INDIRECT COERCIVE METHODS IN ITALIAN LAW: ART. 614 *BIS* C.C.P.

Alessio Caracciolo[1], Fabrizio Cesareo[2] and Federica Stamerra[3]

[1]Teaching assistant (Civil Law), Ph.D. Student, Ionian Department of Law, Economics and Environment, University of Bari "Aldo Moro", Taranto, Italy
[2] Teaching assistant (Civil Law), Ionian Department of Law, Economics and Environment, University of Bari "Aldo Moro", Taranto, Italy
[3]Teaching assistant (Labour Law), Ionian Department of Law, Economics and Environment, University of Bari "Aldo Moro", Taranto, Italy

ABSTRACT

This essay is aimed to the analysis of the transposition path into Italian law of the French measure of astreintes, which are an indirect coercive method aimed to force the debtor to fulfill the obligation. The modern configuration has led to the adoption of judgments such as the one related to the "Case Facebook" (Order of the Court of Reggio Emilia, 15 April 2015), involving the urgency protection provided by art. 700 c.c.p. relatively to the hypothesis of defamation on Facebook or other Social Networking Sites. The astreinte find an equal in the Anglo-Saxon sort, by the contempt of court, and in the German one, through the Zwangsstrafen, which led, after several transposition attempts into national law (among which stands out the "Project Carnelutti" of 1926), to the current forecast referred to art. 614 bis c.c.p., introduced by art. 49 of Law 18 June 2009 n. 69. An application issue of the astreinte in Italy concerns its potential struggle with the internal public order: in Italy, there isn't any provision of punitive damages outlined in common law systems, so that their transposition would lead to a worsening of the obliged subject's position, in contrast with the proportionality principle on which is based the compensation statement system. The Italian Supreme Court, by the judgment of 15 April 2015 n. 7283, expresses itself in the opposite direction, stating that "the astreintes provided in other jurisdictions […] are not incompatible with the Italian public policy". The contemporary Italian law framework, based on the right of "forced execution", which one can deduct from the art. 24 of the Constitution (which states that all may take legal action for protecting their rights and legitimate interests), is outlined from the Book III, Title IV of the Italian Code of Civil Procedure, indexed "the enforcement of proactive or passive obligations", Articles 612 to 614 bis c.c.p., where it is possible to involve, from the address of the art. 614 bis c.c.p., the irreplaceable performance, although the same rule has generated several disputes. To underline the value and the transverse projection of the theme, it is proper to highlight the inapplicability of Article 614 bis c.c.p. to of individual work disputes listed in art. 409 c.c.p. This exclusion, unjustified and irrational, strongly undermines the principle of equality safeguarded by the art. 3 the Italian Constitutional Charter, and has given rise to an abundant doctrine that considered art. 614 bis c.c.p., if applied, an extra protection to the right to work contemplated by the art. 4 of the Constitution, and even by art. 18 L. 20 May 1970 n. 300. In this perspective, the art. 614 bis make up a missed opportunity for the code of civil procedure to ensure an executive procedural protection for both parties of the employment contract. The possible reconstructions related to debtor's indirect coercion shows problematic aspects referring to a potential overlap with ordinary protection instruments provided by Articles 1223 c.c., indexed "compensation of the damage", and 2932 c.c., indexed "specific execution of the obligation to close a contract", which, for certain doctrine, would be posed after the means provided by art. 614 bis c.c.p. In this way, the executive safeguards to the damage resulting from the breach would be erroneously duplicated. For certain doctrine, this impasse could be overcome by the second paragraph of this Article, with a factual assessment, carried out by the Court, of the above-mentioned principle of irreplaceability,

excluding its application to all those obligations deprived of such connotation. Some doctrine opposed another configuration, endorsed by the jurisprudence, which postulates a systematic and teleological interpretation, per which it would be possible to extend such protection independently from a postulate of irreplaceability. In this scenario, the research will, at last, offer an interesting train of thought to the debate on legal affairs in the perspective of a possible future and further reform of the civil execution law, also taking into consideration to transpose into Italian Law an institute inspired by punitive damages and based on the penal principle of rehabilitation function of punishment (rectius, in this case, of execution) referred to art. 27 subparagraph 3 of the Italian Constitution.

KEYWORDS

Specific Execution, Indirect Coercive Methods, Astreintes, Contract Law, Liability.

1. INTRODUCTION

The need to adopt mandatory instruments estranged from the ordinary forced execution methods provided by the law was, during the years, particularly meaningful at national and international level. Taking into consideration the present Italian civil procedure, such as the consumer protection ruling, is clear the insufficiency of direct instruments to protect the creditor. In this context, in fact, although the single failure may seem ridiculous in the entity, a systematic and large-scale application of *in fraude creditoris* behaviors could entail, from one side, a significant and unjustified enrichment, as well as a weakening of the consumer confidence against the economic operators. This example is considerably useful to introduce a solution for the problem, applied in Common Law systems, which thereto were inspired by for the introduction of various instruments useful for the creditor's protection, based on which it is possible to assume that the credit reasons are "bound to the existence of the obligation". In other words, there is an effective public interest for the correct execution of contracts, since in the case of failure are adversely affected both the economic interest of the creditor and the overall effectiveness of justice administration [1]. According to this reconstruction, certain legal systems have introduced punitive systems of public nature, similar (or referred) to a criminal law nature, with the specific purpose of assisting the creditor reasons more than the mere fulfillment of the obligation.

The main comparison patterns vary about: the nature of the protection, civil or criminal; the structure, under a temporal stability profile; the pursued function, compulsory or sanctionative; its application scope; its procedural aspects, depending on whether the measure needs the injured party's initiative or is automatically granted, and if it's editable [2].

1.1 *ASTREINTES* IN FRENCH LAW.

The *astreinte* draws its foundation in the function, essentially of private nature, to guarantee the exact and timely implementation of the provision, subject of the obligation.

With a pioneering contribution, equal only to that of the power conferred in Roman Law to the Praetor [3], in 1811 the Court of Cray condemned the defendant to "make a public withdrawal under penalty of having to pay three francs for each day of delay in fulfillment". From a purely historical point of view, this ruling was a clear judicial response to the liberal trend welcomed in the new-born Code Napolèon, which, according to eminent lawyers of the epoch, sacrificed the legitimate expectations of the creditor protection. Trying to define the *astreinte*, it is a sanction, characterized, towards the sentence of condemnation, by an accessory nature, which is to pay a

sum of money proportioned to the duration of the delay in the execution of the obligation, or to the amount of infringements committed (in the case of continuous bonds). The first obstacle to the full acceptance of the institute was constituted by the detection of its legal basis, initially found in the art. 1142 of Code Napolèon, with an approach to "*dammages-intéréts*" considered misleading. The main flaw of this reconstruction is constituted by the consequences of the equivalence between the binding nature of the *astreintes* and the compensation for the failure to fulfill the obligation. In this context, there would be no deterrent power, given the fixed amount that the debtor had already clear from the outset. In addition, the peculiarity of a temporal criterion is detached from the concept of "damage suffered" by the creditor, and become an objective criterion which doesn't consider the real suffering connected to the continuation of the infringement. It may happen that, despite the lack of interest in the performance by the creditor and the absence of any further damage because of the time, the debtor is subject to the payment of an extra compensation, justifiable under a subjective profile according to the traditional criterion of a breach of good faith in the execution of the contract. In the damages quantification, there are several profiles estranged from the contractual relationship, among which particular interest is accorded to the economic conditions of the debtor, his guilt in the failure to fulfill the obligation and his general attitude [4]. A substantial contribution about the definitory qualification of the institute is provided, in France, by the law of 5 July 1972 n. 626, later amended by the laws of 16 July 1980 n. 539, 9 July 1991 n. 650 and 13 July 1992 n. 644. The current configuration foresees an application both in relation to rulings which are not susceptible of forced execution that about the fulfilment of proactive obligations. In this perspective, it's possible the competition between the enforcement rules to the main performance and those related to the *astreinte*. From a strictly pragmatic point of view, the institute is applicable either on creditor instance either *ex officio*, according to a public interest not only to the fulfilment but also to the enforcement of judgments of courts. The accessory nature of *astreinte* condemnation, in fact, it's more important considering its role of strengthening the binding of the judgment in which it is declared. In this perspective, it would be conceivable a contrast between the declared aim of protecting the public interest and the allocation of the amount within the private, while would have had greater organicity the forecasting of a payment of the same sum to the State. Is possible to argue that the compensation to the creditor reflects the need to monetize the further harm suffered for the delayed (or missing) performance. The *astreinte* connotes a profile of independence referring to the specific execution and the damage compensation so that it is possible to refer the matter to the judicial authorities for each said remedies. Under the profile of cases studies where it is possible to apply the institute of *astreintes*, it's meaningful to include Labour law disputes; those in the field of property rights and of contractual obligations; proactive obligations, also of non-patrimonial nature; the duty to delivery certain things, as well as of the pecuniary obligations; the protection of personal rights and of copyright. Because of the discretionary pronunciation of the judge, it is possible that it would be subject to later revisions both by the same judge and by the judge of the appeal, until the final judgment.

Based on French practical experience, in different countries, similar institutions had an origin, although different for some peculiar aspects. For example, after the reports by a group of government experts of the Benelux Convention of 26 November 1973, there was the ratification by Belgium, with the law of 31 January 1980, from Holland, with the law of 3 October 1978, and from Luxembourg, by the law of 21 July 1976. In the beginning, the transposition by other jurisdictions has been partial, for example about the necessity of the request of a party to get the measure of condemnation, or to the set of case studies to which the same is applicable, and finally about the form of the institute, since each legal system have intrinsic characteristics with which it is necessary to work a balancing for a correct implementation.

1.2. *ZWANGSSTRAFEN* AND *GELDSTRAFE* IN GERMAN LAW.

The German legal system embraces the purely public optical of the creditor protection, by transposing into the *Zwangsstrafen* system a detailed ruling introducing an instrument which leads to the indirect execution. In the strengthening of the principle for which "who doesn't fulfill the measure of the Judicial Authority commits a detriment of the prestige and the authority of the State", it is precisely in favor of the latter that are attributed the sums due for the continuation of the infringement. It is particularly interesting to note how the wide range of legal instruments spaces from the application of a financial penalty to the arrest, covering the whole spectrum to realize a complete executive system. In particular, the *Geldstrafe* consists in a financial penalty to be paid to the State and, in the event of a further breach, is foreseen the imprisonment of the defaulting debtor. The structure adopted by the German legislator subtracts the instrument of the indirect execution to the criticism made in respect of *astreintes* to lend itself to an unjustified profit for the creditor.

1.3. COMMON LAW SYSTEMS: CONTEMPT OF COURT AND PUNITIVE DAMAGES.

In Common law, the protection for the default of the borrower is found in the Contempt of court, an institute characterized by criminal nature. It consists in the application of a custodial or pecuniary sentence, according to the severity, descending from the commission of a real crime, provided to ensure the compliance of the sentence to the performance of irreplaceable obligations, which otherwise would be unenforceable. This remedy takes its origin from the Equity system, since the Common law did not provide for the specific execution but only the compensation for the damage suffered by the creditor because of the breach of contract. The configurable system, therefore, foresees that the creditor can refer the matter to the judge, who decides at his own discretion. If he considers the inadequacy of the compensatory protection, he can request at the same time the specific performance, i.e. the compensation of the damage, and the injunction, i.e. an inhibitory to oblige the debtor to fulfill the obligation. The latter, if not complied, involves the integration of the "Contempt of court" offense. Unlike the German system, this one confers to the creditor the sum resulting from condemnation. The close correlation between the application of this mechanism and the elitist concept of the judicial system's nature creates considerable difficulties in model exportation, especially for the chance that the deterrent function could be disregarded in practice by the debtor attitude. It's indifference about the possibility of incurring the penalty or the conviction, given the discretionary nature of the measure's adoption, could bring to the belief that the measure could be used as a quite arbitrary mechanism. This concern, although in principle isolated by the general confidence in the judicial system, is not, in reality, eccentric, because the English courts have perpetrated, on several occasions, some violations of the press freedom, punishing publishers and journalists guilty of publishing news potentially detrimental to pending court proceedings [5].

A further instrument of indirect coercion is represented by "Punitive damages", which consist in the condemnation to compensation of a sum that exceeds, sometimes in a substantial way, the amount of the damages suffered by the injured person. The main function of this institute subtends the desire to strengthen the penalty's deterrent function, by a quantification of the injury not closely related to the damage suffered, but to a social assessment of defendant's conduct. The application of punitive damages in the context of breach of contract has led to a considerable rapprochement to *astreintes*, although in the United States this started a debate, not yet fully dissipated, on the possible violation of the principle of the condemned safeguard from excessive

and uncommon penalties. The transposition of punitive damages in the systems of Civil law is much more difficult if on consider the fundamental principles of the civil process, rarely based on an *ex aequo et bono* evaluation and irreconcilable with the entirely discretionary nature of the abovementioned conviction.

1.4. TRANSPOSITION PROFILES INTO ITALIAN LAW.

Among the introduction attempts into the Italian legal system of the French mechanism of *astreintes*, the first project was Carnelutti's in 1926, in which articles 667, indexed "of penalty for breach of a proactive or passive obligation", and 668, indexed "liquidation of penalty", provided that in case of non-performance of the obligation, the entitled person could ask the condemnation of the debtor to pay a sum of money for each day of delay from the date fixed by the judge. The second intervention to point out is the Tarzia Project which, at the twenty-fifth point, introduced the theme of coercive measures within the possible content of the judgment, excluding the reference to the unfungibility of the performance, and expressly including the "delivery" or "release" obligations, implying the applicability to fungible ones. In the final abutment is to remember the bill, approved on 24 October 2003, that transposed the project drawn up by the Prof. Vaccarella's Commission, whose art. 42, indexed "indirect execution" envisaged a pecuniary coercive measure. However, it should have applied only to rights arising from unfungible obligations, being impossible to extend them also to indirect execution. The succession of transposition attempts into Italian law of foreign institutions concerning indirect coercive measures, albeit not implemented and overall erratic, has led to the proliferation of legislative particularism that, individually analyzed, represent innovative protection instruments. Among the best examples, it is detected the first application of *astreintes* in the Italian legal system, constituted by the art. 614 *bis*, introduced by the law of 18 June 2009 n. 69, which operates a first reference to the art. 18 of the law of 20 May 1970 n. 300, commonly referred to as "Workers' Statute", which, by introducing the "reintegration", that is achieved by a coercive order, provides protection mechanisms in the case of breach of the employer.

2. ART. 18 L. 20 MAY 1970 N. 300 AS AN INDIRECT COERCIVE METHOD.

The coercive forecasts of art. 18 L. 20 May 1970 n. 300 is considerable a compensation, limited to the dismissal regulation, for the inapplicability of the *astreinte* measure to labour disputes, provided by art. 409 It. c.c.p. The gap can be remedied *a latere praestatoris*, since the Workers' Statute has conveyed the principle *quod nullum est, nullum producit effectum* in the rules on employer's withdrawal. The previous Law on redundancy, even if introduced the (now indispensable) requirement of justification of dismissal, which was missing in the Italian Civil Code, did not consider the retroactivity inherent to the action for a declaration of invalidity: the compulsory protection allowed (and, in some cases, still allows) an *ex novo* reconstitution of the employment relationship, by shouldering on the worker the consequences of an unlawful act. If, on the one hand, therefore one can speak of an innovation in the labor framework, on the other, from a strictly civil point of view, that of the Statute is the mandatory path.

The passage from "illicit" to "invalid" (and therefore defeatable) [6] of unlawfully imposed dismissal keeps an alternative to recovery (*ex nunc* in the L. 604/66, *ex tunc* in the Workers' Statute) of a sum of money. If in the Italian law of the '66 the choice was to introduce an employer's responsibility, the Statute gives to the worker the power to decide, so that he may terminate the relationship against the payment of a sum of money as compensation. It is precisely in this penalty that one can read the reflection of the *astreinte*, subsequently inserted in the art. 614 *bis* c.c.p., since it isn't excluded that the judge can determine the amount "to implement the coercive measure proper to the measure itself" [7].

The order of reinstatement of unlawfully dismissed worker shouldn't be regarded as an unreplaceable obligation: even if the doctrine recalls the known principle *nemo to factum praecise cogi potest*, a more accurate reading of the phenomenon shows how the application of the aforementioned principle would entail the monetization of dismissal, allowing the employer to choose between reintegration and compensation. Not only this perspective, more attentive to the special aspects of labor law, but also the constitutional principle of effectiveness of judicial protection, covered by the art. 24 of Italian Constitution, does orient toward the allocation of a greater coercive force to the order of reinstatement. This would also imply the need to catalogue the same as a form of "not unfungible" [8] fulfilment, opposite the "purpose of approaching toward the specific execution" [9], which is not admissible as conflicting with the constitutional principle of "freedom of private economic initiative": the real protection must surrender under the strength of the constitutional norm. As far as the readmission in the company cannot be the subject of employer's taxation, the deterrent power granted by civil law allows the worker to assert a not-pecuniary ("existential") damage by requesting compensation. The employer is also obliged to correspond the remuneration [10]. Basically, the employer is not obliged to readmit the employee with the previous duties; however, it is subject to the obligation inherent in the reinstatement itself, and this mechanism have a deterrent effect on the employer: exercising this freedom, the consequences would be less convenient of replenishing itself. The compensation eventually settled by the courts, then, amounts to an entity (5 times the monthly salary, as minimum) such that if the employer renounce to reinstate, he shall be liable both to the penalty and to pay at least the minimum allowance, even if the not-working period is proved to be less than the period covered by the allowance itself.

Art. 18 of Workers' Statute reflects the deterrent and afflictive force of the *astreinte* prescribing a penalty, to be paid to the Pensionistic Adaptation Fund, applied in the case of noncompliance with the order of reintegration of a union board, calling unequivocally the German afflictive model. The considerable size of the sum to be paid, equal to the entire amount of the salary multiplied for each day of delay, refers to the French setting that sees in the *astreinte* a more deterrent that punitive institute [11]. On the other hand, in the application of this protection instrument, precisely in France, it was imposed a penalty of 50 francs for each day of delay in the payment of compensation for damages from an unlawful dismissal [12]: the affinity with the forecasts of the art. 18 of the Statute is evident.

Even if there could be considered a reflection of the *astreinte* in the Statute's regulation, the dismissal discipline is only minimally covered by the coercive force of this institute, because there are several cases in which the application of the art. 18 is excluded. The primary limit is constituted by the same threshold of this article application: in addition to the age-old question of dimensional limits, the art. 18 is applied only to cases of employer's withdrawal in employment contracts concluded for an indefinite period. *Ça va sans dire*, in addition to the contractual categories that depart from the latter, the art. 18 shall not apply to employment contracts of not-subordinate nature. Not to mention that, in the *mare magnum* of labor law rules, as far as the discipline on dismissal constitutes the cornerstone of the employment relationship, there are many aspects of the same which would be worthy of discussion. The legislation on dismissal, albeit by way of example, photograph perfectly, through the opposition between the cases in which art. 18 is applied or not, the missed opportunity that art. 614 *bis* represent about the possibility of granting an additional procedural protection not only for workers but also for employers.
The reform of 2009 still has represented, for Italian legal system, an important milestone in the still current attempt to harmonize and transpose the institute of *astreintes*. About the labour legislation, it would be desirable, more than a generic action aimed at conferring organicity, the

introduction of a specific institute in the ranks of the protection of the contractual party's instruments, according to the trends of French and German approach, allowing the current regulation to no more shine of reflected light, asserting itself as an actual remedy.

3. THE FRAMEWORK INTRODUCED BY ART. 614 BIS C.C.P.

Art. 49, par. 1, of L. 18 June 2009/69 introduced, into the Title IV of Chapter VI of the Book III of Italian Code of Civil Procedure, the new art. 614 *bis*, indexed "Fulfilment of unfungible proactive and passive obligations".

The general rule for the application of art.614 *bis* C.C.P. is the fulfillment of unfungible proactive obligations due to a judgment after the failure to carry out the primary obligation, in accordance with art.1218 of the Italian Civil Code, which identifies the compensation of damages as the main consequence.

In the Italian civil code, it is not possible to discern a definition of "obligation" or "fungibility of the performance": they are concepts born outside the judicial system, of an elastic nature, which refers to an evaluation of reality. A "good" can be defined as "unfungible" if, considered in its specificity, it's not replaceable with another of the same species and, therefore, in this case, the term can be applied also to a performance that is feasible only by the liable party or that, anyway, may not be fulfilled by a third, in place of the obliged, with identical satisfaction of the creditor's interests [13]. The norm, however, presents a contrast between the heading and the body of the text, since the first refers to the qualifying adjective "unfungible" only to positive (or proactive) obligations and not to passive (or *pati*) obligations, while the second lacks any reference to the obligation's unfungibility. The missing mention inside the said norm, even though it generated several doctrinal and judicial disputes, has led some to argue that the coercive measures may also be granted to force the fulfillment of fungible obligations.

The creditor, with this innovative tool, has the right to apply to the court in order to obtain a measure of condemnation, consisting in an order to fulfil and, in addition, for every violation and subsequent breach, or for every delay in the execution, the condemnation to pay a certain sum of money [14]; if the order to fulfil will not be met, the sum of money prescribed in the condemnation measure could be considered as "enforceable title", *ex*-art. 474 c.c.p., i.e. a form of "psychological pressure" to load the debtor and to induce him to fulfill spontaneously the unfungible performance. The total sum due from the condemned debtor is determined by the judge, which takes account of the dispute's value, of the provision's nature, of the quantified or predictable damage and of any other useful circumstance. Since the determination is conducted before a court, the disputes about the adequacy of the determined sum are returned to the Court of Appeal and the analysis, since the financial penalty constitutes an enforceable procedural measure, is "on the judgment" and not "of substance". Consequently, the Court of Cassation has full jurisdiction about the sanction determined by the court that gave the contested judgment, and the ruling is always challengeable *ex*-art. 829, par. 1, c.c.p., even if the parties have not promoted the appeal for *errores in iudicando*.

3.1. UNFUNGIBLE OBLIGATIONS.

The first category of unfungible obligations is referred to relations in which the status or the personal qualities of the debtor are decisive [15], as for example: the obligation of a bank to restore the opening of credit granted to the customer and unlawfully closed by bank's withdrawal from the contract [16], or the obligation of the Registar of Property Registers to erase the transcription of a seizure after that it had unlawfully refused to provide [17].

In second place, are to be considered as unfungible obligations those that requires a constant or prolonged activity, which cannot be achieved by the executant, in place of the debtor, taking account of the impossibility of "an authoritarian bargain in someone else's sphere destined to last for an indefinite period" [18].

Another category of unfungible obligations is that which endeavour the debtor to procure the fact or the consent of a third party, such as: the promise of the third party's fact, figure to which is also comparable the obligation detected from preliminary sale of someone else's good and the obligation of the seller of a property to obtain the habitability certificate in the interest of the buyer, for the release of which is responsible the Public Administration.

In the final analysis, also the obligations to deliver shall be considered "obligations to give", in the technical sense, when the delivery entails, through the translation of possession, both the modification of the good's legal situation and the obligation to provide consent to trading activities or to perform legal acts.Falls into this category the obligation to consent the negotiation in the final contract and the obligation, imparted to the creditor, to lend the necessary consent to reduce the mortgages registered in excess, *ex*-art. 2882 c.c. [19].

Art. 614 *bis* c.c.p., however, couldn't be applied in all those obligations, of various content, related to specific performances for which it makes sense to ask the *astreinte* in addition to condemnation, i.e. those family relationships, that make necessary to introduce new coercive measures on the basis of the European models (examples of unfungible obligations in this category are: the obligations arising from the marriage of fidelity, moral support, collaboration and cohabitation, and the parental responsibility, or the duty of the children to respect their parents, *ex* art. 315 c.c.); quite the contrary for the obligations related to the children custody, for whom, despite the doctrinal and judicial debate, it is possible to use the indirect execution.
The unfungibility could derive from "purely subjective considerations, i.e. by the inability of the creditor (or creditors), for economic reasons, to anticipate the (possibly) large sums of money to obtain enforcement of proactive obligations which are objectively substitutable" [20] as, for example, the perpetration of execution for expropriation, that could be resolved through an obligation to fulfil. In this case, it could be realized the so-called procedural unfungibility, which would require a long time that can prejudice the interest of the entitled person [21].

For what concerns, in conclusion, the unfungibility of negative obligations, undoubtedly deserve to be mentioned, by way of example: the obligation to refrain from competitive activities by the transferor company, *ex*-art. 2557 c.c.;the obligation to avoid noisy tasks beyond certain limits of time, *ex*-art. 844 c.c.; the obligation to not hinder the exercise of a right with behaviors and emulative acts, *ex*-art. 833 c.c. [22],and the obligation to not carry out a certain activity in the implementation of the social pacts, *ex*-art. 1953 c.c.

3.2. INDIRECT EXECUTION AND ITS RELATION TO ART. 2932 C.C.

Among the remedies provided for the fulfillment of the preliminary contract, in the Italian law, is highlighted art. 2932 c.c., indexed as "specific execution of the obligation to conclude a contract". This tool is one of the remedies available in civil process and represents the possibility for a party in good faith, who legitimately entrusted in the counterpart, to obtain a constitutive ruling, through which the judge acts in place of the defaulting party and concludes the final contract.

Part of doctrine argues that also the obligation to conclude a contract falls within the scope of application of the art. 614 *bis* c.c.p. [23].

Some hypothesis of conceptual incompatibility are therefore found in relation to the actions aimed at obtaining the fulfillment of a contractual obligation or at the dissolution of the negotiating constraint: in the first case, in fact, the creditor asks for the specific execution of a contractual obligation, *ex*-art. 2932 c.c., which is effective regardless of the conduct, active or passive, of the defendant-debtor; in such a scenario, the *astreinte* would make no sense, since it cannot be found an obstacle to the effectiveness of judicial decisum in the behavior that the latter subject could hold. A conceptual and functional incompatibility, instead, is that of the actions of the second group, as the "termination of the contract for failure to fulfill obligations", *ex*-art. 1453 c.c.: if the creditor have no more interest to the fulfillment of the obligation, because of the negotiation's attitude, of the aims pursued or of the provision implementation's time, and he applies to the court with the action for resolution of the contract, is evident how the condemnation *ex*-art. 614 *bis* c.c.p. would have no more meaning; conversely, nothing excludes that those who ask judicially the fulfilment and, as an alternative, the resolution, may request, as ancillary to the main question, the application of the financial penalty, as well as nothing prevents the creditor, once obtained the measure of condemnation with the appended coercive measure, to act for the resolution, with consequent automatic cessation of the *astreinte* at the time of the commencement of the new application.

The indirect coercive measure is, therefore, the only alternative to the residual remedy of damage compensation *ex*-art. 1218 c.c., indexed as "Liability of the debtor".

3.3. THE MANIFEST INIQUITY AS A NEGATIVE LIMIT.

Art. 614 *bis* c.c.p. provides the so-called "negative limit of manifest iniquity", taking into analysis the principle for which "nobody can be condemned to impossible obligations". So, the legislator, enshrining the exclusion of indirect coercive measures "if this is manifestly unfair", looks decidedly with detriment to further coercion deriving from condemnation, highlighting an intolerance to the compulsory provision. Part of the doctrine considers that it is possible to use some other typical remedies to meet creditor's interest, such as the obligation to conclude a contract *ex*-art. 2932 c.c. The iniquity must, therefore, be clear, and the misapplication of art. 614 *bis* c.c.p. have to affect the rights of the defense, i.e. straight to the execution, which can be deduced from both the art.24 of the Italian Constitution, which establishes that "all may take legal action for the protection of their rights and legitimate interests", and the principle of "fair trial", regulated by art. 111 of Italian Constitutional Charter, returning to the equity of the Judge the examination of each specific case, motivating his choices when he apply the limit [24].

3.4. PUBLIC ORDER LIMIT: THE ITALIAN SUPREME COURT RULING 15 APRIL 2015, N. 7613.

Recently the Italian Court of Cassation, with the judgment of 15 April 2015 n. 7283, ruled on the question of the *astreinte*'s compatibility with the public order. The Court affirmed the principle of law according to which "the *astreintes* provided in other jurisdictions, aimed, with the payment of a sum which increases with the continuation of the infringement, to constitute a coercion to propitiate the fulfilment of obligations not subjected to specific execution, are not incompatible with the Italian public order", hold the presence, in the code of civil procedure's *corpus*, of an institute such as that contained in art. 614 *bis* c.c.p., thereto similar. The reasoning adopted by the Supreme Court was to not trespass into the so-called unjustified enrichment, thus avoiding the introduction of the institution of punitive damages in the legal system, and to restore the damage-event, i.e. the lesion, diverting what is the classic model of the damage-consequence, i.e. the mere reparation of the damage suffered.

The interesting aspect brought to light with the aforementioned judgment is the difference between compensation for damage, *astreinte* and punitive damages institutions, as: the first one would have a reintegrative function; the second one would have a coercive function “not by repairing the damage in favour of those who have suffered, but threatening a damage against those who behave in an undesired way”, and the third one aims to the future fulfilment of the obligation “remaining its own content of to sanction the responsible”.

When the Ermines speak of “opposition to public order”, they do not intend to relate it to a concept of diversity but to a profile of lawfulness, given the assumption that the public order refers to the fundamental principles of the Constitution and of the entire legal system, characterising the ethical and social structure of the community in each historical period and so dictating an evolutionary interpretation of the system.

The caution of the Italian legal system in respect of punitive damages it is recovered in the division between civil liability (contractual and/or non-contractual) and criminal liability (of objective nature) since the monopoly of penal sanctions is placed in the hands of the State, i.e. the Legislator, and this mechanism does admit no exceptions, because the primary source of criminal ruling is the law, constituted by the Penal Code; this can be confirmed, for example, by the art. 1223 c.c., indexed "Damages compensation", which would base the idea that the sole aim of compensation is to restore the injury suffered, and therefore the recognition of a sanctionary function would imply an unjustified enrichment.

In addition to the art.614 *bis* c.c.p., the judges of the Court of Cassation mention as indirect coercive measures those provided for: patents and trademarks; art. 114, par. 4(e), of the Code of the administrative process (D. Lgs. 104/2010),which apply the *astreinte* mechanism to sanction the breach of Public Administration to comply with a ruling; art. 140, par. 7,of the Consumer Code (D. Lgs. 206/2005); art.709 *ter* c.c.p.

The last reference should be made to art. 96, par. 3, c.c.p., indexed “Aggravated responsibility”, which falls within the cases of the so-called “malicious prosecution” and expresses the intention to discourage the abuse of the process while preserving the functionality of the system of justice, deflating the unjustified litigation and favoring the use of instruments of alternative dispute resolution. The mechanism hasn’t a pure sanctionative nature, resulting in an *ex officio* penalty; however, it would seem appropriate to limit the applicability of the provision to those activities that are subjectively attributable to the respondent party, in the form of malice or gross negligence, or for a conduct which has determined a voluntary elongation of the processual termsIn fact, part of doctrine argues that, although the aforementioned article is not purely reparatory, it isn’t automatically qualifiable as punitive, being able to be labeled as “private punishment”, distinguishing itself for the lack of a necessary correspondence to a pecuniary advantage [26].

3.5. Facebook Case Study: Court Order Of Reggio Emilia Court 15 April 2015, N.384.

A practical application of art. 614 *bis* c.c.p. can be found it in the ordinance of 15 April 2015 n. 384 by the Court of Reggio Emilia, that concerns the application of *astreinte* to a case of insults and defamation on Facebook and the related urgency protection.

The applicant has brought the case before the Court by an appeal *ex*-art. 700 c.c.p., indexed “Of urgent measures”, that provides such as “conditions for granting”: the reason to fear the dissatisfaction of the right, i.e. the *periculum in mora*; the imminent and irreparable threat of an injury or a damage during the time necessary to defend the right in an ordinary judgement; the

absence of another suitable precautionary measure; the accusation and the demonstration of the likely merits of its application, i.e. the *fumus boni juris*).

The Court has upheld the precautionary instance aimed to inhibit to the resistant the undue publication on the Facebook platform of posts with abusive and defamatory content, ordering to the same resistant the immediate cessation, further setting, having regard to the art. 614 *bis* c.c.p., a sum of money (€ 100,00) owed by the obliged for each infringement or breach of the order and for each day of delay in the removal of the posts.

The provision, relating to the implementation of unfungible proactive or passive obligations, introduces the possibility of fixing, with the condemnation (constituting enforceable title), a sum of money owed by the obligor for each infringement or breach, or for every day of delay in carrying out the measure applied by the judge, "taking account of the value of the dispute, of the provision's nature, of quantified or predictable damage and of any other useful circumstance", where this is not manifestly unfair.

In the mentioned case there were all the conditions for the urgency protection *ex*-art. 700 c.c.p.: the infringement of a personal right constitutionally guaranteed *ex*-art. 2, that "recognizes and guarantees the inviolable rights" (the conduct is also a criminal offense of defamation, *ex*-art. 595 p.c., which punishes whoever offends the reputation of others in the absence of the offended person with imprisonment of up to one year and a penalty of up to € 1032,91); the *fumus boni juris*; the possible injury that may be caused to the aforesaid right in the ordinary proceedings and, then, the actual and current fear that the right could be exposed to a serious and irreparable damage (*periculum in mora*); the absence into the legal system of a typical precautionary measure appropriate to guarantee the effectiveness of the protection (residuality).

The possibility to include the protective pronunciations in the measures laid down in art. 614 *bis* c.c.p., as also the decrees issued *inaudita altera parte ex*-art. 669 sexies c.c.p. and those of urgency referred to art. 700 c.c.p., is recognized by doctrine and jurisprudence, because the measure issued as precautionary, when suitable to anticipate the effects of the judgment on the merits, acquires definitive effectiveness, since the establishment of proceedings on the merits is purely optional, and this mechanism realizes the deflation aims *ex*-art. 669 *octies* c.c.p. [27].

REFERENCES

[1] Frignani, A. (1974) L'Injunction nella common law e l'inibitoria nel diritto italiano, Milan, Giuffré; Pardolesi, P. (2003) Rimedi all'inadempimento contrattuale: un ruolo per il disgorgement?, Riv. dir. civ., Vol. 1, p. 717; Pardolesi, P. (2012) Contratto, nuove frontiere rimediali, disgorgement v. punitive damages, Collana della II Facoltà di Giurisprudenza – Sede di Taranto, University of Bari – Aldo Moro, Bari, Cacucci; Blomeyer, A. (1975), Zivilprozessrecht. Vollstreckungsverfahren, Berlino-Heidelberg-New York, p. 440 ss.; Taruffo, M. (1988) L'attuazione esecutiva dei diritti: profili comparatistici, Riv. Trim. dir. proc. civ., p. 142 ss.; Guinchard, S. & Moussa, T. (1996) Droit et pratique des voies d'execution, Paris; Perrot, R. (1996) La coercizione per dissuasione nel diritto francese, Riv. dir. proc., p. 658.

[2] Mondini, A. (2014) L'attuazione degli obblighi infungibili, Milan, Giuffré, p. 21; Jacob, J. I. H. (1987) La giustizia civile in Inghilterra, Bologna, p. 183 ss; Dobbs, D. B. (1971) Contempt of Court: A survey, 56 CorLr, p. 183 ss.; Cremonini, C. (1984) An Italian Lawyer Looks at Civil Contempt – From Rome to Glastombury, 3CJQ, p. 133 ss.; Zuliani, A. (2010) L'astreinte (o comminatoria o coercitoria o misura coercitiva), relazione diffusa nell'incontro di studio organizzato dal CSM sul tema della riforma delle norme sul rito civile introdotta dalla legge n.69/2009, Rome; Crivelli, A. (2005) Penalità di mora, astreintes, figure consimili, I danni risarcibili nella responsabilità civile, Vol. I, (Cendon, P.) Il danno in generale, Utet, Turin, 2005, p. 461.

[3] Borrè, G. (1966) Esecuzione forzata degli obblighi di fare o di non fare, Neaples, Jovene, p. 21.
[4] Trapuzzano, C. (2012) Le misure coercitive indirette, Padova, Cedam, p. 29; Marazia, L. (2004) Astreintes e altre misure coercitive per l'effettività della tutela civile di condanna, Riv. esec. forz., Vol. II, Utet, Turin, p. 333; Dondi, A. (1981) L'Astreinte endoprocessuale, Riv. Dir. Proc. Civ., p. 524.; Capponi, B. (1999) Astreintes nel processo civile italiano?, Giust. Civ., Vol. II, p. 157; Costantinesco, L. J. (2009) Il metodo comparativo, Sist. Giur. Comp., Giappichelli, Turin; Benatti, F. (2008), Correggere e punire dalla law of torts all'inadempimento del contratto, Giuffré, Milan.
[5] Varano, V. (1989) Contempt of Court, Processo e tecniche di attuazione dei diritti, Neaples, Jovene, p. 429; Fava, P. (2007) Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco, Corr. giur., p. 498.; Mattei, U. (2010) Il modello di common law, Sist. giur. comp., 3rd ed., Giappichelli, Turin; De Stefano, F. (2009) L'esecuzione indiretta: la coercitoria via italiana alle "astreintes", Corr. del merito, Vol. V, 12, p. 1181.
[6] Freni, A. & Giugni, G. (1971) Lo Statuto dei Lavoratori, Commento alla legge 20 maggio 1970, n.300, Milan, Giuffrè, p. 69; Padovani, T. (1975) Ordine di reintegrazione del lavoratore e art. 388 cpv., c.p., Dir. lav., Vol. II, p. 33; Alessandri, A. (1981) Il problema delle misure coercitive e l'art. 388 c.p., Riv. it. dir. e proc. pen., p. 154 ss.; Neaples, M. (2006) Il diritto del lavoro tra conferme e sviluppi, Giappichelli, Turin, p. 188 ss.; Tatarelli, M. (2006) Il licenziamento individuale e collettivo, Padova, Cedam, p. 43 ss.; Meucci, M. (1999) Risarcimento di danno, reintegra e opzione per l'alternativa economica, in caso di licenziamento invalido, Riv. crit. dir. lav., p. 757.
[7] Iuorio, M. A. & Fanelli, G. (2013) La penalità di mora nel diritto italiano, L'esecuzione processuale indiretta, Milan, IPSOA, p. 91; Santagada, F. (2013) Commento al D. lgs. 1 settembre 2011, n.150, Commentario delle riforme del processo civile dalla semplificazione dei riti al decreto sviluppo, Turin, Giappichelli, p. 142.
[8] inneci, U. (1997) Coercibilità dell'ordine di reintegra del lavoratore illegittimamente licenziato, Lav. giur., Vol. 101, p. 798.
[9] iccardi, A. (2007) Tutela reale versus tutela obbligatoria tra ideologia e tecnica, ADL, Vol. 6, p. 128.
[10] Trapuzzano, C. (2012) Le misure coercitive indirette - come indurre il debitore ad adempiere, Milan, CEDAM, p. 59; Albi, P. (2007) Stabilità del posto di lavoro e accezione "debole" del rapporto di lavoro, Lav. dir., Vol. 4, p. 554; Muggia, S. (2009) Risarcimento del danno per mancata esecuzione della reintegrazione. Il commento, Lav. giur., pp. 1239-1242; Proto Pisani, A. (1982) Aspetti processuali della reintegrazione nel posto di lavoro, Foro it., Vol. V, p. 117 ss.; Proto Pisani, A. (1978) Appunti sulla tutela di condanna, Riv. trim. dir. proc. civ., pp. 1156-1157; Ghera, E. (1989) L'esecuzione diretta e indiretta nel diritto del lavoro, Processo e tecniche di attuazione dei diritti, Vol. II, Neaples, Jovene, p.1077; Vallebona, A. (1995) Tutele giurisdizionali e autotutela individuale del lavoratore, Padova, Cedam; Vallebona, A. (2009) La misura compulsoria per la condanna incoercibile, Mass. giur. lav., p. 568.
[11] Iuorio, M. A. & Fanelli, G. (2011) La penalità di mora nel diritto italiano, L'esecuzione processuale indiretta, Milan, IPSOA, pp. 92-93; Mazzotta, O. (1999) I licenziamenti, Milan, Giuffrè, p. 500; Ziliotti, M.G. (1993) La disciplina dei licenziamenti individuali e collettivi, Turin, Giappichelli, p. 22 ss.;Garofalo, M. G. (1979) Art. 18, lo Statuto dei Lavoratori, Commentario diretto da G. Giugni, Milan, Giuffrè, p. 299; Mandrioli, C. (1975) L'esecuzione specifica dell'ordine di reintegrazione nel posto di lavoro, Riv. dir. proc., p. 9 ss.
[12] French C. Cass. 29.05.1990 and 20.12.1993; Mondini, A. (2014) L'attuazione degli obblighi infungibili, Milan, Giuffré; Capponi, B. (2011) L'esecuzione processuale indiretta, Milan, IPSOA; Trapuzzano, C. (2012) Le misure coercitive indirette - come indurre il debitore ad adempiere, Milan, CEDAM.
[13] Ghiretti (1974) Genericità e fungibilità nell'obbligazione, Riv. dir. comm., Vol. I, p. 257; Consolo, C. & Godio, F. (2013) Art. 614 bis – attuazione degli obblighi infungibili di fare o di non fare, Commentario del Codice di Procedura Civile, Vol. VII, I, artt. 602 – 669quaterdecies, Milan, UTET; Balena, G. (2009) La nuova pseudo-riforma della giustizia civile, Giusto proc. civ., Neaples, ESI, p. 800; Balena, G. (2016), Istituzioni di diritto processuale civile, Vol. III: i processi speciali e l'esecuzione forzata, Cacucci, Bari; Bonilini, G. (1985) Pene private e danno non patrimoniale, Le pene private, Giuffrè, Milan, 1985.

[14] Bove, M. (2010) La misura coercitiva di cui all'art. 614 bis c.p.c., Riv. trim. dir. proc. civ., Giuffrè, Milan, p. 781 ss.; Busnelli, F. D. (1984) Verso una riscoperta delle «pene private»?, Resp. civ. e prev., p. 26.; Capponi, B. (2001) Alcuni problemi su contraddittorio e processo esecutivo – alla luce del nuovo art. 111 della Costituzione, Riv. esec. forz., p. 28; Castronovo, C. (1989) Il risarcimento del danno in forma specifica come risarcimento del danno, Processo e tecniche di attuazione dei diritti, Vol. I, Jovene, Neaples, p. 481.

[15] Partisani, R. (2004) Fungibilità e infungibilità nelle diverse specie di obbligazioni, Trattato delle obbligazioni, Vol. I, Turin, p. 1503; Luiso, F. P. (2015) Diritto processuale civile. Vol. III: il processo esecutivo, Milan, Giuffrè; Mandrioli, C. (1955) L'azione esecutiva, Milan, Giuffrè; Mandrioli, C. (1957) L'esecuzione forzata degli obblighi di fare e di non fare, Noviss. dig. it., Turin, UTET, p. 766; Mandrioli,C.(2016) Corso di Diritto Processuale Civile, ediz. minore. Vol. III: l'esecuzione forzata, i procedimenti speciali, l'arbitrato, la mediazione e la negoziazione assistita, Turin, Giappichelli.

[16] Trib. Catania, ord. 18 January 2004, Giur. comm., 2005, Vol. II, p. 64

[17] Trib. Turin, ord. 2 July 2010, Giur. it., 2011, p. 1123

[18] Petti (2010) Commento a Trib. Cagliari, ord. 19 ottobre 2009, I contratti, p. 682.

[19] Trib. Bari, 10 maggio 2011, n. 365, Dejure, Procedimento cautelare in materia civile - Provvedimento - in genere

[20] Proto Pisani, A. (2010) Appunti sulla tutela di condanna (trentacinque anni dopo), Foro it., Vol. V, p. 257 ss.; Zucconi Galli Fonseca, E. (2010) Le novità della riforma in materia di esecuzione forzata, Riv. trim. dir. e proc. civ., p. 201 ss.

[21] Mazzamuto S. (2009) Le comminatorie di cui all'art. 614 bis c.p.c. e il concetto di infungibilità processuale, Europa e dir. priv., Milan, Giuffrè, p. 947 ss.; Chizzini A., Dell'esecuzione forzata degli obblighi di fare o non fare, commento all'art. 614 bis, La riforma della giustizia civile, Commento alle disposizioni della legge sul processo civile n.69/2009, Turin, Giappichelli, 2009, p. 176; Mandrioli, C. (1976) Sulla correlazione necessaria tra condanna ed eseguibilità forzata, Riv. trim. dir. proc. civ., p. 1342; Mandrioli, C. & Caratta, A. (2009) Come cambia il processo civile, Turin, Giappichelli; Tedioli, F. (2013) Osservazioni critiche all'art. 614 bis cod. proc. civ., Nuova giur. civ. comm., Vol. 2, p. 78.

[22] Trib. Varese, ord. 17 February 2011, Dejure - Sentenze di merito

[23] Consolo, C. (2009) Una buona "novella" al c.p.c.: la riforma del 2009 (con i suoi artt. 360 bis e 614 bis), va ben al di là della sola dimensione processuale, Corr. giur., IPSOA, Vol. 6, p. 741 ss.; Cipriani, V. F., Civinini, M. G. & Proto Pisani, A. (2001) Una strategia per la giustizia civile nella XIV legislatura, Foro it., Vol. V, p. 81; Patti, S. (199 8) Pena Privata, Dig. disc. priv., sez. civ., Vol. XIII, Turin, UTET, p. 349; Saletti, A. (2009) Commento a ll'art. 614 bis, Commentario alla riforma del codice di pr ocedura civile, Turin, UTET, p.100.

[24] Mondini, A. (2014) L'attuazio ne degli obblighi infungibili, Giuffrè; Montesano, L. (1965) Condanna civile e tutela esecutiva, Neaples, p. 5 ss.; Cendon, P. (1979) Pena privata e diffamazi one, Pol. dir., Bologna, Il Mulino, p. 149; Chi ovenda, G. (1960) Istituzioni di diritto processuale civile, 2a ed., Neaples, Jovene; Satta, S. (1952) L'e secuzione forzata, Tratt. Dir. Civ. Vassalli, Turin, U TET, p. 207; Scognamiglio, R. (1957) Il risarcimento del danno in forma specifica, Riv. trim. dir. proc. civ., Vol. I, p. 201; Scognamiglio, R. (1971), Indennità (dir. civile), Enc. dir., Vol. XXI, Milan, Giuffrè, pp . 99-593.

[25] Trib. Terni, 17 May 2010; Trib. Varese, 27 May 2010 e Trib. Verona, 28 F ebruary 2014, wwwiusexplorer.it

[26] Sciaratta, N. (1960) La Cassaz ione su astreinte, danni punitivi e (funzione della) responsabilità civile, www.dirittocivilecontemporaneo.com, YII, Vol. III; Trimarchi, V. M. (1960) Caparra (dir. civile), Enc. dir., Vol. VI, Milan, Giuffrè, p. 191; Vassalli, G. (1938) La mancata esecuzione di un prov vedimento del giudice, Turin, UTET; Carratta, A. & Mandrioli, C. (2016) Diritto processuale civile. Vol IV: L'esecuzione forzata, i procedi menti sommari, cautelari e camerali, Turin, Giappichelli.

[27] Cuofano, A. C. (2015) L'astre inte (art. 614 bis c.p.c.) applicato ad un caso di ingiurie su Facebook: l'analisi dell'ordinanza del Tribunale e dell'istituto, www.camminodiritto.it.

AUTHORS

Dr. Alessio Caracciolo is an Italian Attorney-at-Law. After achieving his Master of Law (LL.M.) at the University of Bari (It aly), since 2014 he cooperates as Teaching Assistant within the Civil Law and Biolaw chairs at the Ionian Department,focusing his research on Human Rights. He attended several conferences as aspeaker, and he was Session Chair for the category Legal Issues at the International Conference ML-TIIM 2015. In the same year, he deepened his research in the field of migratory flows into the EU. He's achieving a Ph.D. in "Law, Economi cs and Mediterranean Cultures".

Dr. Federica Stamerra is an Italian researcher and trainee lawyer. After achieving her Master of Law (LL.M.) at the University of Bari (Italy), since 2015 she cooperates as Teaching Assistant within the Labou r Law chair at the Ionian Department, focusing her research on Trade Union Law. She was a speaker at the International Conference ML-TIIM 2016. She's achieving a Postgraduate Specialisation in Labour Law and she's attending an internship at the Court o f Taranto.

Dr. Fabrizio Cesareo is an Italian researcher and trainee lawyer. After achieving his Master of Law (LL.M.) at the University of Bari (Italy), since 2015 he cooperates as Teaching Assistant within the Civil Law, Family Law and Biolaw chairs at the Ionian Department, focusing his research o n Contract Law and Private Law. He's attending an internship at the Court of Taranto.