

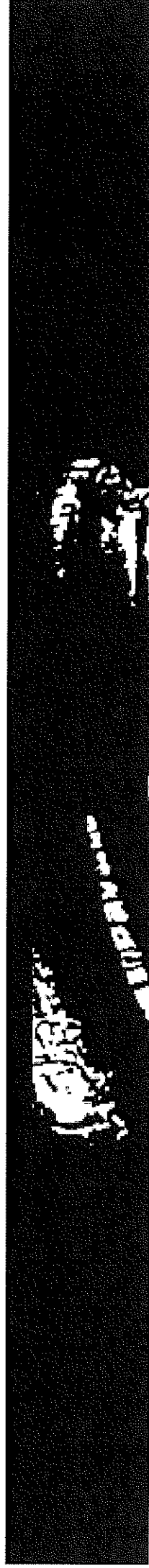


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International Litigation News

Publication of the International Bar Association Legal Practice Division

APRIL 2016



the rules based on the internationally recognised principles and good faith, rules of law as a reflection of the morals and sense of justice jointly adopted by civil societies, the civilisation level, political and economical regime of the society, and human rights and freedoms;

- in determining compatibility of public policy, the judges should examine not the law which has been applied to the merits and how it has been applied, but whether the consequences that will occur in case of enforcement of the foreign judgment would violate Turkish public policy; and
- the boundaries of the prohibition of *revision au fond* should also be respected in the public policy compatibility review, as this prohibition cannot be lifted with the judge's discretion.

Having rendered that the foreign judgments which do not include reasoning (as required by the Civil Procedural Law in Turkey) is not a reason for refusal of its enforcement, the decision has also unified the way in which public policy is interpreted by the different chambers of the Court of Appeals or by the same chambers in every different case. Indeed, in the decisions rendered in the years following this unification decision, the Court of Appeals' approach in interpreting public policy has noticeably changed, and it seems likely that the criteria which is taken into consideration in public policy compatibility review has settled.

Prospective impacts of ISTAC on the enforcement of foreign judgments/awards

ISTAC was established in 2014 and has been operating since the third quarter of 2015, with a mandate to be one of the leading global and regional forums for resolution of international disputes. During the establishment stage of ISTAC, the largely anti-enforcement attitude of both the first instance courts and the Court of Appeals and the barriers to enforcement of foreign judgments/arbitral awards weighed heavily on the agenda of those whose role it was to establish ISTAC.

The issues were debated with the participation of scholars, judges of the Court of Appeals and policymakers. In the end, the importance of having one single chamber which is specialised in enforcement of foreign judgments and arbitral awards, instead of different chambers which are assigned to the files according to the subject matter of the dispute in hand, has been brought to the attention of the relevant authorities, including the chairman of the Court of Appeals.

Although the likely timeframe for the desired changes to happen is still unknown, considering the progressive attitude of the Court of Appeals in recent years and the positive approach of the authorities to the lobbying activities of the scholars, it seems likely that the time is finally right for Turkey to get over its poor reputation and evolve into an enforcement-friendly country.

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Astreintes in Italy: recent developments

Until 2009, the Italian Code of Civil Procedure (ICCP) did not provide for indirect coercive measures aimed at compelling an obligor to comply with court decisions in circumstances where there had been a breach of a 'to do' (positive) or 'not to do' (negative) obligation. Moreover, the few rules¹ that did exist were only applicable to fungible obligations.

However, the contemporary social and economic environment clearly required the implementation of measures regulating non-

fungible obligations. The Italian legislator therefore filled this gap with the introduction of a general rule applicable in cases in which an obligation needs to be fulfilled by a specific person.

Indirect coercive measures under Italian law

The reform of the Italian enforcement proceedings² introduced article 614-*bis* of the ICCP (the 'Provision') and led to an important innovation. According to the Provision, if

there is a breach of a non-fungible positive or negative obligation, the judge may determine an amount of money which will be due from the obligor in the case of any further breach or delay in the execution of the court's decision.

Case law has shown that the innovative nature of the Provision has led to the prompt satisfaction of obligees, thus avoiding any further onerous enforcement proceedings on its part. For this reason, in 2015 the Italian legislator expanded the application of the Provision to all the obligations (both fungible and non-fungible) with the exception of the obligation of payment.³

This innovation has granted a new coercive instrument to creditors seeking the delivery or release of goods, in addition to traditional enforcement proceedings.

Case law has made clear the importance of the amendment. In a case filed before the Modena Tribunal in 2011, the application of the Provision was denied by the judge, who observed that the return of the property in its original condition, as claimed by the plaintiff, was a fungible obligation.⁴ The outcome would have been different, with a consequent advantage for the obligee, had the 2015 reform already been in force.

Application of the rule

The possibility of obtaining the measure in 'special' proceedings (rather than 'ordinary' proceedings) increases the value of the Provision. This could be crucial, particularly in the context of 'precautionary' proceedings (proceedings for interim relief) regarding non-fungible obligations.

The courts have confirmed the importance of this measure and granted indirect coercive measures in both precautionary and summary proceedings. For example, the Provision has recently been applied in precautionary proceedings in a competition law dispute heard by the Court of Milan.⁵ The judge, upon the request for urgent relief by the plaintiff (which was an association representing licensed taxi-drivers), recognised that the defendant (a multinational transportation network company) had committed acts of unfair competition in carrying out an alleged "low-cost carpooling service" that was in fact an unlicensed taxi service. In the decision, the judge ordered the defendant to cease the activity and granted an indirect coercive measure on the basis of the Provision for each day that the company delayed in complying with the decision of the Court.

This case clearly confirms the flexibility of this remedy, which guarantees the enforcement of the Court's decision, especially when used in precautionary proceedings.

Since the Provision can be applied in different proceedings (ie, ordinary, precautionary and summary proceedings), it is worth noting that the indirect coercive measure can be granted regardless of the nature of decision made by the judge: namely a judgment, order or decree.

Limitations

In relation to the limitations on the Provision, it expressly provides for only one exemption, that being disputes regarding public and private employment. As a matter of fact, however, the Provision does not apply when other special coercive measures are applicable (as is the case with specific provisions provided in Copyright Law, Industrial Property Law and the Consumers' Code).

Procedural overview

The Provision comes into play upon the obligee's request during the proceedings. The judge has a significant discretionary power both in evaluating the request and in assessing the amount due from the obligor under the indirect coercive measure. As for the amount, case law almost unanimously confirms that, due to the nature of the measure, it must be sufficient to work as an incentive for the obligor to fulfil its obligation.

The indirect coercive measure is granted by the judge in the final decision. It is applied after a reasonable time, as determined by the judge, and allowing the obligor sufficient time to spontaneously perform its obligation.⁶ Since the final decision gives the right to commence enforcement proceedings, once the indirect coercive measure is granted, it is applicable without the need for a new decision on the obligor's non-fulfilment. This guarantees the effectiveness of the tool without undermining the position of the obligor, who retains the right to oppose.⁷

Notes

1 Articles 612, 613, 614, ICCP.

2 Law No 69/2009.

3 Law No 132/2015.

4 Trib. Modena, 7 March 2011, No 415.

5 Trib. Milano, 26 May 2015, order No 16612.

6 Trib. Terni, 4 August 2009.

7 Ex Article 615, ICCP.