

The Supreme Court of Japan on Punitive Damages...

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1. Introduction

Assume that you successfully obtained a favourable judgment from a foreign court that orders the losing party to pay punitive damages in addition to compensatory damages. Assume also that, later, you could obtain a partial satisfaction of the amount awarded by the court by way of compulsory execution in the rendering state. Happy with the outcome and knowing that punitive damages cannot be enforced in Japan, you confidently proceed to enforce the remaining part before a Japanese court arguing that the payment you would like to obtain now corresponds to the compensatory part of the award. Could the judgment be enforced in Japan where punitive damages are considered as contrary to public policy? In other words, to what part of the damages the paid amount corresponds: the compensatory part or the punitive part?

This is the question that the Supreme Court of Japan answered in its recent judgment rendered on 25 May 2021.

The present case has already yielded an important Supreme Court decision rendered on 18 January 2019 (decision available [here](#)). The main issue that was addressed therein concerned the compatibility of the foreign judgment with the procedural public policy of Japan. The summary below will however be limited to the issue of punitive damages as this was the main issue the Supreme Court has addressed in its decision reported [here](#).

2. Facts:

In 2013, the Xs (Appellees) filed an action with a Californian court seeking damages against the Y (appellant) and several other persons for illegally obtaining their trade secrets and business models. In 2015, the Californian court rendered a default judgment against Y ordering him to pay about USD 275,500, including punitive damages (USD 90,000) and compensatory damages (USD

184,990) as well as other related additional fees. Soon after the decision became final and binding, Xs petitioned for the compulsory execution of the said decision in the US and could obtain partial payment of the awarded damages (USD 134,873). Thereafter, Xs moved to claim the payment of the remaining part (i.e. USD 140,635) by seeking the enforcement of the Californian judgment after deducting the part of the payment already made. Xs argued that the judgment did not violate public policy as the amount they were seeking to obtain in Japan was anyway confined within the scope of the compensatory damages. Y challenged the petition for enforcement, *inter alia*, on the ground that punitive damages were incompatible with Japanese public policy and therefore had no effect in Japan; accordingly, the payment made in the US should be appropriated to the satisfaction of the compensatory part of the foreign judgment. Thus the question above.

3. Rulings

The first instance court (Osaka District Court) considered that the punitive damages ordered by the Californian court were effectively punitive in nature and as such against public policy and had no effect in Japan. The court then considered that the payment made abroad could not correspond to the payment of the punitive damages part, because this would result in enlarging the scope of the enforcement of the other part of the judgment and consequently lead to a result that did not substantially differ from the recognition of the effect of the punitive award. The court stated that the payment made abroad corresponded to the part *other than* the punitive portion of the damages. It finally ruled that the enforcement petition was to be admitted to the extent of the remaining amount (i.e. only USD 50,635), after deducting both the payment already made (USD 134,873) and the punitive damages part (USD 90,000).

On appeal, the issue of punitive damages was not addressed by the second Instance Court (Osaka High Court). The Court decided to reject the enforcement of the Californian default judgment on the ground of violation of procedural public policy of Japan because Y was deprived of an opportunity to file an appeal as the notice of entry of judgment was sent to a wrong address. However, unsatisfied with the ruling of the High Court as to whether Y was actually deprived of an opportunity to file an appeal, the Supreme Court quashed the High Court ruling and remanded the case to the same court for further examination. Again, the issue of punitive damages was not raised before the Supreme Court.

Before the Osaka High Court, as the court of remand, the issue of the enforceability of punitive damages was brought back to the center of the debate. In this respect, like the Osaka District Court, the Osaka High Court considered that the USD 90,000 award was punitive in nature and therefore incompatible with public policy in Japan. However, unlike the Osaka District Court, the High Court considered that since the obligation to pay punitive damages *in* California could not be denied, the payment made abroad through the compulsory execution procedure should be appropriated to the satisfaction of the amount ordered by the Californian court as a whole. Therefore, since the remaining part (i.e. USD 140,635) did not exceed the total amount of the foreign judgment excluding the punitive damages part (i.e. USD 185,500), the High Court considered that its enforcement was not contrary to public policy. Unhappy with this ruling, Y appealed to the Supreme Court.

The Supreme Court disagreed (decision available here, in Japanese only). According to the Supreme Court, “if payment was made with respect to an obligation resulting from a foreign judgment including a part ordering the payment of monies as punitive damages, which do not meet the requirements of Art. 118(iii) CCP, it should be said that the foreign judgment cannot be enforced as if the said payment was appropriated to the satisfaction of the punitive damages part, even when such payment was made in the compulsory execution procedure of the foreign court” (translation by author).

The Supreme Court considered that the payment made should be appropriated to the satisfaction of the parts of the foreign judgment other than punitive damages. According to the Supreme Court, punitive damages had no effect in Japan and therefore, there could be no obligation to pay punitive damages when deciding the effect of a payment of an obligation resulting from a foreign judgment. The Supreme Court finally agreed with the Osaka District Court in considering that, since there was no obligation on the part of Y to pay punitive damages due to their incompatibility with Japanese public policy, Y’s obligation under the foreign judgment was limited to USD 185,500. Therefore, since Y had already paid USD 134,873 in the compulsory execution procedure in rendering state, Xs were entitled to claim only the difference of USD 50,635.

4. Comments:

The ruling of the Supreme Court is interesting in many regards. First, the

Supreme Court reiterated its earlier categorical position on the incompatibility of punitive damages with Japanese public policy. This position is in line with the prevailing opinion in Japan according to which punitive damages are *in principle* contrary to Japanese public policy due to the fundamental difference in nature (civil v. criminal) and function (compensatory v. punitive/sanction) (For a general overview on the debate in Japan, see Bélih Elbalti, “Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan”, *Osaka University Law Review*, Vol. 66, 2019, pp. 7-8, 24-25 available here).

Second, the solution in the present decision can be regarded as a logical consequence of the absolute rejection of punitive damages. In effect, in deciding as it did, the Supreme Court showed its intention to discharge the judgment debtor from his/her obligation to pay punitive damages resulting from a foreign judgment even in the case where a partial payment has been made as a consequence of a compulsory procedure before the foreign court. Indeed, since there can be no obligation to pay punitive damages resulting from a foreign judgment, any payment made abroad should be appropriated to the satisfaction of the parts of the awarded damages other than the punitive portion.

Third, after the first Supreme Court decision on punitive damages, a practice has been established based on which judgment creditors who seek the enforcement of a foreign judgment containing punitive damages, usually, content themselves with the request for the enforcement of the compensatory part to the exclusion of the punitive part of the foreign judgment. (See for example, the Supreme Court judgment of 24 April 2014, available here). For a comment on this case from the perspective of indirect jurisdiction, see Bélih Elbalti, “The Jurisdiction of Foreign Courts and the Recognition of Foreign Judgments Ordering Injunction - The Supreme Court Judgment of April 24, 2014, *Japanese Yearbook of International Law*, vol. 59, 2016, pp. 295ss, available here). This practice is expected to continue after the present decision as well. However, in this respect, the solution of the Supreme Court raises some questions. Indeed, what about the situation where the judgment creditor initiates a procedure in Japan seeking the enforcement of compensatory part of the judgment first? Would it matter if the judgment creditor shows the intention to claim the payment of the punitive part later so that he/she ensures the satisfaction of the whole amount of the award? More importantly, if the judgment debtor was obliged to pay for example the full award including the punitive part in the rendering state (or in another state

where punitive damages are enforceable), would it be entitled to claim in Japan the payment back of the amount that corresponds to the punitive part of the foreign judgment? Only further developments will provide answers to these questions.

In any case, one can somehow regret that the Supreme Court missed the chance to reevaluate its position with respect to punitive damages. In effect, the court ruled as it did without paying the slightest heed to the possibility of declaring punitive damages enforceable be it under certain (strict) conditions. In this regard, the court could have adopted a more moderate approach. This approach can consist in admitting that punitive damages are not *per se* contrary to public policy, and that the issue should be decided on a case by case basis taking into account, for example, the evidence produced by the judgment creditor to the effect that the awarded amount would not violate public policy (see in this sense, Toshiyuki Kono, "Case No. 67" in M Bälz *et al.* (ed.), *Business Law in Japan - Cases and Comments - Intellectual Property, Civil, Commercial and International Private Law* (Wolters Kluwer Law & Business, 2012), p. 743s); or when the amount awarded is not manifestly disproportionate with the damages actually suffered (for a general overview, see Bélich Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments, *Japanese Yearbook of Private International Law*, Vol. 16, 2014, pp. 274-275 available here).

In this respect, it is interesting to note that such an approach has started to find its way into the case law in some jurisdictions, although the methods of assessment of compatibility of punitive damages with the public policy of the recognizing state and the outcome of such an assessment differed from one jurisdiction to another (for a general overview, see Csongor I Nagy, Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe, 30 *Nederlands Internationaal Privaatrecht* 1 2012, pp. 4ss). For example, the Greek Supreme Court has refused to enforce punitive damages but after declaring that punitive damages may not violate public policy if they are not excessive (judgment No. 17 of 7 July 1999, decision available at the Greek Supreme Court homepage). The French *Cour de cassation* has also refused to enforce a foreign judgment awarding punitive damages, but - again - after declaring that punitive damages were not *per se* contrary to French *ordre public*, and that that should be treated as such only when the amount award was

disproportionate as compared with the sustained damages (judgment No. 09-13.303 of 1 December 2010, on this case, see Benjamin West Janke and François-Xavier Licari, “Enforcing Punitive Damages Awards in France after Fountaine Pajot”, 60 *AJCL* 2012, pp. 775ss). On the other hand, the Spanish Supreme Court accepted the full enforcement of an American judgment including punitive damages (judgment of No. 1803/2001 of 13 November 2001; on this case see Scott R Jablonski, “Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts - A Recent Case in the Supreme Court of Spain” 24 *JLC* 2005, pp. 225ss). Finally, the recent extraordinary *revirement jurisprudentiel* of the Italian Supreme Court deserves to be highlighted. Indeed, in its judgment No. 16601 of 5 July 2017, the *Corte Suprema di Cassazione* declared that punitive damages could be enforced under certain conditions after it used to consider, as Japanese courts still do, that punitive damages as such were contrary to Italian public policy (on this case see, Angelo Venchiarutti, “The Recognition of Punitive Damages in Italy: A commentary on *Cass Sez Un 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc*” 9 *JETL* 1, 2018, pp.104ss). It may take some time for Japanese courts to join this general trend, but what is sure is that the debate on the acceptability of punitive damages and their compatibility with Japanese public policy will certainly be put back in the spotlight of doctrinal discussions in the coming days.