The recognition of punitive damages by French courts: the end of the “punitive damage war”? 

Punitive damages. Private fines awarded in US tort and contract decisions, “in addition to actual damages when the defendant acted with recklessness, malice or deceit; more specifically damages assessed by way of penalizing the wrong doer or making an example to others” (Black’s Law Dictionary). Although inherent to US tort and contract law, European countries, including France, for years refused to recognize decisions including punitive damages. The basis for the refusal to recognize was that such damages simply controverted national public policy.

Europe’s hostile attitude towards the recognition of decisions awarding punitive damages has led to what some American practitioners call the “punitive damage war”, considering that “the chances of getting a substantive punitive damages judgment from a U.S. court recognized by any court outside the U.S are virtually nil”.

For years, French courts have not wavered in their refusal to recognize U.S judgments granting punitive damages, citing the violation of French public policy as the reason.

For example, in 2007, the French Supreme Court ruled that a decision awarding punitive damages was contrary to French public policy, observing that the punitive damages were “clearly disproportionate as they were largely higher than the sale price ...”.

Three main principles of French tort and contract law were used to justify the violation of French public policy: (i) unjust enrichment, (ii) the principle of proportionality of penalties and (iii) the principle that the reparation cannot exceed the actual damage.
A movement has in recent times developed within the community of French legal scholars, supporting the recognition of punitive damages by French courts. One particularly prescient member\(^1\) of this community predicted in 2007 that French judges would no longer necessarily refuse to recognize foreign judgments containing a dose of punitive damages.

This turned out to be true.

In 2010, the French Supreme Court\(^2\) reversed its practice, accepting the principle of recognition of US judgments granting punitive damages.

In this case, a couple bought a catamaran ship manufactured in La Rochelle by a French company for 826,009 USD. After seeing damage to the catamaran, the couple sued the French company before a Californian relief judge, who ordered the French company to pay the couple 3,256,734.45 USD, including 1,460,000 USD of punitive damages.

This was the first decision in which a French court agreed to examine the recognition of a decision awarding punitive damages, declaring that in principle, punitive damages are not contrary to French public policy as long as they are not disproportionate to the damage caused to the plaintiffs by the breach of contract.

This decision is recognized as a landmark decision in the field of foreign judgment recognition in that it agreed to entertain the idea of recognizing a judgment contaminated with legal notions completely foreign to the civil law system.

It is however premature to consider that the issue has been settled. In a jurisdiction where precedent is not engrained in the legal tradition, it would not be at all surprising to see resistance on the part of courts of appeal.

It would therefore come as no surprise to Civil Law practitioners if this landmark Supreme Court case did not really gain traction in French case law, which also implies that the punitive damage war is not yet over, and that the recognition of such judgments will continue to be a contentious issue in the French courts.

In reversing the traditional practice of refusing to recognize judgments awarding punitive damages, the French Supreme Court clearly stated that “punitive damages are not a violation of French public policy”. Also, by


\(^{2}\) Cass Civ. 1 December 10, 2010
accepting the idea of recognizing a U.S punitive damage judgment, the French Supreme Court necessarily excluded the principle of unjust enrichment from its analysis.

Indeed, the traditional line of reasoning became more and more difficult to defend, to the extent that the principles of unjust enrichment and the notion of full reparation of damage caused (not more and not less), are not considered a part of French public policy.

One could even go so far as to suggest that French courts refused in the past to recognize punitive damages and may continue do so simply because such damages had no legal existence in French civil law. However, just because a notion of law or even a procedure is foreign to the local legal lexicon, this does not necessarily mean that it is contrary to public policy. A good example would be the common law declaratory judgment. The declaratory judgment procedure does not exist in French civil procedure, yet it would occur to no one to suggest that a foreign judgment granting declaratory relief should be denied recognition.

The Supreme Court, in its decision, traced a perfect escape route for those courts of appeals that do not want to recognize punitive damages. It did so by conditioning the recognition of punitive damages with the notion of proportionality, imported from criminal law.

By inserting the principle of proportionality into the foreign judgment recognition procedure, the Supreme Court confirmed a decision it entered in 2009 in which it held that a civil contempt fine ordered by a U.S. court can be recognized if the fine in question is proportional to the damage caused. It cited Article 8 of the 1789 Declaration of Civil and Human Rights which prohibits disproportionate penalties.

So while accepting the principle of recognizing foreign judgments containing punitive damages, it seems that the French Supreme Court has crossed the line which hitherto prohibited the exequatur judge from delving into the merits of the case. It is difficult to see how the notion of proportionality can be weighed by the exequatur without requiring the parties to reargue, at least in part, the merits of the case.

It is therefore not all astonishing that in a landmark decision recognizing punitive damages as a matter of principle, the Supreme Court in practice declined to enforce the foreign judgment in question, agreeing with the Court of Appeals that the punitive damages were disproportionate. In other words, the Supreme Court accepted recognition only in theory. In practice, the judicial aversion to it will probably make recognition a rare occurrence.
One should also recognize that unlike popular revolutions, legal revolutions in France take a very long time before they are accepted and actually take effect. The French Supreme Court’s attempt, a number of years ago, to import into the French legal psyche the common law doctrine of estoppel\(^3\) has in practice been relegated to nothing more than a declaration of intent. Courts have resisted applying the doctrine\(^4\) and those that actually did try to apply it did so in a confused and unpersuasive manner\(^5\).

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\(^4\) CE July 2, 2014 Sté Pace Europe, req. N°368590: French administrative courts refuse to recognize the common law doctrine of estoppel, and its application to tax litigation.

\(^5\) Cass. Civ. 1. May 6, 2009 no 08-10.281