Conference on punitive damages at Vienna

A Conference on Punitive Damages, organised by the Institute for European Tort Law, was held last Monday in Vienna. Aiming to study the nature, role and suitability of punitive damages in tort law and private law in general, this one-day conference got together a panel of scholars and practitioners from different countries: some where punitive damages are approved (England, the United States and South Africa), as well as others (France, Germany, Italy, Spain, Hungary and the Scandinavian countries) where they are rejected -at least, formally rejected. The position of EU law was considered too. The Conference also included a report on punitive damages from a Law and Economics perspective, another on the the insurability of such damages, and a brief presentention from a Private International Law point of view. The Conference will be published soon in a book titled "Punitive Damages: Common Law and Civil Perspectives" (H. Koziol and V. Wilcox eds).

As a PIL academic with a continental education, and also because I have already worked on the topics of service of process of punitive damages claims and the recognition of foreing punitive damage awards, the most interesting panels for me were those dedicated to England and USA and to the evolution of the figure in both jurisdictions. In this respect, a common feature in the recent past is the trend to rationalize and restrict the pronouncements of punitive damages. The constitutionaly of punitive damages has been (and is being) discussed in the USA, given the fact that despite their proximity to criminal issues, they are granted without the guarantees required in criminal contexts. In fact, a change is already taking place under 14th Amendment of the Constitution: the due process clause is being used in order to derive substantial and procedural limits to condemnations of punitive damages. The formula is articulated through judicial decisions of higher courts that correct those of lower courts. Several decisions can be pointed out as milestones: *BMW of North America v. Gore* (1996); *State Farm Mutual Automobile Insurance Co v. Campbell et al*. (2003); and *Philip Morris v. Williams (*2007). In the first decision the Federal Supreme Court ruled that the amount of the punitive damages award was disproportionate, and impossible that the defendant could have foreseen them as a result of his conduct: for these reasons

the award would be contrary to the due process clause. Based on this finding, the Supreme Court proceeded to set three criteria for studying the constitutional compatibility of punitive damages: the degree of reproach of the defendant's conduct; the reasonableness of the relationship between the amount of compensatory damages and punitive damages; and the size of criminal penalties for comparable conduct. In *State Farm v. Campbell*, the Supreme Court set a rule concerning the ratio of punitive damages to compensatory damages: the former should not exceed the amount resulting of multiplying the latter by a figure greater than 0 and less than 10 (rule of "single-digit multiplier"). The Court added that the wealth of the agent causing the damage should not be taken into account; and rejected the so-called "total harm theory", under which when sentencing to punitive damages, damages that could have been suffered by victims other than the applicant's are also to be considered.

Also in the UK punitive or exemplary damages have been called into question: the Law Commission impact study started in 1993 and completed in 1997 gives proof. But in fact, the restrictive pattern was identified in England long before the 90, and its results are more intensive than those reported for USA. Already in 1964, in the case *Rooker v. Barnard*, exemplary damages were described as "unusual remedy" that should be restricted as far as possible (meaning, if permitted by the respect due to the precedent). This will has lead to what sometimes may seem an excessive limitation: it is striking that a demand for punitive damages will not prosper in cases highly reprehensible according to current parameters, such as discrimination based on sex.

A better knowledge and understanding of punitive damages is certainly required when it comes to PIL. One of the main differences between the two major current civil liability models (those of Anglo-Saxon origin, and the so-called "civil" systems) lies in the fact that where the "civil" systems limit the function of civil liability to repairing or compensating for damages, the commn-law model admits other purposes: sentences must show that damaging conduct is not worth the risk (*tort does not pay*) and discourage its repetition. The relationship between civil liability and compensation, and nothing more than compensation, is so deeply rooted in the Continent, that it not only excludes the possibility of pronouncing sentences of punitive damages in domestic cases: the idea is projected beyond, to cross-border cases. European jurisdictions have therefore refused recognition of foreign judgments awarding punitive damages, arguing that it would be contrary

to public forum. In some countries even service of process of a claim raised in the USA has been refused, thus denying basic cooperation with foreing justice. Nevertheless, we can not talk of a unique, unanimous attitude throughout Europe: whilst recognition of a USA punitive damage award has been rejected in both Germany and Italy, Greece (lower Greek courts) and Spain have reacted the other way round.

I seriously doubt whether German or Italian posture could still be held against an English request of service of process, or a request for recognition of an English punitive damage award. Nowadays, service of process cannot be refused: Regulation 1393/07 applies, and there is no escape device (the public policy clause is no longer included). As for recognition, the scene is a little bit more complicated. Two EC Regulations may apply. The ordre public exception has disappeared in Regulation 805/04. It still survives under EC Regulation 44/01: but this that does not mean that the public policy clause will easily be applied. On the contrary: we are in a European context; and mutual trust prevails on European contexts. In this respect, we should also bear in mind the interesting development undergone by the punitive damages issue in the "Rome II" preparatory works: firstly, punitive damages where said to be contrary to a Community public policy; that is, the Community (the Commission) itself backed the doctrine against punitive damages. Nevertheless, this position was later abandoned, and replaced for a nuanced solution: I quote "Considerations of public interest justify giving the courts of the member States the possibility, in exceptional circumstances, of applying exceptions based on public policy (…). In particular, the application of a provision of the law designated by this Regulation which would cause 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".