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Punitive Damages and French Public Policy

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I. INTRODUCTION

When asked whether French law admits punitive damages, Professor Durré, a prominent French academic, responded: “No, No, and No!; three times No! But...”¹ These few words seem to pretty much illustrate where French law stood several years ago regarding punitive damages.

In French legal terminology, one generally opposes “punitive damages” to “compensatory damages.” Compensatory damages repair the victim’s injury, as if he or she had incurred no loss at all. They are sometimes just symbolic or token sums. In this school of thought, the indemnification must in no way be enrichment for the victim. Contrary to compensatory damages, punitive damages are outrageous sums awarded in excess of compensatory damages to punish a party for outrageous conduct.

For a long time now, punitive damages have been a common law specialty. The US Supreme Court repeats again and again that the US Constitution imposes certain limits, limits that forbid only “grossly excessive” punitive damages.² Let us give you a recent example: in a case tried on February 20, 2007, the representative of a certain Jesse Williams, who died from smoking cigarettes manufactured by Phillip Morris, was awarded \$821,000 in compensatory damages, and \$79,5 million in punitive damages. One major question that could have been debated in court was whether this 100-to-1 ratio constituted a “grossly excessive” amount.³

Despite constitutional limits, punitive damages are still fairly easily awarded in the US, as well as in other common law countries. In France, however, and in civil law countries, punitive damages are generally prohibited because they are considered the sovereignty of criminal proceedings. One of the questions then is: are punitive damages awarded by a US court contrary to French public policy or enforceable in France?

This concept of public policy encompasses a number of rules of law of vital importance to the French legal system: the French rule of law under consideration here is that only compensatory damages would be appropriate in civil lawsuits. This is called the principle of “*full compensation for losses*” (principle of “*réparation intégrale*” in French).⁴

¹ Prof. Georges Durré, Honorary President of the University Panthéon-Assas (Paris II), *Les Punitive Damages*, French Cour de cassation, March 25, 2004 (with John C. Coffée).

² See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432.

³ See *Philip Morris U.S.A. v. Williams*, 549 U.S. ___ (2007). For procedural reasons, the U.S. Supreme Court did not answer this question.

⁴ For a presentation in English, see A. Tunc, *International Encyclopedia of Comparative Law*, Vol. 11 Torts, *Chap. 8 Consequences of Liability: Remedies*, no 26.

After having determined the application of US law, a French judge may decide to ignore the US law, and simply apply the French law instead. In other words, would the judge apply his or her forum law – the *lex fori* – on the grounds of public policy?⁵ Would a US judgment awarding punitive damages be enforced in France, or be barred from enforcement on the grounds of public policy?

The purpose of this presentation is to demonstrate that current French law no longer totally condemns punitive damages; there appears to be a gradual change in France's attitude. Despite this ambivalence, there are reasons to believe that in the near future punitive damages may gain more acceptance in French law.

The traditional French view of punitive damages may be isolating France from other EU countries. This is probably the reason why there is so much discussion in the French domestic legal arena about reforming France's position. Recent developments in private international law could also foster such an outcome.

Let us then first discuss French isolation (II), then move on to modern domestic law discussion (III), and finally turn to the private international law perspective (IV).

II. ISOLATING TRADITION

France's tradition on punitive damages seems to be isolating the French legal system from the rest of the world. When one steps out of the French microcosm and observes the global picture, one realizes that there is not just France in the world... And there are reasons to believe that there is perhaps another path to follow. But let's first discuss the traditional French approach, and then try to see how it fits in with a comparative overview.

A. Traditional Approach

The dilemma as to whether French public policy should oppose a US decision awarding punitive damages has not yet been addressed by the courts. Therefore, could the principle of *full compensation for losses* be considered part of French public policy in private international law? One reason to say "no" to that may be that tort law is not a ballpark where public policy plays regularly.⁶ A specific example of this was that non-compensation of moral prejudice was judged in conformity with French public policy.⁷ One may argue,

⁵ Actually, the exception of public policy does not operate only in the area of choice of law. It is also of significant operation in the area of recognition and enforcement of foreign judgments.

⁶ P. Bourel, *Rép. DIP Dalloz*, V^{is} Responsabilité Civile, no 59.

⁷ Cass. civ. 30 mai 1967, *Rev. crit. DIP*, 1967, p. 728, note Bourel; Cass. civ. 15 déc. 1969, *JDI* 1971, p. 565, note Dayant; *Rev. crit. DIP* 1971, p. 512, note Bourel. *But see, Leitner*, ECJ case no C-168/00, March 12, 2002, E.C.R. p. I-02631: "Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours is to be interpreted as conferring, in principle, on consumers a right to

however, that punitive damages are different. They are awarded in excess of *full compensation for losses*. In the example we give, the damages were not only insufficient (moral prejudice was not repaired), but also in no way did damages exceed the *strict compensation for losses*. Due to the absence of any case law specific to punitive damages, French academics still consider punitive damages as contrary to public policy.⁸ This has also been the opinion of other continental EU Member States, but it seems to be eroding....

B. Comparative Overview

A comparative overview of developments outside of the US concerning punitive damages recently showed that EU Member States are breaking away from their traditional position.⁹ Germany for example, is revisiting their opposition to punitive damages,¹⁰ despite a well-known 1992 decision that refused to enforce punitive damages from a California court on the grounds that it violated German public policy.¹¹

Research also reveals that Spanish courts are less and less reluctant to enforce awards of punitive damages. These examples signal a change in the way other European countries view awards of punitive damages and ultimately may lead to greater enforcement¹². Of course, these examples merely demonstrate a tendency and should be handled with care.

But should the tendency accelerate, international competition between legal orders may encourage France to follow or maybe even jump-start the trend. Before we turn to private international law, we should go back to the roots of the issue and discuss modern French domestic law discussion.

III. MODERN DOMESTIC LAW DISCUSSION

Modern domestic law discussion tends to rattle the fundamental principle of *full compensation for losses*. And it may well no longer be a vital principle. This is demonstrated by practical weakening of the principle, as well as a political ambition to reform.

compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday."

⁸ For instance, see B. Audit, *Droit International Privé, Economica*, 4th ed. 2006, no 802, p. 646.

⁹ John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, [Colum. J. Transnat'l L., vol. 45, 2007](#); see also, from the same author, *SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW*, Kluwer Law International, 1998, p. 193.

¹⁰ V. Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 *Chi.-Kent L. Rev.* 105, 130 (2003); see also W. Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 *Berkeley J. Int'l L.* 175 (2005).

¹¹ Judgment of the Bundesgerichtshof, IXth Civil Senate, June 4, 1992, Docket No. IV ZR 149/91, [1992], summarized in pertinent part in Peter Hay, *The recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court*, 40 *Am. J. Comp. L.* 729, 730-31 (1992).

¹² John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, cited footnote 9 above.

A. Practical Weakening of the Principle

In theory, “*the amount of damages granted by the judge shall cover all the recoupable losses, but shall not go beyond. This is an essential rule, applicable not only in contracts but also in torts.*”¹³ Damages must repair the loss, the full loss, but only the loss.

In practice however, despite this principle, French judges can in the end award punitive damages covertly. To compensate the loss, they award an amount of damages in excess of what would be sufficient, but without calling them punitive damages, and without distinguishing them from compensatory damages.¹⁴ And because the assessment of damages is a question of fact, it is not, as such, under the control of the French Supreme Court. Therefore, some lower courts tend to award excessive damages without explicitly calling them punitive, because they know that their decision cannot be overruled by the superior court¹⁵. This common practice may explain recent political ambition to reform.

B. Political Ambition to Reform

The first two reforms that we will discuss weaken the principle itself. The third reform holds an exception.

In order to compete in the global arena, French politicians understand that the law must be made attractive from an economic standpoint. In 2004, and pursuant to a request from former President Chirac, a commission was formed to reform part of the French Civil Code.¹⁶ Article 1371 provides the possibility for the judge to award punitive damages for a premeditated act, particularly for a lucrative purpose.¹⁷ This proposal is still prospective law, but it reveals the tendency of future admittance of punitive damages in French domestic law.¹⁸

¹³ F. Terré, Ph. Simler, Y. Lequette, *Droit civil*, Dalloz, 9th ed., no 597 (2005). This interpretation is based article 1382 of the French Civil Code which provides: “*Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.*”

¹⁴ Prof. Georges Durry, Honorary President of the University Panthéon-Assas (Paris II), *Les Punitive Damages*, French Cour de cassation, March 25, 2004 (with John C. Coffee). For the same conclusion in public international law: see Nina H.B. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, B.Y.B.I.L. 1997, p. 247.

¹⁵ Cass. chambre mixte Sept. 6, 2002, Bull. no 4 ; BICC no 564, report by Mr. Gridel and conclusions by Mr. de Gouttes : “*Whereas the Court of Appeal ultimately assessed the amount of the whole prejudice and supported its existence by the free evaluation it made, without being legally bound to specify its various and distinctive constitutive elements.*”

¹⁶ The revision is entitled “Proposals for Reform of the Law of Obligations and the Law of Prescription.”

¹⁷ Art. 1371 provides: “*A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public Treasury. A court’s decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.*” (translated into English by J. Cartwright and S. Whittaker, available online at <http://www.competition-law.ox.ac.uk/iecl/pdfs/Proposals%20for%20Reform%20of%20the%20Law%20of%20Obligations%20and%20the%20Law.pdf> (2007).

¹⁸ One can also note that this proposed article add that part of the punitive damages may be allocated by the judge to the Public Treasury. This is kind of confusing, as it makes the distinction between punitive damages

Whatever the result of this discussion, it raises a doubt, from a private international law perspective, as to whether the principle of *full compensation for losses* is of such vital importance that it be adopted by French public policy. This may be consistent with the second political reform.

The second political reform is laid down in a recent announcement from President Sarkozy. To grasp the impact of this announcement, it is important to understand France's reluctance. One explanation is French business law is already penalized, so awarding punitive damages would not be justified. So if France should de-penalize business law as proposed by President Sarkozy, one of the obstacles to punitive damages would be removed.

The French Parliament is implementing a third reform. It concerns the Counterfeiting EU Directive dated April 29, 2004 that is already in force, but not yet transposed into French law.¹⁹ This directive is intended to strengthen legal protection against piracy and counterfeiting across the EU. Although the directive prohibits introduction of an obligation to provide for punitive damages,²⁰ the methods used by this directive to set the damages stand as a clear derogation of the French principle of *full compensation for losses*. The judge shall in fact either (i) take into account all appropriate aspects in order to set the damages, including "any unfair profits made by the infringer."²¹ Or, and this is the other branch of the alternative, the judge shall (ii) "set the damages as a lump sum on the basis of elements;" among these elements are "the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property rights in question."²² Therefore, both branches of the alternative clearly disregard the French principle of *full compensation for losses* according to which the prejudice is the only criterion for the setting of damages. They add a new principle, recalling that damages must also be dissuasive. Parliament is about to transpose these methods into French domestic law.²³ And where the French principle of *full compensation for losses* suffers derogation in domestic law, it will be much harder to become part of French public policy.

and civil penalty not that clear. See also *Rapport du groupe de travail de la Cour de cassation sur l'avant-projet de réforme du droit des obligations et de la prescription* (Report of the Working Group of the French Supreme Court on the Proposals for Reform of the Law of Obligations and the Law of Prescription), at no 91-92, available at http://www.courdecassation.fr/avant_projet_10700.html (2007).

¹⁹ Despite the absence of transposition into domestic French law, it is of direct effect: see, ECJ *Van Duyn*, case no 41/74, Dec. 4, 1974, E.C.R., p. 1337; ECJ *Ratti*, case no 148/78, Apr. 5, 1979, E.C.R., p. 1629.

²⁰ Recital 26.

²¹ Art. 13§1, a).

²² Art. 13§1, b).

²³ The EU Commission lately decided to pursue an infringement procedure against France. However the Parliament voted on Sept. 20, 2007 a draft law on counterfeiting (*Projet de loi de lutte contre la contrefaçon*). This proposal does not introduce punitive damages, but allow for compensation based on objective criteria possibly exceeding the full compensation for losses principle. See, <http://www.senat.fr/dossierleg/pj106-226.html#item_1>

Comparative overview. Economic analysis. EU pressure on fields of domestic law... are these not sufficient reasons to reform French law? Put aside the basic EU rules, such as free movement of goods and persons, or free competition,²⁴ let us now turn to EU private international law development.

IV.EU PRIVATE INTERNATIONAL LAW: RECENT DEVELOPMENT

Recent EU private international law development could win over in the current French debate. Following the traditional approach regarding public policy in private international law, we will first examine new conflict of laws rules applicable in torts (“Rome II Regulation”), and second, how the *Manfredi* case impacts on recognition and enforcement of foreign judgements.

A.Rome II Regulation

The Rome II Regulation is the EU instrument governing the law applicable to non-contractual obligations. It was voted on July 11, 2007.²⁵ What was the position adopted regarding punitive damages and public policy? It varied over the legislative process. First, the Commission decided to firmly oppose “Community” public policy regarding punitive damages.²⁶ But the European Parliament condemned this notion, referring to the more traditional public policy “of the forum”²⁷. It also revealed a more moderate approach. A new draft article was then proposed saying that the application of a law that would award excessive punitive damages may be considered incompatible with public policy.²⁸ In this new wording, punitive damages became admissible as a matter of principle, except when

²⁴ These rules have become part of the public policy of the EU Member States. See, H. van Houtte, *From a National to a European Public Policy*, in *LAW AND JUSTICE IN A MULTISTATE WORLD – ESSAYS IN HONOR OF ARTHUR T. VON MEHREN*, Transnational Publishers, 2002 (p. 841). See also, Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), July 11, 2007, art. 23, deals with “public policy of the forum” which means that public policy remains mainly of national construction, although it is coming to life in the EU as well. See, *Krombach*, case C-7/98, March 18, 2000, E.C.R. p. I-1935, *Rev. crit. DIP* 2000, p. 481, note Muir-Watt; *JDI* 2001, p.690, obs. Huet.

²⁵ Regulation (EC) no 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), July 11, 2007.

²⁶ Draft Article 24 first stated that: “*The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.*” See, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), July 22, 2003, COM(2003) 427 final.

²⁷ Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), June 2, 2004, COM(2003) 427 final - 2003/0168 (COD), §8.4.

²⁸ See, art. 23, which read “(...) *the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive **may be** considered incompatible with the public policy of the forum.*”

“excessive.” However, and this is a third step in the legislative process, Article 26 – finally adopted and relating to public policy – no longer makes any reference to punitive damages. This implies that punitive damages of an excessive nature, depending on the circumstances of the case and the legal system of the Member State of the court seized, may be contrary to public policy.²⁹ It therefore appears that there is a *status quo* regarding punitive damages in conflict of law issues.³⁰

B. ECJ *Manfredi* Case

The *Manfredi*³¹ judgement deals with the availability of damages in case of violation of EU competition law and can impact the enforcement of foreign judgments. In this decision, the European Court of Justice said that “in the absence of any Community rule governing the matter it is (...) for the domestic legal systems to (...) set the criteria for determining the extent of damages.”³² Therefore, if in domestic actions punitive damages are possible, they must also be possible in actions founded on the EU rules.³³ This raises a private international law issue. Suppose a domestic court’s decision, Irish³⁴ for example, awards punitive damages for violation of anti-trust law. What if the enforcement of this decision was requested in France? Could a French judge oppose public policy and refuse enforcement? The position of EU law is ambiguous. On one hand, the Irish judge is bound to award punitive damages by EU case law. Therefore invoking French public policy against the Irish decision would violate EU law. On the other hand, EU law does not prevent French judges from opposing French public policy.³⁵

²⁹ Rome II, recital 32: “In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.”

³⁰ This could well be explained by the launching of a consultation on damages in competition claims: Green Paper - Damages actions for breach of the EC antitrust rules, Dec. 19, 2005 COM/2005/0672 final. It would be premature to determine a rigid position before receiving responses to this consultation.

³¹ *Manfredi*, joined cases C-295/04 to C-298/04, July 13, 2006, E.C.R. p. I-6619. See M. Carpagnano, *Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi*, *Comp. L. Rev.*, vol. 3 (1), p.47.

³² It adds in relevant part that “they have to respect the principle of equivalence that is that those criteria are not less favourable than those governing actions for damages based on an infringement of national competition rules.”

³³ The Court of Justice in *Manfredi* said that “if it is possible to award (...) punitive damages, in domestic actions similar to actions founded on the Community (...) rules, it must also be possible to award such damages in actions founded on Community rules.”

³⁴ In Ireland, exemplary damages are available in actions for breach of competition law. See, Section 14 (5) of the Competition Act.

³⁵ In *Manfredi*, the Court expressly stated that “Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.”

As to whether punitive damages are admitted by French law, and three years after Professor Durry's reply, we conclude that : "punitive damages may not be here yet, but they are on their way..."