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Abstract

In Italy, enforcement proceedings are cumbersome, long, and highly ineffective. Their major shortcomings are complexity, outdated procedures, and lack of efficient compulsory measures. In spite of the recurring complaint about the odd situation of an enforcement machinery that might have worked well in the last century, but looks like an antique in contemporary society, the rules governing the enforcement of judgments have neither changed substantially since the code of civil procedure went into force in 1942, nor are they likely to be improved in the short run. Therefore, judgment-holders find it very difficult to fulfil their expectations when the debtor fails to comply with the court order voluntarily, and there is often no way to overcome the debtor's obduracy.

Keywords

Italy, civil judgments, enforcement

Cover Page Footnote

My thanks to my husband Randy Davidson for his editing and to Jim Corkery of Bond Law School for his helpful hints.

ENFORCEMENT OF CIVIL JUDGMENTS AND ORDERS IN ITALY: AN OVERVIEW*

By Elisabetta Silvestri

Introduction

In Italy, enforcement proceedings are cumbersome, long, and highly ineffective. Their major shortcomings are complexity, outdated procedures, and lack of efficient compulsory measures. In spite of the recurring complaint about the odd situation of an enforcement machinery that might have worked well in the last century, but looks like an antique in contemporary society, the rules governing the enforcement of judgments have neither changed substantially since the code of civil procedure went into force in 1942, nor are they likely to be improved in the short run. Therefore, judgment-holders find it very difficult to fulfil their expectations when the debtor fails to comply with the court order voluntarily, and there is often no way to overcome the debtor's obduracy. As a result, many legal rights are doomed to remain ineffective, since the system either provides no adequate remedies, or offers, at the most, an award of damages for the wrong inflicted by the defaulting judgment-obligee. It is clear that money restoration is not suitable for every right, most of all for the so called 'new rights' emerging in sensitive areas of substantive law, such as the ones dealing with the protection of minorities, the environment, consumers, and so on. Still, money restoration turns out to be the only remedy available when the system surrenders to a debtor who refuses to comply with a court order and nurtures the certainty that no coercive instrument will be resorted to in order to bend his will.

* This essay is a modified version of the Italian Report prepared for the volume *Astreinte and Imprisonment for Debt*, edited by Antonie W Jongbloed and forthcoming in the series of books on the topic *Procedural Law in the European Union*. Footnotes are restricted on purpose to a minimum, since the legal literature on the subject matter is almost exclusively in Italian.

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In Italy, the enforcement machinery does not include anything even slightly akin to the compulsory measures adopted by other legal systems belonging to the civil law tradition, such as the French *astreintes* or the German *Geldstrafen*.¹ Of course, the idea of procedural devices aimed at forcing the debtor to comply with his obligations is well known to scholars, but apparently in the doctrinal debate revolving around the importance of an appropriate armoury of compulsory measures, the legislator has so far found no inspiration on updating the enforcement procedures still in force.

The Maze of Enforcement Procedures

A huge section of the code of civil procedure is devoted to enforcement proceedings.² This section begins with a set of general principles, applicable to every kind of enforcement, and then it goes on to lay down detailed rules concerning different types of procedures which the judgment holder can start. A special subsection deals with how the debtor may oppose enforcement. A handful of rules also contemplates suspension and discontinuance of enforcement. All that amounts to no fewer than 150 articles of the code, to which one must add several statutes governing special kinds of enforcement, such as the ones related to tax collection or the garnishment of salaries earned by public servants: a true legal maze in which not only the lay citizen, but even a skilled lawyer can easily get lost.

According to a well-established doctrine, not every judgment calls for judicial enforcement. Declaratory and constitutive judgments³ are self-executing, while the relief sought requires the machinery of judicial enforcement when the

1 *Astreintes* are court's orders for the payment of a certain amount of money for each day the debtor delays compliance with the primary judgment. *Geldstrafen* are fines threatened to the judgment debtor, and aimed at pressuring him either to fulfil an obligation no third party can comply with, or to refrain from a certain behavior. One of the main differences between *astreintes* and *Geldstrafen* is that *astreintes*, once collected, are assigned to the judgment creditor, while the fines imposed as *Geldstrafen* are always assigned to the State. *Geldstrafen* show a slight resemblance to contempt of court, since if they cannot be collected, the sanction for failure to comply with the judgment changes into imprisonment. For a concise account of the basic features of *astreintes* and *Geldstrafen*, see Denti and Silvestri, 'Regional Report from Continental Western Europe', in Jacobsson and Jacob (eds), *Trends in the Enforcement of Non-Money Judgments and Orders. The First International Colloquium on the Law of Civil Procedure* (1988) 157 - 170.

2 The whole third book of the code (arts 474 - 632) deals with enforcement.

3 Constitutive judgments 'create or change a legal relationship rather than judicially affirm the pre-existing rights and duties of the parties': see Cappelletti and Perillo, *Civil Procedure in Italy* (1965) 152.

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judgment entered is a condemnatory one and the judgment debtor does not comply with it spontaneously. A final judgment on the merits is enforceable even before it becomes *res judicata*, unless a stay is granted by the court having jurisdiction over the matter.⁴

Besides judgments, several kinds of court orders (such as eviction orders and certain types of interim measures) can be enforced. A few legal instruments - including public deeds, bills of exchange, and promissory notes - are enforceable as well. Judgments, courts orders and public deeds can be enforced only if the judgment creditor obtains from the court clerk or a public notary a special certification authorising the enforcement. The wording of such a certification is a good example of obsolete and pretentious 'legalese'. It reads: 'It is hereby commanded that any marshall so requested and whoever is entrusted with the duty to do so enforce this instrument, that public prosecutors grant their assistance, and that all police officers aid in the enforcement upon lawful request to do so'.

Enforcement, even when it is based on a judgment or a court order, is conceived of as an autonomous proceeding that the judgment-holder is supposed to start before the appropriate court. At no stage in the course of the proceeding can the debtor seek a review on the merits of the judgment that is enforced: he is only allowed to oppose the proceeding by denying the creditor's right to enforcement or by challenging the regularity of specific steps in the procedure.

There are various kinds of enforcement proceedings: the choice of the appropriate one is not left to the judgment-holder, but depends on the obligation the debtor is expected to discharge. Therefore, different procedures empower the creditor to recover a certain sum of money, to obtain the delivery of specified assets, or to enforce orders compelling (or enjoining) the debtor to do something. These procedures are not interchangeable: it is critical for the judgment-holder not to start off on the wrong foot, because the choice of an incorrect procedure may nullify the whole enforcement proceeding. Further hurdles are faced by the creditor when he realises that a panoply of sub-

4 Until 1990, judgments issued by a court of first instance could not be enforced while they were still subject to appeal or the appellate proceeding was pending. However, enforcement could be authorised in exceptional circumstances. Appellate judgments were enforceable immediately, even though their enforcement could be stayed when the aggrieved party launched a further appeal to the Court of cassation (the Italian court of last resort). Nowadays, arts 282 and 283 of the Code of civil procedure (hereinafter cpc), both reformed in 1990, provide that judgments rendered by a court of first instance can always be enforced unless the appellate court grants the debtor a stay of enforcement for 'serious reasons'.

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procedures stems from a given enforcement procedure. Each sub-procedure, in its turn, is rich in formalities and requirements that are often hard to satisfy. The journey through the enforcement maze is slow and full of pitfalls. The brave creditor who endures the effort hardly ever receives what he is entitled to, whether it is a sum of money, a piece of property, or the result of an act the debtor was bound to perform.

An illuminating example of the complexity of Italian enforcement machinery is the multifaceted procedure laid down by the code for the enforcement of money judgments. In theory, the basic pattern of this procedure is quite simple: the debtor's property is attached, sold at a public auction, and the proceeds of the sale are delivered to the judgment creditor. The complexity arises when different procedures branch off from the basic pattern, according to the kind of assets the judgment creditor is determined to attach, namely a) personal property owned by the judgment debtor that is in his possession; b) personal property owned by the judgment debtor that is in the possession of a third party; c) real property owned by the judgment debtor.

It would be cruel to inflict on the reader a detailed description of the countless and abstruse variations which the Italian legislator has devised for the levying of execution.. However, some fancy details merit passing mention: it may be interesting to know, for instance, that the debtor's personal property includes any silkworms that happen to be in his possession. The code specifies that silkworms can be attached, too, provided that they are still on the trees and manufacturing their own cocoons:⁵ a legal rule of pivotal importance for the economy of a country aspiring to be one of the most industrialised in the Western hemisphere.

Along the same lines, one can remember that until recently the public auction to sell the debtor's assets had to take place according to the so called 'method of the virgin candle'. This evocative expression applied to the following procedure: after every bid, three candles (each one lasting approximately one minute) were lit, and the assets were knocked down to the last bidder if no higher bid had been made by the time the third candle went out.⁶

The Lack of Compulsory Measures

5 See art 516, para 2 cpc.

6 The 'method of the virgin candle' disappeared in 1998: according to the new text of art 581 cpc, the mechanics of the bids are the same, but reference is made to a waiting period of three minutes after which the last bid is considered final, unless in the meantime it has been exceeded by another bid.

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Two main principles inspire the rules governing judicial enforcement in civil matters. On the one hand, the system adopts what is called the 'principle of the greatest possible coincidence'.⁷ In other words, the enforcement machinery is designed to enable the creditor to obtain the same result that he would have obtained if the debtor had complied with the judgment voluntarily. On the other hand, enforcement proceedings are strictly confined to actions *in rem* against the property of the debtor, since actions *in personam* would clash with the principle according to which *nemo praecise ad factum cogi potest* (or, as the common lawyers say in more prosaic terms, 'You can lead a horse to water, but you can't make it drink').

It is understandable that these two principles are bound to collide when what the judgment-holder is entitled to receive from the debtor is not a sum of money or a piece of property, but the result of an act which only the debtor, can perform. The example of the famous painter who is hired to paint a portrait, and refuses to fulfil his obligation, clarifies the issue. Who cares if somebody else can paint the portrait? Certainly not the creditor, who chose that painter for his reputation, and who has no interest whatsoever in the performance of a 'surrogate' painter. The situation becomes even more delicate when the obdurate debtor is required by a court order to refrain from engaging in specified activities: how can he be forced to comply with his duties without infringing upon his freedom? Is there any action *in rem* against the debtor's property sufficient to guarantee that in the future he will abstain from repeating the forbidden behaviour?

Courts are short of means suitable to bring about the enforcement of non-money judgments and orders compelling (or enjoining) the debtor to do something other than activities whose practical results can be obtained by entrusting a 'substitute' with the task to perform the obligation instead of the debtor. Anybody can build a wall or tear it down when the debtor refuses to do so; this case and very few others of the same kind are the only ones for which the enforcement machinery provided by the code of civil procedure seems to work smoothly. The nature of the so-called surrogate performance and its limits make it unavailable for the enforcement of a variety of non-money remedies that are much more frequent and socially relevant than an order directing the judgment-obligee to dismantle the wall he built on his neighbour's land. In short, there is no way out: either the debtor can be 'bypassed', resorting to somebody else for

⁷ On this principle, well known to the doctrine of civil enforcement followed by the civil law systems, see Barbosa Moreira, 'Regional Report from South America' in Jacobsson and Jacob (eds), *Trends in the Enforcement of Non-Money Judgments and Orders: The First International Colloquium on the Law of Civil Procedure*, see above n 1 at 87.

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the fulfilment of his obligation, or the non-money remedy cannot be enforced according to the ordinary procedure.

This being the situation, one would expect the Italian procedural system to be at least well-equipped with appropriate and effective coercive measures aimed at forcing compliance with those non-money remedies unsuited for the mechanics of surrogate performance. On the contrary, no coercive measure is contemplated by the law in force: no *astreintes*, no *Geldstrafen*, let alone contempt of court. What is the judgment-holder supposed to do when he realises that his right cannot be made effective because even a court of justice lacks the legal tools necessary to bend the debtor's will? Unfortunately, not very much. It may be wise of him to seek compensation for the damages suffered, but rarely can a mere award of damages satisfy his expectations. Nobody could reasonably argue, for instance, that the employee who experienced an unfair dismissal, and obtained a judgment ordering his reinstatement, would content himself with an award of damages. In this case, like in many others, there is no 'second best', and money cannot be a substitute for what the creditor is entitled to receive.

One of the many contradictions of the Italian legal system is that while an increasing number of non-money claims is recognised as justiciable, no effort is made to devise efficient machinery for the enforcement (either direct or via coercive measures) of the corresponding non-money remedies. New rights keep on flourishing in the law concerning labour relations; discrimination on the ground of gender or race; consumer protection, and environment control. But the protection these rights enjoy is highly ineffective: although their infringement entitles the party to the appropriate non-money remedies, no redress is possible unless the judgment-obligee is inclined to cooperate.

Only randomly do special statutes sanction with fines the failure to comply (or the delayed compliance) with the obligations laid down by civil judgments and orders. Fines of this kind, for instance, can be found in the rules governing patents and trademarks, as well as in the statute protecting employees against unfair dismissals. Scholars have been striving to show that these fines are a sort of Italian approach to the mechanics of *astreintes*. Whether or not one agrees with their opinion, it is important to stress that isolated cases of fines conceived as coercive measures intended to pressure the debtor into voluntary compliance do not justify any statement declaring that the Italian legal system is moving toward a generalised acceptance of *astreintes*. On the contrary, several bills supporting a widespread use of fines the court may impose on a debtor refusing to fulfil his obligation to perform specified acts, or to abstain from a certain conduct, have been methodically rejected.

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Recently, a new bill has taken up again the idea of fining the judgment debtor who fails to fulfil his obligations. According to this bill, the creditor could obtain from the court an ancillary order warning the debtor that he will have to pay a fine for each day of delay in complying with the primary judgment. As opposed to previous ones, the bill at issue does not limit the availability of fines to the case of failure to comply with non-money judgments. In any event, the court should decide the amount of the fine taking into account the interests at stake, as well as the parties' personal conditions and their conduct during the trial.

For a system whose enforcement procedures 'lack teeth' and that is often tricked by professional debtors who know how to bend the rules to their own advantage, the fine envisaged by the bill would be a big improvement. However, one may doubt the effectiveness of the pecuniary sanction in forcing the debtor to comply with the judgment, considering that the court should always set a ceiling to the fine. In other words, the debtor can easily succeed in avoiding compliance with the judgment if he is resolved to do so, provided he is willing to pay the fine. Besides, if the debtor has not complied with a money judgment, it seems unreasonable to think he will be frightened by the threat of a fine, knowing that if he refuses to pay it, the court order will have to be enforced, too: therefore, the pressure the fine is supposed to exert on the debtor would be gone, while the judgment creditor would be left in a very frustrating predicament.

In this respect, but probably in whatever attempt to improve enforcement proceedings, it could be useful to make a distinction between debtors who 'can't pay' and debtors who 'won't pay',⁸ which would be possible only provided that the creditor and the court were enabled to gather more information about the debtor's circumstances. For 'won't pay' debtors there should be no ceiling to the compulsory fine, whose amount could increase indefinitely: the longer the delay in complying with the judgment, the higher the price of disregarding the court's authority.

Enforcement and Criminal Penalties

8 On the usefulness of this distinction, which is one of the basic principles at the core of the English enforcement review, see 'Key Principles for a New System of Enforcement in the Civil Courts. A Lord Chancellor's Department Consultation Paper', *Enforcement Review*, 2nd Consultation Paper, May 1999, at <<http://www.open.gov.uk/lcd/consult/general/enfor2fr.htm>>, at §§ 1.1 - 1.6. On the enforcement review, with some interesting hints drawn from the experience of other European legal systems, see also Kennet, 'Key Principles for a New System of Enforcement in the Civil Courts: A Peep over the Garden Wall', 18 *CJQ* (1999), 311 - 342.

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The Italian legislator places an unshakeable confidence in the effectiveness of criminal penalties in bending the will of the reluctant debtor and persuading him to fulfil his obligations spontaneously, most of all when no enforcement process can overcome his defaulting conduct. On the contrary, plenty of evidence shows that the threat of a criminal prosecution does not increase the degree of voluntary compliance with court orders, at least not in Italy, where the debtor can count on the fact that the rules according to which the failure to abide by a civil judgment could generate criminal liability are construed very narrowly. In spite of that, a few recent statutes seal the fate of important non-money remedies by committing their enforcement to the mild coercion exerted by criminal penalties. This is the case, for instance, with some statutes related to labour relations, such as the one on the protection of unfairly dismissed employees, or the ones on affirmative action against discrimination on the grounds of gender or nationality.

The resort to criminal penalties as coercive measures raises several criticisms. The harshest ones point out that criminal penalties are bound to jeopardise some very fundamental rights of the judgment-obligee: a price too high to pay even for the pursuit of an important goal such as the efficiency of the enforcement process. According to these criticisms, the spectre of imprisonment for debt, outlawed in 1877, still lurks beneath the modern criminal sanctions that can send the defaulting debtor to jail.

Actually, and leaving aside any matter of principle, the threat of criminal penalties assist the enforcement process is little, mostly for two reasons. First of all, according to the basic rule expressed by the Latin saying *nulla poena sine lege*, the debtor can be prosecuted only when the law states explicitly that failure to comply with a specified court order is sanctioned with criminal penalties. In other words, the penal code does not punish as a crime all conduct that might bring about by itself obstruction or abuse of justice. Generally, disobedience of a civil judgment or order is not regarded as a threat to the state or judicial authority. Only occasionally does the legal system consider failure to comply with judgments or orders issued by civil courts to affect not only the interest of creditors, but also the public interest; hence, the mechanics of criminal prosecution and penalties to restrain behaviour that normally concerns only the parties and their relationship.

Secondly, even when the law allows the prosecution of the defaulting debtor, his *mens rea* must be established. No criminal penalty can be imposed on the debtor unless it is proved that he failed to fulfil his obligations with willful intent. This requirement, difficult to meet, reduces the operational range of

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criminal penalties and lessens the 'power of persuasion' they could exert as legal devices to induce voluntary compliance with civil judgments.

Enforcement of Judgments and the European Court of Human Rights

The majority of the countless cases in which the European Court of Human Rights has found the Italian government guilty of having violated art.6, § 1 of the European Convention on Human Rights deals with the excessive length of civil trials. However, some interesting cases concerning the enforcement of civil judgments and its ineffectiveness, another aspect of the devastated condition of Italian civil justice, cannot escape the Court's notice. In a recent case, a unanimous Court said:

The right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention.⁹

In finding that enforcement proceedings lasting approximately thirteen years entailed a denial of the right to a court, since the length of the proceedings was blatantly unreasonable, the Court reaffirmed the following principle:

The right to a court as guaranteed by Article 6 also protects the implementation of final, binding judicial decisions.... Accordingly, the execution of a judicial decision cannot be unduly delayed.¹⁰

Therefore, the Court's case law makes it clear that the judicial declaration of a right is meaningless when enforcement procedures are unable to satisfy the well-founded expectations of the judgment-creditor, and leave him at the mercy of the debtor for a potentially indefinite time.¹¹ The rule of law is not upheld,

9 See *Immobiliare Saffi v Italy* (Grand Chamber), July 28, 1999 (application no 22774/93), at para 62. The text of the judgment, not yet available in the official Reports of the Court, can be read in [1999] 11 *RUDH* 191 or online, at <<http://www.dhcour.coe.fr/hudoc/>>.

10 *Ibid*, at para 66.

11 In another case where the Court held that art 6, § 1 had been violated by the Italian government, thirty three years had already elapsed from the commencement of

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and the 'right to court' is denied if citizens seek for a redress they are likely to never obtain: the Court gives the Italian government another unmistakable warning, requiring it to guarantee its nationals not only the right to access the courts, but also the right to an effective and reasonably swift implementation of judicial decisions.

Final Remarks

Enforcement proceedings reflect the state of deep crisis the civil justice system is experiencing in Italy. A warped sense of patriotism could lead the author of this essay to deny a tragic reality, and to impress foreign readers with the picture of a 'perfect world' in which every citizen can count on a well-oiled enforcement machinery that will make his legal rights effective and whole, even when the person who infringed these rights does not want to restore them. Such a picture would be false and misleading. Enforcement procedures take the creditor nowhere slowly: even in the less complicated cases, when he is entitled to receive a sum of money or to recover a piece of property, he can spend years filing countless motions and attending many useless hearings, just to find himself empty-handed. Should he try to enforce a non-money judgment ordering the debtor to do something, he had better realise that no procedural device exists which effectively compels the debtor into compliance. And so much for the highly praised 'principle of the greatest possible coincidence'. It is no more than a piece of obsolete rhetoric which is glorified as the foundation of the Italian law of enforcement.

proceedings, and the enforcement phase was still pending: see *Zappia v Italy*, September 26, 1996 (application no 24295/94), in *Reports 1996-IV*, at §§ 23 - 26.