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studio legale

# **SUMMARY NOTES ON CASS. CIV., SS.UU., 05.07.2017, NO. 16601**

## **THE GRAND CHAMBER OF THE ITALIAN COURT OF CASSATION ISSUES A GROUNDBREAKING JUDGMENT ON PUNITIVE DAMAGES**

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1. These notes summarize the contents of Cass. Civ., SS.UU., 05.07.2017, No. 16601, a landmark judgment whereby, for the first time, the Court of Cassation ruled in favour of the possibility to recognize and enforce in Italy foreign judgments awarding compensation in the form of punitive damages.
2. It is common ground that punitive damages – which are of American origin and exist in a number of common law legal systems – are awarded in civil lawsuits in addition to the damages actually suffered by the injured party (compensatory damages), in case of conduct characterized by malice or gross negligence. Their function is to punish the wrongdoer, as well as deter him and society at large from engaging in that conduct in the future. Whilst punitive damages were traditionally not admitted in Italy, where civil liability revolves around the notion of compensatory damages aimed at reinstating the victim's position before the commission of the tort, the Supreme Court now affirmed the principle that punitive damages are *per se* not incompatible with the fundamentals of the system.
3. By its decision, the Grand Chamber rejected a petition filed by the defendant in the previous instance before the Court of Appeal of Venice, thus upholding the recognition and enforceability of three Florida judgments awarding compensation for bodily injury caused by a motorbike accident occurred in the US and involving the Italian manufacturer of a crash helmet and its distributor, which were comprised of punitive damages. The grounds of law developed by the Court of Cassation to let punitive damages in are worthwhile dwelling on.
4. The Court supplied in the first place a comprehensive case-law review, taking the lead from Cass. 1183/2007 and Cass. 1781/2012, representing the traditional position in the sense of the mono-functional nature of civil liability, aimed at the restoration of the patrimonial integrity of the injured party. The Grand Chamber considered this analysis outdated and worth revisiting, and recalled its own decision SS.UU. 9100/2015, in which the sanctioning function of compensation was in the abstract held no longer in absolute conflict with the general principles of the Italian legal system. The Grand Chamber thus held that, in addition to the predominant and primary compensatory function, the multi-functional nature of civil liability allows room for elements of both deterrence and punishment.
5. The Court then supplied an extensive exemplification of instances of so-called ultra-compensatory damages already present in domestic statutory provisions, with deterring and/or sanctioning functions in relation to the seriousness of the conduct or the extent of the harm caused. In the field of intellectual property in particular, the Court mentioned Article 158 of the Copyright Act (Law 22 April 1941, no. 633) on the compensation for damages that can be claimed by a person injured by the unauthorized exploitation of an intellectual work, as well as the analogous Article 125 of the Code of Industrial Property (Legislative Decree 10 February 2005, no. 30) on the compensation for damages by way of disgorgement of the profits earned by the infringer, as allowed by Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive).

6. The Grand Chamber's reconstruction appears consistent with the recent case law of the Court of Justice on Article 13 of the Enforcement Directive. In particular, the Liffers judgment (17.03.2016, Case C-99/15) had highlighted that the damages awarded to the holder of an infringed IP right should take account of all appropriate aspects, including any moral prejudice suffered by him, thus, going beyond a strictly compensatory approach. Besides, in its judgment of 25.01.2017 (Case C-367/15, Stowarzyszenie Oławska Telewizja Kablowa), the Court of Justice ruled that a national provision whereby the holder of an infringed IP right may, without having to prove the actual loss or specific causal nexus, demand payment of a sum corresponding to twice the appropriate fee that would have been due if permission had been given by the right holder, was not precluded by EU law.
7. Turning to the Court of Cassation's decision, significant references were made to certain relevant rulings of the Italian Constitutional Court: Corte Cost. 303/2011, which attributed an express sanctioning value to the determination of damages in some contexts of labour law; Corte Cost. 238/2014, which highlighted the multifunctional nature of civil liability, in response to the need for greater effectiveness; and Corte Cost. 152/2016, which emphasized the non-compensatory nature of the special liability for abuse of process under Article 96 of the Code of Civil Procedure.
8. Thereafter, the reasoning of the Court focused on whether foreign judgments awarding punitive damages are compatible with Italian public order. Under Italian law (pursuant to Article 64 of Law no. 218/1995, the Private International Law Act), the Court of Appeal that is competent to grant the recognition and enforcement of a foreign judgment must verify its compatibility with public order, traditionally defined as the set of fundamental principles characterizing the ethical and social structure of the national community at a certain point in time.
9. In this regard, the Grand Chamber dwelt on the profound evolution undergone by the notion of public order over the years and nowadays identified it with the broader concept of international public order, which is comprised of the recognition and protection of fundamental rights common to different legal systems, first and foremost at supranational level. Thus, public order encompasses the architecture of fundamental rights which is shared by the international community, in particular at the European level (as mainly enshrined in the Charter of Fundamental Rights of the European Union).
10. The Court furthermore specified that any foreign judgment "exporting" rights and obligations not governed by (and unknown to) the domestic legal system, even if not precluded by European law, must nonetheless comply with the Constitution and the primary legislation implementing the constitutional system. Ultimately, the foreign legal entity that "knocks at the door" of the Italian jurisdiction (in this case, punitive damages) may be held contrary to public order only if it is in total contradiction with the texture of values and legal rights that are relevant for the purposes of its recognition (which was held not to be the case with respect to punitive damages).
11. Having thus overcome the hurdles of the very nature of non-compensatory awards and of public order, the Court moved on to the conditions that non-

compensatory damages must fulfill in order to be safely “imported” into our legal system. These are

- the principle of legality, whereby a foreign award comprised of punitive elements must be based upon an identifiable source of statutory law
- the principle of typicality, which requires an accurate characterization of the instances in which punitive damages may be awarded
- the principle of predictability, requiring the specification of quantitative limits or criteria of the awardable compensation, and
- the principle of proportionality between compensatory damages and punitive damages, as well as between punitive damages and wrongful conduct, in order to appropriately identify the breadth and borders of the sanctioning/punishing element.

12. To sum up, the ruling of the Grand Chamber marks a turning point in the evolution of the civil liability paradigm in Italy. However, this does not mean that the Italian Courts ruling on claims for non-contractual or contractual damages will be allowed to increase the compensation arrived at according to the ordinary rules by adding a punitive element in their discretion. This would be contrary to Article 23 of the Constitution which links the imposition of patrimonial obligations to a statutory enabling provision. All in all, the door to punitive damages is not wide open, but is doubtless more than ajar.