

DIRITTO DEL COMMERCIO INTERNAZIONALE

Anno XXX Fasc. 4 - 2016

ISSN 1593-2605

Giovanni Zarra

THE DOCTRINE OF PUNITIVE DAMAGES AND INTERNATIONAL ARBITRATION

Estratto



Milano • Giuffrè Editore

GIOVANNI ZARRA

THE DOCTRINE OF PUNITIVE DAMAGES
AND INTERNATIONAL ARBITRATION

Abstract. — 1. Introduction: The Relevance of a Discussion on Punitive Damages and International Arbitration. — 2. Brief Analysis of the Doctrine of Punitive Damages in US Law. — 3. The Ongoing Debate on Punitive Damages in Civil Law Countries. — 4. Existing Approaches on the Suitability of Arbitrators to Award Punitive Damages in International Arbitration and the Enforceability of International Arbitral Awards Setting Forth Punitive Damages. — 5. The Law Applicable to the Issue of Punitive Damages in International Arbitration. — 6. Punitive Damages in International Investment Arbitration (*in a nutshell*).

Abstract

This article analyzes the possibility to award punitive damages in international arbitration. First of all, it studies the functions of punitive damages in US litigation and the reasons behind the growing interest for this remedy in civil law countries and in the doctrine of international arbitration. Secondly, this article argues that, notwithstanding the fact that arbitration has become the natural judge of international commercial disputes, the competence of international arbitrators cannot be extended to remedies of quasi-criminal nature, such as punitive damages. The work finally briefly analyzes the possibility to award punitive damages in international investment arbitration and demonstrates that it is not possible to observe, in international law, a remedy which could be compared to punitive damages as recognized in national law systems.

1. *Introduction: The Relevance of a Discussion on Punitive Damages and International Arbitration.*

Punitive or exemplary damages are commonly defined as “money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of

fragantly violating the plaintiff's rights" (1). Traditionally, and in general terms, the main purposes for which punitive damages have been awarded are to *punish* the defendant for outrageous misconduct and to *deter* the defendant and others from similarly misbehaving in the future (2).

From an historical point of view, it is possible to find predecessors of punitive damages since the Code of Hammurabi (3). However, the figure as we know it today was created and developed in the English common law system since 1275 in the form of the so-called "multiple damages", *i.e.* punitive damages measured according to a predetermined scale based on a multiplication of the amount of the damage actually occurred (4). Since 1763 judges have also started to authorize "exemplary damages", mainly aimed at fulfilling punitive and deterring functions (5). Punitive damages find today their main expressions and applications in the US system of law, where all States but 4 use to award this kind of damages (6). In this regard, it is worth noting that today punitive damages are awarded by US judges

(1) D. G. OWEN, *A Punitive Damages Overview: Functions, Problems and Reform*, *Villanova Law Review*, 1994, p. 364. In this regard, it is worth considering that, due to their peculiarities (examined below), punitive damages according to US law cannot be simplistically equated to other forms of deterrent and punishing remedies which might be adopted by civil law systems. See, in this regard, G. PONZANELLI, *I danni punitivi*, in P. SIRENA (ed.), *La funzione deterrente della responsabilità civile*, Milan, 2011, p. 319 and ff. In the present work we will adopt US punitive damages as a paradigm and will, then, on a case-by-case basis, highlight the peculiarities of the US law of punitive damages which cannot be considered as transplantable in other systems of law.

(2) *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 US 424, 432 (2001). In this regard it is worth highlighting that punitive damages are considered to be applicable in cases of "opportunistic breaches of contract", *i.e.* breaches occurring "when the breaching party gains more than she bargained for at the expense of the non-breaching party"; see N. P. CASTAGNO, *International Commercial Arbitration and Punitive Damages*, *Arbitraje: Revista de Arbitraje Comercial y de Inversiones*, 2011, p. 730.

(3) For a deep analysis of the history of punitive damages see M. M. BELLI, *Punitive Damages: Their History, Their Use and Their Worth in Present Day Society*, *UMKC Law Review*, 1980, p. 1 and ff. See also J. Y. GOTANDA, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, *Harvard International Law Journal*, 1997, p. 62; D. G. OWEN, n. 1, p. 368 and ff.

(4) See the Synopsis of Statute of Westminster I, 3 Edw., Ch. 1 (Eng.), according to which: "Trespassers against religious persons shall yield double damages".

(5) See *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763).

(6) Such States are Louisiana, Massachusetts, Nebraska and Washington. Initially, however, punitive damages were considered by US judges as "a monstrous heresy (...) an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law". See *Fay v. Parker* 53 N.H. 342, 382 (1873). It should be noted that, contrary to the practice in the US, the award of punitive damages in England has been drastically reduced since the House of Lords Decision in *Rookes v. Barnard* (1964) AC 1129. However, according to K. NOUSSIA, *Punitive Damages in Arbitration: Panacea or Curse?*, *Journal of International Arbitration*, 2010, p. 279 such a restrictive approach is not justifiable and, indeed, some judicial decisions, such as *Kuddus v. Chief Constable of Leicestershire*, [2002] 2 A.C. 122, militate in a different sense. Punitive damages are today accepted also in Ireland, Wales, Cyprus and People's Republic of China. See J. Y. GOTANDA, *Punitive Damages: A Comparative Analysis*, *Villanova University School of Law Public Law and Legal Theory, Working Paper No. 2003-6*, 2003, p. 1 and ff.

not only in tort cases (in which there has usually been the recourse to punitive damages) but also in cases arising from breach of contract (7).

On the contrary, civil law systems and scholars have been traditionally far from an idea of damages that goes beyond of the mere compensatory function, *i.e.* an approach according to which damages may only put the person (or entity) which suffered them in the position in which he would have been if the loss did not occur. The award of punitive damages has been therefore traditionally avoided by these systems of law (8). Similarly, the enforcement of foreign decisions (and arbitral awards) providing for punitive damages has been usually refused due to the contrariety of punitive damages to international public policy (which allegedly encapsulates the compensatory function of damages) (9).

Doubts have also generally occurred with regard to the possibility for arbitrators to award punitive damages. Indeed, due to the “quasi-criminal” nature of punitive damages (10), it is arguable that, even if one admits the abstract possibility that punitive damages are awarded in civil litigation before national courts, subjects which are different from State judges, such as arbitrators (whose institution is due to a private manifestation of party autonomy), cannot make recourse to a form of remedy which should allegedly be an exclusive competence of the State (11).

However, the debate on the availability of punitive damages in international litigation of civil law countries and international arbitration, as well as on the worthiness of making recourse to such a legal tool, is far from being settled.

(7) See J. Y. GOTANDA, n. 3, p. 65; W. DODGE, *The Case for Punitive Damages in Contracts*, *Duke Law Journal*, 1999, p. 629 and ff.; C. MEURKENS, *The Punitive Damages Debate in Continental Europe: Food for Thought*, *Maastricht European Private Law Institute Working Paper No. 2014/01*, p. 7. Such a solution was already considered by G. PONZANELLI, *I punitive damages nell'esperienza nordamericana*, *Rivista di diritto civile*, 1983, p. 476-477 and p. 483-484. K. NOUSSIA, n. 6, p. 279, stated that the choice English of English judges to limit punitive damages to tort cases without extending them to contract claims is today unjustifiable.

(8) See H. KOZIOL, *Punitive Damages - A European Perspective*, *Louisiana Law Review*, 2008, 741 and ff.; C. MEURKENS, n. 7, p. 2 and ff.; F. QUARTA, *La funzione deterrente della responsabilità civile*, Naples, 2010, p. 30-31.

(9) See, *inter alia*, Italian Corte di Cassazione, 19 January 2007, n. 1183/2007; German Bundesgerichtshof, Decision of 4 June 1992 in *Neue Juristische Wochenschrift*, 1992, 3096 and ff.; Bezirksgerichtspräsident Sargans (Switzerland) Decision of 1 October 1992 mentioned in A. SARAVALLE, *I punitive damages nelle sentenze delle corti europee e dei tribunali arbitrali*, *Rivista di diritto internazionale privato e processuale*, 1993, p. 875. See also F. BORGIA, *Sentenza straniera di condanna a danni punitivi e ordine pubblico*, *Studi in onore di Umberto Leanza*, Naples, 2008, p. 851 and ff. On the concept of international public policy see footnote 90 below.

(10) See M. G. GÓMEZ TOMILLO, *Punitive Damages: A European Criminal Law Approach. State Sanctions and the System of Guarantees*, *European Journal of Criminal Policy and Research*, 2013, p. 218 and ff.; D. G. OWEN, n. 1, p. 365.

(11) See *Garrity v. Lyle Stuart*, 40 N.Y.2d 354 (1976). See also F. BRICOLA, *La riscoperta delle “pene private” nell’ottica del penalista*, in F. D. BUSNELLI, G. SCALFI (eds.), *Le pene private*, Milan, 1985, p. 28 and ff.; I. ROTHKEN, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, *Golden Gate University Law Review*, 1991, p. 387 and ff.

With regard to civil law scholars, some of them are today reconsidering the possibility of awarding punitive damages. This is mainly due to the feeling perceived by part of them that civil damages shall also serve social and law-enforcement functions and that it is therefore desirable to introduce, in the cases of civil liability, a remedy which has also a deterrent function⁽¹²⁾. Moreover, and as a consequence, the contrariety of foreign award of punitive damages to international public policy has been put into question. Spanish⁽¹³⁾, German⁽¹⁴⁾, French⁽¹⁵⁾ and Italian⁽¹⁶⁾ judges and scholars are therefore today considering whether it is worth introducing

(12) Punitive damages are often perceived as societal damages: see C. M. SHARKEY, *Punitive Damages as Societal Damages*, *The Yale Law Journal*, 2003, p. 347 and ff. Civil law scholars have started studying punitive damages since the eighties: see G. PONZANELLI, n. 7, p. 435 and ff.; V. ZENO-ZENCOVICH, *Il risarcimento esemplare, Responsabilità civile e previdenza*, 1983, p. 40 and ff.; V. ZENO-ZENCOVICH, *Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai punitive damages di common law*, *Giurisprudenza italiana*, 1985, p. 12 and ff.; G. PONZANELLI, *I punitive damages, il caso Texaco e il diritto italiano*, *Rivista di diritto civile*, 1987, p. 405 and ff.; A. SARAVALLE, n. 9, p. 867 and ff.; G. BROGGINI, *Compatibilità di sentenze statunitensi di condanna al risarcimento di "punitive damages" con il diritto europeo della responsabilità civile*, *Europa e diritto privato*, 1999, p. 479 and ff.; E. URSO, *Recenti sviluppi nella giurisprudenza statunitense e inglese in materia di punitive damages: i casi TXO Production Corporation v. Alliance Resources Corporation e AB v. South West Water Services Ltd.*, *Rivista di diritto civile*, 1995, p. 81 and ff.; Z. CRESPI REGHIZZI, *Sulla contrarietà all'ordine pubblico di una sentenza straniera di condanna a punitive damages*, *Rivista di diritto internazionale privato e processuale*, 2002, p. 977 and ff.; M. LOPEZ DE GONZALO, *Punitive damages e ordine pubblico*, *Rivista di diritto internazionale privato e processuale*, 2008, p. 77 and ff.; E. D'ALESSANDRO, *Pronunce americane di condanna al pagamento di punitive damages e problemi di riconoscimento in Italia*, *Rivista di diritto civile*, 2007, p. 383 and ff.; A. RICCIO, *I danni punitivi non sono, dunque, in contrasto con l'ordine pubblico interno*, *Contratto e impresa*, 2009, p. 854 and ff.; V. BEHR, *Punitive Damages in America and German Law - Tendencias Towards Approximation of Apparently Irreconcilable Concepts*, *Chicago - Kent Law Review*, 2003, p. 105 and ff.; E. BUYÜKSAGIS, I. EBERT, D. FAIRGRIEVE, C. MEURKENS, F. QUARTA, *Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism*, *European Business Law Review*, 2016, p. 137 and ff. A complete opera on the subject is C. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, The Hague, 2014. Certain scholars have expressly taken the position that the function of damages is not only compensatory and therefore punitive damages should be explicitly allowed. See F. QUARTA, n. 8, p. 110 and ff.; P. SIRENA, *Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa*, *Rivista di diritto civile*, 2006, p. 531 and ff.; F. D. BUSNELLI, *La funzione deterrente e le nuove sfide della responsabilità civile*, in Sirena (ed.), n. 1, p. 37 and ff. Others, however, still have not reached a solution in this regard: see, for instance, G. PONZANELLI, n. 1, p. 319 and ff.

(13) Tribunal Supremo, Sala de lo Civil, 13 November 2001, n. 2039/1999.

(14) Bundesverfassungsgericht, 24 January 2007, in JZ, 2007, p. 1046 and ff.; Bundesverfassungsgericht, Beschl, 17 December 2004. See V. BEHR, n. 12, p. 105 and ff.

(15) Cour de Cassation, 7 November 2012, n. 11-23871; and, mainly, Cour de Cassation, 1 December 2010, n. 90-13303 Bull. civ.II, No. 248, so-called *Fontaine Pajot* case. See in this regard K. J. PARKER, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, *Georgia Journal of International and Comparative Law*, 2013, p. 390 and ff.; B. W. JANKE, F. X. LICARI, *Enforcing Punitive Damage Awards in France after Fontaine Pajot*, *The American Journal of Comparative Law*, 2012, p. 775 and ff.; V. WESTER-OUISSSE, T. THIEDE, *Punitive Damages in France: A New Deal?*, *Journal of European Tort Law*, 2012, p. 115 and ff.

(16) See Italian Corte di Cassazione, 16 May 2016, *Ordinanza* n. 9978/2016, according to which it is now time for a reconsideration of the issue of enforcement of foreign

certain kind of remedies that do not have only a compensatory function ⁽¹⁷⁾ and whether it would be more appropriate granting the enforcement of foreign decisions awarding punitive damages.

In parallel, and under the influence of the growing interest for punitive damages in national litigation, also international arbitration scholars are questioning whether it would be worth introducing this remedy among the tools to which arbitrators can make recourse. The possibility of allowing an award of punitive damages in international arbitration might be justified on the basis of three main factors. The first of such factors is that arbitration is today perceived as a perfect and meaningful surrogate for national litigation (with particular regard for international commercial disputes) and, therefore, it is said that arbitrators should be able to award all the remedies that may be awarded by national judges ⁽¹⁸⁾. The second factor is that, as we have seen ⁽¹⁹⁾, punitive damages are today considered awardable also in cases of breach of contract; considering that arbitrators usually deal with contractual cases, they are today facing the issue of the possibility to make recourse to punitive damages. The third and final factor is given by the extension of arbitral jurisdiction also to tort cases arising from and/or related to contractual disputes on which they have jurisdiction ⁽²⁰⁾. The three above circumstances, taken together, mean that today arbitrators may potentially face all the kind of disputes from which awards of punitive damages have usually arisen.

From all the above discussion it emerges the necessity to try to offer a systematization of the current debate on punitive damages, with the final goal of understanding whether international arbitrators have the power to award such damages and, if so, whether it would be worth awarding this remedy. This will, first of all, require understanding how punitive damages work in litigation, what are the *pros* and *cos* of adopting such a remedy

decisions awarding punitive damages and, for this reason, a decision on such a issue is requested to the Plenary Session (*Sezioni Unite*) of the Corte di Cassazione.

⁽¹⁷⁾ Argentina has been the first civil law country expressly allowing punitive damages. See M. IRIGOYEN-TESTA, *Punitive Damages in Developing Countries: The Argentine Case, The Latin American and Iberian Journal of Law and Economics*, 2015, p. 79 and ss.

⁽¹⁸⁾ T. STIPANOWICH, *Punitive Damages and the Consumerization of Arbitration*, *Northwestern University Law Review*, 1997, p. 5 and ff.; T. STIPANOWICH, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, *Boston University Law Review*, 1986, p. 971; S. J. WARE, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, *Fordham Law Review*, 1994, p. 571; J. A. FRIEDLANDER, *Punitive Damages as a Remedy for Discrimination Claim Arbitrations in the Securities Industry*, *Hofstra Law Review*, 1994, p. 245; B. R. HAJICEK, *Punitive Damages in New York Arbitration: Who is Really Being Punished?*, *Journal of Dispute Resolution*, 1992, p. 375.

⁽¹⁹⁾ See *supra* n. 7.

⁽²⁰⁾ See J. D. M. LEW, L. A. MISTELIS, S. KRÖLL, *Comparative International Commercial Arbitration*, The Hague, 2003, p. 150-151. See also N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, *Redfern and Hunter on International Arbitration (Sixth Edition)*, The Hague - Oxford, 2015, p. 71-154.

(especially in civil law countries) and, finally, whether it is possible and worth recognizing and enforcing a foreign national decision awarding punitive damages. Only after having retraced the ongoing debate on the structure and functions of punitive damages it will, indeed, be possible to correctly assess the possibility to award punitive damages in international arbitration.

The present article may be, therefore, divided in two parts, the first of which will start by offering a clear framework of the US law of punitive damages by analyzing the features and functions of this remedy (paragraph 2) and will proceed by studying the various approaches which have emerged as to the functions of damages and the worthiness of awarding punitive damages in national litigation, with particular regard to the differences arisen between civil and common law systems (paragraph 3). After having showed the reasons behind the growing interest for punitive damages in litigation, the article will then turn, in its second part, to the parallel debate on the possibility of awarding punitive damages in international arbitration. It will, first of all, focus on the existing approaches regarding the abstract power of arbitrators to award punitive damages in relation to the enforceability before national courts of arbitral awards providing for punitive damages (paragraph 4) and, then, will analyze the matter from the perspective of the concrete availability of such remedy during arbitral proceedings, on the basis of an analysis of the law applicable to punitive damages in international arbitration (paragraph 5). The article will finally briefly analyze the issue of punitive damages in arbitrations between States and foreign investors (paragraph 6).

2. *Brief Analysis of the Doctrine of Punitive Damages in US Law.*

As already mentioned, punitive damages are traditionally awarded with the purposes of punishment and deterrence. This means that such damages are awarded in order to punish the wrongdoer for his behavior and “in order to deter him, and others as well, from again engaging in socially unacceptable conduct” (21).

However, it is possible to say that the functions of punitive damages are more than what stated above (22). In order to explain such functions, which, as it will be demonstrated, may be ideally divided in public/societal functions and private functions, it is prior necessary to understand what is the approach underlying the law of damages in US common law, where the recourse to punitive damages is very frequent. In this regard, it is worth

(21) M. M. BELL, n. 3, p. 6. The doctrine of punitive damages has been very strongly criticized by J. D. LONG, *Punitive Damages: An Unsettled Doctrine*, *Drake Law Review*, 1976, p. 870 and ff.

(22) F. QUARTA, n. 8, p. 139.

starting from the assumption that US lawyers do not apply a sharp distinction between the public and private areas of the law. This means that they do not consider that criminal law is solely (or primarily) concerned with punishment, while, oppositely, private law is solely (or primarily) concerned with compensation⁽²³⁾. On the contrary, according to the US approach, all crimes include an injury and, vice versa, all cases of civil liability are considered to also affect the community⁽²⁴⁾. On this basis, it is first of all possible to affirm that punishment is considered to fulfil a public and societal function also if applied in civil disputes. Secondly, the idea of adopting a criminal remedy in civil litigation does not conceptually run against any principle on which the legal system is based. Finally, the fact that punitive damages may be considered as having strong criminal elements does not *per se* involve a different procedure and different forms of protection for the party against whom such a remedy is going to be awarded⁽²⁵⁾.

As to the public functions, first of all, US courts and scholars say that punitive damages serve an important *educational* function, which shall be associated to the deterrent function, and which acts in two significant respects⁽²⁶⁾. Firstly, punitive damages allegedly certify the existence of a certain legally protected right and a correlative legal duty. Secondly, punitive damages proclaim the importance that the law attaches to the invaded right and the corresponding condemnation that society attaches to such a violation. This finally means that punitive damages help in *enforcing the law*, by increasing compliance with the rule of law, due to the fear of all members of the society of incurring in punishment⁽²⁷⁾.

Another public function that is usually related to punitive damages is *retribution*. They are, indeed, a sort of *private revenge* which substantiates in a judicial fine to be paid by the wrongdoer to a person who suffered a grave damage. In this regard, it is worth noting that, according to US scholars, punitive damages foster values such as freedom and equality, due to the fact that they recreate the substantial equilibrium that has been broken by the willful action carried out by the defendant⁽²⁸⁾. For this

⁽²³⁾ A. P. HARRIS, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, *Alabama Law Review*, 1989, p. 1090 and ff.

⁽²⁴⁾ A. P. HARRIS, n. 22, p. 1092. See, in this regard, also G. PONZANELLI, n. 1, p. 321.

⁽²⁵⁾ See M. GALANTER, D. LUBAN, *Poetic Justice: Punitive Damages and Legal Pluralism*, *The American University Law Review*, 1993, p. 1394 and ff. These Authors argue that punitive damages “are but one of a number of forms of legally recognized noncriminal or “civil style” punishments that are as basic to social and legal life as criminal punishment”. The same Authors, at p. 1396, further explain that “punitive awards do not illegitimately evade the safeguards of criminal procedure”.

⁽²⁶⁾ This is the approach sustained by D. G. OWEN, n. 1, p. 374.

⁽²⁷⁾ D. G. OWEN, n. 1, p. 380.

⁽²⁸⁾ D. G. OWEN, n. 1, p. 375.

reason, it is also said that punitive damages *promote justice*, by providing “needed incentives for the initiation of socially desirable civil suits” (29).

With regard to the private function of punitive damages, it substantiates in the *compensatory role* fulfilled by this remedy. Such a role consists in reimbursing the plaintiff for losses not ordinarily recoverable by means of compensatory damages. The reference is made to: (i) legal expenses, which are usually autonomously sustained by each party in US processes; (ii) damages arising from pain and suffering, which are not easily quantifiable; and (iii) cases in which it is not possible to quantify actual losses, such as cases of intellectual property infringements and antitrust cases (30).

The sum of the public functions with the private-compensatory function of damages let an Author talk about the *dualistic* approach to damages in US law (31).

Having ascertained the functions and purposes of punitive damages, it is worth now considering the modalities in which punitive damages are awarded and the requirements for their award (32).

As to how punitive damages are awarded (33), they are normally decided by both trial courts and juries. The former decide whether, as a matter of law, there is sufficient evidence to support a punitive damages award; if so, the latter will (usually discretionally and without the necessity to provide a motivation for its decision) then establish whether, as a matter of fact, it is worth awarding punitive damages (34).

There is no fixed standard to decide the amount of punitive damages. Therefore, by taking into account the aims of a punitive damage award, juries shall award an amount which is deemed sufficient to reach the scopes for which punitive damages are awarded. However, in this regard, it is worth noting that the amount of awardable punitive damages has been today (at least partially) limited by the Supreme Court and by certain legislative acts in order to ensure a certain proportionality between the damage actually occurred and the punishment that is awarded (35).

(29) J. T. SCHMIT, S. T. PRITCHETT, P. FIELDS, *Punitive Damages: Punishment or Further Compensation?*, *The Journal of Risk and Insurance*, 1988, p. 454.

(30) V. BEHR, n. 12, p. 122-125. In this regard, it is also worth noting that the economic analysis of law imposes, in cases of undercompensation, to protect the party who suffered a damage. See G. PONZANELLI, n. 1, p. 321; G. PONZANELLI, *L'attualità del pensiero di Guido Calabresi. Un ritorno alla deterrenza*, *Nuova giurisprudenza civile commentata*, 2006, p. 293 and ff.

(31) V. BEHR, n. 12, p. 105-106.

(32) All these aspects are analyzed in depth in G. PONZANELLI, *I punitive damages (...)*, n. 7, p. 438 and ff.

(33) See C. MEURKENS, n. 7, p. 8.

(34) G. PONZANELLI, n. 1, p. 321.

(35) See *BMW of North America v. Gore*, 517 US 559. The reference applies, *inter alia*, to laws enacted in Colorado, Connecticut and Georgia. See F. D. BUSNELLI, n. 12, p. 46, who talked about a “constitutionalization process” of punitive damages in the US which has brought to a “slimming cure” of grossly excessive damages; V. BEHR, n. 12, p. 117. See also

Concerning the requirements for an award of punitive damages, it is usually said that punitive damages are action-oriented and tortfeasor-oriented⁽³⁶⁾. This means that, in awarding this remedy, it is essential to look at the state of mind of the person whose actions are going to be punished. The defendant shall have caused an undue damage to the plaintiff by acting intentionally, maliciously, consciously, recklessly, willfully, wantonly or oppressively⁽³⁷⁾. Once the existence of one of those states of mind is ascertained, there is discretion upon judges and/or juries to award punitive damages.

The above brief description should suffice in order to understand, in the next paragraph, why civil law countries have traditionally been so suspicious with regard to the award of punitive damages. We will also try to address the ongoing debate on the worthiness of adopting punitive damages outside the framework of US common law.

3. *The Ongoing Debate on Punitive Damages in Civil Law Countries.*

This paragraph will examine the two aspects on which the debate on punitive damages has been developed in civil law countries. It will firstly analyze the approaches on the worthiness of awarding damages with a deterrent function in civil litigation and, subsequently, discuss the opinions emerged as to the possibility of recognizing and enforcing a foreign decision awarding punitive damages.

(a) *The worthiness of awarding punitive damages in civil law countries*

With regard to the possibility of awarding punitive damages, it shall first of all be recalled that civil law countries apply a very sharp distinction between public and private law. Public (criminal) law serves purposes of general societal interest and, through the adoption of certain deterrent legal tools pre-determined by the law, is aimed at preventing the occurrence of certain behaviors. Criminal law is usually associated to various procedural safeguards afforded by constitutions to those accused of public wrongs⁽³⁸⁾. Private law, on the contrary, has only a *monistic* function and serves only compensatory purposes, *i.e.* it is aimed at putting the damaged person in the same position it would have been if the loss determined by the

V. R. JOHNSON, *Punitive Damages, Chinese Tort Law, and the American Experience*, *Frontiers of Law in China*, 2014, p. 327 and ff.

⁽³⁶⁾ V. BEHR, n. 12, p. 113.

⁽³⁷⁾ K. J. BEUCHER, J. B. SANDAGE, *United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement*, *Vanderbilt Journal of Transnational Law*, 1991, p. 971; V. BEHR, n. 12, p. 105.

⁽³⁸⁾ H. KOZIOL, n. 8, p. 745. See also M. L. WELLS, *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*, *Louisiana Law Review*, 2010, p. 564 and ff.

damage did not occur⁽³⁹⁾. The payment of any amount superior to the compensation of the damage occurred is perceived, in civil law systems, as unjust enrichment⁽⁴⁰⁾. The amount of damages shall, indeed, be proportional to the loss occurred (so-called principle of proportionality).

The focus of the law of damages is on the loss/damage occurred to the victim and not on the action of the person who caused the damage (as well as on the state of mind of this person)⁽⁴¹⁾. Moreover, due to the existence of the principle according to which the expenses of the procedure follow the outcome of the case (*i.e.* the loser pays), punitive damages would lose, in civil law countries, one of their main function, *viz.* to compensate the winning party of the expenses he incurred for the litigation.

There are also several differences in the procedure used to award punitive damages, due to the lack, in civil law systems, of juries, which, where existing, are considered to be an expression of the will of the society in cases of public interest.

In this legal framework, it has been convincingly stated that “[civil and] tort law [including punitive damages] is not in a position to achieve the aim of prevention, because if prevention [was] the decisive aim of tort law, punitive damages would have to be awarded regardless of whether the claimant suffered any damage, only taking regard of the defendant’s misbehavior”⁽⁴²⁾.

Moreover, it has been also noted that the extension of quasi-criminal functions to civil disputes would require also the extension of the safeguards and guarantees available in criminal proceedings to defendants in civil suits⁽⁴³⁾.

However, the above traditional approach has been recently put into question, for reasons which are similar in all the various systems. Such reasons are mainly based on the necessity of ensuring the enforcement of law.

The starting point of the above criticism to the monistic function of

⁽³⁹⁾ V. BEHR, n. 12, p. 106. See Italian Corte di Cassazione, 17 September 2013, n. 21255/2013, in *Responsabilità civile e previdenza*, 2014, p. 53, with a comment by F. BENATTI. See also D. BARBIERATO, *Risarcimento del danno e funzione deterrente, Responsabilità civile e previdenza*, 2009, p. 1176.

⁽⁴⁰⁾ See Italian Corte di Cassazione, 8 February 2012, n. 1781/2012. M. SERIO, *La tutela della parte adempiente: il principio di effettività del rimedio risarcitorio e la sua attuazione negli ordinamenti nazionali, Europa e diritto privato*, 2010, p. 1073 and ff.

⁽⁴¹⁾ A. DI MAJO, *La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente*, in P. SIRENA (ed.), n. 1, p. 3-4. BEHR, n. 12, p. 111 and ff. See also Italian Corte di Cassazione, Plenary Session, 22 July 2015, n. 15350/2015.

⁽⁴²⁾ H. KOZIOL, *Chinese Punitive Damages Seen in a Comparative Perspective, Frontiers of Law in China*, 2014, p. 314.

⁽⁴³⁾ M. G. GÓMEZ TOMILLO, n. 10, p. 225, stated: “[m]y point of view, (...) proposes to universalize the system of guarantees and principles of due process in all punitive aspects of the State, which, in turn, is based on historic experience that makes it quite clear how punitive powers granted to the State through the social contract have always been abused”.

damages is given by the fact that nothing precludes a different approach to the law of damages in the Constitution of civil law countries⁽⁴⁴⁾. Such an opinion found a judicial support in the decision n. 641 of 1987 of the Italian Constitutional Court, where it was said that civil liability might also have prevention and sanctioning purposes⁽⁴⁵⁾.

In France, the *Avant-Projet de réforme du droit des obligations et du droit de la prescription* (so-called *Avant-Projet Catala*, due to the surname of its proposer), explicitly proposes the award of punitive damages for the commission of certain torts in French law⁽⁴⁶⁾.

Approaches which somehow favor a non-compensatory conception of damages have been also found in Germany and The Netherlands⁽⁴⁷⁾.

In addition to the above, certain already existing civil law remedies are considered to have the function of punishment rather than compensation⁽⁴⁸⁾. On the basis of the existence of these remedies, it is argued that the monistic function of civil responsibility has been (or, at least, is being) abandoned in favor of a dualistic one and, as a consequence, nothing would preclude also the existence of punitive damages in civil law countries⁽⁴⁹⁾.

However, the vast majority of scholars (correctly, in the opinion of the present author) recognize that the insertion of punitive damages in civil law systems would require a legislative action and could not take place by way of case law⁽⁵⁰⁾. Such an opinion is, firstly, motivated on the basis of the

⁽⁴⁴⁾ F. QUARTA, n. 8, p. 125.

⁽⁴⁵⁾ F. QUARTA, n. 8, p. 44.

⁽⁴⁶⁾ K. J. PARKER, n. 15, p. 392 and ff. This Author has tried to demonstrate that punitive damages are not contrary, and — indeed — are perfectly compliant, with French law of civil responsibility.

⁽⁴⁷⁾ E. BÜYÜKSAGIS, I. EBERT, D. FAIRGRIEVE, C. MEURKENS, F. QUARTA, n. 12, p. 142 and ff.

⁽⁴⁸⁾ The reference is made, inter alia, to the cases of vexatious litigation, regulated by art. 96 of the Italian Code of Civil Procedure, and to the case of abuses in the use of trademarks, regulated by art. 125 of the Italian Code of Industrial Property. See, in this regard, D. BARBIERATO, n. 39, p. 1176 and ff.; M. FRANZONI, *La lite temeraria e il danno punitivo, Responsabilità civile e previdenza*, 2015, p. 1063 and ff.; A. GIORDANO, *Il litigante temerario paga “in ogni caso”. Riflessioni sull’art. 96, comma 3, c.p.c. tra “abuso del processo” e “danni punitivi”*, *Giurisprudenza italiana*, 2012, p. 10 and ff. It is also possible to refer to the French doctrine of *astreintes*, which have some similarities with the remedy set forth by art. 614-bis of the Italian Code of Civil procedure. Indeed, *astreintes* are remedies aimed at coercing the fulfilment of an obligation through the imposition of fines of growing amount. *Astreintes* have not been considered as running against Italian public policy by Italian Corte di Cassazione, 15 April 2015, n. 7613/2015. See A. MENDOLA, *Astreinte e danni punitivi*, *Giurisprudenza italiana*, 2016, p. 562 and ff.; N. SCIARRATTA, *La Cassazione su astreintes, danni punitivi e (funzione della) responsabilità civile*, www.dirittocivilecontemporano.com, 2015, p. 1 and ff. On art. 614-bis of the Italian Code of Civil Procedure, see M. BOVE, *La misura coercitiva di cui all’art. 614-bis c.p.c.*, www.judicium.it, 2010, p. 1 and ff.

⁽⁴⁹⁾ E. BÜYÜKSAGIS, I. EBERT, D. FAIRGRIEVE, C. MEURKENS, F. QUARTA, n. 12, p. 142 and ff. BEHR, n. 12, p. 130 and ff. also notes a certain convergence among civil law systems (in particular the German one) and the US system as to the function of civil responsibility.

⁽⁵⁰⁾ See P. PERLINGIERI, *Le funzioni della responsabilità civile*, *Rassegna di diritto civile*, 2011, p. 115 and ff.; F. D. BUSNELLI, n. 12, p. 59-60; M. G. GÓMEZ TOMILLO, n. 10, p. 229. Contrariwise, see F. QUARTA, n. 8, p. 381-383. See also G. PONZANELLI, n. 1, p. 328. The same

fact that a similar choice would involve several policy considerations which have to be made by the legislator and not by judges. Secondly, it is argued that punitive damages would run against the principle of legal certainty if the awardable amount is not clearly regulated (and limited) by the law, but is just discretionally decided by judges⁽⁵¹⁾. Thirdly, it is worth recalling that, due to the already examined several differences existing between civil and common law systems, it is not possible to simply operate a legal transplant of punitive damages as they exist in the US (or elsewhere) without adapting, by means of a legislative process, such a form of punishment and deterrence to the peculiarities of civil law systems⁽⁵²⁾. Finally, and most importantly, in light of the quasi-criminal nature of punitive damages it is possible to say that an award of punitive damages in lack of a legislative provision might run against the principle of legality (*nullum crimen, nulla poena sine lege*), which is the cornerstone of the vast majority of modern legal systems and that is recognized, *inter alia*, by Art. 7 of the European Convention of Human Rights.

As things currently stand, in conclusion, it does not seem possible to affirm that judges are free to award punitive damages (as developed and applied in the US) in civil law countries.

(b) *The possibility to recognize and enforce foreign punitive damage awards*

Having ascertained that, without a legislative reform, it does not appear possible to award punitive damages in domestic litigation of civil law systems, it still has to be ascertained whether it is possible to recognize and enforce a foreign judicial decision awarding punitive damages.

As we will immediately see, also this aspect has been characterized by a change of attitude by judges and scholars. What is at stake in the evaluation of the recognition and enforcement of foreign decisions awarding punitive damages is the possible contrast with international public policy of the enforcing State, *i.e.* “the basic ideas of justice and *bonos mores* of the forum”⁽⁵³⁾ which cannot be waived in cases with an international element.

Author, at p. 325, expressly said that “punishment is a binding function of the criminal legislator and cannot in any way be listed among the competences of civil law in general and of civil responsibility in particular” (own translation).

⁽⁵¹⁾ A. MENDOLA, n. 48, p. 564-565.

⁽⁵²⁾ G. PONZANELLI, n. 1, p. 322; F. D. BUSNELLI, n. 12, p. 43-44; A. GIORDANO, n. 48, p. 10 and ff.

⁽⁵³⁾ J. DOLINGER, *World Public Policy: Real International Public Policy in the Conflict of Laws*, *Texas International Law Journal*, 1982, p. 170. The possibility of such a contrast is also recognized by Recital 32 of EU Regulation 864/2007 (so-called “Rome II” Regulation), according to which: “Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. *In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may,*

The initial approach is perfectly represented by two decision of the German and Italian Supreme Courts. In 1992, the *Bundesgerichtshof* refused to recognize and enforce a US decision providing for punitive damages, considering such a decision contrary to German international public policy on the basis of three main arguments: (i) the punitive and deterrent functions of damages have been considered incompatible with the modern conception of civil law adopted in Germany; (ii) punitive damages are not to be equalized to moral damages, because the latter have a compensatory function, while the former are extra-compensatory and would constitute an unjust enrichment; and (iii) the very high amount awarded as punitive damages by the US court is in violation of the principle of proportionality of damages ⁽⁵⁴⁾.

Similarly, the Italian *Corte di Cassazione* stated that, due to the sole compensatory function of damages in Italian law, the recognition of a US decision awarding punitive damages would run against Italian international public policy, due to the unduly lack of proportionality between the damages awarded and the loss occurred ⁽⁵⁵⁾.

An analogous approach was adopted by Swiss Courts ⁽⁵⁶⁾.

There have been, however, several recent changes of attitude with

depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (ordre public) of the forum” (emphasis added). It is worth noting, in this regard, that such a Recital does not necessarily involve the contrariety of punitive damages to public policy, but merely envisages the possibility of such a contrast, to be evaluated taking into account the relevant factual circumstances and the relevant provisions of the *lex fori*; this is particularly remarkable even in light of the fact that the original draft of the Regulation provided, at Art. 24, for the contrariety *tout court* of punitive damages with European public policy. This could mean that the European legislator has taken into account the on-going change of attitude that is described in the text. See, in this regard, F. MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milan, 2013, p. 170-174. On the concept of European public policy see O. FERACI, *L'ordine pubblico nel diritto dell'Unione Europea*, Milan, 2012, p. 1 and ff.

⁽⁵⁴⁾ Decision of 4 June 1992, published in NJV, 1992, 32096 and ff. Such a decision is analyzed in depth by A. SARAVALLE, n. 9, p. 879-882.

⁽⁵⁵⁾ Decision 1183/2007, the content of which was reaffirmed in decision 1781/2012. For a comment to the former decision see F. BORGIA, n. 9, p. 852 and ff.; P. PARDOLESI, *Danni punitivi all'indice?, Danno e responsabilità*, 2007, p. 1126 and ff.; A. GIUSSANI, *Resistenze al riconoscimento delle condanne al pagamento dei punitive damages: antichi dogma e nuove realtà, Giurisprudenza italiana*, 2008, p. 2 and ff. Such a decision followed (and confirmed) a decision by the Corte d'Appello di Venezia, issued on 15 October 2001, in *Nuova giurisprudenza civile commentata*, 2002, p. 765 and ff. with a comment by G. CAMPEIS, A. DE PAULI. As to the approach adopted by Italian Courts, it is worth highlighting that they have always been careful in distinguishing punitive damages from other remedies that could in theory be confused with punitive damages, such as the so-called *clausola penale* (that could be somehow compared to liquidated damages) and from moral damages. The former has, indeed, the scope of establishing — prior to the unfulfillment of a contract — the value of the damages and does not have the aim of punishing (see, in this regard, BORGIA, n. 9, 853). Moral damages, in turn, are strictly anchored to the principle of proportionality and cannot be compared, according to Italian judges, to extra-compensatory remedies.

⁽⁵⁶⁾ See the decisions mentioned by A. SARAVALLE, n. 9, p. 875 and ff.

regard to the issue of the recognition and enforcement of punitive damages awards. The reference is made, first of all, to the opinion of several scholars, and secondly to certain recent judicial decisions which have opened the door to the recognition and enforcement of such decisions.

Concerning the criticisms expressed by scholars against the abovementioned decisions, they are based, first of all, on the fact that such decisions do not consider the alleged circumstance that there already exist various non purely compensatory remedies in civil law countries⁽⁵⁷⁾. According to an Author, the approach adopted by those decisions is only based on legal tradition, but legal tradition is not a source of law; the approach would be, therefore, not legally justifiable⁽⁵⁸⁾. Other Authors state that foreign decisions awarding punitive damages are not enforceable only if the amount they award is grossly excessive⁽⁵⁹⁾.

As to the judicial decisions which have recognized the enforceability of foreign awards of punitive damages, the reference applies, first of all, to a 2001 decision of the Spanish *Tribunal Supremo*⁽⁶⁰⁾, according to which there is no incompatibility of punitive damages with international public policy due to the circumstances that: (i) the ideas of punishment and deterrence are not unknown to the Spanish law of damages; and (ii) promoting the goals of punishment and deterrence is one of the scope of the law, which may adopt penalties in response to antisocial behaviors.

A second decision militating in the same sense has been issued by the French *Cour de Cassation*, which stated that punitive damages run against

⁽⁵⁷⁾ See F. QUARTA, *Private Enforcement and the Deterrent Effect of Private Actions: An Overview*, *Rivista di diritto dell'impresa*, 2011, p. 98 and ff.; A. SARAVALLE, n. 9, p. 892; E. D'ALESSANDRO, n. 12, p. 394 and ff.; P. PARDOLESI, n. 55, p. 1130. This last Author makes reference in particular to art. 125 of the Italian Code of Industrial Property (Legislative Decree n. 30/2005), that does not relate the amount of damages to be awarded in case of violations of industrial property only to the loss occurred, but also to all the other relevant circumstances of the case. See also G. PONZANELLI, *Danni punitivi: no grazie*, *Corriere giuridico*, 2007, p. 1463 and ff.

⁽⁵⁸⁾ F. QUARTA, n. 8, p. 80. See, in this sense, also E. URSO, n. 12, p. 85, stating that there are not constitutional objections to the recognition and enforcement of foreign punitive damages awards.

⁽⁵⁹⁾ A. GIUSSANI, n. 55, p. 1184. This Author justifies his opinion also on the basis of Recital 32 of EU Regulation n. 864/2007 which states: "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing 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" (emphasis added).

⁽⁶⁰⁾ Decision of 13 November 2001, Exequatur No. 2039/1999. For a comment to such a decision see F. QUARTA, n. 57, p. 96 and ff.

ordre public only if they are “disproportionate” to the actual injury ⁽⁶¹⁾. A similar approach has been also adopted by the Greek *Areios Pagos* ⁽⁶²⁾.

Finally, and surprisingly enough, the Italian *Corte di Cassazione*, on 16 May 2016, issued a *interim* decision stating that it is doubtful whether it is possible to say that foreign decisions that award civil punishments are *per se* contrary to international public policy, due to the fact that it does not seem possible to say with certainty that damages have only compensatory functions in Italian law ⁽⁶³⁾. For these reasons, and notwithstanding the prior case law clearly running against the possibility of recognizing and enforcing foreign awards of punitive damages, the question has been submitted for a new decision of the Plenary Session (*Sezioni Unite*) of the *Corte di Cassazione*. The case is still pending.

All the above discussion shows that the issue of punitive damages in domestic litigation (both with regard to the possibility to award such damages and with regard to the recognition and enforcement of foreign decisions awarding punitive damages) is still a very open issue. As anticipated, similar discussions and considerations are currently taking place also among international arbitration scholars, some of which are strongly encouraging the recourse to punitive damages even in international arbitration. The following discussion will, therefore, try to understand whether the framework on the law of punitive damages traced above is apt to justify the award of punitive damages by international arbitrators.

4. *Existing Approaches on the Suitability of Arbitrators to Award Punitive Damages in International Arbitration and the Enforceability of International Arbitral Awards Setting Forth Punitive Damages.*

The determination of whether arbitral tribunals have the power to award punitive damages is a task which requires a balance between conflicting values ⁽⁶⁴⁾. On the one hand it is necessary to take into account the modern trend favoring the recourse to international arbitration (so-called *favor arbitrati*), while, on the other hand, it is not possible to forget that arbitration is a private process of dispute resolution having inherent limitations deriving from such a private nature ⁽⁶⁵⁾. Indeed, the more

⁽⁶¹⁾ Decision of 1 December 2010, N. 09-13303, *Schlenzka & Langhorne v. Fountaine Pajot S.A.*, Recueil Dalloz [D.]. 2011, 423.

⁽⁶²⁾ See B. W. JANKE, F. X. LICARI, n. 15, p. 777, footnote 9.

⁽⁶³⁾ See *Ordinanza* n. 9978/2016 available at <http://www.ipsoa.it/~media/Quotidiano/2016/05/17/riconoscimento-di-sentenze-straniere-la-cassazione-apre-ai-danni-punitivi/9978-16%20pdf.pdf>.

⁽⁶⁴⁾ J. A. FRIEDLANDER, *Punitive Damages as a Remedy for Discrimination Claim Arbitrations in the Securities Industry*, *Hofstra Law Review*, 1994, p. 244; S. P. BEDELL, M. B. CYZE, D. M. DAVIS, *Current Developments in Arbitration: Arbitrability and Punitive Damages*, *John Marshall Law Review*, 1989, p. 627.

⁽⁶⁵⁾ A. S. RAU, *Punitive, Exemplary, “Vindictive”, or Edifying Damages of Whatever*

arbitral tribunals have the power to award remedies of quasi-criminal nature, such as punitive damages, within the framework of private and confidential proceedings, the more it would be possible to equate *tout court* arbitrators to State judges with criminal competences (66). This might not be a problem in legal systems, such as the US, where, as we have seen, the public-private distinction is not perceived as crucial, but could instead be understood as an undue invasion in the criminal competences of the State in those systems which apply a rigid distinction between the public and private areas of the law.

It appears quite logical that finding a point of equilibrium between those conflicting values necessarily involves certain policy choices and considerations which cannot be *per se* defined as correct or incorrect, but are indeed related to the background and the culture of different interpreters. It is not surprising, therefore, that the same question, *i.e.* whether it is possible to allow arbitrators to award punitive damages, has been resolved in diametrically opposite ways by different judges in the United States.

The first decision to analyze is *Garrity v. Lyle Stuart, Inc.* (67); in this case Mr. Garrity, an author, and Lyle Stuart, a publisher, entered into a contract with a broadly worded arbitration clause. Garrity accused Lyle Stuart of fraudulent inducement and malicious harassment and invoked the arbitration clause. An arbitrator awarded Garrity \$45,000 in royalties and \$7,500 in punitive damages. Garrity then tried to confirm the award, but the publisher objected by saying that punitive damages were beyond the

Nature, The University of Texas at Austin, Research Paper No. 2015-11, 2015, p. 2, highlights that "arbitration is a 'hybrid institution' - viewed from one angle as an exercise in 'adjudication' (as it endows arbitral tribunals with 'jurisdictional powers to give their decision the force of law'), and yet from another angle as an exercise in private self-government (as it is infinitely malleable and rests on contractual agreement)".

(66) This opinion has been sustained by T. STIPANOWICH, n. 18, p. 8, where he stated that "despite its roots in private contract, arbitration has been called upon to function as a wide-ranging surrogate for the courtroom. Indeed it has increasingly moved from the role of commercial court to that of a civil court of general jurisdiction".

(67) 40 NY.2d 354, 353 NE.2d 793, 386 NY.S2d 831 (1976). On this decision see K. J. TOLSON, *Punitive Damage Awards in International Arbitration: Does the Safety Valve of Public Policy Render Them Unenforceable in Foreign States?*, *Loyola of Los Angeles Law Review*, 1987, p. 470 and ff.; K. R. DAVIS, *Protected Right or Sacred Rite: The Paradox of Federal Arbitration Policy*, *DePaul Law Review*, 1995, p. 74 and ff.; A. NORRIS, *When "Contracting Around" the Law Will Not Work: The Potential Inability to Expressly Prohibit Punitive Damages in Arbitration*, *Journal of Dispute Resolution*, 2005, p. 147 and ff.; R. P. HACKETT, *Punitive Damages in Arbitration: The Search for a Workable Rule*, *Cornell Law Review*, 1978, p. 272 and ff. Prior to the decision in *Garrity*, it is worth mentioning the rule of *Publishers' Association v. Newspaper & Mail Deliverers' Union*, 280 App. Div. 500, 114 NYS.2d 401 (1st Dep't 1952), where it was firstly said that penalties were impermissible in arbitration and would be overturned whether or not the arbitration statute authorized vacatur. A partially different decision (regarding, however, liquidated damages) can be found in *Associated General Contractors v. Savin Brothers*, 45 App. Div. 2d 136, 356 NYS.2d 374 (3d Dep't 1974). In this decision, the Court confirmed triple damages awarded by arbitrators, but such damages were already established and quantified in the contract between the parties of the arbitration.

arbitrator's authority. The New York Court of Appeals (in a 4-3 decision) then vacated the award in its part on punitive damages. It stated that "an arbitrator has no power to award punitive damages, even if agreed upon by the parties" (68). The reason for such a statement is, according to Chief Judge Breitel (who wrote the majority opinion), that punishment is a function of the State and an arbitrator, by awarding punitive damages, encroaches on the State's authority, that is the only one entitled to protect the public good. Private parties, even by design, are not entitled to delegate this exclusive state function to a non-judicial forum. "[T]he evil of permitting an arbitrator (...) to award punitive damages is that *it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction*" (emphasis added) (69) and this would "ride roughshod over strong policies in the law which control coercive private conduct and confine to the State and its courts the infliction of punitive sanctions on the wrongdoers" (70). The Court therefore concluded that "[t]he day is long past since barbaric man achieved redress by private punitive measures" (71). For this reason, an arbitral award of punitive damages is to be considered, according to *Garrity*, contrary to public policy.

Opposite to this decision is the Supreme Court approach in *Mastrobuono v. Shearson Lehman Hutton, Inc.* (72); in this dispute, concerning a securities trading account opened by Antonio and Diana Mastrobuono with Shearson Lehman Hutton, the contract provided for the law of New York as applicable law (and, thus, allegedly included the *Garrity* rule) and for arbitration according to the rules of the National Association of Securities Dealers, Inc. (NASD). These rules empowered arbitrators to award "damages and other relief" (73) and this provision was interpreted by the arbitration panel as giving the possibility to also award punitive damages in favor of the Mastrobuonos. In the presence of a conflict between the applicable substantive law and the applicable arbitration rules, the District Court and the Seventh Circuit gave preeminence to the former and applied the *Garrity* ruling and said that arbitrators did not have the power to award punitive damages. The Supreme Court reversed. It started its reasoning by saying that the US Federal Arbitration Act involves a policy

(68) 353 NE.2d 794 (1976).

(69) *Id.*, 796.

(70) *Id.*, 795.

(71) *Id.*, 797.

(72) 115 S. Ct. 1212 (1995). The decision is analysed in depth by J. Y. GOTANDA, n. 3, p. 71 and ff. Prior decisions which applied a similar rationale are *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984) and, in particular, *Willoughby Roofing & Supply Co. v. Kajima International*, 598 F. Supp. 353 (N. D. Ala. 1984), 776 F.2d 269 (11th Cir. 1985) where it was held that public policy favours arbitration in resolving disputes and an arbitration is more likely than a court to be versed in the particular issue at hand and, therefore, more able to award appropriate remedies.

(73) § 3741(3) (1993).

which favors the recourse to arbitration ⁽⁷⁴⁾ and said that such a policy is also able to preempt the *Garrity* ruling. In particular, in presence of a very broadly worded arbitration clause, as the one at issue was considered, the Supreme Court stated that “it would seem sensible to interpret the ‘all disputes’ and ‘any remedy or relief’ phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award. Since courts are empowered to award punitive damages with respect to certain types of claims, the (...) arbitrators would be equally empowered” ⁽⁷⁵⁾.

The Supreme Court approach in *Mastrobuono* is today the majoritarian one. Indeed, on the basis of the principle of *favor arbitrati*, a vast number of scholars consider appropriate for arbitrators to issue punitive damages as if they are State judges ⁽⁷⁶⁾. It is often said, in particular, that due to arbitrators’ expertise and to the almost total assimilability of arbitration to State justice, it does not make sense to exclude the power of arbitrators to award punitive damages ⁽⁷⁷⁾.

However, while it is undeniable (and, indeed, correct), on the one side, that today a very wide spectrum of subjects that have been traditionally considered not-arbitrable are considered arbitrable ⁽⁷⁸⁾, and, on the other side, that arbitration is the most-common and effective method of dispute

⁽⁷⁴⁾ Such a policy is expressly recognized in the Supreme Court’s previous decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), on which see TOLSON, n. 67, p. 474 and ff.

⁽⁷⁵⁾ *Mastrobuono*, n. 72, 115 S. Ct. 1218, n. 7, quoting *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989).

⁽⁷⁶⁾ See T. STIPANOWICH, n. 18, p. 26 and ff.; RAU, n. 65, p. 53; NORRIS, n. 67, p. 160; P. MUNDHEIM, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono*, *University of Pennsylvania Law Review*, 1995, p. 197 and ff.; B. R. HAJICEK, n. 18, p. 361 and ff. This position was already sustained by A. SARAVALLE, n. 9, p. 890-891; S. J. WARE, n. 18, p. 531 and ff.

⁽⁷⁷⁾ Professor A. S. RAU, n. 65, p. 53-54, stated that “in a world where privately negotiated arrangements assume a privileged position, and where proponents of the arbitral process pursue their progress towards the ‘anarcho-capitalist fantasy’ of an autonomous system, punitive damage awards are increasingly unlikely to be seen as implicating any serious ‘public policy’ applicable to transnational cases. It may seem something of a paradox to argue that freeing the arbitral process from intrusive review, in the service of the neo-liberal agenda of privatization, is at the same time an appropriate means of enlisting arbitrants to advance the greater good by helping to repress anti-social behavior. But to suggest the presence of a ‘paradox’ is hardly to suggest contradiction or error — on the contrary. It will be noted at least that a familiar concern in recent scholarship — to the effect that entrusting mandatory law to arbitrators with final effect may, through corporate capture, lead to the underenforcement of social norms — can have little purchase indeed in cases involving the enforcement of US punitive damage awards; indeed any punitive damage award can only serve to redress what might otherwise be the underdeterrence of wrongdoing that tends to accompany an exclusively remedial model of compensation”.

⁽⁷⁸⁾ N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, n. 20, p. 110-124; J. D. M. LEW, L. A. MISTELIS, S. KRÖLL, n. 20, p. 187-221.

settlement in international commerce⁽⁷⁹⁾, it does not seem possible to extend, *in abstracto*, the powers of arbitrators to the award of punitive damages, *i.e.* to consider punitive damages as an arbitrable matter⁽⁸⁰⁾. This opinion will be explained in light of the features and functions of punitive damages as outlined above, as well as on the basis of the features of arbitration as a private method of dispute settlement.

The first two functions of punitive damages that have been outlined above are punishment and deterrence (to which it is possible to connect the educational function of punitive damages). These functions, as already said, are typical of criminal sanctions and are usually ascribed to the State, which — in modern times — has the role to punish wrongdoers, but contextually has to rehabilitate them⁽⁸¹⁾. State judges punish wrongdoers in the name and on behalf of the society that they represent and in the name of which they are appointed. Would it be possible to say the same for arbitrators? In name of which society would they punish? Which and whose interest would they represent? Actually it seems implied in the same nature of arbitration as a method of dispute settlement in which “[d]isputants agree to submit their disputes to an individual whose judgment *they* are prepared to trust” (emphasis added)⁽⁸²⁾ that any interest outside the ones of the disputing parties cannot be represented during the proceedings. Arbitrators seem, therefore, ill-suited to carry out punishment and deterrence functions in the interests of the society. Moreover, disputes submitted to international commercial arbitration are usually commercial (and private) in nature and do not involve any potential public aspect that would justify the adoption of remedies aimed at protecting public interests, such as punitive damages⁽⁸³⁾.

⁽⁷⁹⁾ K. YOUSSEF, *The Limits of Consent: The Right or Obligation to Arbitration of Non-Signatories in Group of Companies*, in E. SCHWARTZ, B. HANOTIAU (eds.), *Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law*, Paris, 2010, p. 99, talked about “the emergence of arbitration as the judge nature of disputes arising under international contracts” (emphasis added).

⁽⁸⁰⁾ S. L. BREKOUKAKIS, *Arbitrability and conflict of jurisdictions: The (diminishing) relevance of lex fori and lex loci arbitri*, in F. FERRARI, S. KRÖLL, *Conflict of Laws in International Arbitration*, Turin, 2010, p. 120 stated that “[t]he meaning of the term arbitrability, at least outside the US, refers to the material scope of arbitration. It relates to the question of what types of issues and disputes can and cannot be submitted to arbitration”. In the US, arbitrability encompasses all issues of jurisdiction.

⁽⁸¹⁾ See, for example, Art. 27 of the Italian Constitution.

⁽⁸²⁾ N. BLACKBAY, C. PARTASIDES, A. REDFERN, M. HUNTER, n. 20, p. 2. The same Authors say that “[The] decision is final and binding on the parties — and it is final and binding because the parties have agreed that it should be, rather than because the coercive power of any State”.

⁽⁸³⁾ K. RUGA, *An Argument Against the Availability of Punitive Damages in Commercial Arbitration*, *St. John's Law Review*, 1988, p. 279, stated that “it can be argued that the public's interest is not duly served when arbitrators are permitted to award punitive damages. Indeed, it is submitted that the state's power to punish is one that is not readily transferrable to a panel of arbitrators because to do so transgresses important state interests”. See also M. G. GÓMEZ TOMILLO, n. 10, p. 226, stating that “punitive damages do not constitute an exception

With regard to the retributive (*i.e.* private revenge) function of punitive damages, it is here argued that parties, if they are willing to do so, have other means to contractually ensure that a (sort of) fine is paid by the defaulting party. The reference is made, in particular, to liquidated damages, which are common practice in commercial contracts and which are commonly awarded by arbitrators⁽⁸⁴⁾. The difference with punitive damages is that the amount to be paid by the defaulting party is already set out in the agreement between the parties and is not left to the discretion of arbitrators (such as in the case of punitive damages), who do not find any guidance in the law with regard to the amount to be awarded⁽⁸⁵⁾.

Finally, concerning the compensatory function of punitive damages, it is worth noting that today in international arbitration there is a growing tendency to let the loser pay the expenses of the proceedings and, therefore, punitive damages in arbitration would lose one of their main functions in US civil procedure⁽⁸⁶⁾.

In addition to the above, it is worth recalling that the abovementioned aspects of the unpredictability of punitive damages awards as well as of the almost total discretion left to arbitrators in awarding them could also involve due process concerns⁽⁸⁷⁾. Indeed, without an actual discussion

to the idea that the State holds a monopoly over the imposition of punishment, while the State maintains that monopoly, as demonstrated by the fact that punitive damages are necessarily imposed by judicial power (...). It might be questionable that the beneficiary is an individual and not the State, or, that the State”.

⁽⁸⁴⁾ See the decision in *Associated General Contractors v. Savin Brothers*, at n. 67, above. Liquidated damages are also common practice in shipbuilding contracts and disputes arising from such contracts are usually referred to arbitration. On liquidated damages see M. PRESSMAN, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, *Virginia Law and Business Review*, 2013, p. 651 and ff.

⁽⁸⁵⁾ See J. Y. GOTANDA, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, *Journal of World Investment and Trade*, 2009, p. 553 and ff.

⁽⁸⁶⁾ See, in this regard, L. REED, *Allocation of costs in international arbitration*, *ICSID Review - FILJ*, 2011, p. 76 and ff.; N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, n. 20, p. 499.

⁽⁸⁷⁾ The applicability of due process concerns in the framework of commercial arbitration is today settled (at least in Europe). See G. CARELLA, *Arbitrato commerciale internazionale e Convenzione europea dei diritti dell'uomo*, in G. CARELLA (ed.), *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato*, Turin, 2009, p. 53 and ff.; W. ROBINSON, B. KASOLOWSKY, *Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?*, *Arbitration International*, 2002, p. 453 and ff.; N. McDONALD, *More Harm than Good? Human Rights Considerations in International Commercial Arbitration*, *Journal of International Arbitration*, 2003, p. 523 and ff.; M. BENEDETTI, *Human Rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, *Arbitration International*, 2015, p. 631 and ff.; S. BESSON, *Arbitration and Human Rights*, *ASA Bulletin*, 2006, p. 395 and ff.; A. JAKSIC, *Procedural Guarantees of Human Rights in Arbitration Proceedings*, *Journal of International Arbitration*, 2007, p. 159 and ff.; J. C. LANDROVE, *European Convention on Human Rights' Impact on Consensual Arbitration: An Etat des Lieux of Strasbourg Case-Law and of a Problematic Swiss Law Feature*, in S. BESSON, M. HOTTETIER, F. WERRO (eds.), *Human Rights at the Center*, Basel, 2006, p. 73 and ff. With regard to due process and arbitration in US law, see SMITH, *The Application of Due Process*

between the parties on the point of punitive damages, arbitrators could award this remedy for a discretionary amount, without a legal basis for doing so ⁽⁸⁸⁾.

All the above concerns may lead to two grounds for non-enforcement according to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or annulment at the place of the seat according to the *lex fori* of such a State) ⁽⁸⁹⁾.

The first of them is given by Art. V(2)(b) of the New York Convention, consisting in the contrariety of the punitive damage award with the international public policy of the place where recognition and enforcement of such an award are sought (or of the place of the seat, in case the losing party asks for the annulment of the award) ⁽⁹⁰⁾. This ground will be successful in the cases where the enforcing (or annulling) court will adopt an approach such as the one sustained in *Garrity* and in the present article ⁽⁹¹⁾. Even if the present author has not been able to find precedents in this regard ⁽⁹²⁾, it is arguable that non-enforcement of punitive damages awards is more likely to happen in civil law countries, where, as it has been

to Arbitration Awards of Punitive Damages - Where is the State Action?, *Journal of Dispute Resolution*, 2007, p. 417 and ff.; S. BOYARSKY, *The Confirmation of Punitive Awards in Arbitration: Did Due Process Disappear?*, *Pepperdine Dispute Resolution Law Journal*, 2006, p. 229 and ff.; I. ROTHKEN, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, *Golden Gate University Law Review*, 1991, p. 387 and ff.

⁽⁸⁸⁾ I. ROTHKEN, n. 87, p. 388-389 has strongly sustained that punitive damages issued by arbitrators can potentially violate due process. This Author stated that “[u]nlike jury trials, the arbitrator is not required to use the correct punitive damages standard. (...) This unfettered arbitration discretion violates procedural due process”.

⁽⁸⁹⁾ In this regard, it is worth noting that the grounds for challenging an award at the place of the seat usually recall the grounds for non-enforcement set forth by Art. V the New York Convention. See N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, n. 20, p. 569 and ff.

⁽⁹⁰⁾ On the concept of international public policy, see, N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, n. 20, para. 11.105 and ff. In this regard it is possible to say that international public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every State, which are considered to be so sacrosanct as to require their maintenance at all costs and without exception (even in cases involving foreign elements). On public policy see also N. PALAIA, *L'ordine pubblico "internazionale"*, Padua, 1974, p. 1 and ff.; J. D. M. LEW, *Applicable Law in International Commercial Arbitration*, The Hague, 1978, p. 532; J. DOLINGER, n. 53, p. 170; FRY, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, *Chinese Journal of International Law*, 2009, p. 81 and ff.; L. G. RADICATI DI BROZOLO, *Deroga alla giurisdizione e deroga alle norme imperative. Un conflitto fra conflitti di leggi e conflitti di giurisdizioni?*, in V. COLESANTI, C. CONSOLO, G. GAJA, F. TOMMASEO (eds.), *Il diritto processuale civile nell'avvicinamento giuridico internazionale, omaggio ad Aldo Attardi*, Padua, 2009, p. 290.

⁽⁹¹⁾ As explained by J. Y. GOTANDA, n. 3, p. 78, indeed, a mechanical application of the principles set forth in *Mastrobuono* in the framework of international arbitration (*i.e.* an unlimited availability of punitive damages in presence of broadly worded arbitration clauses or rules) might lead to the negative result of the refusal of recognition and enforcement of these awards in countries who do not recognize this quasi-criminal remedy due to public policy reasons. See also N. P. CASTAGNO, n. 2, p. 747.

⁽⁹²⁾ Similarly, see M. PETSCHKE, *Punitive Damages in International Commercial Arbitration: Much Ado About Nothing*, *Arbitration International*, 2013, p. 90-91; M. PETSCHKE,

demonstrated above, there are still difficulties in admitting the enforceability of foreign judicial decisions of punitive damages and — therefore — it is likely that such perplexities would be even greater in the case of punitive damages awarded by an arbitration panel ⁽⁹³⁾.

The second ground for non-enforcement is provided by Art. V(1)(b) of the New York Convention, according to which enforcement can be refused if a party was unable to present his case during the arbitration proceedings. This provision, echoed by several national law provisions ⁽⁹⁴⁾, is usually considered as referring to violations of due process in the conduct of the proceedings and could, therefore, be relied upon in the cases where a tribunal awards punitive damages in a discretionary amount without giving to the parties the possibility to legally discuss such a point.

In conclusion, it seems that it is not unlikely that an arbitral award of punitive damages is considered unenforceable in several States in application of the provisions of the New York Convention. For this reason, and considering that arbitrators have a duty to issue an enforceable award ⁽⁹⁵⁾, it seems reasonable to say that, *in abstracto*, they would be inclined to refrain from issuing an award of punitive damages ⁽⁹⁶⁾. However, it is necessary also to consider when arbitrators might potentially and *in concreto* exercise their discretion in awarding punitive damages. This is (at least apparently) a conflict of laws question and will be addressed in the next paragraph.

5. *The Law Applicable to the Issue of Punitive Damages in International Arbitration.*

As for every issue in international arbitration, also the determination of the law applicable to punitive damages should find an answer in the principle of party autonomy. However, the case law shows that it is very unlikely that the parties address such an issue in their arbitration agreement. Indeed, it is also rare to find an arbitration agreement in which the parties clearly indicate the remedies that the arbitrators may adopt at the end of the proceedings.

As a consequence, the answer to the question of the law applicable to

Punitive Damages in International Commercial Arbitration: A Conflict of Laws Lesson, *Journal of International Arbitration*, 2013, p. 42.

⁽⁹³⁾ This opinion is also sustained by M. PETSCHÉ, *Journal of International Arbitration*, n. 92, 2013, p. 43.

⁽⁹⁴⁾ See, *inter alia*, s. 68(2)(a) of the English Arbitration Act 1996, Art. 34(2)(a)(ii) of the UNCITRAL Model Law and art. 840 no. 2 of the Italian Code of Civil Procedure.

⁽⁹⁵⁾ See, *inter alia*, art. 41 of the 2012 ICC Arbitration Rules, Art. 32(2) of the 2014 LCIA Arbitration Rules.

⁽⁹⁶⁾ Similarly, see J. Y. GOTANDA, n. 3, p. 103; S. DONAHEY, *Punitive Damages in International Commercial Arbitration*, *Journal of International Arbitration*, 1993, p. 77; M. PETSCHÉ, *Journal of International Arbitration*, n. 92, p. 45.

the issue of punitive damages shall be found by way of a conflict of laws analysis. On the one side, the fact that the power of the arbitrators to award punitive damages shall be treated, as we have seen, as an arbitrability issue, should lead us to apply the law regulating the arbitration procedure⁽⁹⁷⁾, *i.e.* the so-called *lex arbitri*⁽⁹⁸⁾. On the other side, considering that the remedies available in cases of breaches of contracts (or torts) are usually a matter of substantive law, this circumstance should let us take into account the law governing the substance of the relationship.

Both these possible approaches find confirmation, as already seen, in national law. The opinion according to which the procedural law is the only law that shall regulate the issue of punitive damages is the one sustained in *Mastrobuono*, where the US Supreme Court stated that the pro-arbitration policy of the Federal Arbitration Act *tout court* pre-empts the substantive *Garrity* rule. In *Garrity*, on the contrary the Court limited its analysis to the substantive law, simply ignoring the *lex arbitri*.

Arbitral case law, in turn, has applied both the *lex arbitri* and the substantive law to the issue of punitive damages. In ICC Case No. 5946⁽⁹⁹⁾ the parties chose the law of New York as substantive law and Switzerland as the seat of arbitration. The Tribunal refused to award punitive damages on the basis of the fact that such an award would have been contrary to the public policy of the law of the seat (*i.e.*, the *lex loci arbitri*)⁽¹⁰⁰⁾. In ICC Case No. 8445⁽¹⁰¹⁾, on the contrary, the Tribunal refused to award punitive damages on the basis of the law applicable to the substance of the dispute, *i.e.* Indian law⁽¹⁰²⁾.

Scholarship is also divided between who considers punitive damages as a matter of procedural law⁽¹⁰³⁾ or as a matter of substantive law⁽¹⁰⁴⁾.

⁽⁹⁷⁾ S. L. BREKOULAKIS, n. 80, p. 126, stated that “[a]rbitrability relates to the allocation of jurisdiction between national courts and tribunals, and it is therefore a matter of procedural nature”.

⁽⁹⁸⁾ See, *inter alia*, L. A. MISTELIS, *Reality Test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri”*, *The American Review of International Arbitration*, 2006, p. 164 and ff.

⁽⁹⁹⁾ In A. J. VAN DEN BERG (ed.), *Yearbook of Commercial Arbitration*, 1991, p. 97 and ff.

⁽¹⁰⁰⁾ *Id.*, p. 113, where it is said that “[d]amages that go beyond compensatory damages to constitute a punishment of the wrongdoer (punitive or exemplary damages) are considered contrary to SWISS public policy, which must be respected by an arbitral tribunal sitting in Switzerland.

⁽¹⁰¹⁾ In A. J. VAN DEN BERG (ed.), *Yearbook of Commercial Arbitration*, 2001, p. 167 and ff.

⁽¹⁰²⁾ *Id.*, p. 178, where it is stated that “[a]s a matter of Indian law (the *lex contractus*), (...) a court, and thereby by extension an arbitral tribunal, will normally give damages for breach of contract only by way of compensation for loss suffered, and not by way of punishment”. As to the modalities in which substantive law can limit and influence party autonomy see L. G. RADICATI DI BROZOLO, *Autonomia negoziale e ruolo del diritto materiale nell’arbitrato internazionale ed interno*, *Rivista dell’arbitrato*, 2016, 1 and ff.

⁽¹⁰³⁾ J. Y. GOTANDA, n. 3, p. 60 (even if the Author, at 85, criticizes the fact that procedural law may pre-empt substantive law), K. NOUSSIA, n. 6, p. 289. This last Author says

However, at a closer look, both these approaches are unsatisfactory. As it has been correctly pointed out ⁽¹⁰⁵⁾, while the *lex arbitri* pertains to the power of arbitrators to issue punitive damages, *i.e.* the possibility that they have to award such a remedy, the *lex contractus* pertains to the availability of the remedy *stricto sensu*. For this reason, both the *lex arbitri* and the *lex contractus* shall be taken into account by arbitrators when considering to awarding punitive damages. Arbitrators shall, therefore, first of all, look at the *lex contractus* in order to understand whether punitive damages are a legal tool at their disposal according to the agreement of the parties and, then, turn to the *lex arbitri* in order to understand whether they are entitled to make recourse to such a tool in the relevant proceedings.

Only when both the *lex arbitri* and the *lex contractus* entitle arbitrators to award punitive damages they may consider whether it is worth awarding this remedy. Such a consideration, as it has been demonstrated in the previous paragraph, should be however strongly conditioned by the fact that several countries may follow an approach contrary to the enforcement of an international arbitral award providing for punitive damages. This means that, even if they consider themselves entitled to award punitive damages, arbitrators should carefully consider whether to do so also on the basis of the law of the likely place(s) of enforcement of the arbitral award.

6. *Punitive Damages in International Investment Arbitration (in a nutshell).*

The possibility of awarding punitive damages in investment arbitration requires a prior distinction between arbitrations celebrated under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) and other forms of arbitration. Indeed, non-ICSID arbitrations have a seat (like all commercial arbitrations) and, therefore, in order to award punitive damages, arbitrators shall look both at the law of the seat and at the substantive law applicable in the proceedings. On the contrary, ICSID arbitration is completely delocalized and proceedings do not have a seat ⁽¹⁰⁶⁾. This means that, in light of the complete silence of the

that “the issue of the power of the arbitrators to award punitive damages depends on the substantive law of the place of arbitration (*lex arbitri*) and the terms of the arbitral agreement”.

⁽¹⁰⁴⁾ K. R. DAVIS, n. 67, 84-85; N. P. CASTAGNO, n. 2, p. 733.

⁽¹⁰⁵⁾ M. PETSCHKE, *Journal of International Arbitration*, n. 92, p. 39. Due to the applicability of both the *lex arbitri* and the *lex contractus*, the Author says that “[i]n reality, however, there is no ‘conflict’ since the two laws relate to two distinct aspects of the question of the availability of punitive relief”. Such an approach seems sustained also by J. J. FEI, *Awards of Punitive Damages*, in D. BRAY, H. L. BRAY, *Post-Hearing Issues in International Arbitration*, New York, 2013, p. 25.

⁽¹⁰⁶⁾ See A. R. PARRA, *The Enforcement of ICSID Arbitral Awards*, 24th Joint Collo-

ICSID Convention on the issue of punitive damages, the only law to be taken into account by arbitrators in order to award punitive damages is the substantive law of the proceedings.

In international investment arbitrations arising from Bilateral Investment Treaties (BITs) (both ICSID and non-ICSID) such law usually consists in the provisions of the relevant BIT, which, in turn, generally refers to international law. In cases BITs do not expressly set forth the applicable law, the applicable law generally consists in a joint application of the national law of the host State and international law⁽¹⁰⁷⁾. What is, hence, essential for the sake of the present article is to understand whether and how punitive damages are allowed by BITs and by public international law.

As foreseeable, save as for rare exceptions⁽¹⁰⁸⁾, BITs are usually silent on the issue of punitive damages. The solution to the present issue shall be therefore searched in public international law.

However, the possibility to award punitive damages in international law is a completely unsettled issue. It is here necessary to distinguish between relationships between sovereign States and relationships between States and foreign investors.

Concerning the relationships between equally sovereign States, the starting point for a discussion on punitive damages shall certainly be the Commentary to article 36 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (regarding compensation for damages that cannot be made good by restitution), stating that “the function of article 36 is purely compensatory; it is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character”⁽¹⁰⁹⁾. Similarly, the Commentary to article 37 (regarding satisfaction) states that satisfaction for the injury caused by an internationally wrongful act, insofar as it cannot be made good by restitution or compensation, “is not intended to be punitive in

quium on International Arbitration, Paris, November 16, 2007, http://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf, p. 2; M. MOSES, *The Principles and Practice of International Commercial Arbitration*, Cambridge, 2012, p. 236.

⁽¹⁰⁷⁾ See Art. 42 of the ICSID Convention. See also, *inter alia*, A. GIARDINA, *International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse, The Law and Practice of International Courts and Tribunals*, 2006, p. 29 and ff.; A. GIARDINA, *La legge regolatrice dei contratti di investimento nel sistema ICSID, Rivista di diritto internazionale privato e processuale*, 1982, p. 677 and ff.; E. GAILLARD, Y. BANIFATEMI, *The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, ICSID Review - FILJ*, 2003, p. 375 and ff.; Z. CRESPI REGHIZZI, *Diritto internazionale e diritto interno nelle controversie sottoposte ad arbitrato ICSID, Rivista di diritto internazionale privato e processuale*, 2009, p. 5 and ff.

⁽¹⁰⁸⁾ The main exception to be mentioned is Art. 34 of the 2004 US Model BIT, which specifically states that a tribunal may not award punitive damages.

⁽¹⁰⁹⁾ ILC Articles, Commentary to Art. 36, Par. 4.

character, nor does it include punitive damages”⁽¹¹⁰⁾. It seems, therefore, that the drafters of the ILC articles have excluded any form of punitive damages from public international law.

Notwithstanding the above, some Authors have pointed out that international case-law has admitted punitive damages as a sort of reparation for the mere violation of a right of a State under international law, provided that such a violation (i) did not generate a material damage; and (ii) derived from a grave fault of the State that committed the wrong⁽¹¹¹⁾. Punitive damages would therefore be a consequence of the moral prejudice suffered by the honor and the dignity of a State due to a mere violation of a right it owns under international law, regardless of the occurrence of any material damage. However, as an Author has conveniently pointed out, this opinion does not seem convincing. Indeed, contrary to national law systems, international law does not protect *per se* rights such as honor and dignity of States and, as a consequence, talking about an autonomous form of damages related to these values would be inappropriate⁽¹¹²⁾. Moreover, it does not seem possible to find a place in the relationships between equally sovereign States for the functions of punitive damages as recognized in national law systems, such as punishment, deterrence and retribution. These functions are indeed based on the circumstance that a State, through its judges, tries to influence the behaviors of its citizens, but cannot find place in a system of law, such as international law, where there are no hierarchies and States are equal by definition.

The situation may, however, be different in the relationships between States and foreign investors⁽¹¹³⁾. Indeed, international investment law has developed its own standards of protection, which have been obviously influenced by the fact that investment relationships do not involve two equally sovereign States, but a State and a private investor⁽¹¹⁴⁾. The

⁽¹¹⁰⁾ ILC Articles, Commentary to Art. 37, Par. 8.

⁽¹¹¹⁾ G. CARELLA, *I punitive damages e la riparazione del danno morale in diritto internazionale*, *Rivista di diritto internazionale*, 1984, p. 751 and ff.; A. SARAVALLE, n. 9, p. 890-891.

⁽¹¹²⁾ M. IOVANE, *La riparazione nella teoria e nella prassi dell'illecito internazionale*, Milano, 1990, p. 160-161. According to this Author, a discussion about moral damages in the relationships between States would be based on mistaken premises: international law is autonomous and different from national law systems and, therefore, it is not possible to transplant in the former the category of damages (and the forms of reparation) existing in the latter. The possibility to award punitive damages in international law is also strongly criticized in S. WITTICH, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, *Austrian Review of International & European Law*, 1998, p. 101 and ff.; N. JØRGENSEN, *A Reappraisal of Punitive Damages in International Law*, *British Yearbook of International Law*, 1997, p. 247 and ff.

⁽¹¹³⁾ See L. MARKERT, E. FREIBURG, *Moral Damages in International Investment Disputes - On the Search for a Legal Basis and Guiding Principles*, *The Journal of World Investment & Trade*, 2013, p. 1 and ff.; A. CHAMPAGNE, *Moral Damages Left in Limbo*, *McGill Journal of Dispute Resolution*, 2015, p. 17 and ff.

⁽¹¹⁴⁾ These legal relationships are usually characterized by both elements of national

investor, in particular in the cases where he is an individual person ⁽¹¹⁵⁾, may potentially suffer also a moral prejudice to his honor and dignity caused by the behavior of the host State. Such a prejudice might, in turn, give rise to forms of damages that are unknown to international law but are well recognized in national law systems ⁽¹¹⁶⁾. Indeed, certain international investment tribunals have recognized the possibility to award moral damages to investors and some Authors have argued that such damages are characterized by a punitive element ⁽¹¹⁷⁾.

The first of such cases is *Bervenuti and Bonfant s.r.l. v. People's Republic of Congo* ⁽¹¹⁸⁾. In this case Mr. Bonfant and most of the Italian staff of the investor company had to leave Congo after their propriety was expropriated, due to the fact that their safety was threatened. The arbitral tribunal, ruling *ex aequo et bono* (and without referring to any international law source), accepted the possibility of making an award of moral

law and elements of international law, so that it is possible to talk about the "hybrid foundations" of international investment law. See Z. DOUGLAS, *The Hybrid Foundations of Investment Treaty Arbitration*, *British Yearbook of International Law*, 2005, p. 151 and ff.

⁽¹¹⁵⁾ It seems more difficult, for a company, to prove the mental distress which is typical of moral damages as recognized in national law systems.

⁽¹¹⁶⁾ It is worth here mentioning the Separate Opinion of Charles N. Brower in the case held before the Iran-United States Claims Tribunal, *Sedco, Inc. v. National Iranian Oil Co.*, Interlocutory Award No. 59-129-3, 27 March 1986, where he stated, in a case where property was unlawfully taken and restitution was impossible, that "[t]here are strong reasons in logic why it would be appropriate for an international tribunal to award punitive or exemplary damages against a State in such circumstances. In the absence of such damages being awarded against an unlawfully expropriating State, where restitution is impracticable or otherwise inadvisable, that State is required to furnish only the same full compensation as it would need to provide had it acted entirely lawfully. Thus, the injured party would receive nothing additional for the enhanced wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct. If it is not deemed unseemly for the national courts of one State to 'punish' at least certain entities of a foreign State, see U.S. Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (court award of punitive damages prohibited against a foreign State 'except for an agency or instrumentality thereof,' defined in § 1603(b) to include 'a separate legal person ... which is an organ of a foreign state'), it is questionable whether an international tribunal, particularly one formed by agreement of the only States Parties as to which it can adjudicate, need be so reticent".

⁽¹¹⁷⁾ S. JAGUSH, T. SEBASTIAN, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?*, *Arbitration International*, 2013, p. 45 and ff.; M. T. PARISH, A. K. NEWLSON, C. B. ROSENBERG, *Awarding Moral Damages to Respondent States in Investment Arbitration*, *Berkeley Journal of International Law*, 2011, p. 253; I. SCHWENZER, P. HACHEM, *Moral Damages in Investment Arbitration*, in S. KRÖLL, L. A. MISTELIS, P. P. VISCASILLAS, V. ROGERS (eds.), *Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, The Hague, 2011, p. 411 and ff.; B. EHLE, M. DAWIDOWICZ, *Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation*, in J. A. HUERTA-GOLDMAN, A. ROMANETTI, F. X. STIRNIMANN (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration*, The Hague, 2013, p. 293 and ff.; P. DUMBERRY, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, *Journal of International Arbitration*, 2010, p. 247 and ff.; P. DUMBERRY, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-States Arbitration Disputes*, *Journal of International Dispute Settlement*, 2012, p. 1 and ff.

⁽¹¹⁸⁾ ICSID Case No. ARB/77/2, Award of 15 August 1980.

damages due to the immaterial damage suffered by the Claimant due to the egregious conduct of the Respondent State and consisting in the Claimant's loss of credit with suppliers and bankers.

The second case is *Desert Line Projects L.L.C. v. The Republic of Yemen* ⁽¹¹⁹⁾. The Claimant started building roads in Yemen in 1997 and, after the Government refused to pay certain construction bills, works were interrupted by Desert Line and, as a consequence, Yemeni authorities forced Desert Line to close its operations. Desert Line personnel was also threatened by opening fire and through the removal of all equipment. The ICSID Tribunal awarded Desert Line US\$1 million for the physical duress carried out by Yemeni authorities with malice and fault, which determined moral damages to the Claimant. The particular emphasis put by the Tribunal on the subjective element of the conduct of Yemeni authorities is the reason why several Authors said that the award of moral damages in *Desert Line* is to be equated to an award of punitive damages ⁽¹²⁰⁾.

Finally, it is worth here remarking the *Joseph Charles Lemire v. Ukraine* ⁽¹²¹⁾ Award, where the Tribunal explicitly set forth a test for awarding moral damages in international investment law. According to the Tribunal "moral damages can be awarded in exceptional cases, provided that: (-) the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; (-) the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation,

⁽¹¹⁹⁾ ICSID Case No. ARB/05/17, Award of 6 February 2008.

⁽¹²⁰⁾ Contrary to what stated above, international investment tribunals have always refused to award moral and punitive damages in the cases where such damages were claimed by the Respondent States due to the commencement of abusive claims by investors. This opinion seems justifiable on the basis of the fact that, as stated above, States cannot suffer damages to honor and dignity and also on the basis of the circumstances that in all such cases abusive Claimants have been condemned to pay the expenses of the proceedings, so that the Respondent State has not suffered any damage from the conduct of the investor in bad faith. See *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, par. 177; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, par. 165. On this issue (and in favor of moral damages to respondent States) see M. T. PARISH, A. K. NEWLSON, C. B. ROSENBERG, n. 117, p. 236 and ff.

⁽¹²¹⁾ ICSID Case No. ARB/06/18, Award of 28 March 2011, par. 333. The Award has been cited (and its approach followed) also in the award *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011. Other awards where the problem of moral/punitive damages has arisen (and the Tribunal refused to award the requested damages) are *Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, par. 198; *Bogdanov v. Republic of Moldova*, Award, 22 September 2005 (mentioned in JAGUSH, SEBASTIAN, n. 117, p. 51); *Victor Pey Casado et Fondation v. République du Chili*, ICSID Case No. ARB/98/2, Award, 8 May 2008, par. 704; *Funnekotter and other v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras. 139-140; *Bywater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 June 2008, par. 808 (with regard to the issue of damages, it is worth remarking here the dissenting opinion by Gary Born issued the same day of the Award).

credit and social position; and (-) *both cause and effect are grave or substantial*" (emphasis added). Also such test, which focuses both on the damages on the Claimant and on the egregious conduct of the Respondent (*i.e.* the cause and effect of the moral prejudice suffered by the investor), has been considered as having a strong punitive element ⁽¹²²⁾.

What emerges from the abovementioned case law is that, while it is true that the award of moral damages in international investment law may involve punitive elements, all other functions of punitive damages as traditionally intended do not exist in international investment law. Indeed, it is not plausible to discuss, *e.g.*, about a deterrent function with concern to the conduct of a State, as well as it does not appear possible to discuss about an educative function to be exercised on a State. Similarly, considering that nothing precludes arbitrators from awarding all costs on the losing party, even the compensatory function of US punitive damages does not seem existing in international investment law.

It seems, therefore, possible only to discuss about an autonomous figure of moral damages in international investment law, which has been indicated as a form of compensation for non-pecuniary injuries suffered by investors and that may involve also a punitive element. In conclusion, it is strongly arguable that such damages cannot be equated to punitive damages as recognized in national law systems, due to the strong diversity of the circumstances in which these damages operate. The presence of a State party in the dispute, indeed, determines that it is impossible to observe the traditional functions of punitive damages in investment disputes.

⁽¹²²⁾ S. JAGUSH, T. SEBASTIAN, n. 117, p. 53 and ff.