*Csongor István Nagy**

Recognition and enforcement of US judgments involving punitive damages in continental Europe

'I can resist everything except temptation.'
Oscar Wilde

Abstract

The paper examines the recognition practice of US punitive awards in continental Europe from a comparative and critical perspective. After analysing the pros and cons of the recognition of punitive awards from a theoretical point of view, it presents and evaluates the judicial practice of the European (French, German, Greek, Italian, Spanish and Swiss) national courts and the potential impact of the 2005 Hague Choice-of-Court Convention and the Rome II Regulation. The paper ends with the final conclusions containing a critical evaluation of the present judicial practice and a proposal for a comprehensive legal test for the recognition of punitive damages.

1. Introduction

The recognition and enforcement[1] of US punitive[2] judgments has been a highly controversial issue, both globally and in Europe.[3] Although punitive damages are available in various common law jurisdictions (e.g., Australia, England and Wales, New Zeeland, the US), the US awards are by far the greatest and (for some) the most excessive.[4] Whereas much has been written and said about punitive damages, it seems that scholarship is advocating a more tolerant approach towards punitive damages, aside from some exhilaratory exceptions, but has failed to permeate the judicial practice of the European national courts.

Perhaps, two quotations could elucidate what European courts say that they do and what they in fact do when facing punitive damages. Judge Cardozo's classical words seem to provide a concise summary about what European civil law jurisdictions claim to be doing: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'[5] Nonetheless, European civil law jurisdictions seem to be typified rather by Henry Ford's words conveyed to his management in 1909: 'Any customer can have a car painted any color that he wants so long as it is black.'[6] In the following it will be demonstrated how these two approaches shape judicial practice.

This paper first examines the pros and cons of the recognition of punitive awards: it analyses the arguments that support the position that punitive damages are against public policy and then examines the arguments that support the position that they are not. The second pillar presents and evaluates the judicial practice of the European (French, German, Greek, Italian, Spanish, and Swiss) national courts on the recognition of punitive damages and examines the impact of two recent legal instruments touching upon the issue of punitive damages (the 2005 Hague Choice-of-Court Convention and the Rome II Regulation). The paper ends with final conclusions containing a critical evaluation of the present judicial practice.

The paper argues that whereas excessive punitive awards are probably contrary to public policy in continental Europe, the present hostile approach of judicial practice is flawed. The following legal test is proposed. First, the recognizing court should examine whether and to what extent the foreign judgment contains a non-compensatory element, taking into account the contextual concepts (e.g., the allocation of attorney's fees and pre-judgment interest). This will be called the 'what remains in the pocket' (in short: 'in-the-pocket') approach. The recognizing court should not stick to the characterization of the court of origin but should carry out its own calculation. Second, the recognition of the non-compensatory element should not be refused outright; since most civil law systems recognize rules that have a punitive aspect, only disproportionate and excessive punitive damages should raise public policy concerns. Third, the recognizing court should show some deference to the judgment of the court of origin and recognize the judgment's punitive part to the extent that is still tolerable for its law (even if it is not available thereunder). Fourth, 'pain and suffering' awards should not be automatically characterized as punitive, especially not on the basis that the damages awarded are higher than the amount normally awarded in the country of recognition.

* Associate Professor of Law and head of the Private International Law Department at University of Szeged (Hungary) and Associate Professor of Law at Budapest University of Technology and Economics (Hungary), MacCormick Fellow at the University of Edinburgh, head of the International and EU Law Department of the István Bibó College of Law (Budapest), admitted to the Budapest Bar. Email: nagycs@juris.u-szeged.hu. The author is indebted to Professor Peter Hay for his invaluable help and for his comments on this paper. All views and any errors remain the author's own.

1 For the sake of simplicity, in the following the term 'recognition' will embrace both recognition and enforcement.

2 For the sake of simplicity, the terms 'punitive damages' and 'punitive award' will mean all cases where super-compensatory damages are awarded, whatever their precise designation may be (exemplary, aggravated, treble etc.).

3 See R.A. Brand, 'Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far', *Journal of Law and Commerce* (24) 2005, p. 181 at pp. 181-182 and 196. Very probably, this has contributed to the fact that the US is not a party to any treaty on the recognition of judgments, see P.J. Borchers, 'Punitive Damages, Forum Shopping and the Conflict of Laws', *Louisiana Law Review* (70) 2010, p. 529 at pp. 539-540, with the exception of the 2005 Hague Choice-of-Court Convention, which, nevertheless, provides for the possibility of the non-recognition of excessive awards (Art. 11). For an overview of the global picture see J.Y. Gotanda, 'Charting Developments Concerning Punitive Damages: Is the Tide Changing?', *Columbia Journal of Transnational Law* (45) 2007, p. 507 at pp. 509-516. At the same time, it is noteworthy that US judgments do not fare very well in Europe even if they do not contain a punitive element. See S.P. Baumgartner, 'How Well do US Judgments Fare in Europe?', *George Washington International Law Review* (40) 2008, p. 173.

4 For a comparative overview see J.Y. Gotanda, 'Punitive Damages: A Comparative Analysis', *Columbia Journal of Transnational Law* (42) 2004, p. 391. For English law see V. Wilcox, 'Punitive Damages in England', in: H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna: Springer 2009, pp. 7-53. For US law see A.J. Sebok, 'Punitive Damages in the United States', in: Koziol and Wilcox (eds.), ibid., pp. 156-196.

5 *Loucks* v. *Standard Oil Co*. 224 NY 99, 111 (1918).

6 Henry Ford, published in his autobiography *My life and Work*, 1922, Chapter IV, pp. 71-72.

Ironically and perversely, punitive awards discomforted not only European courts but occasionally also the US court when facing a European judgment with a punitive-like element. In *Laminoirs* v. *Southwire* the district court in Georgia refused to recognize the supplemental 'punitive interest rate' of an arbitral award that served as a post-award sanction for late payment. This part of the award was based on the French law concept of '*astreinte*'[7] and the debtor was obliged to pay 5% extra interest if he failed to honour his payment obligation within two months from the notification of the award. In this 'back to sender' situation the US court concluded that since 'the imposition of an additional 5% interest (…) is penal rather than compensatory, and bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded, (…) that portion of the award (…) will not be enforced or recognized';[8] the enforcement of this element 'would violate the forum country's most basic notions of morality and justice'.[9]

2. Why and why not are punitive damages contrary to public policy in Europe?

2.1 *Why are punitive damages contrary to public policy in Europe?*

Essentially, there are three points of aversion against punitive damages in civil law countries: the prohibition of unjust enrichment, the lack of criminal procedural safeguards and the intrusion on the penal monopoly of the state.

Under the first point, it is argued that in continental Europe damages are meant to compensate the injured party for the loss suffered but may under no circumstance entail his enrichment: the purpose of the damages awarded is to restore the initial status (*in integrum restitutio*), i.e., to compensate; it is not destined to punish the wrongdoer, although it may certainly have such a side-effect.[10] Of course, it is a matter of taste whether any deviation from the compensatory logic is to be regarded as being outright contrary to public policy.

The second important concern attached to punitive damages is that they imply a *quasi* criminal sanction, while the procedure in which they are awarded is civil and thus lacks the safeguards of criminal procedure. Some decades ago even the 'civil' nature of punitive damages was questioned.[11] Nowadays, it is settled that these awards are not sufficiently 'criminal' to push them out of private international law (thus the regime of recognition and enforcement is equally applicable thereto), while this criminal flavour is to be taken into account when applying the rules of recognition and enforcement. Although it seems to be welcome that punitive damages are not left to criminal law, the apparent inconsistency of this approach cannot be disregarded: if punitive damages are not sufficiently criminal to be excluded from private international law, why is the recognizing court lacking the criminal procedural safeguard in respect thereof? That is, if punitive damages are criminal in nature, the recognition rules are not applicable to them; if they are not, the recognition rules are applicable, but then why do criminal procedural safeguards have relevance here?

The third concern is that punitive damages intrude in the penal monopoly of the state:[12] in modern democracies governed by the rule of law only the state has the power to punish criminal acts. The problem with this argument is that punitive damages are awarded by courts, similar to criminal sanctions. In this regard it is not easy to find any difference: punitive damages do not qualify as a 'private sanction' simply because there is a 'private plaintiff' involved, contrary to the criminal procedure's public prosecutor. Namely, the sanction is invariably imposed by the court. Moreover, even in civil jurisdictions there are a handful of criminal acts that are not prosecuted by the public prosecutor but are to be tried by the victim.[13] Furthermore, some legal systems recognize the institution of a 'subsidiary private prosecutor': the alleged victim has the right to accuse the alleged perpetrator before the court if the public prosecutor refuses to institute a proceeding.[14] All these suggest that punitive damages do not intrude in the penal monopoly of the state.

All in all, it seems that the strongest argument against punitive damages is that they are contrary to the civil law's compensatory logic and fall foul of the prohibition of unjust enrichment.

2.2 *Why are punitive damages not contrary to public policy in Europe?*

The arguments in favour of the recognition of punitive damages are mainly twofold. First, punitive damages are not (or not completely) punitive. Second, civil law systems equally contain punitive-like rules.

When examining whether the award is truly punitive, it all depends on the context. Namely, punitive damages are usually not fully punitive. Although one part of the award may be labelled as punitive by the court of origin, the compensatory part normally does not cover all the elements that are

7 On the characterization of civil fines see Case C-406/09 *Realchemie Nederland BV* v. *Bayer CropScience AG*, not yet published in ECR, *NIPR* 2011, 473 (holding that the concept of 'civil and commercial matters' in the Brussels I Regulation covers civil fines for ensuring compliance with a civil or commercial judgment).

8 *Laminoirs etc.* v. *Southwire Co.*, 484 F.Supp. 1063, 1069 (1980).

9 *Laminoirs etc.* v. *Southwire Co.*, 484 F.Supp. 1063, 1068 (1980).

10 See, e.g., BGH 4 June 1992, BGHZ 118, 312 (*Bundesgerichtshof*), see *infra* 32 ('often, the sole appropriate aim of the civil action taken in response to an illegal act is to compensate for the effects of that act on the financial circumstances of the parties directly concerned'); M. Requejo Isidro, 'Punitive Damages from a Private International Law Perspective', in: Koziol and Wilcox (eds.) 2009, p. 246 (*supra* n. 4).

11 See M. Requejo Isidro 2009, p. 241 (*supra* n. 10).

12 See J. Mörsdorf-Schulte, *Funktion und Dogmatik US-amerikanischer punitive damages. Zugleich ein Beitrag zur Diskussion um die Zustellung und Anerkennung in Deutschland*, Tübingen: Mohr Siebeck 1999, p. 298 (arguing that punitive damages interfere with the penal monopoly of the state and referring to the status of the jury).

13 E.g., criminal libel suits in French law: see the French Law on the Freedom of the Press of 29 July 1881 ('*Loi sur la liberté de la presse du 29 juillet 1881*'); private prosecution ('*magánvád*') in Hungarian law: according to Section 52 of the Hungarian Code of Criminal Procedure, the private prosecutor, i.e., the victim, can bring an indictment in the following matters: simple battery (slight bodily injury), violation of private secret, violation of the privacy of correspondence, defamation and libel, impiety (outraging a dead person or his memory in an illicit way); private prosecution ('*Privatklage*') in German law: according to Section 374 of the German Code of Criminal Procedure, the victim may bring an indictment in respect of the following offences without first having recourse to the public prosecutor: trespass, defamation unless it is directed against one of the political bodies specified in Section 194(4) of the Criminal Code, violation of the privacy of correspondence, battery (bodily injury), stalking ('*Nachstellung*') and threats, taking or offering a bribe in business transactions, criminal damage to property, certain criminal offences against unfair competition, certain criminal offences concerning intellectual property rights.

14 See the subsidiary private prosecution ('*pótmagánvád*') in Hungarian law; according to Sections 199 and 229 of the Hungarian Code of Criminal Procedure the victim may act as a subsidiary private prosecutor, i.e., he may bring a charge if the criminal complaint has been rejected, the investigation has been terminated or the public prosecutor has refused to bring a charge against the alleged perpetrator.

compensated in civil law jurisdictions (the attorney's fee, in some cases pre-judgment interest). Under US law, the successful plaintiff cannot be compensated for certain expenditures and costs; even if theoretically it is meant to serve the purpose of punishment and not that of compensation, the judgment's punitive part fills this void (at least partially). According to the American rule, each party (both the victor and the loser) bears his own costs, contrary to the European approach (termed in the US as the 'English' rule) where the 'winner takes it all' and the loser pays all the legal costs: his own and those of the winning party. Due to the contingency fee arrangements which are popular in the US, the attorney's fee may easily cover 30-40% of the damages awarded; i.e., only 60-70% of the money awarded remains in the plaintiff's pocket. Furthermore, pre-judgment interest is normally not granted automatically in case of non-pecuniary loss,[15] while punitive damages are usually awarded in the case of non-tangible damages (violation of personality rights, personal injury etc.). To put it succinctly: in civil law the plaintiff may be left with more money than the compensatory part of the US judgment but less than the whole award (compensatory plus punitive damages). Taking these two components into account, it is easy to see that full compensation under civil law may easily amount to double damages under US law (i.e., where, besides the compensatory part, punitive damages of a similar amount are awarded).

Accordingly, the following question emerges: can the award violate public policy if it does not exceed the amount which the injured party would get in the county of recognition? Note that in the recognition phase the question is not whether the foreign law applied diverges from the law of the court of recognition (recall Judge Cardozo's classical words quoted in the introduction) but whether the difference is so great that it is to be regarded as intolerable under the public policy exception.

Furthermore, even if the judgment in fact has a punitive part, it is to be stressed that civil law systems are far from being free of punitive-like rules,[16] albeit it is not a surprise that these are not characteristic of them and only enable a modest punitive element.

First, the wrongdoer is often required to disgorge the profits earned from the illicit act and this may go well beyond the injured party's loss. This is typical in intellectual property law and in cases of a violation of personality rights.[17] Second, civil law systems often provide for summary compensation: the court does not have to examine the actual damages suffered by the plaintiff but has to award an amount that seems to compensate the injured party for the pecuniary and non-pecuniary loss suffered; by way of an example, this is the case in employment law where in the event of an illegal termination of a labour contract the court may oblige the employer to pay summary compensation equal to some months' wages.[18] Third, damages may serve the purpose of deterrence. This is the case, for instance, in respect of a violation of personality rights.[19] Furthermore, in *Nils Draehmpaehl v. Urania Immobilienservice OHG*[20] the European Court of Justice (when holding that the German law implementing Directive 76/207/EEC on the equal treatment of men and women failed to satisfy the requirements of effective implementation) provided that the compensation awarded for the violation of equal treatment shall, among other things, have 'a real deterrent effect on the employer'.[21] Fourth, civil law systems recognize the concept of a 'punitive interest rate' payable by the debtor to the creditor, which is, partially or entirely, meant to increase the debtor's 'willingness' to pay or to perform his obligations. The French institution of '*astreinte*' is the judicial imposition of a periodical financial penalty (on a daily, weekly or monthly basis) for delay against a recalcitrant debtor in order to enforce him to perform his obligation. The '*astreinte*' is to be paid to the creditor and is entirely independent of the damages suffered.[22] Fifth, in the context of antitrust law's private enforcement both the European Commission and the German Monopolies Commission[23] proposed the introduction of double damages for horizontal cartels. Although it is not submitted here that these proposals were well founded, they seem to suggest that super-compensatory damages are not necessarily contrary to public policy in Europe. Sixth, under Hungarian law if the amount of the damages to be awarded for a violation of personality rights is disproportionate to the wrong done, the court can impose a fine on the wrongdoer, which is to be used for public interest purposes.[24]

15 For US federal law see *Mowry* v. *Whitney* 81 US (14 Wall.) 620, 621 (1871) ('Interest upon unliquidated damages is not generally allowable, and should not be alloyed before a final decree for profits'); *Poleto* v. *Consolidated Rail Corp*. 826 F.2d 1270, 1279 (3d Cir.1987) (the awarding of prejudgment interest 'would generally be committed to the discretion of the district court'); *Savarese* v. *Agriss* 883 F.2d 1194, 1207 (3d Cir. 1989) (citing *Poleto*); for Tennessee see *Louisville & Nashville R.R.* v. *Wallace* 17 SW 882, 884 (Tenn. 1891); *Hollis* v. *Doerflinger* 137 SW 3d 625, 630 (Tenn. Ct. App. 2003); in Idaho the award of prejudgment interest is unlikely in personal injury cases, see *Davis* v. *Professional Business Services* 109 Idaho 810, 712 P.2d 511 (1985) (pre-judgment interest is not available in personal injury cases); *McGill* v. *Lester* 108 Idaho 561, 700 P.2d 964 (Ct. App. 1985) (prejudgment interest is not available in personal injury cases). Section 3291 of the California Civil Code provides that prejudgment interest may be awarded in actions brought to recover damages for personal injury if the defendant has rejected the plaintiff's settlement offer and subsequently the plaintiff obtained a more favourable judgment; nevertheless, the interest shall be calculated from the date of the plaintiff's first offer. The availability of prejudgment interest for personal injury outside Section 3291 is uncertain.

16 V. Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts', *Chicago-Kent Law Review* (78) 2003, p. 105 at pp. 130-138.

17 See the judgment of the Swiss Court of Appeals of Basel in *S.F. Inc. v. T.C.S. AG*, see footnotes 41-42.

18 In respect of Swiss law see G. Nater-Bass, 'US-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries', *Deutsch-Amerikanische Juristen-Vereinigung Newsletter* 4/2003 p. 157; in respect of Hungarian law see Section 100(4) of the Hungarian Labour Code.

19 In respect of German law see BGH 15 November 1994, BGHZ 128, 1 ('*Caroline von Monaco*') (*Bundesgerichtshof*); BVerfG 8 March 2000, 1 BvR 1127/96, NJW 2000, p. 2187 (*Bundesverfassungsgericht*) ('Die Entscheidung wegen einer Persönlichkeitsrechtsverletzung soll nicht nur dem Ausgleich des entstandenen Schadens dienen, sondern zugleich präventive Zwecke erfüllen'). See also P. Hay, 'The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court', *American Journal of Comparative Law* (40) 1992, p. 729 at p. 745; P. Hay, 'Entschädigung und andere Zwecke. Zur Präventionsgedanken im deutschen Schadensersatzrecht, punitive damages und Art. 40 Abs. 3 Nr. 2 EGBGB', in: G. Hohloch, R. Frank and P. Schlechtriem (eds.), *Festschrift Hans Stoll*, Tübingen: Mohr Siebeck 2001, pp. 521-532.

20 Case C-180/95 *Nils Draehmpaehl* v. *Urania Immobilienservice OHG* [1997] ECR I-2195.

21 Ibid., para. 25.

22 R.A. Brand, 'Punitive Damages and the Recognition of Judgments', *NILR* (43) 1996, p. 143 at p. 172.

23 *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*, Special Report of the Monopolies Commission provided in accordance with section 44(1) line 4 GWB (*Gesetz gegen Wettbewerbsbeschränkungen; Act against Restraints of Competition*), March 2004, marginal no. 83, discussed in: U. Böge and K. Ost, 'Up and Running, or is it? Private Enforcement – The Situation in Germany and Policy Perspectives', *European Competition Law Review* (27) 2006, p. 197 at p. 201.

24 Section 84(2) of the Hungarian Civil Code.

Although the above enumeration is not exclusive,[25] it clearly suggests that in respect of actions for damages a punitive aspect is not necessarily not in accordance with civil law. Nonetheless, it must also be emphasized that the above examples simply support the conclusion that a *little* punitive flavor is *not necessarily* distasteful to the civil law stomach; excessive punitive damages may still be indigestible!

3. Where are we now – the judicial practice of punitive damages in Europe: united in diversity?

3.1 The case law of European national courts

European national courts have a relatively long history as far as US punitive damages are concerned. They adopted rather divergent approaches, but mainly rejected them.

The first approach is the outright and complete refusal to recognize awards containing a punitive element ('you can't touch pitch without being defiled').

In *Fimez*[26] the Italian court faced a 'pain and suffering' judgment which it regarded as punitive simply because the money awarded seemed to be excessive.[27] Nonetheless, the court did not trouble itself with demarcating the compensatory and the punitive part; it automatically refused to enforce the entire judgment. It is probable that the court would have decided otherwise if the court of origin had carried out the demarcation itself.[28]

In this matter the plaintiff's son had been killed in a road accident; his death was allegedly due to the defective design of his motorcycle helmet. The father sued the producer of the helmet and was awarded 1,000,000 USD. The Italian Supreme Court (*Suprema Corte di Cassazione*) held that the idea of punishment embedded in punitive damages is so alien to Italian law that it is contrary to public policy. Unfortunately, the court did not grapple with the dilemma that leaving the injured party with no remedy is similarly alien to civil law:

> '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.'[29]

It is worthy of note that contrary to the above approach the Higher Regional Court (*Oberlandesgericht*) of Frankfurt refused to re-characterize an award as punitive. On the basis of the case file (*Prozeßunterlagen*) the court came to the conclusion that the jury wanted to compensate the injured person properly, and hence the award was not punitive.[30]

The second approach is based on the separation of compensatory and punitive parts: the court recognizes and enforces the former and refuses the latter ('separate the wheat from the chaff'). This category also encompasses judgments where the application for recognition was completely rejected due to procedural reasons: although a partial recognition was probable, this was not requested and the court could not decide *ultra petita*.[31]

This approach was followed by the German Federal Court (*Bundesgerichtshof*) in its famous judgment of 1992.[32]

The controversy emerged from a sexual crime committed against the plaintiff, who was at the relevant time a 14-year-old minor. The wrongdoer had been convicted and left for Germany after serving his sentence in a US prison. Afterwards, the Superior Court of the State of California (San Joaquin County) awarded the plaintiff 750,260 USD under the following heads of damages: 350,260 USD in compensatory damages (past medical damages, future medical damages and the cost of placement) and 400,000 USD punitive damages. The judgment expressly provided that the plaintiff's attorney was entitled to 40% of all moneys collected.

The *Bundesgerichtshof* recognized the award's compensatory part, while it completely refused the punitive element. The court held that '[a] US judgment awarding lump-sum punitive damages of a not inconsiderable amount in addition to an award for damages for material and non-material injury cannot, as a rule, be held to be enforceable in Germany'. Accordingly, although it could be argued that not all punitive awards come under the purview of the foregoing exclusion (only the 'not inconsiderable' ones), it is the very purport of punitive damages that they are 'not inconsiderable'.

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25 For some more examples see J.J. Berch, 'The Need for Enforcement of U.S. Punitive Damages Awards by the European Union', *Minnesota Journal of International Law* (19) 2010, p. 55 at pp. 81-82.

26 For the analysis and an English translation of the judgment see F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: the Italian Supreme Court's Veto', *Hastings International and Comparative Law Review* (31) 2008, p. 753. See also Requejo Isidro 2009, pp. 248-249 (*supra* note 10).

27 The Venice Court of Appeals based its conclusion that the award was punitive on the following factors: a lack of reasoning, the size of the amount awarded and the wrongdoer's professional quality. Quarta 2008, p. 756 (*supra* note 26). On appeal, the Italian Supreme Court regarded this question of characterization as an issue of fact and, hence, not subject to be reviewed by it. Quarta 2008, p. 757 (*supra* note 26).

28 Problems similar to the Italian case may arise in Germany if the US judgment does not distinguish between the compensatory and the punitive part; although a complete refusal is probably not a concern here, the German court may recognize less than what the US court may have devoted to compensatory purposes. See T. Kraetzschmar and Ph.K. Wagner, 'Responding to Differing Procedural Concepts in U.S.-German Cross-Border Disputes', *NYSBA International Law Practicum* (23) 2010, p. 34 at p. 35.

29 For the translation see Quarta 2008, p. 782 (*supra* note 26).

30 OLG Frankfurt a.M. EWiR § 338 ZPO 2/92, 829, 830. Reported in: Mörsdorf-Schulte 1999, pp. 38-39 (*supra* note 12).

31 This probably occurred in the 1982 judgment of the *Bezirksgerichtspräsidium Sargans* (Switzerland); for an analysis of the case see *infra* footnote 41. See J. Drolshammer and H. Schärer, 'Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages-Urteils"', *Schweizerische Juristenzeitung* (82) 1986, p. 309 at pp. 310 and 318. Likewise, the same seemingly 'all or nothing' approach was applied by the French Supreme Court in *Fountaine Pajot* (French Supreme Court, First Civil Chamber, 1 December 2010); as to the analysis of this case see footnote 53. Nevertheless, it is probable that the judgment creditor could subsequently request a partial recognition as the US judgment clearly distinguished between the actual and the punitive damages. See N. Meyer Fabre, 'Enforcement of US Punitive Damages Award in France: First Ruling of the French Court of Cassation in X. v. Fountaine Pajot, December 1, 2010', *Mealey's International Arbitration Report* (26) 2011, p. 4; F.-X. Licari, 'La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'oeil de la Cour de cassation?', *Recueil Dalloz* (6) 2011, p. 423 at p. 424, especially fn. 42.

32 BGH 4 June 1992, BGHZ 118, 312 (*Bundesgerichtshof*). Quotations refer to the translation in G. Wegen and J. Sherer, 'Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages [June 4, 1992]', *International Legal Materials* (32) 1993, p. 1320. For an earlier German judgment touching upon the issue see LG Berlin 13 June 1989, *RIW* 1989, p. 988.

The *Bundesgerichtshof* aligned the traditional arguments to justify its stance that punitive damages are contrary to public policy: the compensatory mission of the law on delictual liability and the prohibition of unjust enrichment, a violation of the penal monopoly of the state etc. The most interesting point, however, is how the court took into account that 40% of the money would be going to the attorney and that this could not be shifted to the defendant. Whereas expressly recognizing the problem related to the rule on the allocation of legal costs (the 'American' rule on attorney's fee), due to several reasons it refused to take this circumstance into account when 'separating the wheat from the chaff'. First, the *Bundesgerichtshof* considered that although the punitive part may provide reimbursement for the legal costs *by effect*, it did not do so *by object*: the foreign judgment did not contain any reliable information as to whether the punitive damages were '*intended*' to cover the plaintiff's legal costs ('*die Gesamtprozeßkostenlast des Klägers erfaßt werden sollte*'). The *Bundesgerichtshof* emphasized that the US judgment did not reveal what considerations drove the court of origin when determining the amount of punitive damages; in the absence of such references in the judgment, the *Bundesgerichtshof* resorted to the general considerations concerning punitive damages: it examined what purposes judicial practice and scholarship attach to punitive damages and came to the conclusion that the reimbursement of legal costs is normally not included in the reasons justifying such awards or at least it cannot be assumed that all punitive awards are meant to cover legal costs;[33] on the contrary, punitive damages serve the purpose of deterrence and prevention.[34]

On the basis of these circumstances, the court drew the conclusion that the judgment did not disclose why punitive damages had been awarded and judicial practice and scholarship, with some exceptions, did not regard the reimbursement of legal costs as part of the *raison d'être* of punitive damages; consequently, since the intention of the award is not reimbursement (not even partially), the recognizing court cannot recognize it up to the level of legal costs. Furthermore, the *Bundesgerichtshof* also held that the attorney's contingency fee concerning the compensatory part (350,260 USD x 0.4 = 140,104) made up only about one third of the punitive damages (400,000 USD) and the arbitrary splitting of the punitive part would fall foul of the prohibition of *révision au fond*; thus it was excluded.[35] It is worth noting that it seems that the *Bundesgerichtshof* had the perception that the compensatory award for medical expenses and 'pain and suffering' was probably more than generous: these sums 'have not been calculated so precisely as to exclude the possibility of their already including an element in respect of costs'. The court had the impression that it cannot be assumed that cost shifting is embedded, if at all, solely in the punitive part.[36]

Interestingly, as acknowledged by the *Bundesgerichtshof*, the matter had no close connection ('*verhältnismäßig geringe Inlandsbeziehung*') to Germany. The victim was a US citizen. The wrongdoer had dual (US and German) citizenship but, in the relevant period, was a California resident. The crime had been committed in the US. This suggests that the aversion against punitive damages is very strong in Germany: such awards are not tolerated even in cases where there is a slight connection to the forum.[37]

As far as the objectives of punitive damages are concerned, it is to be emphasized that the *Bundesgerichtshof*'s judgment was rendered in 1992; although the proposition that the reimbursement of legal costs is not, according to the mainstream approach, among the purposes of punitive damages may have been valid at that time,[38] today this consideration seems to be one of the important (even if not the most important) purposes of punitive damages.[39] Nevertheless, the judgment has two very important elements that still speak against the (at least partial) recognition of punitive awards: first, the *Bundesgerichtshof* was only concerned with what the foreign court said it would do ('*object*') and completely disregarded what it in fact did ('*effect*'); second, the court of recognition is not a butcher who can chop the punitive award according to its own discretion in order to strike the right balance.

Though not a European judgment, it is worthy of note that this separation approach was also followed by the Japanese court in *Mansei Kôgyô*.[40] The Japanese Supreme Court (*Saikô Saibansho*), whereas it recognized the compensatory award, held that punitive damages as such are contrary to public policy.

The third group of cases comprises those judgments that have recognized a punitive damages award (the punitive part of the award) or have held that punitive damages are in principle recognizable (i.e., they are not *per se* contrary to public policy) but have refused recognition because the judgment's punitive part was excessive or disproportionate.

In *S.F. Inc.* v. *T.C.S. AG*[41] the Swiss Court of Appeals of Basel affirmed the first instance court's recognition of punitive damages (1989).[42,43] The judgment was rendered by a California court which awarded 120,060 USD in compensatory and 50,000 USD in punitive damages. Very interestingly, the US judgment was based on English law. After stressing that the matter's slight internal connection warranted only a slightly withheld public policy scrutiny ('*eine sehr zurückhaltende Anwendung der ordre public-Klausel*'),[44] the court affirmed that the super-compensatory element was primarily meant to 'restitute to the plaintiff the unjust profit the defendant had real-

33 See Hay 1992, p. 747 (*supra* note 19).

34 See in this regard Mörsdorf-Schulte 1999, pp. 112-113 (*supra* note 12) (submitting that punitive damages have a penal function and that using the ancillary functions as arguments disregards the legal reality).

35 Cf. R.A. Schütze, 'The Recognition and Enforcement of American Civil Judgments Containing Punitive Damages in the Federal Republic of Germany', *University of Pennsylvania Journal of International Business Law* (currently *University of Pennsylvania Journal of International Commercial Law*) (11) 1990, p. 581 at p. 601 (arguing against the separation of the punitive award into penal and non-penal elements).

36 Hay 1992, p. 742 (*supra* note 19).

37 See Mörsdorf-Schulte 1999, p. 298 (*supra* note 12).

38 However, it is to be noted that the reimbursement of attorney's fees was arguably part of the rationale of punitive damages also some decades ago. See, e.g., D.D. Ellis, 'Fairness and Efficiency in the Law of Punitive Damages', *Southern Californa Law Review* (56) 1982, p. 1 at p. 3.

39 Brand 2005, pp. 185-186 (*supra* note 3).

40 For a note on the case see Y. Nishitani, 'Anerkennung und Vollstreckung US-amerikanischer punitive damages-Urteile in Japan', *IPRax* 2001, p. 365; for a further detailed analysis see N.T. Braslow, 'The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience', *Arizona Journal of International and Comparative Law* (16) 1999, p. 285 at pp. 288-294.

41 Although this is the first punitive damages case tried under Swiss federal law (Swiss Private International Law Act of 1988), it is to be noted that this was not the first time that a Swiss court faced the problem of the recognition of a US punitive award. In 1982 the *Bezirksgerichtspräsidium Sargans* refused to recognize a US treble damages award. Nevertheless, this judgment occurred before the federalization of private international law in Switzerland and was, accordingly, based on the law of the canton of St. Gallen. See Drolshammer and Schärer 1986, p. 309 (*supra* note 31).

42 *Basler Juristische Mitteilungen* (*BJM*) 1991, pp. 31-38.

43 The judgment was appealed to the Swiss Federal Supreme Court but the appeal was rejected due to procedural reasons. Nater-Bass 2003, p. 155 (*supra* note 18).

44 *BJM* 1991, p. 31 at pp. 34-35.

ized and that punishment of the defendant had been of only secondary importance'.[45] Accordingly, the Swiss court recognized that the US judgment provided for the disgorgement of unjust profits,[46] a principle which was in accordance with Swiss law. It is very interesting how the court established the (low) intensity of the 'internal connection'; it provided that the 'nationality' and seat of the defendant (here both of them were Swiss) did not establish a close connection to Switzerland in a case where the defendant had a worldwide operation and the transaction at stake (transportation between the US and the UK) had no connection to Switzerland; furthermore, the parties had agreed to the application of English law.[47]

In *Miller/Florence* v. *Alabastres*[48] the plaintiff sued because of a violation of intellectual property rights and unfair competition law and was awarded treble damages. The Spanish Supreme Court (*Tribunal Supremo*) declared the judgment enforceable notwithstanding its punitive aspect. According to the court, the award's purposes were manifold: compensation, the manifestation of disapproval and prevention. It noted that in case of moral damages it is not easy to demarcate the compensatory part (available under Spanish law) from the punitive one (not available under Spanish law) and the concept of punitive damages is not completely contrary to Spanish public policy since for Spanish law, though to a very limited extent, the overlap between punishment and compensation is not completely unknown. The Spanish court also emphasized that here the awarding of treble damages was provided by statute and it corresponded to 'the material injuries effectively caused'. Finally, the court considered that the protection of intellectual property rights is a valid purpose both globally and in Spain.[49]

In 1996, a divided Greek Supreme Court (*Areopag*) refused to recognize a US punitive award; however, the court made it clear that the award of super-compensatory redress is as such not contrary to Greek public policy; recognition was refused because the punitive award was disproportionate to the compensatory part (the total award was 1,359,578 USD, while the punitive part was 650,000 USD).[50]

Recently, the French Supreme Court (*Cour de Cassation*), for the first time in its history,[51] was faced with a recognition matter concerning punitive damages and took a very liberal approach, at least at face value.[52] In *Fountaine Pajot*[53] the plaintiffs were a US couple who had purchased a catamaran manufactured by a French company; they sued because the ship turned out to have serious defects. The Superior Court of California (County of Alameda) decided for the plaintiffs and awarded them actual damages (reconditioning of the ship: 1,391,650.12 USD), the attorney's fee (402,084.33 USD)[54] and punitive damages (1,460,000 USD). Interestingly, the amount of the actual damages (reconditioning costs) considerably exceeded the ship's purchase price; if the ship's price is compared to the full amount of the award (compensatory plus punitive), this contrast is even stronger: the ship's price was 826,009 USD, while the plaintiffs were awarded a total of 3,253,734.45 USD. It is noteworthy that the US court, contrary to normal practice, shifted the plaintiffs' attorney's fee onto the defendant; hence, it could not be argued that the punitive award was partially destined to cover the plaintiff's legal costs; these were expressly compensated.

The *Cour de Cassation* very progressively held that 'a foreign decision ordering a party to pay punitive damages is not, in principle, contrary to substantive international public policy'.[55] Likewise, the *Cour de Cassation* also announced that the scrutiny under the concept of public policy cannot at all be reduced to the question of whether or not the decision is in compliance with French law.[56]

At the same time, the French Supreme Court also held that punitive damages are contrary to public policy 'when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligation'. Generalizing this statement, it may be concluded that the punitive award's excessiveness is to be assessed in relation to the amount of actual damages (in this case the punitive part exceeded the compensatory part) and it is to be taken into account how blameworthy the fault is. At the end of the day, the *Cour de Cassation* concluded (or more precisely held that the 'Court of Appeal could conclude') that 'the amount of damages was manifestly disproportionate with regard to the damage sustained and the breach of the contractual obligations'. The court did not enter into the troublesome task of finding out the level up to which the punitive element is proportionate (and recognizing it until this point).

Interestingly, and contrary to the Swiss court in *S.F. Inc.* v. *T.C.S. AG* and the Spanish court in *Miller/Florence* v. *Alabastres*, the *Cour de Cassation* did not analyse the internal connection between the forum and the matter; nevertheless, it is assumed that in the above matter the connection to the forum was not at all negligible.

45 M. Bernet and N.C. Ulmer, 'Recognition and Enforcement in Switzerland of US Judgments Containing an Award of Punitive Damages', *International Business Lawyer* (22) 1994, p. 272 at p. 273.

46 Gotanda 2007, p. 515 (*supra* note 3).

47 *BJM* 1991, p. 31 at pp. 34-35.

48 *Miller Import Corp.* v. *Alabastres Alfredo*, S.L., STS, 13 November 2001 (Exequátur No. 2039/1999) (Spain).

49 Reproduced and summarized in: Gotanda 2007, pp. 521-522 (*supra* note 3). See also S.R. Jablonski, 'Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain', *Journal of Law and Commerce* (24) 2004-2005, p. 225; Requejo Isidro 2009, p. 247 (*supra* note 10).

50 For a note on the case see C.D. Triadafillidis, 'Anerkennung und Vollstreckung von punitive damages – Urteilen nach kontinentalem und insbesondere nach griechischem Recht', *IPRax* 2002, pp. 236-238.

51 Licari 2011, p. 424 (*supra* note 31).

52 Licari 2011, p. 424 (*supra* note 31) ('Plusieurs hautes juridictions européennes se sont prononcées, tantôt en faveur d'une compatibilité avec leur ordre public, tantôt en défaveur de celle-ci. *Apparemment, mais apparemment seulement*, la Cour de cassation a rejoint le camp des premières [emphasis added]').

53 French Supreme Court, First Civil Chamber, 1 December 2010. Quotations refer to the translation in Fabre 2011, p. 1 (*supra* note 31). For an analysis of the judgment of the Court of Appeal (Poitiers) see F.-X. Licari's Note in: *Journal du Droit International* (137) 2010, pp. 1230-1263.

54 The plaintiff's claim was based, among other things, on the Magnuson-Moss Warranty Act (a US federal statute), which – as an exception to the general 'American' rule – provides (in 15 USC 2310(d)(2)) that the prevailing plaintiff (the consumer) is to be compensated for his reasonable legal costs. *Michael Kaye* v. *Fountaine Pajot, S.A., et al*, No. 08-16824 (2 July 2009).

55 For the translation see Fabre 2011, p. 6 (*supra* note 31).

56 '[T]he control of conformity of a foreign decision with international public policy excludes any review of the decision on the merits; by basing its decision on French tort and contract law in order to hold that the judgment of the Superior Court of California (…) is contrary to substantive international public policy, the Court of Appeal violated Articles 3 and 15 of the Code Civil, Article 509 of the Code of Civil Procedure and the principles governing the enforcement procedure.' For the translation see Fabre 2011, p. 6 (*supra* note 31). Cf. *Beals* v. *Saldanha* [2003] 3 SCR 416 at para. 76 (Canada) ('The public policy defense is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada').

All in all, the approach of European national courts ranges from a complete refusal to a qualified recognition but has remained, in essence, rather rejectionary.

3.2 *Recent international legal instruments*

The question of punitive damages has emerged in some of the recent international legal instruments. Article 11 of the 2005 Hague Choice-of-Court Convention is particularly noteworthy in this context,[57] especially as this instrument is expected to profoundly influence the recognition of punitive awards in general: although the Convention is only applicable in cases where the jurisdiction of the foreign court is based on the parties' agreement, it could be argued that its approach may be applicable by analogy to all recognition matters falling under the Convention *ratione materiae*;[58] there is no reason to make the application of the public policy exception dependent on whether the foreign court's jurisdiction is based on the parties' agreement or on the provisions of the law (especially as it is the law that gives legal force to the parties' agreement on jurisdiction).

In respect of punitive damages the Convention (in Art. 11) provides that the recognition and enforcement of the punitive part may be refused but that of the compensatory part may not: 'Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.' This wording seems to clearly reject the 'you can't touch pitch without being defiled' approach and codifies the 'separating the wheat from the chaff' approach, provided that the court of recognition is willing to refuse recognition at all; i.e., the Convention does not impede the full recognition of the punitive part. Interestingly (and very consequently) Article 11(2) of the Convention adds that the recognizing court shall include legal costs when assessing punitive damages: 'The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.' Accordingly, Article 11 autonomously defines what is compensatory and what is not;[59] the civil court cannot refuse to recognize those parts of the punitive award that are meant to cover legal costs, which under civil law would normally be passed on to the losing party.

As there seems to be no valid reason to make the application of the public policy exception dependent on the characteristics of the original court's jurisdiction (provided it is well founded), it is submitted that the Convention's above approach should be applied by analogy to all recognition matters that fall under the Convention's subject-matter.

A similarly lenient approach is foreshadowed by the Rome II Regulation, which, however, deals with the question of the applicable law. Note that the Regulation has universal application, i.e., the law specified by the Regulation 'shall be applied whether or not it is the law of a Member State'.[60] Recital 32 of the Regulation suggests that the refusal to apply foreign law on the basis of public policy should be reduced to cases where the punitive damages are excessive ('exemplary or punitive damages of an excessive nature'), that is punitive damages as such are not automatically contrary to public policy.[61]

'In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory 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.'

Although the Rome II Regulation deals with the question of the applicable law, its approach may affect the way public policy is grasped in the field of recognition and enforcement.

All in all, recent international legal instruments adopt the following approach: not all but only excessive punitive damages may fall foul of public policy (Rome II Regulation) and the compensatory part of these judgments is to be recognized (2005 Hague Choice-of-Court Convention). The requirement of consistency may justify the application of these principles outside the scope of these international instruments.

4. Conclusions

Although advocating different levels of hospitality, scholarship's mainstream approach contends that the courts' current hostility towards punitive damages is misplaced.[62]

As a starting point it is suggested that the prohibition of the *révision au fond* implies that the recognizing court should show some deference to the judgment of the court of origin and in case of doubt should decide in favour of recognition in the fashion of the traditional maxim of procedural law: *in dubio pro recognitione*.[63] Although the prohibition of unjust enrichment is part of the civil law tradition, the latter equally contains the principle that the wrong cannot make the tortfeasor better off ('*Nemo ex suo delicto meliorem suam condicionem facere potest*').[64] Restricting the injured person's recovery to an amount that is less than the compensation that can be acquired in the country of recognition seems not to be justifiable through public policy; on the contrary, making the wrongdoer better off seems to be contrary to the principle.

Theoretically, 'pain and suffering' do not fit in the picture of punitive damages and it is only the recognizing court's recharacterization that makes this part of the issue. Still, the Italian court in *Fimez* was quick to characterize the 'pain and suffering' judgment as punitive simply because it was regarded as excessive.

It seems to be clear that the awarding of damages for 'pain and suffering' cannot be regarded as punitive simply because it is more generous than the law of the county of recognition and enforcement. This is so for differences between US and continental awards for 'pain and suffering' in terms of their amount, first of all, as well as the divergent attitudes as regards the value (or sorrow) of emotional distress and what it takes to make it right. Furthermore, due to the stringent concept of claim preclusion, the plaintiff has only one opportunity to litigate his claims; the 'pain and suffering' award is meant

57 The Convention has not yet entered into force; it deals with jurisdiction and the recognition and enforcement in international cases involving exclusive choice of court agreements. For the legislative history of Art. 11 see H. Duintjer Tebbens, 'Punitive Damages: Towards a Rule of Reason for US Awards and Their Recognition Elsewhere', in: *G. Venturini* and *S. Bariatti* (eds.), *Liber Fausto Pocar*, Vol. 2, Milan: Giuffrè 2009, p. 274 at pp. 283-286.

58 Civil or commercial matters, Art. 1(1).

59 See T. Hartley and M. Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*, The Hague: Hague Conference on Private International Law 2007, para. 205, available at <www.hcch.net/index_en.php?act=publications.details&pid=3959>.

60 Art. 3.

61 See Duintjer Tebbens 2009, p. 287 (*supra* note 57).

62 Of course, as usual, the scholarship is not completely unanimous. For a contrary position see Mörsdorf-Schulte 1999, pp. 296-299 (*supra* note 12).

63 And not in dubio pro debitore domestico. See Duintjer Tebbens 2009, p. 277 (*supra* note 57).

64 Ulpian D. 50, 17, 134, 1.

to cover also potential future claims and to put an end to the matter completely and finally.[65]

The analysis under the public policy exception seems to presuppose some deferentialism to the court of origin, especially when facing the unsolvable question of how to contrast disgeneric values, like life (health, physical integrity) and money. The following question emerges: is the award punitive simply because it 'overvalues' human life and health? The answer seems to be in the negative.

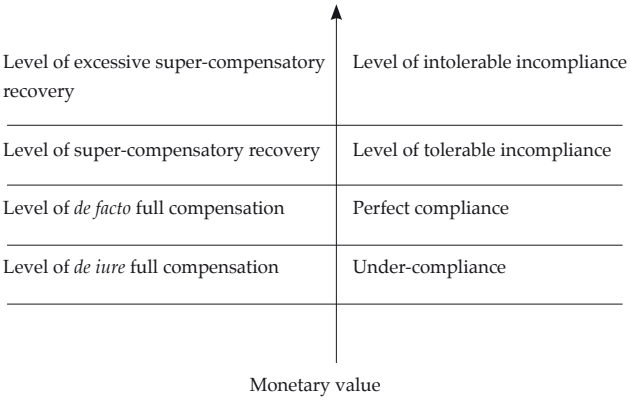
The following two-step analysis is proposed. First, it is to be assessed what amount would remain in the plaintiff's pocket on the basis of the law of the country of recognition. Recovery not exceeding the limit established by the *lex fori* would certainly not fall foul of public policy: it is not easy to see how a lawful situation could violate public policy (the 'what remains in-the-pocket' approach). Accordingly, the calculation by the court of recognition should conquer the devil of detail and should not shy away from doing the maths: the recognizing court should inquire which part of the award is super-compensatory, taking into account the allocation of legal costs and the award (or non-award) of pre-judgment interest. It is important that when doing the calculation and separating compensatory from punitive damages, the court of recognition should not bind its own hands with the motives of the court of origin (or more precisely those of the jury). The thinking that appears in judicial practice that money awarded with the motive of punishing (although from a civil law perspective it does not do more than compensate) is contrary to public policy seems to be odd: the analysis under public policy should not inquire whether the thinking ('*object*') of the court of origin is acceptable (if this were the case the court of recognition would be in great trouble); instead, the relevant question should be whether (and to what extent) the consequences ('*effect*') of the recognition are tolerable.

Second, if the plaintiff is left with more money in his pocket than he would receive under civil law, the question is whether and to what extent the punitive part will be recognized. It is submitted that the question is not whether the foreign award is *compensatory for our mentality*; the relevant question is whether the award is *tolerable for our compensatory mentality*.

This implies, on the one hand, that super-compensatory damages are not automatically contrary to public policy. This is confirmed by the existence of numerous punitive-like rules in civil law jurisdictions;[66] all these suggest that some windfall (in excess of the actual damages) is tolerable under civil law. Especially, if the court, otherwise, runs the risk of making the wrongdoer benefit from his evil, as this would run counter one of the core principles of civil law. The approach of the 'greatest common divisor' suggests that it would be odd to treat the award as intolerable, while the law of the court recognizes a similar concept in a different field (disgorgement of profits, summary compensation etc.).

On the other hand, the above also implies that punitive damages are to be recognized to the extent that they are not excessive. Since the court of recognition is expected not to be 'so provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home', the relevant question is not whether the in-the-pocket monetary value exceeds what could normally be recovered under the *lex fori*; the relevant question is whether the surplus is so outrageous that it cannot be tolerated by the *lex fori*. Since civil law legal systems do contain, though to a limited scope and to a limited extent, punitive-like rules, it seems to be hypocritical to argue that any punitive aspect falls foul of their public policy. Nevertheless, if we accept that this is not the case, the next question is how to strike the right balance?

Using the marginal cost concept of economics, this could be designated as the 'marginal recovery' approach. In the perfect competition model, the undertaking produces until its marginal cost (the cost related to the production of one more product unit) reaches the market price. The marginal cost is the expenditure attached to the production of one more unit. Translating this into the language of recognition, the court should recognize the punitive part to the extent (to the point) that it reaches its level of intolerance.



Accordingly, the court should proceed from the point of in-the-pocket compensation. The question to be answered is whether the recognition of an additional dollar would violate public policy. If not, then this dollar is to be included in the recognizable part and the exercise starts once again: would the recognition of an additional dollar violate public policy. The court of recognition should stop at the point where the recognition of an additional dollar would reach its point of intolerance. Albeit this exercise seems to be complicated in practice, justice has never been an easy job…

65 See Hay 1992, p. 742 (*supra* note 19).

66 See *supra* section 2.2.