

ITALY

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Recognition of US punitive damages

Cassazione Sezioni Unite, 5 July 2017, no. 16601

Where were we before?

- **Cassazione no. 1183/2007:** NO recognition of punitive damages as inconsistent with the Italian legal system - tort law essentially serves a compensative function
- **Cassazione no. 1781/2012:** NO recognition of judgments which do not explicitly mention punitive damages, if the award is 'abnormal' and there is no statement of reasons – Application of proportionality and reasonableness test, which requires the qualification of the liability, the criteria to assess damages and their legal basis to be stated.

Where were we last year? Cassazione no. 9978/2016 Punitive damages NOT per se conflicting with public policy -

- A motorcycle racer suffered serious personal injuries due to the defect of the crash helmet produced by an Italian company (Axo) and sold by an American company (Nosa). Nosa accepted a compromise agreement with the victim and sued Axo for the reimbursement. On the basis of the potential liability test, three US Courts ruled that the producer had to reimburse the following sums:
- 2008: \$ 1.436.136 plus annual interest of 11%,
- 2009: \$ 106,500 for costs, legal expenses and interests
- 2010: \$ 9,000 for costs, legal expenses and interests.
- In 2014 the court of appeal of Venice upheld Nosa's claim for the recognition of the judgment, arguing that the producer did not intervene in the trial to support the seller's arguments neither opposed the transaction

Waiting for the Grand Chamber....

Follow-up: Cassazione Sezioni Unite 16601/2017 Punitive damages NOT per se conflicting with public policy

ARGUMENTS

- Stricter definition of public policy: fundamental rights common to foreign countries and protected by the EU Treaties, the EU Charter of fundamental rights and the European Convention of Human Rights
- Compensation prevailing but not exclusive in tort law. Damages may serve deterrent/punitive functions which better satisfy the principle of effectivity

Opening of floodgate? NO! 'counter-limits'

- **1. Principle of legality:** Punitive damages must be based on the legislation or a 'similar legal source' in the foreign legal system (arts. 23-25 of the Italian Constitution, art. 7 ECHR, art. 49 EChFR)
- **2. Predictability:** Damages must be predictable and subject to a certain ceiling
- **3. Proportionality at double level:** Punitive damages must be proportionate to both tortfeasor's fault and compensative damages (art. 49 EChFR)

What actually changes after SSUU 16601/2017?

A) Functions of tort law at national level

- Almost nothing changes. That damages serve multiple purposes is not a new statement, especially in the field of non-pecuniary damages.
- The court broke down an open door – the solely compensatory function was a weak, false argument by Cass. No. 1183/2007

B) Private international law level

- Huge change: Even where punitive damages are explicitly mentioned in the foreign judgment, Italian courts, instead of simply rejecting the *exequatur*, must apply the public policy test and assess the effects of the recognition **on a case-by-case basis**
- As expected last year, the Italian Cassazione follows the way of the French Cour de Cassation, but the applicable test is more complex

Looking forward to future applications

- More discretionary power given to Italian courts
- Complexity of judgments
- Initial unpredictability