 2007, the Italian Supreme Court explained that the Venice Court of Appeal's factual finding that the US judgment consisted of punitive damages could not be reversed. It further confirmed the Venice Court of Appeal's view that punitive damages violate (international) public policy and declined to enforce the Alabama court's USD 1 million award. It did not uphold Mrs. Glebosky's contention that the US decision did not violate public policy because the Italian liability system contains several legal institutions, such as penalty clauses and moral damages, which pursue punitive objectives. The *Corte di Cassazione* declined to analogize punitive damages to penalty clauses and moral damages.

According to the Italian Supreme Court, damages in private law are not connected to the idea of punishment or to the wrongdoer's misconduct. These damages are intended to compensate the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money. This is true for all types of civil damages, including moral damages, which are not influenced by the victim's conditions or the wrongdoer's wealth, but require concrete and factual evidence of the loss suffered. In other words, Italy's highest court built a strong dogmatic wall between compensatory and punitive damages, with absolutely no room for overlap. Compensatory damages, such as moral damages, focus on the victim, relate to his or her loss, and intend to make him or her whole. On the other hand, punitive damages centre on the

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U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto', 31. *Hastings International & Comparative Law Review* 2008, Appendix A, pp 780–782.

3 The District Court had already rendered the USD 1 million award in a non-final decision of 1 April 1991 or 1 January 1991 (the Venice Court of Appeal's judgment mentions both dates throughout its text). The judgment of 14 September 1994 confirmed the previous order, declared it final and added reasons for it.

wrongdoer's behaviour, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.

The Italian Supreme Court affirmed this position in a judgment of 8 February 2012.[4] The Middlesex Superior Court in Massachusetts had ordered an Italian company to pay USD 8 million to an employee who had suffered injuries in an accident at the Italian corporation's US subsidiary. The judgment did not mention punitive damages nor the criteria used to quantify the award. As was the case in *Glebosky v. Fimez*, the Italian courts were confronted with a global award without further specification or demarcation. The Court reiterated that the Italian civil liability system is strictly compensatory and not punitive. The USD 8 million in damages awarded was thus unenforceable on the basis of the public policy exception.[5]

3. Groundbreaking U-turn in *AXO v. NOSA*

In *AXO v. NOSA* the Italian Supreme Court rejected AXO's appeal because it did not accept that the award in question had a punitive character. It nevertheless took the opportunity (derived from Art. 363 of the Code of Civil Procedure) to rule on the compatibility of a foreign judgment containing punitive damages with the Italian legal system.

The *Corte di Cassazione* radically changed its stance regarding the enforcement of punitive damages. It held that punitive damages are not ontologically contrary to the Italian legal system. It pointed to various examples of provisions in Italian law, introduced in the last decades, that pursue a punitive goal. The Court now accepts that civil liability law has evolved to the point that the idea of a punitive function being attached to a damages award is no longer incompatible with it. According to the Supreme Court, next to the primary function of compensation, new functions such as prevention and sanctioning have emerged, leading to a multifunctional dimension of liability law. In that context it would be inadequate to refuse any remedies not precisely fitting in the category of compensation.

This does not mean that foreign judgments will be given unhindered access to the Italian territory. In that regard the Court identifies a number of principles that foreign punitive awards need to satisfy in order to be imported into the Italian system. There must be an adequate legal basis for the punitive damages awarded. Additionally, the facts subject to punishment must be precisely pre-identified guaranteeing the standardization of cases in which punitive damages may be

4 Corte di Cassazione 8 February 2012, Soc Ruffinatti v. Oyola-Rosado, no. 1781/2012, *Danno resp* 2012, p 609.

5 F. Quarta, 'Foreign Punitive Damages Decisions and Class Actions in Italy', in D. Fairgrieve & E. Lein (eds), *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press 2012), p 275, n. 32.

awarded. Furthermore, the awards must adhere to the principle of predictability, in that limits must be set as to the punitive damages that may be granted. The Italian courts faced with a foreign punitive award must, moreover, check the proportionality between the compensatory damages and punitive damages and between the punitive damages and the wrongful conduct.

4. Consequences for Belgium

In Belgium, as in Italy, the legal source regulating the enforcement of foreign judgments depends on the origin of the judgment. If the enforcement of an American judgment containing punitive damages is requested in Belgium, the Brussels I*bis* Regulation does not apply because that instrument only deals with intra-EU judgments. There is no treaty between the European Union and the United States arranging for the mutual recognition and enforcement of judgments. Belgium equally has not concluded a bilateral convention with the United States. The recognition and enforcement of US decisions in Belgium is, therefore, governed by Belgium's national (or residual) rules of private international law.

The residual private international law regime is laid down in the Belgian Code of Private International Law.[6] Pursuant to Article 23, sections 1 and 2 the court of first instance of the domicile or the habitual residence of the defendant has, in principle, jurisdiction to hear actions for recognition and enforcement of a foreign judgment. Article 25 lists the grounds for refusal of recognition and enforcement. The most important ground in the context of punitive damages is to be found in Article 25, section 1, 1°. Under that provision recognition or enforcement can be denied if the result of the recognition or enforceability would be manifestly incompatible with public policy. Upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby.

To our knowledge there is no published case law in Belgium dealing with the application of the public policy exception to (American) punitive damages. Belgian judges, therefore, have no previous examples to draw inspiration from. They can, however, rely on judgments from other EU countries, especially at the level of the Supreme Court. The *Corte di Cassazione*'s ruling in *AXO v. NOSA* will form an important building block for the creation of a judicial approach to the enforcement of US punitive damages in Belgium. The decision clearly demonstrates that the concept of punitive damages can no longer be held to be contrary to international public policy.

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6 Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht, *B.S.* 27 July 2004, p 57344.

The Italian Supreme Court based this reasoning on the existence of provisions in Italian law pursuing a punitive aim. We have argued before that if it can be shown that a legal system contains private law instruments which resemble punitive damages or which pursue the same goals, internal legal coherence would demand 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 shield. The country would be guilty of legal hypocrisy if it were to reject US punitive damages as violating international public policy while at the same time acknowledging or condoning similar instruments in its substantive law.[7] By accepting that punitive damages, in principle, do not trigger the public policy exception, the Italian *Corte di Cassazione* joins the camp of the French and Spanish Supreme Courts. These Courts already acknowledged the compatibility with international public policy.[8] The German *Bundesgerichtshof*, on the other hand, displays a strong disapproving position towards US punitive damages, rejecting the alien phenomenon *in se*.[9]

Belgian courts should follow the Italian Supreme Court's approach and not disallow US punitive damages *a priori*. Analogous to Italian law, Belgian liability law also encompasses private law instruments akin to punitive damages or pursuing identical or similar goals. It should be kept in mind that the legal yardstick is the *international* public policy and the analysis should, therefore, be confined to the question whether foreign punitive damages are manifestly offensive to the international public policy. It is not necessary to prove that fully fledged punitive damages are part of the Belgian legal system.[10] Instead, to debunk the argument that punitive damages emanating from a foreign judgment are completely indigestible to our Civil Law stomach,[11] it suffices to show that Belgian law accommodates the pursuit of penal and/or deterrent goals in private

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7 C. Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Cambridge-Antwerp-Portland: Intersentia 2016), pp 158–159, with references contained therein.

8 Cour de Cassation 1re civ. 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, *Recueil Dalloz* 2011, p 423; Tribunal Supremo 13 November 2001, Exequatur no. 2039/1999, *Aedipr* 2003, p 914. See for an extensive analysis of both judgments C. Vanleenhove, *Punitive Damages in Private International Law*, pp 124–136 and 139–144, respectively.

9 Bundesgerichtshof 4 June 1992, *NJW* (*Neue Juristische Wochenschrift)* 1992, pp 3096–3106. See for an extensive analysis of the judgment C. Vanleenhove, *Punitive Damages in Private International Law*, pp 100–109.

10 Until two decades ago a 19th century law actually provided for double damages for damage caused to crops by rabbits: H. Bocken, I. Boone, with cooperation from M. Kruithof, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (Brugge: Die Keure 2014), p 205, para. 334.

11 C.I. Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe', *NIPR* (*Nederlands Internationaal Privaatrecht*) 2012, p 7.

law (beyond the limited amounts of punishment and deterrence that are inherent by-products of compensatory damages[12]).[13]

Belgium does indeed form a habitat for punitive-like damages, despite punitive damages not having an official existence in the nation according to the Belgian *Cour de Cassation.*[14] An example of such a punitive mechanism is *l'astreinte.* It is essentially a periodic penalty imposed by a court on a debtor who fails to perform what is required of him. The penalty payment results from an act (e.g. the debtor enters the land of another person despite being ordered by a court not to do so) or an omission (e.g. the debtor fails to break down an illegally built wall) of the debtor. The penalty can be calculated per day of non-compliance but also per infringement. It should be underlined that *l'astreinte*, like punitive damages, is to be paid to the other party in the litigation. The penalty payment, however, does not intend to compensate that party for damages that result from the non-compliance. The sums are due in addition to the compensatory damages. The creditor thus receives more than the harm he suffered. The existence of *l'astreinte* thus contributes to the idea that penal mechanisms are present in private law.

The contractual penalty is another form of punishment within private law. Belgian law allows parties to insert a penalty clause into their contract (Arts 1226–1233 Civil Code). A penalty clause leads to the party failing to perform his obligation or failing to do it properly having to pay an amount of money as penalty to the other party. The clause is intended to encourage performance or, in other words, to deter the party from breaching the contract. The party requesting payment of the penalty does not have to prove the existence of any real damage. The (indirect) penal effect of the clause is thus obvious. The judge has the power to reduce the amount agreed upon if he finds the sum to be manifestly excessive (Art. 1231, section 1 Civil Code). Courts are, however, not allowed to award the other party less than the damage actually suffered. This means that the judge could moderate the penalty clause to a level above the damage incurred. The lower limit of the amount of actual damage thus opens the possibility for extra-compensatory damages to be awarded.

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12 U. Magnus, 'Comparative Report on the Law of Damages', in U. Magnus (ed), *Unification of Tort Law: Damages*, (The Hague: Kluwer Law International 2001), p 185; F. Pantaleón, 'Principles of European Tort Law: Basis of Liability and Defences. A critical view "from outside"', *InDret* 2005, p 6.

13 We have already performed this analysis (with a positive outcome) for France, Spain, Italy, Germany and England: C. Vanleenhove, *Punitive Damages in Private International Law*, pp 147–206.

14 Cour de Cassation 13 May 2009, AR P.09.0121.F, www.cass.be, *A&M (Auteurs & Media)* 2009, p 384.

A further example of 'punitive traces' can be found in Directive 2011/7 which deals with late payment in commercial transactions.[15] The Directive seeks to combat delays in payment between commercial parties, thereby fostering the functioning of the internal market.[16] It lays down the obligation for Member States to ensure that a creditor is entitled to interest for late payment without the necessity of a reminder. 'Interest for late payment' is defined as interest at a rate which is equal to the sum of the reference rate and at least eight percentage points.[17] The 'reference rate' is the interest rate applied by the European Central Bank to its most recent refinancing operations.[18] The idea behind the rule is clear: it should not be more favourable for a debtor to owe money to the creditor than to obtain credit from a bank.

We should assess the interest rate from the point of view of the creditor who cannot dispose of the sum owed to him. The loss suffered in such a case can be calculated by looking at the cost for the creditor to acquire a bank loan for the amount owed. The compensatory nature of private law is adhered to as long as the rate stays under the average rate banks charge when issuing a loan. However, to the extent that the interest rate exceeds this bank average it amounts to punitive damages.[19] The sanction provided for by Directive 2011/7 can at times thus be severe and could be viewed as punishment.[20] To put it more broadly, any legal interest higher than the average market interest for loans (and, *a fortiori*, higher than the lowest interest rate available) is extra-compensatory to the extent of the difference. The amount of the excess could be understood as pursuing a punitive aim.

Although principled objections to punitive damages should be discarded, the admittance of the remedy into the Belgian legal order should by no means be unbridled. The Belgian judiciary should employ a proportionality test to separate acceptable punitive damages from the intolerable ones. The French and Spanish German Supreme Courts have resorted to such an excessiveness test. The Italian *Corte di Cassazione* now follows suit. We have already extensively discussed how such a test should be construed, offering concrete guidelines for European judges.[21]

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15 Dir. 2011/7 of 16 February 2011 on combating late payment in commercial transactions, *OJ* L 48 of 23 February 2011, pp 1–10.

16 Art. 1.1.

17 Arts 2(5) & 2(6).

18 Art. 2(7), (a), (i).

19 N. Jansen & L. Rademacher, 'Punitive Damages in Germany', in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer 2009), p 84.

20 C. Cauffman, 'Naar een punitief Europees Verbintenissenrecht?', *TPR* (*Tijdschrift voor Privaatrecht)* 2007, p 806.

21 C. Vanleenhove, *Punitive Damages in Private International Law*, pp 210–236. See also C. Vanleenhove, 'A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No pasarán!"', 41. *Vermont Law Review* 2016, pp 377–401.

Axo v. Nosa from a Dutch Law Perspective

Lotte Meurkens*

1. Introduction

This contribution deals with the enforceability of foreign punitive damages-judgments in the Netherlands. Immediate cause is a recent decision of the Italian Supreme Court, *Axo v. Nosa.*[1] Italy is one of the known countries in which the Supreme Court has addressed the enforceability issue, the others being Germany, France and Spain. As will be shown below (numbers 5 and 6), these courts have taken opposite positions towards enforceability. To my knowledge, the Dutch Supreme Court has not (yet) decided on this issue. It is nevertheless interesting to consider *Axo v. Nosa* from a Dutch law perspective, in order to find out how the enforcement-question is currently answered and how it should be answered in the future.

2. Punitive Damages in the Private International Law Perspective

The question how punitive damages are dealt with from a private international law (PIL) perspective receives growing attention throughout Europe.[2] This comes as no surprise, given the increased European interest in the civil sanction. The reason for this interest is twofold: (1) the sanction can complement public enforcement mechanisms by facilitating citizens to privately enforce their rights in several fields, and (2) the sanction can react better (than existing remedies) to intentional, calculative or grave misconduct within civil liability law.[3] PIL decisions of national courts usually deal with the recognition and enforcement (hereafter: enforcement) of *American* punitive damages awards.[4]

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1 Corte di Cassazione, 5 July 2017 (*Axo v. Nosa*). See for an English translation of this case F. Quarta, 'Italian Corte di Cassazione 5 July 2017 no 16601', *ILJ*, pp 277-289.

2 See among others, M. Requejo Isidro, 'Punitive Damages from a Private International Law Perspective', in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Wien: Springer Verlag 2009); M. Requejo Isidro, 'Punitive Damages: How Do They Look Like When Seen From Abroad?', in L. Meurkens & E. Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Antwerpen: Intersentia 2012); C. Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Antwerpen-Cambridge: Intersentia 2016).

3 See for the causes of the increased interest, R.C. Meurkens, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (Deventer: Kluwer 2014), Ch. 7.

4 Other situations in which punitive damages are considered from a PIL perspective – requests to cooperate in a foreign lawsuit or questions of applicable law – are less common, see Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, p. 238, 245, 252.

3. The Italian Decision in the European Context

In *AXO v. Nosa*, the Italian Supreme Court held that punitive damages are not ontologically contrary to the Italian legal system because the functions of deterrence and punishment are already inherent in its civil liability law. This forms a radical departure from the Supreme Court's former position that punitive damages are contrary to (international) public policy. In 2007, the enforcement of an American punitive damages-judgment was refused because punitive damages were alien to the Italian legal system.[5]

In the current legal system, the idea of punishment is alien to any award of civil damages. The wrongdoer's conduct is also considered irrelevant. The task of civil damages is to make the injured party whole by means of an award of a sum of money, which tends to eliminate the consequences of the harm done. The same holds true for any category of damages, moral and non-economic damages included, whose award not only is unresponsive to both the injured parties' conditions and defendants' wealth, but it also requires that plaintiffs prove the existence of a loss stemming from the offense, resorting to concrete, factual evidence, on the assumption that such evidence cannot be considered in re ipsa.

The idea that Italian civil liability law is strictly compensatory and not punitive was reaffirmed by the Court in 2012,[6] but only five years later the Court surprisingly changed its position in *AXO v. Nosa.*

The Italian Supreme Court's conservative position towards enforceability before it decided *AXO v. Nosa* was not strange in itself. Other (lower) national courts have also rejected the enforcement of punitive damages-judgments because this would be contrary to public policy.[7] The public policy-exception is explained in several ways, for example that punitive damages cannot be accepted due to their criminal law-function or because the amount of the award is considered excessive or disproportionate.[8] These explanations fit with the traditional reasons for the non-existence of punitive damages in continental Europe (in short: fundamental rejection in light of the functions of civil liability law, the public-private law divide, and other views on the role of government).[9] As European courts

5 Corte di Cassazione, 19 January 2007 (*Glebosky v. Fimez).*

6 Corte di Cassazione, 8 February 2012 (*Soc Ruffinatti v Oyola-Rosado).* See on this decision, Vanleenhove, *Punitive Damages in Private International Law*, pp 96-97.

7 C.I. Nagy, 'Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe', *Nederlands Internationaal Privaatrecht* 2012, p 7; Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, p 243.

8 Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, pp 245-246; Requejo Isidro, in *The Power of Punitive Damages: Is Europe Missing Out*, pp 325-326.

9 See for an overview of reasons for the non-existence of punitive damages in continental Europe, chapter six of my *Punitive Damages: The Civil Remedy in American Law.*

occasionally do recognize punitive damages awards, reasons why punitive damages are *not* contrary to public policy can also be provided. For example: these awards are not completely punitive (attorney's fees are included, deterrence is the primary function of the award) and continental European legal systems also acknowledge punitive elements in civil liability law.[10] The latter reasoning is used by the Italian Supreme Court in *Axo v. Nosa.*

Germany, like Italy prior to *Axo v. Nosa*, has thus far rejected punitive damages from a PIL perspective. In 1992 the German Supreme Court denied enforcement of an American judgment.[11] The Court allowed only the compensatory award; the punitive part was considered contrary to public policy because of its criminal and disproportionate nature.[12] Especially, the punitive award was seen as excessive because it exceeded the sum of all compensatory damages. From this, Vanleenhove draws the conclusion that a 1:1 ratio between compensatory and punitive damages is the maximum allowed by the Court.[13] Indeed, a proportionate punitive award could perhaps be recognized in Germany because its civil liability law already recognizes remedies that are not merely compensatory, such as substantial immaterial damages for personality right infringements.[14] Furthermore, in a case from 2000 the Court explicitly left open, i.e. did not answer negatively, the question whether foreign punitive damages awards should be enforced by German courts.[15] Even so, thus far no German court has explicitly accepted enforceability.

The negative approach towards enforceability shown by the German (and Italian, prior to *Axo v. Nosa*) Supreme Court can be contrasted to the more positive approaches of France and Spain. In the case *Fountaine Pajot* (2010) of the French Supreme Court, it was decided that it depends on the circumstances of the case whether punitive damages are incompatible with public policy.[16] Foreign punitive damages awards can in principle be recognized in France except if they are disproportionate to the harm sustained and the contractual breach. An award will be considered excessive and therefore contrary to public policy if it is not proportionate to the actual damages award and to the wrongdoer's fault.[17] Enforcement was also allowed in a decision of the Spanish

10 Nagy, *Nederlands Internationaal Privaatrecht* 2012, pp 4–7.

11 BGH 4 June 1992, *BGHZ* 118, 312.

12 Nagy, *Nederlands Internationaal Privaatrecht* 2012, p 8.

13 Vanleenhove, *Punitive Damages in Private International Law*, pp 105–106.

14 Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, p 246.

15 I. Ebert, *Pönale Elemente im deutschen Privatrecht – Von der Renaissance der Privatstrafe im deutschen Recht* (Tübingen: Mohr Siebeck, 2004), p 531, citing BGH 8 May 2000, *NJW-RR* 2000, s. 1372.

16 Cour de cassation, Première chambre civile, 1 décembre 2010, 09/13303 (*Fountaine Pajot*).

17 Nagy, *Nederlands Internationaal Privaatrecht* 2012, p 9.

Supreme Court from 2001.[18] This Court did not accept the public policy-argument: even though compensation is the general rule in Spanish civil liability law, it is not always easy to distinguish concepts of compensation, in particular the 'sum of the coercive sanction and the sum which corresponds to reparation for moral damages'. Furthermore, the Court stated that existing law does not strictly separate civil law and criminal law. Punitive damages, as an aspect of civil liability law, can complement criminal law which is in accordance with the criminal law doctrine of minimum intervention.[19] According to the Court, the punitive and deterrent character of the award followed from a legal norm and was proportionate given the defendant's grave misbehavior. Lastly, the Court referred to the international character of the case and its relationship with Spain, and emphasized that the interest pursued by the damages award (*in casu* the protection of intellectual property rights) is a universally accepted desire.[20]

These Supreme Court decisions show that the enforceability of punitive damages-judgments in relation to the public policy-exception is on the one hand rejected (Germany), on the other hand increasingly accepted (Italy, France and Spain).[21]

4. The Current Dutch position

Even in the absence of a decision of the Dutch Supreme Court, it is interesting to explore the current Dutch position towards enforcement of American punitive damages awards, and how to evaluate this position in light of *Axo v. Nosa.* The

18 Tribunal Supremo, 13 November 2001, Exequátur No. 2039/1999 (*Miller Import Corp. v. Alabastres Alfredo, S.L.*); S.R. Jablonski, 'Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain', *Journal of Law and Commerce* 2005, pp 225-243 (including English translation of decision).

19 The theory that the civil sanction is originally meant to supplement criminal law sanctions receives support in the American legal system, see my *Punitive Damages: The Civil Remedy in American Law*, s. 3.3.4.

20 Jablonski, *Journal of Law and Commerce* 2005, translation at s. 9; Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, pp 247-248. For an interesting recent decision of the CJEU relating to punitive damages and intellectual property law, see OTK/SFP, CJEU 25 January 2017, case C-367/15, ECLI:EU:C:2017:3; C. Vanleenhove, 'Punitive Damages in Intellectual Property Law: a Private International Law Outlook', in F. Petillion (ed), *Handhaving van intellectuele rechten in België/Respect des droit intellectuels en Belgique: 10 jaar implementatie van de Europese richtlijn 2004/48/10 ans après la transposition de la directive 2004/48* (Brussel/Bruxelles: Larcier 2017), pp 203-221; R.C. Meurkens, 'Punitive damages ter handhaving van intellectuele eigendomsrechten', *Intellectuele Eigenom & Reclamerecht* 2017, pp 256-264.

21 See for extensive discussion, C. Vanleenhove, 'The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard', *Polish Yearbook of International law* 2015, pp 250-257.

only Dutch decision concerning enforceability described in literature is that of a lower court (*Rechtbank Rotterdam*) from 1995.[22] In this case, an enforcement request concerning an American award amounting to USD 520,000 in compensatory damages and USD 1 million in punitive damages was denied: a further explanation on this amount was deemed necessary by the court as particularly the punitive award, which clearly deviates from the compensatory principle and the actual loss suffered by the plaintiff, cannot be recognized without any review of its content.

Having said that, let us take a closer look into the legal instrument(s) to be used by a Dutch national court when dealing with an enforcement issue. This is conditional upon the question whether the punitive damages-decision comes from an EU Member State or not. If the decision is made by a Member State, the Brussels I Regulations, as well as the EC Regulation creating a European Enforcement Order for uncontested claims, apply.[23] In case of non-EU decisions – such as American punitive damages-judgments – the national PIL rules of the country where enforcement is requested apply. To date, neither the EU nor any of its Member States has a treaty with the US concerning the enforcement of foreign judgments.[24] In the future, the Choice of Court Convention (2005) might apply to the enforcement of punitive damages-judgments.[25] This Convention has been signed by both the EU and the US, but it is not yet in force in the US (entry into force in the EU was on 1 October 2015). Furthermore, although the Convention contains a set of uniform rules concerning the enforcement of foreign judgments in civil or commercial matters (Arts 8–15), these rules only apply when the parties have made an 'exclusive choice of court agreement'.[26]

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22 F. Ibili, *Groene Serie Onrechtmatige daad*, Art. 7 WCOD, aant. 4 (online via Kluwer Navigator 2018), citing Rb Rotterdam, 17 February 1995, *NIPR* 1996, 134, upheld by Hof 's-Gravenhage 29 October 1996, *NIPR* 1997, 244.

23 Reque Requejo Isidro, in *Punitive Damages: Common Law and Civil Law Perspectives*, p 245, referring to Regulation 44/2001/EC (now replaced by Regulation 1215/2012/EU) and Regulation 805/2004/EC.

24 M.H. Ten Wolde, J.G. Knot & K.C. Henckel, *Tenuitvoerlegging van buitenlandse civielrechtelijke vonnissen in Nederland buiten verdrag en verordening (art. 431 Rv)* (Den Haag: WODC 2017), p 81.

25 The Hague Convention on Choice of Court Agreements, 30 June 2005, via www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court. The relevant provision about punitive damages is Art. 11: enforcement *may* be refused if the judgment awards damages that do not compensate a party for actual loss or harm suffered. Cf. Art. 10 of the latest version (November 2017) of the preliminary draft Convention on the recognition and enforcement of judgments in civil and commercial matters, via assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf.

26 Requejo Isidro, in *The Power of Punitive Damages: Is Europe Missing Out*, p 323; Nagy, *Nederlands Internationaal Privaatrecht* 2012, p 10.

It can thus be concluded that national PIL rules apply if a Dutch court is nowadays requested to enforce an American punitive damages-judgment. An important part of Dutch PIL rules is codified in Book 10 of the civil code (BW) including, for example, the already mentioned public policy-exception (Art. 10:6 BW). This exception can be invoked by Dutch courts when the *applicability* of foreign law is manifestly contrary to public policy, but should only be used as *ultimum remedium.*[27] In Dutch literature, the punitive damages-concept has been mentioned as an example that is manifestly contrary to public policy, because it is contrary to the fundamental principles of our legal order, and is thereby equated with intolerable concepts in family law such as child marriage and forced marriage.[28] This is in line with the Regulation on the law applicable to non-contractual obligations (Rome II), which considers punitive damages of an excessive nature contrary to public policy.[29] Concerning the applicability of foreign law, in practice only a few Dutch lower courts have thus far made differing decisions on the question whether punitive awards violate public policy.[30] According to the *Rechtbank Utrecht*, an excessive compensation in the form of punitive damages is contrary to Dutch civil liability law and for that reason violates public policy.[31] The *Rechtbank 's-Gravenhage* held that a punitive award cannot be imposed on a defendant who had already been sentenced to prison in a criminal procedure, as such a 'double punishment' violates public policy.[32] The *Rechtbank Amsterdam* – on the other hand – decided that the fact that the punitive damages concept is unknown to Dutch law, does not mean that this form of damages is contrary to public policy.[33] The Dutch defendants in this case therefore had to pay, inter alia, punitive damages of € 5000,- to the American plaintiffs.

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27 A.P.M.J. Vonken, *Internationaal Privaatrecht: Algemeen deel IPR, Asser/Vonken* 10-1 (Deventer: Kluwer 2013), n. 408.

28 Asser-Vonken 2013, n. 409; A.P.M.J. Vonken, *Tekst & Commentaar, commentaar op art. 10:6 BW* (online via Kluwer Navigator 2018); F. Ibili, *Groene Serie Onrechtmatige daad* 1 (online via Kluwer Navigator 2018).

29 Regulation 864/2007/EC, recital 32. This public policy-argument against punitive damages was initially placed in the main text of Rome II but was transferred to the Preamble in the drafing process.

30 F. Ibili, *Groene Serie Onrechtmatige daad*, null, aant. 1 (online via Kluwer Navigator 2018), citing Rb Utrecht, 8 February 2012, ECLI:NL:RBUTR:2012:BW1631 (violation of public policy); Rb Amsterdam, 15 June 2012, ECLI:NL:RBAMS:2012:BW9838 (no violation of public policy).

31 Rb Utrecht, 8 February 2012, ECLI:NL:RBUTR:2012:BW1631, s. 4.21.

32 F. Ibili, *Groene Serie Onrechtmatige daad*, Art. 7 WCOD, aant. 4 (online via Kluwer Navigator 2018), citing Rb's-Gravenhage, 15 September 2004, ECLI:NL:RBSGR:2004:AR4546, s. 3.21 (violation of public policy).

33 Rb Amsterdam, 15 June 2012, ECLI:NL:RBAMS:2012:BW9838, s. 4.14.

In the context of applicability of foreign punitive damages law, the public policy-exception has thus been explained differently by lower Dutch courts. However, this contribution concerns – from a PIL perspective – the question of enforceability rather than applicable law. Enforcement in the Netherlands of foreign judgments in civil and commercial matters is not specifically dealt with by mentioned Book 10 BW. Some relevant rules have been included there, but these generally deal with family law matters such as recognition of a foreign marriage or adoption. If a Dutch court is requested to enforce a foreign civil judgment, the applicable regime can be found in the Dutch code of civil procedure (Rv), especially Article 431 thereof. In the absence of any regulation or treaty, these judgments *cannot* be enforced (Art. 431(1) Rv), but the dispute *can* be brought and tried anew before the Dutch court (Art. 431(2) Rv).[34] As follows from a recent study from 2017 on Article 431 Rv (hereafter: 2017-study), the Dutch enforceability regime is in essence known as a 'system of conditional recognition' ('*erkennen, mits*').[35] The Dutch Supreme Court confirmed (again) in 2014 that the following conditions have to be met in order to recognize and enforce a foreign judgment in the Netherlands[36]:

(1) The jurisdiction of the judge who rendered the decision is based on a ground of jurisdiction that is generally acceptable by international standards;
(2) The foreign decision has been concluded in legal proceedings that meet the requirements of a proper judicial procedure that provides sufficient safeguards;
(3) The recognition of the foreign decision is not contrary to Dutch public policy; and
(4) The foreign decision is not incompatible with a decision of the Dutch court between the same parties, or with a previous decision of a foreign court between the same parties in a dispute concerning the same subject matter and base on the same cause of action, provided that this earlier judgment is subject to recognition in the Netherlands.

34 M.H. Ten Wolde, J.G. Knot & K.C. Henckel, *Tenuitvoerlegging van buitenlandse civielrechtelijke vonnissen in Nederland buiten verdrag en verordening (Art. 431 Rv)*, p 17.

35 M.H. Ten Wolde, J.G. Knot & K.C. Henckel, *Tenuitvoerlegging van buitenlandse civielrechtelijke vonnissen in Nederland buiten verdrag en verordening (Art. 431 Rv)*, p 17, 51.

36 Hoge Raad, 26 September 2014, ECLI:NL:HR:2014:2838 (*Gazprombank*), NJ 2015/478. English translation of conditions derived from M.H. Ten Wolde, J.G. Knot & K.C. Henckel, *Tenuitvoerlegging van buitenlandse civielrechtelijke vonnissen in Nederland buiten verdrag en verordening (Art. 431 Rv)*, pp 18–19.

Although it falls outside the scope of this contribution to explore the complex regime of Article 431 Rv in detail, it is clear that the third condition concerns the public policy-exception. In case the other conditions are met, it thus still depends on the interpretation of this exception whether or not an American punitive damages-judgment will be enforced by a Dutch court.

5. The Impact for Dutch Legal Practice

What does this mean for Dutch legal practice? The (near) absence of guidance by the Dutch Supreme Court or lower courts does not help us much further. In literature, the public policy-exception is only mentioned – without inclusive explanation – as an obstacle that hinders the enforcement of punitive damages-judgments. For example, in an advice from 1996, the Dutch state commission for private international law (*Staatcommissie voor het internationaal privaatrecht*) mentioned that enforcement of a punitive damages-judgment *could be* refused because this violates public policy.[37] As follows from the 2017-study, excessive punitive damages-judgments that are disproportionate to the (im)material loss of the claimant cannot be enforced categorically. A review of the merits of the foreign judgment is considered necessary. According to these authors, who refer to the abovementioned lower court decisions, enforcement of excessive awards in the absence of such review would violate public policy.[38] Although the latter position leaves some room for debate (questions that come to mind are: when is a punitive damages award excessive or disproportionate to the loss of the claimant? what does review of the merits mean?), the public policy-exception still seems to be a hurdle when it comes to the enforcement of punitive awards in the Netherlands.

In itself, the Dutch 'system of conditional recognition' of foreign civil judgments is carefully thought-out. It seems logical that prior to the enforcement of a foreign judgment, certain conditions have to be met. On the other hand, it is not (but should be) clear *why* the public policy-exception plays such a dominant role in the debate concerning punitive damages from a PIL perspective. While it is generally accepted that this exception should only be used as *ultimum remedium*, a widespread idea exists that the enforcement of punitive damages-judgments is 'manifestly contrary to public policy'. In the current debate concerning punitive damages, which also takes place in the Netherlands, there is both strong interest in and strong resistance to the sanction. Proponents find the idea that the sanction violates the fundamental

37 P. Vlas, s. 5 of annotation to Hoge Raad, 10 September 1999, ECLI:NL:HR:1999:ZC2962, NJ 2001/41.

38 M.H. Ten Wolde, J.G. Knot & K.C. Henckel, *Tenuitvoerlegging van buitenlandse civielrechtelijke vonnissen in Nederland buiten verdrag en verordening (Art. 431 Rv)*, pp 51–52.

principles of our legal order outdated. The argument that punitive damages-awards are alien to the Dutch legal system, especially in relation to the compensatory function of civil liability law, is considered unfounded and an insufficient basis for courts to invoke the public policy-exception. An important argument to support this conclusion is – in line with *Axo v. Nosa* – that the assessment of damages awards by national courts is sometimes based on factors that go beyond the principle of compensation, such as the conduct of the defendant and the degree of blameworthiness. This additional focus on the defendant's behaviour means that compensation of the victim is not the only goal in estimating the award. An example is the infringement of personality rights: immaterial damages that deviate from the compensatory principle can especially be pointed out in the case of serious personality right infringements.

6. Conclusion

The conservative Dutch position on punitive damages from a PIL perspective might change when the public policy-exception is seen as an open norm that is suitable for adaptation if required by changing social and political desires. The highest courts in some European countries have already shown a positive position on the enforcement of American punitive damages awards. This development has not only been signalled but also supported in international literature. Nagy refers to a mainstream approach in legal doctrine that the 'current hostility towards punitive damages is misplaced'.[39] Requejo Isidro mentions that the tolerant approach of the liberal courts should form an example to others.[40] Parker uses the *Fountaine Pajot*-decision and other indications to show that, while the sanction has received substantial critique in continental Europe, the tides are changing.[41] Vanleenhove argues that 'a dismissal of punitive damages on principle fails to recognize the legal reality in the Member States'.[42] To conclude, it remains to be seen whether the punitive damages-sanction will – as such – be introduced in Dutch civil liability law.[43] It is, however, likely that the liberal approach towards enforceability which is gradually portrayed throughout Europe will eventually serve as an example to Dutch courts.

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39 Nagy, *Nederlands Internationaal Privaatrecht* 2012, p. 10.

40 Requejo Isidro, in *The Power of Punitive Damages: Is Europe Missing Out*, p 329.

41 M. Parker, 'Changing Tides: the Introduction of Punitive Damages into the French Legal System', *Georgia Journal of International and Comparative Law* 2013, p 431.

42 C. Vanleenhove, 'A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No pasarán!"', *Vermont Law Review* 2016, p 402.

43 My *Punitive Damages: The Civil Remedy in American Law*, p 376.

Die Anerkennung und Vollstreckbarkeit von US-amerikanischen Strafschadensurteilen in Deutschland und in Italien: Auf ewig entzweit?

André Janssen*

1. Einführung

Der italienische *Corte di Cassazione* hat kürzlich in einem bahnbrechenden Urteil US-amerikanische Strafschadensurteile für in Italien als grundsätzlich vollstreckbar erklärt.[1] Dass dieses Urteil auch in Deutschland Gehör finden wird, steht zu erwarten; gehört doch die Anerkennung und Vollstreckbarkeit US-amerikanischer Punitive Damages-Awards dort ebenfalls zu einem *der* heißen Eisen des Internationalen Privat- und Verfahrensrechts. Die deutsche Diskussion wird dabei oftmals von der Angst eines „Dammbruchs" und somit über Deutschland hineinbrechende Strafschadensurteile aus den USA bestimmt. Vordergründig steht also das Schreckgespenst des langen Arms des aus deutscher Sicht regelmäßig unvorhersehbarem US-amerikanischen Recht mit exorbitanten Schadenssummen wie ein Elefant im Raum.[2] Zwischen den Zeilen spielt aber ein anderer Beweggrund eine wohl noch bedeutendere Rolle: Würde man die US-amerikanischen *Punitive Damages*-Awards in Deutschland grundsätzlich für anerkennungsfähig und vollstreckbar halten, so befürchtet man eine negative Rückkopplung für das *eigene deutsche materielle Recht.* Es geht nämlich die Angst um, dass mit der Anerkennung und Vollstreckbarkeit solcher Urteile auch der in Deutschland bislang oftmals verpönte Strafgedanke Einzug ins *deutsche* Zivilrecht finden könnte. Insoweit sieht man also die Gefahr eines doppelten Dammbruchs, einen offensichtlichen auf dem Gebiet des Internationalen Privat- und Verfahrensrechts und einen weiteren (versteckten, aber nicht weniger wichtigen) im deutschen materiellen Zivilrecht.

2. Der Grundsatz in Deutschland: Keine Anerkennung und Vollstreckung US-amerikanischer Strafschadensurteile

Aber befassen wir uns nun erst einmal mit den rechtlich relevanten Bestimmungen für Deutschland. Die Anerkennung und Vollstreckbarkeit ausländischer Urteile richtet sich nach section 328 Abs. 1 Nr. 4, 722 Abs. 1, 723 Abs. 2 S. 2 ZPO (oder

1 Corte di Cassazione – Sezioni Unite, Urteil vom 5 Juli 2017, Urteilsnummer 16601.

2 Als Gründe für die Unvorhersehbarkeit des US-amerikanischen Rechts wird oftmals der „toxic cocktail" genannt, der aus den Bestandteilen contingency fees; punitive oder treble damages; pretrial discovery und opt-out class actions besteht.

im Anwendungsbereich der EuGVVO[3] nach Artt. 45 Abs. 1 lit. a, 46 EUGVVO). Voraussetzung für die Anerkennung und Vollstreckbarkeit eines ausländischen Urteils ist jeweils, dass daraus kein Verstoß gegen den *orde public* resultiert. Dreh-und Angelpunkt bei der Entscheidung über eine mögliche Anerkennung und Vollstreckbarkeit von US-amerikanischen Punitive Damages-Awards ist die Entscheidung des Bundesgerichtshofs vom 4. Juni 1992.[4] Gegenstand des Vollstreckungsverfahrens war eine Entscheidung eines US-amerikanischen Gerichts. Im Ausgangsverfahren wurde dem minderjährigen Kläger wegen sexuellen Missbrauchs durch den Beklagten ein Schadensersatz in Höhe von 700.000 Dollar, darunter 400.000 Dollar Punitive Damages zugesprochen. Während des Verfahrens hatte sich der Beklagte, der die deutsche und amerikanische Staatsangehörigkeit besaß, nach Deutschland abgesetzt. Der Kläger beantragte daraufhin die Anerkennung und Vollstreckung des Urteils in Deutschland. Hinsichtlich des im amerikanischen Ausgangsverfahren ausgeurteilten Strafschadens stellte der Bundesgerichtshof fest, dass „*(e)in US-amerikanisches Urteil auf Strafschadensersatz (punitive damages) von nicht unerheblicher Höhe, der neben der Zuerkennung von Ersatz für materielle und immaterielle Schäden pauschal zugesprochen wird, (...) in Deutschland regelmäßig nicht für vollstreckbar erklärt werden* (kann).“[5]

Die Unvereinbarkeit von US-amerikanischen Strafschadensurteilen mit den wesentlichen Grundsätzen des deutschen Rechts folgte für die Bundesrichter daraus, dass die Bestrafung und Abschreckung Ziele der Kriminalstrafe gem. sections 46 ff. StGB, bei denen die Geldstrafe an den Staat fließt, nicht aber des Zivilrechts seien.[6] Bei den Punitive Damages sei aber neben anderen Zielen gerade der Aspekt der Bestrafung besonders maßgeblich,[7] so dass diese als mit dem staatlichen Bestrafungsmonopol und

3 Verordnung N. 1215/2012 des Europäischen Parlaments und des Rates vom 12 Dezember 2012 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen.

4 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (312 ff.).

5 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (313).

6 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (338).

7 Dass der Strafgedanke bei der Zuerkennung von Punitive Damages in den USA nach wie vor eines der zentralen Elemente ist, zeigen die zahlreichen Urteile, wie etwa das des Supreme Court in der Sache Cooper Industries, Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001), worin es unter anderem heißt: „*Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. (...)The latter, which have been described as 'quasicriminal', (...) operate as 'private fines' intended to punish the defendant and to deter future wrongdoing*“. Siehe hierzu auch J. Rosengarten, 'Der Präventionsgedanke im deutschen Zivilrecht: Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?', *NJW* 1996, s.

den dafür eingeführten besonderen Verfahrensgarantien unvereinbare Strafen einzuordnen seien.[8] Die Funktionen der Punitive Damages in den USA wurden vom Bundesgerichtshof unter umfangreicher Auswertung in- und ausländischer Literatur wie folgt zusammengefasst:

„*'Punitive oder exemplary damages' werden (...) als weiterer Geldbetrag zum rein ausgleichenden Schadensersatz zuerkannt, wenn dem Täter als erschwerender Umstand zu einem allgemeinen Haftungstatbestand ein absichtliches, bösartiges oder rücksichtsloses Fehlverhalten zur Last fällt (...). Mit ihr (den Punitive Damages) werden bis zu vier Hauptzwecke verfolgt: Der Täter soll für sein rohes Verhalten bestraft werden, auch damit mögliche Racheakte des Opfers selbst überflüssig werden. Täter und Allgemeinheit sollen präventiv von künftigem sozialschädlichem Verhalten abgeschreckt werden, soweit das bloße Risiko der Kompensationspflicht keine ausreichende Verhaltenssteuerung gewährleistet. Der Geschädigte soll für die auf seinem Einsatz beruhende Rechtsdurchsetzung – zur Stärkung der Rechtsordnung im Allgemeinen – belohnt werden. Schließlich soll das Opfer eine Ergänzung zu einer als unzureichend empfundenen Schadensbeseitigung erhalten, wobei sich unter anderem eine fehlende soziale Absicherung auswirken kann; auf diese Weise kommt auch ein Ausgleich für die nicht selbstständig erstattungsfähigen außergerichtlichen Kosten des Klägers in Betracht.*"[9]

3. Ein zusätzlicher Blick auf den Strafzweck US-amerikanischer *Punitive Damages*

Auch ein zusätzlicher eigener Blick in die USA bestätigt die Aussage des Bundesgerichtshofs hinsichtlich der Zwecke der Punitive Damages.[10] Zu ihrem Strafzweck führte der US-amerikanische Supreme Court in der Entscheidung

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1935 (1937); G. Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht: Anmaßung oder legitime Aufgabe?', 206 *AcP (Archiv für die civilistische Praxis)* 2006, s. 352 (474).

8 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (338 ff.).

9 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (334 ff.). Ähnlich hierzu auch das Bundesverfassungsgericht, Beschluss vom 7 December. 1994, *BVerfGE* 91, 335 (343 ff.). Siehe vertiefend zu den Funktionen von US-amerikanischen Punitive Damages nur A. Sebok, 'Punitive Damages in the United States', in: Koziol/Wilcox (Hrsg.), *Punitive Damages: Common Law and Civil Law Perspective* (Wien: Springer 2009), s. 155 (169 ff.).

10 Wenngleich man aus europäischer Sicht oftmals verkennt, dass die Situation in den USA hinsichtlich Punitive Damages je nach Bundesstaat sehr unterschiedlich ausfallen kann. So gibt es, um nur einen Aspekt zu nennen, immerhin fünf Staaten (Louisiana, Massachusetts, Nebraska, New Hampshire und Washington), in denen Punitive Damages verboten sind. Daneben dienen in einigen Staaten wie Connecticut die Punitive Damages ausdrücklich nicht der Bestrafung, sondern nur zur Entschädigung der Prozesskosten, die nach der American Rule grundsätzlich jede Partei selbst zu tragen hat. Siehe hierzu auch Sebok, in: Koziol/Wilcox (Hrsg.), *Punitive Damages: Common Law and Civil Law Perspective*, s. 155 (155 ff.).

Electrical Workers v. Foust aus, sie seien „*private fines levied by civil juries*“[11] und auch section 908.1 (Second) Restatement of Torts lässt keinen Zweifel an der pönalen Funktion. Dort wird festgehalten, dass „*(p)unitive 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.*“

Zweifel an der überragend wichtigen Straffunktion der US-amerikanischen Punitive Damages gibt es daher nicht. Teilweise wird sogar angenommen, dass ihre Kompensationsfunktion inzwischen vollkommen erlöschen sei und sie ausschließlich nur noch der Abschreckung und Strafe dienen.[12] Jedenfalls stellte der Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* im Jahre 2001 nochmals ausdrücklich fest, dass „*the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding.*“[13] Und auch *Sebok* führt aus, dass sich die Funktion des US-amerikanischen Strafschadens immer weiter geändert habe und diese nunmehr eindeutig „*a quasi-criminal punishment imposed in the context of a civil tort suit*“ seien.[14]

4. Das verbleibende Schlupfloch zur Anerkennung und Vollstreckbarkeit US-amerikanischer Strafschadensurteile in Deutschland

Ganz absolut will die deutsche Rechtsprechung allerdings die angesprochene Versagung der Anerkennung und Vollstreckbarkeit US-amerikanischer Punitive Damages-Awards nicht verstanden wissen. Vielmehr macht der Bundesgerichtshof hinsichtlich der Unvereinbarkeit von Strafschäden mit dem deutschen ordre public eine bedeutsame Einschränkung, die oftmals in der weiteren Diskussion unterschlagen wird bzw. nur wenig Beachtung findet. Dienen nämlich die Punitive Damages letztlich nur dazu „*restliche, nicht besonders abgegoltene oder schlecht nachweisbare wirtschaftliche Nachteile pauschal*“ auszugleichen oder die „*vom Schädiger durch die*

11 Electrical Workers v. Foust, 442 U.S. 42 (48); 99 S. Ct. 2121 (2125); 60 L. Ed. 2d 698 (1979). Siehe zu dieser Entscheidung auch J. Köndgen, ‘Immaterialschadensersatz, Gewinnabschöpfung oder Privatstrafen als Sanktionen für Vertragsbruch? Eine rechtsvergleichend-ökonomische Analyse’, 56 *RabelsZ (Rabels Zeitschrift)* 1992, s. 696 (705).

12 So ausdrücklich aus deutscher Sicht T. Hoppe, ‘Gewinnorientierte Persönlichkeitsverletzung in der europäischen Regenbogenpresse’, *ZEuP (Zeitschrift für Europäisches Privatrecht)* 2000, s. 29 (44): „*Heute dienen punitive damages allein der Abschreckung und Strafe, jedoch nicht der Kompensation.*“

13 Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 Supreme Court Reporter (S. Ct.) 1678, 1686 (2001).

14 Sebok, in: Koziol/Wilcox (Hrsg.), *Punitive Damages: Common Law and Civil Law Perspective*, s. 155 (170).

unerlaubte Handlung erzielten Gewinne" abzuschöpfen, so sind diese nicht zu beanstanden.[15] Entsprechende US-amerikanische Urteile können also auch in Deutschland anerkannt und vollstreckt werden, sofern die Punitive Damages im Urteil separat ausgewiesen sind.[16] Dies bedeutet, dass Strafschäden nicht dem deutschen ordre public widersprechen, solange sie primär dem Schadensausgleich für nicht oder schwer nachweisbare Schäden oder der Gewinnabschöpfung dienen.

Dies entspricht im Wesentlichen auch der nach dem Urteil des Bundesgerichtshofs im Jahre 1999 eingeführten Regelung des Article 40 Abs. 3 Nr. 1 und 2 EGBGB zur *Anwendung ausländischen Rechts.*[17] Danach können Ansprüche, die dem Recht eines anderen Staates unterliegen, nur dann nicht geltend gemacht werden, soweit sie entweder wesentlich weiter gehen als zur angemessenen Entschädigung des Verletzten erforderlich oder offensichtlich anderen Zwecken als einer angemessenen Entschädigung des Verletzten dienen.[18]

Das Bundesverfassungsgericht teilt zwar die Auffassung des Bundesgerichtshofs, dass Strafschäden wie in den USA dem deutschen Zivilrecht fremd sind, doch anders als die Richter des Bundesgerichtshofs scheinen die des Bundesverfassungsgerichts noch nicht einmal von der Aussage, dass diese Ansprüche das Bestrafungsmonopol des Staates berühren, überzeugt.[19] Vielmehr betont das Bundesverfassungsgericht, dass die mit einem US-amerikanischen Strafschaden verfolgten Ziele durchaus zumindest zum Teil mit der deutschen Rechtsordnung vereinbar seien und jedenfalls eine Verletzung der unverzichtbaren Grundsätze des freiheitlichen Rechtsstaates durch die Möglichkeit von Strafschäden nicht zur Debatte stehe.[20]

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15 Dass diese Ausnahme einen großen Wertungsspielraum des entscheidenden Gerichts mit sich bringt, steht dabei natürlich außer Frage.

16 Bundesgerichtshof, Urteil vom 4 June 1992, *BGHZ* 118, 312 (340).

17 Im Anwendungsbereich der Rom II-Verordnung gilt hingegen nur der allgemeine ordre public-Vorbehalt des Art. 26 Rom II-Verordnung, wonach die Anwendung einer Vorschrift nur versagt werden kann, wenn ihre Anwendung mit der öffentlichen Ordnung des Staates des angerufenen Gerichts offensichtlich unvereinbar ist.

18 Siehe zu dieser Vorschrift im Zusammenhang mit Strafschadensurteilen ausführlicher I. Ebert, *Pönale Elemente im deutschen Privatrecht* (Tübingen: Mohr Siebeck, 2004), 530 ff.; C. Schäfer, 'Strafe und Prävention im Bürgerlichen Recht', 202 *AcP (Archiv für die civilistische Praxis)* 2002, s. 398 (429 ff.).

19 Bundesverfassungsgericht, Beschluss vom 7 December 1994, BVerfGE 91, 335 (343). Siehe hierzu auch C. Alexander, *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht* (Tübingen: Mohr Siebeck 2010), 104, der von einer deutlichen Distanz des Bundesverfassungsgerichts zur Rechtsprechung des Bundesgerichtshofs spricht; G. Wagner, 206. *AcP* 2006, s. 352 (473).

20 Bundesverfassungsgericht, Beschluss vom 7 December 1994, *BVerfGE* 91, 335 (344). Siehe hierzu auch Bundesverfassungsgericht, Beschluss vom 25 July 2003, *NJW* 2003, 2598 (2599 ff.); G. Wagner, 206. *AcP* 2006, s. 352 (473).

5. Bewertung der aktuellen deutschen Rechtslage

Vom gedanklichen Ausgangspunkt her gesehen scheinen sich die deutsche und italienische Rechtslage zur Anerkennung und Vollstreckung von US-amerikanischen Punitive Damages Awards diametral entgegenzustehen: Auf deutscher Seite werden diese bei Strafschadensurteilen grundsätzlich versagt, während solche Urteile auf italienischer Seite im Prinzip anerkannt und vollstreckt werden können. Die deutschen Gerichte halten weiter am traditionellen *nationalen* ordre public-Konzept fest, während der italienische Corte di Cassazione mit dem *internationalen* ordre public ein weitergehendes Konzept entwickelt hat. Danach ist der ordre public nicht länger auf die nationale Rechtsordnung beschränkt, sondern muss auch die Grundwerte mit berücksichtigen, die durch die internationale Gemeinschaft geteilt und geschützt werden.

Ob sich die unterschiedlichen Ausgangspunkte aber auch im Ergebnis nachhaltig unterschiedlich auswirken, wird erst die Praxis zeigen müssen. Denn es wurde zum einen aufgezeigt, dass der deutsche Bundesgerichtshof nicht *per se* die Anerkennung und Vollstreckung von Strafschadensurteilen verweigert, sondern durchaus eine wertungsoffene und praxisrelevante Ausnahme etabliert hat. Zum anderen gewährt der italienische Corte di Cassazione nicht ohne weiteres die Anerkennung und Vollstreckbarkeit solcher Urteile, sondern unterstellt sie einer Prüfung anhand des internationalen orde public. Womöglich wird der Unterschied in der Praxis deutlich geringer ausfallen, als man dies auf den ersten Blick meinen könnte. Hier darf man also gespannt die weitere Entwicklungen abwarten.

Die derzeitige deutsche Position der grundsätzlichen Versagung der Anerkennung und Vollstreckbarkeit von US-amerikanischen Strafschadensurteilen steht aus verschiedenen Gründen zunehmend auf dem Prüfstand. So erhöht das Urteil des italienischen Corte di Cassazione sicherlich den Druck auf den deutschen Bundesgerichtshof, seine derzeitige Auffassung zu überdenken. Auch wird der Bundesgerichtshof die neuere Rechtsentwicklung der Punitive Damages in den USA, deren praktische Bedeutung in Europa ohnehin überschätzt wird, weiter beobachten müssen.[21] Denn sollte sich die dort seit einigen Jahren abzeichnende Tendenz der Reduzierung der durch Punitive Damages zu erzielenden Summen auf ein – aus europäischer Sicht – angemessenes Niveau fortsetzen, so gerät die Position des Bundesgerichtshofs zunehmend unter Druck.[22] Drohen in den USA keine

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21 In nur etwa 1-5% aller erfolgreichen Schadensersatzklagen werden auch Punitive Damages gewährt. Siehe dazu vertiefend und mit weiteren Hinweisen Sebok, in: Koziol/Wilcox (Hrsg.), *Punitive Damages: Common Law and Civil Law Perspective*, s. 155 (156 ff.).

22 So etwa grundlegend BMW of North America, *Inc.* v. *Gore*, 517 U.S. 559, 568 ff. (1996). Darin ging es um einen merkantilen Minderwert eines BMW in Höhe von 4000 Dollar infolge eines schon vor Verkauf reparierten Lackschadens. Da der Schaden aber nur von etwa jedem siebten

exorbitanten Blockbuster-Awards (mehr),[23] dürfte es auch für das deutsche Recht immer schwieriger werden, sich unter Berufung auf den *ordre public* der Anerkennung und Vollstreckung von US-amerikanischen Punitive Damages-Awards zu widersetzen.[24] Ein letzter hier zu nennender Gesichtspunkt, durch den die Position des Bundesgerichtshofs immer mehr ins Wanken gerät, stammt aus der Entwicklung des internen deutschen Rechts selbst. Galten bis vor einigen Jahren Begriffe wie „Prävention" oder „pönale oder strafende Elemente" für das Zivilrecht mehrheitlich als Tabu, so steht man diesen Gedanken nunmehr oftmals sehr viel offener gegenüber.[25] Öffnet sich das deutsche Zivilrecht aber zunehmend selbst für strafendes oder zumindest präventives Gedankengut, so verliert der deutsche Bundesgerichtshof sein zentrales Argument gegen eine Anerkennung und Vollstreckbarkeit von US-amerikanischen Strafschadensurteilen. Es ist also sehr gut möglich, dass Deutschland und Italien in dieser Rechtsfrage nicht auf ewig entzweit sein werden, sondern nur für eine gewisse Zeit getrennte Wege gehen und der italienische Corte di Cassazione bereits den Weg für die weitere Rechtsentwicklung in Deutschland vorzeichnet.

Käufer bemerkt bzw. geltend gemacht wurde, sprach das zuständige Gericht in Alabama dem Kläger Punitive Damages unter der Anwendung des Faktors 1000 in Höhe von vier Millionen Dollar zu. Der amerikanische Supreme Court sah dies als exzessiv an. Der Strafschaden wurde letztlich auf 50.000 Dollar reduziert. Auch V. Behr, 'Strafschadensersatz: Poenale Elemente im Schadensersatzrecht', in: Hiebl/Kassebohm/Lilie (Hrsg.), *Festschrift für Volkmar Mehle zum 65. Geburtstag* (Baden-Baden; Nomos, 2009), s. 33 (47) sieht derzeit eine Neubesinnung in den USA aufkommen, die zu einer Annäherung der Systeme führe. Zudem darf nicht außer Acht gelassen werden, dass zahlreiche Staaten in den USA inzwischen gesetzliche Beschränkungen hinsichtlich der Punitive Damages eingeführt haben (wie etwa Höchstsummen etc.).

23 Siehe zu den neueren Entwicklungen der Strafschäden in den USA A.F. Del Rossi & W.K. Viscusi, 'The Changing Landscape of Blockbuster Punitive Damages Awards', 12. *American Law and Economics Review* 2010, s. 116 (116 ff.); Sebok, in: Koziol/Wilcox (Hrsg.), *Punitive Damages: Common Law and Civil Law Perspective*, s. 155 (156 ff.), der die durchschnittliche Höhe von Punitive Damages in den USA mit 38.000 bis 52.000 Dollar beziffert und ausführt, dass „*(p)unitive damages are not typically very large*".

24 Bereits jetzt mehren sich die Stimmen, die sich für eine grundsätzliche Anerkennung und Vollstreckung von US-amerikanischen Strafschadensurteilen in Deutschland aussprechen (V. Behr, in: Hiebl/Kassebohm/Lilie (Hrsg.), *Festschrift für Volkmar Mehle zum 65. Geburtstag*, s. 33 (46 ff.); D. Brockmeier, *Punitive damages, multiple damages und deutscher ordre public* (Tübingen: Mohr Siebeck 1999), 206; I. Ebert, Pönale Elemente im deutschen Privatrecht, 525 ff.; Rosengarten, *NJW* 1996, s. 1935 (1938).

25 Siehe dazu beispielsweise A. Janssen, *Präventive Gewinnabschöpfung* (Tübingen: Mohr Siebeck 2017); G. Wagner, 206. *AcP* 2006, s. 352 (352 ff.).

Are Punitive Damages Incompatible with the Spanish Legal System?

Natalia Alvarez Lata*

1. Introduction: Spanish punitive damages and the liability system

The essentially reparatory and compensatory nature of civil liability has traditionally been considered as a sufficient argument to reject punitive damages in Spanish law. The few occasions where pronouncements have been made on the subject, the Spanish case law has been very clear: '*the compensation for damages has to understand the emergent damage and the lost profit, but having the compensation of the injured party as the limit of the compensation [...], in that the purpose of the compensation is to return the affected party to the disposition in which it would be found if the breach had not happened [...] but not to procure a gain or enrichment for the injured party. So that the damages actually suffered are repaired, since so called* '*punitive damages*' *are neither known in our law nor does the idea of a* '*private punishment*' *currently operate*'.[1]

But it cannot be denied that the Spanish legal system of non-contractual liability contains some punitive elements and that it could suggest a preventive or punishment function. There are hypotheses in which damages is not only value by the magnitude, the reality of the harm caused and suffered by the plaintiff, but also by taking into account other factors which border on the purpose of reparation, with a basis more or less, in a punitive or coercive role.

One of these is the criterion of disgorging profits. In Spanish law, this rule is just possible in some specific situations statutorily established. For example, this rule is admitted in the compensation of non-pecuniary loss by illegal interference with honour, privacy and own image (Art. 9.3 of Act 1/82) and also in the scope of the Trademark Act: Art. 43.5 of Act 17/2001 states that 'the trademark owner, whose rights has been judicially declared to have been infringed upon, is entitled to, in any event and without needing to prove, compensation for damages of 1% of the turnover made by the violator from the illicitly marketed products or services'-note that the trademark owner can be compensated without having experienced damage. Other legal provisions in the scope of industrial and intellectual property are expressed in similar terms; it is the case of Art. 66.2 of Act 11/1986; Art. 140.2.a) of RDL 1/1996; Article 55.2 of Act 20/2003 – regarding this standard, SAP Balearic 17.07.2015 9 [AC 2015]] uses the term 'punitive damages'. Curiously, however, this rule was not incorporated in the field of antitrust damages following Directive 2014/104 – Article 72.3 of the Spanish Act which indicates that 'full compensation will not

1 SSTS 19 December 2005 [RJ 2006\295]; 30 September. 2010 [RJ 2010\654]).

lead to overcompensation through punitive, multiple or other compensations' and does not incorporate the disgorgement of damages rule.

The severity of the defendant´s conduct is another criterion that is sometimes taken into account for assessment of damages. At this point, apart from the difficult Art. 1107.2 CC – which plays in the case of intention (in what is a hypothesis of foreseeability and consequential damages) – the seriousness of the offender's conduct is taken into account when determining compensation for damages to reputation and those inferred to intellectual property, and, in general, in the assessment of moral damage. And in the case of occupational accidents, if the employer's harmful action has failed to comply with health and safety measures at work, this means that the victim can receive compensation with a surcharge of between 30% and 50% depending on the severity of the infraction. This surcharge is not insurable and has been recognized in case law as a coercive measure to promote 'compliance, indirectly, with a corporate duty of security, specifically increasing their responsibilities in order that the company is not less onerous for the compensation of the injured so as to take the appropriate measures to avoid risks of accident ...'.[2]

2. Recognition of Punitive Damages in Private International Law: the Question of the Difference to Spanish Public Policy

Based on the premise that the Spanish legal system does not include punitive damages, are punitive damages contrary to public order? As in the Italian case, in Spain the question of Spanish public order has been raised, with some punitive damages, in two different hypotheses: (1) when Spanish courts must apply a foreign law that grants punitive damages to the victim, or (2) when they must recognize foreign judgments that had been awarded according to their law.[3]

We will differentiate both assumptions:

2.1. Application by Spanish Courts of a Foreign law that Grants Punitive Damages

At this point, it is necessary to make a prior reference to the Rome II Regulation that settles the question of whether the imposition of compensation for punitive damages triggering non-contractual damage under the foreign law is applicable: the

2 Cf. STS 22 October 2002 [RJ 2003/504].

3 On this question, cf. Carrascosa: 'Punitive damages. European and Spanish private international law aspects', in Herrador Guardia (ed.), *Derecho de Daños* (Cizur Menor: Thomson-Aranzadi 2013), pp 383–464; De Angel, *Daños punitivos* (Cizur Menor: Thomson-Aranzadi 2012); P. Olmo, 'Punitive Damages in Spain', in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Wien: Springer 2009), Tort and Insurance Law, vol. 25; Reglero Campos, *Tratado de Responsabilidad Civil* (4th edn, Cizur Menor: Thomson-Aranzdi 2014), T. I, pp 108 and ss.

application may be refused only if it is manifestly incompatible with the public policy (ordre public-'orden público', in Spanish) of the forum (Art. 26 RR-II).

Thus, the incompatibility with the public policy of the forum is a key argument which arises to prevent the application in Spain of a law that admits punitive damages. Spanish doctrinal sector said contrariety is clear and therefore it violates the principle of full compensation (Art. 1902 Spanish Civil Code) and also the principle of unjust enrichment, since the victim is enriched by these excessive compensations without cause. However, it seems increasingly accepted that even if the law in Spain is the principle of full compensation, there are enough examples in our legal system, such as those introduced previously, that indicate that the Spanish law itself goes beyond that purpose on occasion and admits coercive or punitive damages. This determines that even though they are not recognized in Spanish law, punitive damages are not contrary to the public policy of the forum.[4]

There are no clear pronouncements of case law about this issue. In the case of an air accident in which a Tupolev aircraft crashed in the vicinity of Lake Constance (Germany), which originated in Moscow (Russia) and with Barcelona as its final destination, the companies ACSS and Honeywell were sued Internationally, as manufacturers, and punitive damages were requested. The judgment of the JPI of Barcelona of 3 March 2010 (AC 2013\1992) deepened the issue and concluded that they should not be granted, and at the same time the foreign law requirements had not been met, but not for other reasons of public order: 'As set out previously, the rule of law of the State of Arizona and the law of the State of New Jersey conceive punitive damages as those caused by a 'malevolent mind, 'which requires that the defendant has acted with intent to harm the plaintiff or with a free and deliberate indifference to people who could be harmed. There was clear evidence which attributed responsibility to the manufacturers of the TCAS II version 7 system due to a defect in information contained in the user manual and which has been considered to be a contributor to the damage, as part of one of its main causes, pilot error, it can not be concluded in any way that the defendants had, or, of course, intended to harm or was even indifferent to the lives of the people who have been injured. Consequently, it is not possible to grant any compensation for this type of damage.' This pronouncement has been confirmed by Supreme Court Decision 13 January 2014 (RJ 2015\612).

Likewise, the STS 12 January 2009 (RJ 2009\544) can be cited here, in which a breach of expressed submission precisely to obtain punitive damages, a possibility that is ultimately frustrated: 'From this perspective, the choice of applicable law and of the competent jurisdiction may have been decisive, in the case, for the willingness to build a strong relationship, with clear importance in the contractual economy, given that the application of Spanish law establishes a contractual framework determined from the

4 A development of these opinions in Carrascosa, in Herrador Guardia (ed.), *Derecho de Daños*, pp 390 y ss.

perspective of the assessment of the damage (since they exclude punitive damages, admissible under United States law), and point to an assessment of the procedural costs of lawyers' fees of very different levels. The conscious breach of the pact, when filing a lawsuit requesting the application of United States of America law, before a court of this Republic, in claiming a significant amount for 'punitive damages', has determined the need for defence, generating costs that exceed the foreseeable framework in the normal or pathological development of the contractual relationship'. There is also no point in the Supreme Court's argument of contradiction with international public order.

2.2. Recognition of Foreign Judgments that have Awarded Punitive Damages

In the case of recognition in Spain of judgments that have already granted punitive damages, the reference standards are Article 34 of Regulation 44/2001 and art. 954.1º LEC 1881, which establish the possibility that the Spanish court does not recognize foreign decisions in the event that such recognition is manifestly contrary to the public policy of the requested Member State.

Once again, the manifest contradiction (Art. 34) and flagrant contradiction (Art. 954) with Spanish public policy can constitute the cause of the non-recognition of a judicial decision that grants punitive damages. The arguments that have been given before regarding point 2.1 are applicable here to the full extent.

From case law, the clearest pronouncement on this point is the Supreme Court Decision 13 November 2001 [JUR 2002\608][5] which – albeit *obiter dicta* – clearly rules out that there is this contradiction between punitive damages and Spanish public policy:

> Finally, the company against which they intend to assert the effects of the judgement opposes the *exequatur* pleading the impact of the public order in its material or substantive aspect. Advocates for this, purpose the application of the principle of equivalence of results contained in various treaties on the recognition and declaration of enforceability of foreign judgments, and request that the alleged exequatur be denied in view of the sentence for 'punitive damages' contained in the foreign judgement, not featured to our legal system. ... In the judgment, recognising it is easy to see, in effect, economic pronouncements that respond to an aim of not strictly compensating of the damages suffered as a result of the action of the defendant, but rather punitive and sanctioning, and likewise preventive of future injury. When it comes to

5 It was intended to execute a judgment issued by a judicial organ of Houston (Texas), on the misuse of intellectual property. The defendant had invoked several arguments against the exequatur, among them the 'affectation of the internal public order, as much in its procedural aspect as material or substantive'.

specifying the essential legal principles and values with which the concept of international public order can be identified, it cannot be ignored that those under which the mechanism of compensation for damages is developed are not entirely unrelated to the idea of prevention, and nor are they strangers to the coercive sanctioning instruments, both in the material sphere-contractual, specifically – such as the procedural sphere. It is also not always easy to differentiate compensatory concepts and pinpoint the quantum corresponding to the coercive sanction and that which corresponds to the repair of moral damages. In any case, when facing the dilemma of its compatibility with public order, for the purposes of recognition of foreign decisions, we cannot lose sight of neither the relationship that the matter presents to the forum, nor, especially, the principle of proportionality that has permeated the decisions of the state courts of other countries in similar situations. On the other hand, and in addition, we must take into account that the referred 'punitive damages' have used civil liability as a private law entity, as a diminution of punitive law, which is totally in accordance with the doctrine of minimal intervention in the aforementioned criminal sphere, and therefore, based on this absolutely generalized doctrine, punitive damages cannot be described as an entity that threatens public order. The above considerations lead us to consider that the pronouncement of judgement be recognized in relation to the infringement of intellectual property rights of the transferor of the plaintiff is *not contrary to public order, despite the marked punitive and preventive nature of the compensatory judgement, arising* '*ex lege*' *from the infringement of those rights, and, therefore, without a strictly restitutory and restorative purpose, for whose fixation, on the other hand, took into account the intentionality of the behaviour of the offender and its seriousness*.

3. Conclusion

Despite the fact that punitive damages are not recognized in Spanish law, the majority opinion in Spain – according to the legal doctrine and the existing limited case law-, it is inferred that this *flagrant difference* would not occur in public policy that prevents recognition of foreign judgements for punitive damages or the application of the law by a Spanish court. Thus, in general, the considerations expressed by the United Sections of the Italian Supreme Court of Cassation on 5 July 2017 can be assumed in Spanish law.

This does not mean that the Spanish damages system makes its position more flexible regarding the compensatory function of non-contractual liability, opening a door to punitive damages - in fact, I do not think that the Italian decision does. The Supreme Court rejects an effort in that direction (even in complex cases, see SSTS 30 September 2010 [RJ 2010\654]; 22 November 2010 [RJ 2011\565]; 18 February 2013 [RJ 2013\2919]) and this is despite the fact that the Court itself understood that punitive damages were not contrary to Spanish public policy in the aforementioned decision of 13 November 2001.

Likewise, the main part of Spanish legal doctrine reject the approach, emphasising, when necessary, the dogma of the full compensation and the reparatory purpose of non-contractual liability and even pointing out that a recognition of punitive damages in Spanish law would be unconstitutional.[6] This determines that it is a question of looking for a foundation different from those examples in which a coercive function of tort law can emerge. In fact, for example, the stated criterion of disgorgement of damages is not interpreted as an exceptional case of punitive damages in Spanish law but as compensation for unjust enrichment or management of third party businesses.[7]

That is why the STJUE of 17 December 2015 makes full sense in which the question is raised to the CJEU to apply by a Spanish judge for punitive damages on the basis of Article 25 of Directive 2006/54 to the victim of discrimination based on sex. The CJEU understands that the Directive allows Member States to adopt measures that provide for the payment of damages and punitive interests to the victim of discrimination based on sex, but does not oblige them to do so; given that the punitive damages figure does not exist in Spanish law and there is no ad hoc provision, the Directive does not authorize the national judge to condemn the author of such discrimination himself to the payment of those damages and interests: 'Article 18 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted in the sense that, harm suffered as a result of discrimination based on sex to be effectively compensated or repaired in a dissuasive and proportionate manner, this article obliges the Member States that choose the pecuniary form to be introduced in their domestic legal system, the procedures that they determine, measures that establish the payment to the person who has suffered an injury of an indemnity that covers completely said prejudice'.

6 Cf. De Angel, *Daños punitivos*, pp 60 and ss.

7 Cfr. Peña Lopez, *Responsabilidad civil por daños a la libre competencia* (Valencia: Tirant lo Blanch 2018), pp 178–181.