

## ARTICLES

### THE *ASTREINTE* IN THE ITALIAN AND RUSSIAN ADMINISTRATIVE (JUDICIAL) AND CIVIL PROCEEDINGS

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*This paper focuses on the last indirect coercive measure introduced by the Italian and Russian legislation. After a general overview of the coercive measures already known to Italian law, also from an historical perspective, this paper identifies – through a parallelism commonly followed between the *astreinte* under Art. 114(4)(e) of the Italian Administrative Procedure Code and those under Art. 614-bis of the Italian Civil Procedure Code – the main traits of the new rule as to conditions, calculation of the amount due and beneficiary of the payment.*

*The author's intention is to investigate the rationale of Art. 114, dealing with the issue of its applicability to obligations having a monetary content, so as to assess the actual possibility to make a complete parallelism between the two types of *astreinte* at issue: those for administrative proceedings and those for civil proceedings.*

*In contrast to the Italian experience, *astreinte* in Russian civil and administrative judicial proceedings is not directly regulated by procedural legislation. *Astreinte* unexpectedly appeared in the case law of commercial courts in 2013 and was / became widely discussed by scholars. From June 1, 2015, the institute quite similar to the *astreinte* was introduced by the Civil Code of the Russian Federation.*

*The authors mean to reveal the nature of the *astreinte* and scope of its application both in civil and administrative judicial proceedings.*

*Keywords: administrative (judicial) proceedings; *astreinte*; civil procedure; enforcement of judicial decisions; coercive measures.*

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**1. The *astreinte* in the Italian Administrative (Judicial) Proceedings: A Remedy Only Partially Comparable with the *astreinte* Provided for Civil Proceedings**

**1.1. Article 114 of the Administrative Procedure Code and the *astreinte* in the Italian Legal System**

The so-called Administrative Procedure Code [hereinafter APC] approved by Legislative Decree No. 104 of July 2, 2010 (in implementation of enabling Law No. 69 of June 18, 2009), introduced at Art. 114(4)(e) the French-inspired remedy of the *astreinte*.<sup>1</sup>

In particular, Art. 114(4)(e) of the APC provides that the judge, in upholding the claim – besides being empowered to a) order the execution of the decision,

<sup>1</sup> As to the origin of the *astreinte*, see Pasquale Pucciariello & Giuseppina Fanelli, *Capitolo II. L'esperienza straniera dell'esecuzione forzata indiretta*, in *L'esecuzione processuale indiretta* 43 (Bruno Capponi, ed.) (IPSOA 2011).

prescribing the relevant modalities, also determining the content of the administrative measure; b) declare null and void any measures taken in violation of a judgment having the *res judicata* effects; c) in case of decision not yet having the *res judicata* effects, to determine the relevant modalities of execution, considering as ineffective the measures taken in violation thereof; and d) to appoint, if necessary, an *ad acta* commissioner – has e) the power to ‘determine, upon motion by the party, except where this is manifestly unjust and provided that there are no other impediments, a sum of money to be paid by the defendant for any further breach or non-compliance, or for any delay in the execution of a judgment having the *res judicata* effects.’ The law specifies that such ‘order is an enforceable title.’

The remedy of the *astreinte* contained in Art. 114(4)(e) of the APC is a novelty for administrative law, but not entirely for the Italian legal system. Indeed, on the one hand, the abovementioned enabling Law No. 69 of June 18, 2009, had directly introduced within the Civil Procedure Code [hereinafter CPC] a new Article 614-*bis* containing a general remedy for civil proceedings,<sup>2</sup> and, on the other hand, even before 2009 the Italian law already knew some special coercive measures.<sup>3</sup>

#### 1.1.1. Article 614-*bis* of the Civil Procedure Code Dating Back to 2009 and the Previous Attempts to Introduce a General System of Indirect Coercive Measures

Until the reform of 2009, the Italian legal system lacked a provision of law containing a general coercive measure with pecuniary content protecting the performance of obligations to do or not to do something. Such obligations relate to a person and voluntary conduct of the debtor and, for this reason, enforcement (which involves the subrogation to the principal debtor by a third party) cannot be applied. The solution was to convert the damage from non-performance into an equivalent compensation of money. However, with the emergence of non-property rights, especially in the field of labor law, equivalent compensation of money appeared unsatisfactory.<sup>4</sup>

The first attempts to introduce a system of indirect coercive measures dates back to the reform project of the CPC proposed by Carnelutti in 1926 (which, however, was not implemented). The bill contained two provisions on indirect enforcement: Art. 667 (pecuniary penalty for non-performance of an obligation to do or not to do) which provided that

[i]f the obligation is to do or not to do, the creditor may demand that the debtor be ordered to pay him a pecuniary penalty for each day of delay in the

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<sup>2</sup> See *infra* Sec. 1.1.1.

<sup>3</sup> For a brief overview of other coercive measures known to the Italian legal system, see *infra* Sec. 1.1.2.

<sup>4</sup> Maria A. Luorio & Giuseppina Fanelli, *Capitolo III. La penalità di mora nel diritto italiano*, in *L'esecuzione processuale indiretta*, *supra* n. 1, at 71, 71–72.

performance, starting from the day specified by the court. Such an award may be issued with the judgment asserting the obligation or with a subsequent one;

and Art. 668 of the project of reform, titled 'Liquidation of the Penalty,' which provided that

[t]he creditor, who has obtained the adverse judgment referred to in Art. 667, may request that the execution office liquidates the pecuniary penalty for the delay already occurred, without prejudice to his right for the further delay. If such sum is proposed to him, the execution office convenes the creditor and the debtor under Art. 498. If the debtor does not appear or appears and admits the delay, the chief of the execution office orders the debtor to pay the sum due for the delay occurred. The order has the value of title empowering to levy execution and is not subject to complaint. If the debtor challenges his obligation, the chief of the execution office remands the parties to the judge with venue for the decision of the dispute.<sup>5</sup>

Carnelutti, in his reform project, had also planned a series of criminal provisions, grouped in Ch. II, titled 'Fine and Arrest for Non-Performance,' by means of which the judge who deemed that, on the basis of a discretionary evaluation, there existed a series of clues indicating that the debtor did not want to perform a pecuniary obligation, had the power to order the arrest of the debtor under Art. 687(g). The criminal law approach of Carnelutti created dissension among scholars, because it both appeared as a major step backwards compared to the evolution of human rights at an international level and recalled the old institution of the arrest for debts which had been repealed by Law No. 4166 of December 6, 1877.<sup>6</sup>

After the failed attempt to introduce a general system of indirect coercive measures with the Carnelutti project of 1926, the situation remained static until the seventies, a period of advancement of workers' rights.

The project of Minister Reale of 1975 provided, at Art. 23, the inclusion in the CPC of Art. 279-*bis*:

The judgment asserting the violation of an obligation to do or not do to, in addition to providing for the compensation for damages, orders the cessation of the unlawful conduct and issues the necessary measures to ensure the removal of the effects of the violation; for this purpose, it may provide for

<sup>5</sup> Salvatore Ziino, *Esecuzione forzata e intervento dei creditori* 103 (especially fn. 36) (Ila Palma 2004), available at <<http://www.unipa.it/persona/docenti/z/salvatore.ziino/?pagina=pubblicazione&idPubblicazione=12416>> (accessed Jul. 24, 2015).

<sup>6</sup> On the Carnelutti project of reform, see Augusto Chizzini, *Patrimonialità dell'obbligazione tra condanna ed esecuzione forzata*, 2009 *Il giusto proc. civ.* 659, 664 ss.

a sum of money due for each violation or non-compliance subsequently found and for each delay in the performance of the measures contained in the judgment, specifying, when necessary, the subject or the private or public institutions to whom such sums are paid.<sup>7</sup>

This project also failed, and in 1981 there was a new bill of reform of the CPC, drafted by the Ministerial Committee chaired by Liebman. Point 24 of the Liebman draft delegated to the Government the authority to regulate

the power of the judge, who finds that the debtor has failed to fulfill his obligations to do or not to do, which do not require special professional skills and do not concern personality rights, obligation which in any case are to be identified by the law, to judge against the debtor, on the motion of the other party, to the payment of pecuniary penalties in favor of the creditor, per each day of delay in the performance of the obligation, within minimum and maximum limits set out by the law.<sup>8</sup>

However, this project was also never enacted.

In the nineties, the Ministerial Committee chaired by Tarzia proposed a new bill.<sup>9</sup> Article 2(25)(a) with regard to the content of a judgment, provided for

the power of the judge, who finds that the debtor has failed to fulfill his obligations to do or not to do, exception made for the obligation of a subordinate employee or of a self-employed worker, or an obligation to deliver and release not deriving from a residential lease contract, to determine a sum of money due to the creditor, in addition to compensation for damages, for each day of delay in the performance of the obligation, even with effect after the judgment, and also with subsequent measure.

Since the provision did not refer to the infungible nature of the obligation, it led to the belief that it could be applied also to fungible obligations.

As far as more recent projects of reform are concerned, it is worth mentioning the bill approved on October 24, 2003, which implemented the project proposed by the Vaccarella Committee.<sup>10</sup> Article 42, titled 'Indirect Enforcement,' delegated to the Government the task to

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<sup>7</sup> Bruno Capponi, *Manuale di diritto dell'esecuzione civile* 24 (Giappichelli 2010).

<sup>8</sup> For the text of the project of reform, see *Disegno di legge sulla delega legislativa al Governo della Repubblica approvato dal Consiglio dei Ministri l'8 maggio 1981*, Giust. civ. 1981, II, 339 ss.

<sup>9</sup> Giuseppe Tarzia, *Per la revisione del codice di procedura civile*, 1996 Riv. dir. proc. 945, 956.

<sup>10</sup> Nicola Ventura, *Capitolo X. L'esecuzione in forma specifica*, in *L'esecuzione forzata riformata* 468 (Giuseppe Miccolis & Carmen Perago, eds.) (Giappichelli 2009).

provide for forms of indirect enforcement for the protection of rights linked to infungible obligations according to the following principles: a) determination of the obligation to pay a sum of money for each fraction of time of delay to perform the obligation; b) provision of a summary proceedings for the verification of the delay and liquidation of the pecuniary penalty, to be started at the request of the creditor; c) provision that the pecuniary penalty be paid in the form of judicial deposit or similar form; d) provision that the sum of money thus paid be destined to compensate the creditor for the damages suffered due to the non-performance of the obligation and, for the remaining part, be paid to the State.

Unlike the Tarzia project, the Vaccarella one included the requirement of infungibility. The most innovative element was the payment of the financial penalty in the form of judicial deposit and then draw from this to determine the amount to be paid to the creditor by way of compensation for damage caused by the non-performance of the obligation: this way, the amount of the financial penalty covered the compensation due by the debtor and the residual part remained with the State.<sup>11</sup>

Eventually, the current Article 641-*bis* of the CPC was introduced by Art. 54 of Law No. 69 of June 18, 2009, titled 'Performance of Obligations to Do or Not to Do,' according to which

[b]y the judgment against the defendant, except where this is manifestly unjust, upon motion by the party, the judge establishes the amount of money due by the obliged party, for any breach or next nonobservance, or for any delay in the execution of the decision. The judgment against the defendant is title for the payment of the due sums for any breach or nonobservance. The provisions of the present paragraph shall not apply to the public and private employment controversies and to other collaboration relations consisting of the rendering of continuative and coordinated services under Art. 409. The judge determines the amount of the sum under the first paragraph, taking into account the value of the controversy, the nature of the service, the liquidated or predictable damage, and any other useful circumstance.<sup>12</sup>

<sup>11</sup> Claudio Consolo & Federica Godio, *Sub Art. 614-bis*, in 2 Codice di procedura civile commentato 2558–59 (Claudio Consolo, ed.) (5<sup>th</sup> ed., IPSOA 2013).

<sup>12</sup> In general terms on the *astreinte* under Art. 614-*bis* of the CPC, see among the many: Consolo & Godio, *supra* n. 11; Davide Amadei, *Una misura coercitiva generale per l'esecuzione degli obblighi infungibili*, 2010 Riv. trim. dir. proc. civ. 343, available at <[http://dipartimenti.unicatt.it/scienze/giuridiche/forense\\_091126\\_juiso1.pdf](http://dipartimenti.unicatt.it/scienze/giuridiche/forense_091126_juiso1.pdf)> (accessed Jul. 24, 2015); Antonio Lombardi, *Le modifiche apportate dalla L. n. 69 del 18 giugno 2009 in materia di processo di esecuzione*, 2009 Giur. mer. 2079; Mauro Bove, *La misura coercitiva di cui all'art. 614-bis c.p.c.*, *Judicium* (Apr. 29, 2010), <[http://www.judicium.it/saggi\\_leggi.php?id=44](http://www.judicium.it/saggi_leggi.php?id=44)> (accessed Jul. 24, 2015); Elena Zucconi Galli Fonseca, *Le novità della riforma in materia di esecuzione forzata*, 2010 Riv. trim. dir. proc. civ. 197; *L'esecuzione processuale indiretta*, *supra* n. 1.

### 1.1.2. Other Coercive Measures Known to the Italian Legal System

Without claiming to be exhaustive and focusing instead on those aspects deemed most relevant with regard to the purpose of this paper, besides Arts. 114 of the APC and 614-*bis* of the CPC, there are a number of coercive measures already effective in the Italian legal system. These measures, however, inasmuch as set out by special provisions of law in order to govern cases expressly identified, cannot be applied by analogy.<sup>13</sup>

In particular, worthy of note, in the field of industrial law, is Art. 124 of Legislative Decree No. 30 of February 10, 2005 (the so-called Industrial Property Code), which recognizes a periodic penalty payment applied with the judgment that defines the infringement proceedings.

With this ruling, the court, after having ascertained the infringement of an intellectual property right, may order the infringer to refrain from the manufacture, trade and use that constitutes a violation of the intellectual property right (permanent injunction) and, pursuant to Art. 124(2) of the Industrial Property Code, may determine a sum payable in respect of any breach or next non-compliance, or for any delay in the execution of the decision. The judgment against the defendant thus issued has a dual – repressive and preventive – function: repressive – because it is designed to eliminate the effects of the breach already through the destruction or removal of the behavior detrimental to the protected right; preventive – because it is designed to prevent the violation from being committed or continued.<sup>14</sup> The sum is determined by the court discretionarily, even though the judge is not free from any parameter: it is necessary to respect the principle contained in Art. 124(6) of the Industrial Property Code, according to which the judge ‘in the application of the sanction takes into account the necessary proportion between the seriousness of the violation and the sanction, as well as of the interest of third parties.’ The beneficiary of the sum is the movant.<sup>15</sup>

<sup>13</sup> luorio & Fanelli, *supra* n. 4, at 72. See also the systematic reconstruction of the Italian legal system made by Cons. Stato, Ad. Pl., sentenza 26 giugno 2014, n. 15, Corr. giur. 2014, 11, 1406.

<sup>14</sup> Andrea Proto Pisani, *Appunti sulla tutela di condanna (trentacinque anni dopo)*, 2010 Foro it. V, at 257, 259.

<sup>15</sup> Article 124 of the Italian Industrial Code, enacted with Legislative Decree No. 30 of 2005, abrogated the coercive measures already provided for by the original Trademark and Patent laws and extended the scope of application of the measure at issue to all the industrial property rights both registered and *de facto*. The rule at issue had also been amended with Legislative Decree No. 140 of 2006 in order to apply Arts. 10 and 11 of the Enforcement Directive. With regard to such rule see Andrea Giussani, *La disciplina comunitaria della tutela giurisdizionale della proprietà intellettuale*, in *La proprietà intellettuale* (= 12 Trattato di diritto privato dell'unione europea) 459 (Luigi C. Ubertazzi, ed.) (Giappichelli 2011); Michelle Vanzetti, *Contributo allo studio delle misure correttive e delle sanzioni civili nel diritto industriale: i profili processuali dell'art. 124 c.p.i.*, 2010 Riv. dir. ind. 26; Adriano Vanzetti & Vincenzo di Cataldo, *Manuale di diritto industriale* 549 (6<sup>th</sup> ed., Giuffrè 2009); Marco Ricolfi, *Le misure compulsorie*, in *L'enforcement dei diritti di proprietà intellettuale. Profili sostanziali e processuali* (= 12 Quaderni di AIDA) 91 (Luca Nivarra, ed.) (Giuffrè 2005); Giovanni Angelicchio, *Sub. Art. 124*, in *Commentario breve alle leggi su proprietà intellettuale e concorrenza* (= 5 Breviaria Iuris) 604 (Luigi C. Ubertazzi & Piergaetano Marchetti, eds.) (5<sup>th</sup> ed., CEDAM 2012); Francesca Ferrari, *Capitolo XVII. La disciplina cautelare in materia di proprietà industriale*, in *Il processo cautelare* 677, 729 ss. (Achille Saletti & Giuseppe Tarzia, eds.) (4<sup>th</sup> ed., CEDAM 2011).

Moreover, in the field of employment relationships, Art. 18, last paragraph, of Law No. 300 of 1970 (the so-called Statute of Workers)<sup>16</sup> provides that, should the employer fail to comply with the order to reinstate into the workplace a union representative unlawfully dismissed, the same employer is required not only to pay the employee his salary, but also to pay to a special fund for pensions, for any day of delay in the execution of the decision, a sum equal to the amount of salary payable to the employee.

Undoubtedly, reinstatement into the workplace, as a result of an unlawful dismissal, is a forced reconstruction of the employment relationship. It is an obligation that is not coercible through the irrepressible procedural forms of direct execution and, for this reason, an indirect coercive measure has been introduced, which consists in paying a sum of money until the employer complies with the reinstatement obligation.<sup>17</sup>

Moreover, Art. 18(4) of the Statute of Workers sets forth that the judge, issuing the reinstatement order, provide

for the payment of compensation for damages commensurate with the last total remuneration of the employee, from the date of dismissal up to the effective reinstatement, reduced by the amount the employee has received during the period of dismissal for the performance of other working activities, as well as by the amount he could have received if he had devoted himself diligently to the search for a new job. In any case, the measure of compensation cannot be more than twelve months' salary.

The purpose of the sum provided by the rule at issue is multifunctional:<sup>18</sup> it may have a remuneration function and at the same time the function of a psychological compulsion on the employer in such a way as to induce him to comply with the measure. Indeed, on the one hand, for the period from the dismissal to the issuance of the decision, the compensation allows the employee to overcome the economic damage suffered, while, on the other hand, for the period following the issuance of the decision, the provision of an order to pay a predetermined sum of money, provided that the non-compliance occurs, has the express purpose of imposing psychological pressure that pushes the employer to fulfill the measure in order not to suffer an economic loss which is less convenient than the reinstatement of the dismissed worker.<sup>19</sup> In fact, the duty to pay a salary without the performance

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<sup>16</sup> This rule is at the center of the attention of the lawmaker and has been the subject matter of various reforms which have directly or indirectly affected its content. See Francesco P. Luiso et al., *La nuova disciplina sostanziale e processuale dei licenziamenti* (Giappichelli 2013).

<sup>17</sup> Luorio & Fanelli, *supra* n. 4, at 87.

<sup>18</sup> Oronzo Mazzotta, *Il risarcimento dei danni per licenziamento illegittimo tra 'sanzione' e 'inadempimento'*, 1978 *Foro it. I*, at 2165, 2175.

<sup>19</sup> Luorio & Fanelli, *supra* n. 4, at 90.



of an effective job, pushes the employer to reinstate the dismissed employee in such a way as to exploit his / her production capability. The coercive nature of this paragraph is supported by the fact that compensation has as a parameter the total remuneration, although the court may then determine an amount greater or lower than that, provided it complies with the minimum amount of five months' salary, taking into account the real need of indirect coercion that it should pursue.<sup>20</sup>

Still in the field of employment relationships, Art. 28 of the Statute of Workers provides:

In the case of non-execution of the measure concerning the repression of anti-union conduct by which the court has ordered the cessation of anti-union behavior and the removal of its effects, the court may apply for its compliance a criminal sanction provided for in Art. 650 of the Criminal Code.

Article 650 of the Criminal Code provides for imprisonment of up to three months or the payment of a fine of up to €206. Unlike Art. 18, Art. 28 of the Statute of Workers does not predetermine the specific behavior that needs to be stopped, and what the effects that need to be removed are. Certainly, this rule recalls the Anglo-Saxon contempt of court because it refers to a measure that punishes with a criminal sanction those who do not comply with an order issued by the authority for reasons of justice and public safety.<sup>21</sup> In reality the threatened sanction is tenuous, which make one think that it does not have an effective coercive force.<sup>22</sup>

Furthermore, in the field of collective protection of consumers and users, Legislative Decree No. 206 of September 6, 2005 (the so-called Consumer Code), provides for a system with a double protection:<sup>23</sup> on the one hand, the general inhibitory action laid down in Arts. 139 and 140 of the Consumer Code, aimed at protecting the collective interests of consumers taken into consideration within the Consumer Code; on the other hand, the contractual inhibitory action provided for in Art. 37 of the Consumer Code, governing special cases where the collective interests of consumers were infringed by the inclusion of unfair or abusive clauses in the general conditions of contracts by the professional.

With Art. 37, the court, upon motion of consumer associations and of the professionals of the associations of the Chambers of Commerce, Industry, Handicraft and Agriculture, prohibits the professional from using unfair or abusive clauses. In reality, this rule does not provide for any special measures in order to implement the

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<sup>20</sup> Iuorio & Fanelli, *supra* n. 4, at 90.

<sup>21</sup> *Id.* at 93.

<sup>22</sup> Mario Romano, *Repressione della condotta antisindacale. Profili penali* 58 ss. (Giuffrè 1974).

<sup>23</sup> Enrico Minervini, *Contratti del consumatore e tutela collettiva nel codice del consumo*, 22(3) *Contr. e impr.* 636 (2006).

injunction, and thus Art. 37(4) refers to the provisions of Art. 140 of the Consumer Code. Article 140 of the Consumer Code gives the associations of consumers and users, representative on a national level within the meaning of Art. 137, the power to take legal action in order to ask the judge to inhibit the conduct prejudicial to the interests of consumers and users; the adoption of appropriate measures to correct or eliminate the harmful effects of the violations; the order to publish, at the expense of the defendant, the decision issued in one or more newspapers, when such publication is useful to eliminate the harmful effects.

Article 140(7) of the Consumer Code provides that with the final decision within the proceedings started pursuant to Art. 140(1), when the claim is upheld, the court, in addition to indicating the obligations imposed on the losing party and the deadline for their fulfillment, may award the payment of a sum of money (between a minimum of €516 and a maximum of €1,032) for each day of delay in the execution or for each breach, taking into account the seriousness of the fact. The sum is paid to the State with a binding destination in favor of consumers

In the field of family law, Law No. 54 of February 8, 2007, has introduced Art. 709-*ter* of the CPC, for the solution of controversies arising between parents with reference to the exercise of parental authority or the modalities of foster care. The coercive measure referred to in Art. 709-*ter* is considered as an indirect measure aimed at inducing the parent to assume an attitude aligned to the needs of the family and the children, especially in order to solve the problems – very recurrent in practice – related to the coercive implementation of measures on the custody of children and the exercise of rights to visit.<sup>24</sup> Article 709-*ter* of the CPC gives the judge the opportunity to apply a number of measures, progressively one to the other because of the gravity of the breach.

Under Art. 709-*ter*(1), the judge, in case of serious non-performance or activities which cause damages to the minor or thwart the correct implementation of the foster care modalities, may, in the first place, warn the non-performing parent, with the purpose of having the parent comply with his legal duties. It is difficult to assign to this warning an effective deterrent function, unless we admit, as suggested by certain scholars,<sup>25</sup> that the judge, following the warning, may continue to monitor the behavior of the non-performing parent.

Under Arts. 709-*ter*(2) and (3), the judge may order the compensation of damages by one of the parents towards the minor or the compensation of damages by one of the parents in favor of the other. The nature of the measures is disputed among scholars: some believe they have a sanctioning function,<sup>26</sup> in the direction of the punitive damages typical of common law systems; others believe that the

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<sup>24</sup> Iuorio & Fanelli, *supra* n. 4, at 111 ss.

<sup>25</sup> Bruno de Filippis, *Affidamento condiviso dei figli nella separazione e nel divorzio* 154–55 (CEDAM 2006).

<sup>26</sup> Iuorio & Fanelli, *supra* n. 4, at 115.

lawmaker intended to go along with the majority of case law according to which the ascertainment of damages is based on non-contractual liability and, in this sense, the order to pay has a restorative function and not punitive.<sup>27</sup>

Under Art. 709-ter(4), the judge orders the non-performing parent to pay a fine between a minimum amount of €75 and a maximum amount of €5,000 in favor of the fine fund. In this latter case, the lawmaker's intention is clearly to construe this measure as a real fine, the amount of which will not be paid in favor of the child or of the other parent.<sup>28</sup> The aim is to exert psychological pressure on the non-performing parent to push him to fulfill, by threatening the issuance of an order providing for the payment of a sum in favor of a public body.

Within the mediation process, Art. 11 of Legislative Decree No. 28 of March 4, 2010, titled 'Conciliation,' provides:

The agreement reached by the parties during the mediation process, also as a result of the proposal made by the mediator, may provide for the payment of a sum of money for each violation or non-compliance with the obligations established or the delay in their fulfillment.

Article 11 does not specify many aspects and the gaps have been filled by Art. 614-bis of the CPC: the sums are paid in favor of the private individuals and not the public fund; there is no reference to the impediment represented by the circumstance that the payment is 'manifestly unjust,' as set out in Art. 614-bis, because with the conciliation agreement the coercive measure is agreed jointly by the parties and, therefore, they have already assessed its fairness with respect to their respective interests; the scope of the application of Art. 11 is much wider than that of Art. 614-bis. The measure set out in Art. 614-bis is linked only to infungible obligations to do or not to do, while Art. 11(4) refers to any obligation established by the parties, and therefore is totally independent from the nature of the obligation. The legal framework considered here is to be integrated with another rule related to measures enhancing mediation, namely Art. 13(2), according to which when the final decision of the proceedings corresponds entirely to the content of the proposal, the judge orders the winning party, who has rejected the proposal, to pay a sum of money corresponding to the tax due for bringing an action before a court. The intent of this provision is to discourage dilatory behaviors thus causing the litigants to consider very carefully the proposal made by the mediator.<sup>29</sup>

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<sup>27</sup> Enzo Vullo, *Affidamento dei figli, competenza per le sanzioni ex art. 709-ter e concorso con le misure attuative del fare infungibile ex art. 614-bis*, 2010 Fam. e dir. 924, 930.

<sup>28</sup> Luorio & Fanelli, *supra* n. 4, at 116.

<sup>29</sup> Giuseppe Buffone, *Mediazione e conciliazione* 52 ss. (Giuffrè 2010).

## **1.2. The Parallelism between Art. 114 of the Administrative Procedure Code and Art. 614-bis of the Civil Procedure Code**

Having thus provided the reader with an overview – albeit partial – of the special coercive measures known to the Italian legal system, it is now possible to focus on the *astreinte* introduced in the subsystem of administrative law.

In this regard, it is first necessary to stress that a strong parallelism between Art. 114 of the APC and Art. 614-bis of the CPC has been immediately and widely recognized by scholars and case law<sup>30</sup> as well as directly declared by the same lawmaker.<sup>31</sup>

This parallelism – as will be seen – has relevant consequences as to the condition, amount and beneficiary of the remedy.

### **1.2.1. The Applicability Conditions**

The text of Art. 114(4)(e) of the APC provides for stringent conditions for the application of the *astreinte*, thus showing the limits of such remedy within the administrative proceeding of the Italian legal system.

Specifically, as is clearly recognizable by simply reading the rule, the application of the remedy at issue must be requested by a party during a proceeding and is, in any case, subject to the upholding of the claim by the court; furthermore, it is also necessary that the judge deem that its application would not be manifestly unfair as well as that, in the specific case, there are no other impediments.<sup>32</sup>

<sup>30</sup> See, *inter alia*, Cons. Stato, sez. V, sentenza 20 dicembre 2011, n. 6688, at <<http://www.altalex.com/documents/massimario/2012/05/07/processo-civile-esecuzione-indiretta-obblighi-fare-infungibile-non-fare>> (accessed Jul. 24, 2015). Among the scholars, see Roberto Chieppa, *Il codice del processo amministrativo*. Commento a tutte le novità del giudizio amministrativo (D.lgs. 2 luglio 2010, n. 104) 492 (Giuffrè 2010).

There are those who, however, stressed that the parallelism between Art. 114(4) of the APC and Art. 614-bis of the CPC is only apparent: Andrea Carbone, *Riflessioni sul valore sanzionatorio dell'astreinte e sulla sua applicazione nel processo amministrativo*, 2014 *Foro ammin.* 1297, available at <[https://www.academia.edu/10843319/Riflessioni\\_sul\\_valore\\_sanzionatorio\\_dell\\_astreinte\\_e\\_sulla\\_sua\\_applicazione\\_nel\\_processo\\_amministrativo](https://www.academia.edu/10843319/Riflessioni_sul_valore_sanzionatorio_dell_astreinte_e_sulla_sua_applicazione_nel_processo_amministrativo)> (accessed Jul. 24, 2015); Fulvio Cortese, *Sull'obbligo di pagare una somma di denaro ex art. 114, comma 4, lett. e), C.P.A.: natura giuridica e regime applicativo*, 79(2) *Resp. civ. e prev.* (2014); Francesco Buscicchio, *Le astreintes nel processo amministrativo*, 2012 *Giur. mer.* 2446; Clarice Delle Donne, *Astreinte e condanna pecuniaria della P.A. tra Codice di procedura civile e Codice del processo amministrativo*, 2011(2) *Riv. es. forz.* <<http://www.judicium.it/admin/saggi/198/Delle%20Donne%20III.pdf>> (accessed Jul. 24, 2015) [hereinafter *Delle Donne, Astreinte*]. See *infra* Sec. 1.3.

<sup>31</sup> See the Explanatory Report to the APC (*Relazione finale al Codice del processo amministrativo*) at <[https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mdax/nzez/~edisp/intra\\_032384.pdf](https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mdax/nzez/~edisp/intra_032384.pdf)> (accessed Jul. 24, 2015) (p. 52), where it reads that Art. 614-bis of the CPC has been reproduced at Art. 114 of the APC.

<sup>32</sup> With respect to the limits, see Clarice Delle Donne, *Capitolo IV. L'introduzione dell'esecuzione indiretta nell'ordinamento giuridico italiano: gli artt. 604-bis c.p.c. e 114, comma 4, lett. e) Codice del processo amministrativo*, in *L'esecuzione processuale indiretta*, *supra* n. 1, 123, 160 ss. [hereinafter *Delle Donne, L'introduzione*]; Domenico Tomassetti, *L'astreinte nel processo amministrativo: natura, ambito oggettivo, portata e limiti alla luce della più recente giurisprudenza*, 2010(1) *Gazz. ammin.* 1, available at <[http://www.gazzettaamministrativa.it/opencms/export/sites/default/\\_gazzetta\\_amministrativa/\\_aree\\_tematiche/sett\\_7\\_gius\\_aff\\_int/redazionali/numero\\_2012\\_1/gazzamm2astreintetomassetti.pdf](http://www.gazzettaamministrativa.it/opencms/export/sites/default/_gazzetta_amministrativa/_aree_tematiche/sett_7_gius_aff_int/redazionali/numero_2012_1/gazzamm2astreintetomassetti.pdf)> (accessed Jul. 24, 2015); Luigi Viola, *Nuovi poteri sanzionatori del giudice amministrativo, astreintes e giudizio di ottemperanza*,

Looking at Art. 614-*bis* of the CPC, it appears that similar limits are set forth by the law with respect to the *astreinte* applicable in civil proceedings: also Art. 614-*bis* requires in fact that its application not be 'manifestly unjust' as well as be urged 'upon motion by the party.'

Conversely, the inexistence of 'other impediments' is a requirement imposed only by Art. 114(4)(e) of the APC: the meaning of such expression has been investigated by case law, according to which 'other impediments' may be seen in 'difficulties in the fulfillment due to regulatory or budgetary constraints, or the state of public finance and the relevance of specific public interests.'<sup>33</sup>

According to scholars, instead, such expression would merely mean that the lawmaker intended to provide for an additional reason for hesitation, without having in mind, nor expressing, any concrete idea.<sup>34</sup>

Essentially, these conditions of applicability make the *astreinte* under Art. 114(4)(e) of the APC (and that under Art. 614-*bis* of the CPC) a remedy available only to the interested party, without the possibility for the judge to proceed *sua sponte*.<sup>35</sup>

### 1.2.2. The Calculation of the Amount of the *astreinte*

Article 114 of the APC does not contain any provision on the calculation of the amount of the *astreinte*.

In the absence of any legislative guidance, some scholars<sup>36</sup> and a part of the case law<sup>37</sup> have sustained the applicability of the criteria set out in Art. 614-*bis* of the CPC. According to such a rule, the judge determines the amount of the *astreinte* taking into account the value of the dispute, the nature of the service, the liquidated or

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22(3/4) Riv. it. dir. pubbl. com. (2012); Calogero Commandatore, *Osservazioni su presupposti e limiti per l'applicazione della penalità di mora prevista dall'art. 114, comma 4, lett. e), C.P.A.*, 2013 Giur. it. 2381.

<sup>33</sup> See Cons. Stato, Ad. Pl., sentenza 26 giugno 2014, n. 15, Corr. giur. 2014, 11, 1411. More recently, see: Trib. ammin. reg. Lazio, sez. III-*quater*, sentenza 24 febbraio 2015, n. 3158, at <<http://www.amministrativistaonline.it/giurisprudenza/t-a-r-lazio-roma-sez-iii-quater-sentenza-24-febbraio-2015-n-3158/>> (accessed Jul. 25, 2015); Trib. ammin. reg. Lazio, sentenza 26 gennaio 2015, n. 1394; and Trib. ammin. reg. Roma, sentenza 16 dicembre 2014, n. 12763, which refer to financial conditions of the public administration duly documented and to the notoriously tough economic situation that has imposed stringent spending cuts.

This interpretation of the rule has been criticized by the scholars (Franco G. Scoca, *Natura e funzione dell'astreinte nel processo amministrativo*, 31 Corr. giur. 1406, 1414 (fn. 18)) who have pointed out how, on the one hand, regulatory or budgetary constraints should not limit the duty of the public administration to fulfill its obligation and, on the other hand, financial difficulties cannot justify a delayed fulfillment by the State.

<sup>34</sup> See Scoca, *supra* n. 33, at 1414; Delle Donne, *L'introduzione*, *supra* n. 32, at 134.

<sup>35</sup> Tomassetti, *supra* n. 32.

<sup>36</sup> Giulia Ferrari, *Processo amministrativo: le penalità di mora; l'ottemperanza al decreto decisivo del ricorso straordinario al Capo dello Stato*, 2014(5) Giornale dir. ammin.; Commandatore, *supra* n. 32.

<sup>37</sup> See: Trib. ammin. reg. Lazio, Roma, sez. III-*quater*, 18 ottobre 2013, n. 9028, Urb. app. 2013, 1346; Cons. Stato, sez. V, sentenza 11 giugno 2012, n. 3397; Cons. Stato, sez. V, sentenza 14 maggio 2012, n. 2744; Cons. Stato, sez. V, 20 dicembre 2011, n. 6688.

predictable damage, and any other useful circumstance, such as the personal and financial conditions of the person against whom the coercive measure is requested, so that such coercive measure be effective but not too afflictive.

As already highlighted with respect to Art. 614-*bis*, the formulas contained therein are generic and designed to grant the judge a certain margin of discretion in order to apply a measure that is appropriate for the case. Indeed, according to some scholars this would be the reason for the lack of a predetermination of a minimum and a maximum amount.<sup>38</sup>

From a different perspective, some scholars have pointed out a link between the measure – high or low – of the *astreinte* and the qualification of the remedy as punitive or compensatory in nature: in particular, the case law that has granted *astreinte* for rather small amounts tends to consider them as a compensatory remedy, while the case law that has granted *astreinte* for more significant amounts adheres to the interpretation of the remedy as punitive in nature.<sup>39</sup>

### 1.2.3. The Beneficiary of the Payment

Also with reference to the beneficiary of the amount of the *astreinte*, Art. 114 of the APC is silent. Therefore, also here it is common to make reference to Art. 614-*bis* of the CPC, according to which the beneficiary is the movant: consequently, the sums of the *astreinte* under Art. 114 of the APC and Art. 614-*bis* of the CPC are both paid in favor of the private individuals and not to any public fund.<sup>40</sup>

### **1.3. A Parallelism Only Apparent: The Type of Obligation the Violation of Which May Be Sanctioned by the *astreinte* under Art. 114 of the Administrative Procedure Code**

The similarities between the *astreinte* contained in Art. 114 of the APC and that provided by the CPC at Art. 614-*bis* – and the consequent parallelism identified, as said, by case law, scholars and the same lawmakers essentially with the aim of filling the legislative vacuums left by the rule<sup>41</sup> – have provided the basis for the development of the opinion according to which the remedy contained in the APC would not be applicable in cases of failed or delayed fulfillment of obligations having a monetary content.<sup>42</sup>

<sup>38</sup> Delle Donne, *L'introduzione*, *supra* n. 32, at 137 ss.

<sup>39</sup> Carbone, *supra* n. 30.

<sup>40</sup> Luigi Viola, *Le astreintes nel nuovo processo amministrativo*, 2011(2) Urb. app.; Antonio Lombardi, *Il nuovo art. 614-bis: l'astreinte quale misura accessoria ai provvedimenti cautelari ex art. 700 c.p.c.*, 2010 Giur. mer. 398.

This solution is clear among case law and scholars regardless of the reference to Art. 614-*bis* of the CPC. See Carbone, *supra* n. 30.

<sup>41</sup> See *supra* Sec. 1.2.

<sup>42</sup> In the view of Scoca, *supra* n. 33, the similarities between the provisions at issue have a preliminary and conditioning relevance, in the sense that a parallelism between the rules had not been highlighted, the problem in question would not have arisen.

Indeed, the rule for the administrative procedure – differently than Art. 614-*bis* of the CPC – does not contain an explicit provision limiting the scope of application of the rule to infungible obligations to do or not to do: this is why there is room for an inclusion or exclusion of monetary obligations.<sup>43</sup>

In this regard, a conflict in case law had developed since the enactment of the APC.

The first case law believed that the *astreinte* under Art. 114 may be applied by the court to sanction only the nonfulfillment of infungible obligations to do or not to do, with the exclusion of pecuniary claims because, in case of pecuniary claims, the application of the remedy of the *astreinte* would be ‘manifestly unjust’ considering that the delay in the fulfillment of a pecuniary obligation is already sanctioned by the legal system with the payment of interests in the measure set out by the law. In other words, the sum due as *astreinte* would add to the sum due as interests, thus showing the ‘manifestly unjust’ nature of the remedy at issue.<sup>44</sup>

Nevertheless, according to another part of case law,<sup>45</sup> the limits contained in Art. 614-*bis*, as to its applicability only to infungible obligations to do or not to do, should not be referred to Art. 114 of the APC: the main argument is that these remedies are contained in two different rules that provide for different conditions to be met and the rationales of which are not coincident one with the other. Moreover, the circumstance that the debtor would also be ordered to pay interests in the measure set out by the law should be irrelevant: the interests pursue a specific aim (*i.e.* provide compensation for the damage represented by the delayed payment) different from that pursued by the *astreinte* (*i.e.* sanction the non-compliance with an order issued by the court).<sup>46</sup>

<sup>43</sup> In a systemic and comparative perspective, it is worth recalling that – although it is true that the purpose of Art. 614-*bis* of the CPC is to provide protection to those rights that, before the reform, precisely because of the infungibility of their underlying obligation, could find protection only through an equivalent compensation of money (Delle Donne, *Astreinte*, *supra* n. 30) – however, some case-law considered such measures to be applicable also to fungible obligations to do. In this regard, it has been stated that ‘beyond the literal data contained in the heading of the article, the coercive fine may be considered as a general remedy aimed at ensuring the implementation of all condemnation judicial measures, and not just those relating to infungible obligations to do or obligation not to do’ (Trib. Terni, ordinanza 6 agosto 2009, Giur. it. 2010, 637, available at <[http://www.giur.uniroma3.it/materiale/didattico/prcessuale%20civile%20II/2011/Trib.\\_Terni\\_6.8.09.pdf](http://www.giur.uniroma3.it/materiale/didattico/prcessuale%20civile%20II/2011/Trib._Terni_6.8.09.pdf)> (accessed Jul. 25, 2015)).

<sup>44</sup> See, *inter alia*: Cons. Stato, sez. III, sentenza 6 dicembre 2013, n. 5819; Cons. Stato, sez. IV, sentenza 13 giugno 2013, n. 3293; Trib. ammin. reg. Marche, sentenza 20 febbraio 2014, n. 238; Trib. ammin. reg. Lazio, Roma, sentenza 29 dicembre 2011, n. 10305, at <<http://www.neldiritto.it/appgiurisprudenza.asp?id=7276#.VbLVqbPtnSc>> (accessed Jul. 25, 2015); Trib. ammin. reg. Campania, Napoli, 15 aprile 2011, n. 2161, Corr. mer. 2011, 991 con nota di Di Marco *Inerzia dell'amministrazione e astreinte*.

<sup>45</sup> See *ex plurimis*: Cons. Stato, sez. IV, 29 gennaio 2014, n. 462; Cons. Stato, sez. V, 15 luglio 2013, n. 3781; Cons. Stato, sez. V, 19 giugno 2013, n.ri 3339, 3340, 3341 e 3342; Cons. Stato, sez. III, 30 maggio 2013, n. 2933.

<sup>46</sup> Trib. ammin. reg. Lazio, Rome, sez. I, 18 ottobre 2013, n. 9028; Cons. Stato, sez. IV, sentenza 31 maggio 2012, n. 3272, at <<http://www.amministrativistaonline.it/giurisprudenza/cons-stato-sez-iv-sentenza-31-maggio-2012-n-3272/>> (accessed Jul. 25, 2015); Trib. ammin. reg. Puglia, Bari, sez. III, sentenza 26 gennaio, 2012, n. 254, at <<http://www.ediltecnico.it/newsletter/2012/060412/18.pdf>> (accessed Jul. 25, 2015). See also: Luigi Viola, *Ancora sulla pretesa incompatibilità tra astreintes ed esecuzione delle sentenze in materia di obbligazioni pecuniarie della p.a.*, 2013 Foro ammin. 528; Calogero Commandatore, *L'art. 114, comma 4, lett. e) c.p.a.: tra danni punitivi e sanzioni civili*, 2013 Corr. mer. 895.

This last interpretation was eventually shared by the *Consiglio di Stato* (Council of State) in plenary session,<sup>47</sup> whose nomophylactic function should have definitely settled the contrast.

## 2. Russian *astreinte*: *extra legem* or Legal Measure

### 2.1. The Nature of the *astreinte*

The *astreinte* was known by Russian scholars as the French institute of indirect coercive measures. One of the well-known Russian scholars K. Malyshev in the 19<sup>th</sup> century referred to the French *astreinte* as a coercion which aims to have an effect on the *will* of the debtor and persuade him to execute his obligations.<sup>48</sup>

In Russian legal doctrine both direct and indirect enforcement measures are determined by the kind of an imposed obligation. The Russian scholar E. Vaskovsky distinguished five possible obligations of a debtor: 1) to pay a sum of money; 2) to transfer a property; 3) to do something 4) to abstain from doing something; 5) to sustain any actions of the plaintiff (*e.g.*, servitude).<sup>49</sup> The first and the second obligations could be enforced by direct real measures (*Realexekution*) and guaranteed by indirect personal measures like a prohibition to leave the country (*Personalexekution*). The third obligation could be enforced only if this obligation is 'replaceable,' *i.e.* another person besides a debtor also can perform it. If the obligation is not fungible only indirect coercive measures (penalty or payment of damages) can be applied. The same rule determines the performance of the fourth obligation.

In the Charter of Civil Procedure of 1864 there were only two possible indirect coercive measures: a prohibition to leave the country and the possibility of a plaintiff to claim, in a separate trial, for the damages for non-performance. So, when the *astreinte* developed in the French case law, the Russian case law and doctrine tried to avoid personal indirect measures in enforcement proceedings. The doctrine of enforcement proceedings in Russia in the 19<sup>th</sup> century opposed personal coercive measures favouring the real measures of the enforcement. Personal measures were considered inhumane and archaic. At the same time, Russian scholars disputed the possibility of specific performance itself and tried to elaborate effective measures for the enforcement of the obligation to do something. These disputes last to the present day.

A superficial analysis of the development of *astreinte* in the French doctrine<sup>50</sup> shows that there is no consensus in the conception of this institute. These are some

<sup>47</sup> Cons. Stato, Ad. Plen., sentenza 25 giugno 2014, n. 15, Corr. giur. 2014, 1406 con nota di Scoca *Natura e funzione dell'astreinte nel processo amministrativo*; Urb. app. 2014, 1060 con nota di Cumin *Condanna al pagamento di somme di denaro ed astreinte nell'ottemperanza*.

<sup>48</sup> *Малышев К.* Курс гражданского судопроизводства. Т. 1 [Malyshev K. *Kurs grazhdanskogo sudoproizvodstva*. Т. 1 [Kronid Malyshev, 1 Civil Proceedings Treatise]] 104 (M.M. Stasyulevich 1875).

<sup>49</sup> *Васьковский Е.В.* Учебник гражданского процесса [Vaskovsky E.V. *Uchebnik grazhdanskogo protsesssa* [Evgeny V. Vaskovsky, Textbook of Civil Procedure]] (2<sup>nd</sup> ed., Izdanie Br. Bashmakovykh 1917).

<sup>50</sup> See: François Terré et al., *Droit civil: Les obligations* 1046–47 (10<sup>th</sup> ed., Dalloz 2009); Philippe le Tourneau & Loïc Cadiet, *Droit de la responsabilité* (Dalloz 1996); Кузнецов Е.Н. Астрэнт (*astreinte*) как способ



of the views concerning the character of the *astreinte*: the *astreinte* is 1) the threat of a monetary award (*menace*); 2) a private punishment for the non-performance of an obligation (*peine privée*); 3) a compensation for the damage (*réparation*); 4) a special enforcement measure (*voie d'exécution*); 5) a public penalty for non-performance; 6) a punitive damage for the non-performance of the judicial act.

The countries that try to adopt this institute in their legal systems (the Benelux states, Portugal, Italy, Greece, Russia) have the same debates about the nature of the *astreinte*. Its nature (public or private, compensatory or punitive, substantive or procedural) determines the scope and procedure of its application, the possibility to extend it to the administrative proceedings and define the position of this institute among other categories of the enforcement of law.

## 2.2. The Development of the *astreinte* in Russian Case Law

The *astreinte* appeared in Russian case law in 2013. The Supreme Commercial Court of the Russian Federation imposed a special penalty for each day of the future possible non-performance of the obligation of the state to pay compensation for the delay of the enforcement of another judicial decision.<sup>51</sup> In Russia, there is no rule that rejects or acknowledges judicial precedent as a source of law.<sup>52</sup> Meanwhile there was no legal regulation of the *astreinte* and this penalty was considered by some scholars as an *extra legem* measure, which was imposed beyond the competence of the court. In contrast to the Italian experience, there was no institute similar to the *astreinte* in Russian legislation or case law, even in consumer or intellectual property disputes. The abovementioned decision of the Supreme Commercial Court gave an impulse to the development of the *astreinte* in Russia.

To determine the place of the new institute in Russian legal practice, it is useful to describe in general enforcement proceedings in Russia. In Russian legal tradition, long before *Hornby v. Greece*,<sup>53</sup> *Immobiliare Saffi v. Italy*,<sup>54</sup> *Burdov v. Russia*,<sup>55</sup> European Court

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принуждения должника в исполнительном производстве Франции // Российский ежегодник гражданского и арбитражного процесса. № 2 (2002–2003) [Kuznetsov E.N. *Astrent (astreinte) kak sposob prinuzhdeniya dolzhnika v ispolnitel'nom proizvodstve Frantsii* // Rossiiskii ezhegodnik grazhdanskogo i arbitrazhnogo protsesssa. No. 2 (2002–2003) [Evgeny N. Kuznetsov, *Astreinte as a Coercive Measure Applied to a Debtor in the French Enforcement Proceedings, 2002–03(2)* Russian Yearbook of Civil Procedure].

<sup>51</sup> Decision of the Presidium of the Supreme Commercial Court of the Russian Federation No. 8711/2012 of March 12, 2013, 2013(3) Bulletin of the Supreme Commercial Court of the Russian Federation.

<sup>52</sup> Dmitry Mareshin, The Russian Style of Civil Procedure, 21(2) Emory Int'l L. Rev. 555 (2007), available at <[http://papers.ssrn.com/abstract\\_id=2208488](http://papers.ssrn.com/abstract_id=2208488)> (accessed May 17, 2015).

<sup>53</sup> *Hornsby v. Greece*, ¶ 40, no. 107/1995/613/701 (Eur. Ct. H.R., Mar. 19, 1997): 'It would be inconceivable that Article 6 para. 1 (art. 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 . . . Execution of a judgment given by any court has to be regarded as an integral part of the "trial" for the purposes of Article 6 . . .'

<sup>54</sup> *Immobiliare Saffi v. Italy*, no. 22774/93 (Eur. Ct. H.R., Jul. 28, 1999).

<sup>55</sup> *Burdov v. Russia (No. 2)*, no. 33509/04 (Eur. Ct. H.R., Jan. 15, 2009).

of Human Rights [hereinafter Eur. Ct. H.R.] decision enforcement was considered as one of the essential phases of adjudication. The main purpose of adjudication is not fulfilled without real enforcement of a final judgment. Official statistics for the years 2013–14 shows that fewer than 50% of the judicial decisions have been enforced. The reality is even more disappointing, as according to some estimates we can talk only of 20% of enforced decisions. If judgments are not enforced, it means that the whole judicial machinery which operates through a complicated adversarial process to reveal the truth and to protect rights, as a matter of fact works in vain. The situation with the enforcement of the pecuniary obligation is more optimistic than one concerning the enforcement of an obligation to do something (and other non-property obligation). The *astreinte* was considered by the Supreme Commercial Court as one of the measures that can improve special enforcement in Russia.

A final judgment in Russia is enforceable only after it becomes *res judicata*, with no possibility of appeal. There are some exclusions from this general rule and judgment can be executed before it has *res judicata* effect in some cases specified in procedural codes (e.g., recovery of alimony, salary payment, reemployment, etc.).

There are three systems of state courts in Russia: courts of general jurisdiction, commercial (*arbitrazh*) courts, and constitutional courts. Commercial courts have special competence to hear cases between corporations (other legal entities) concerning economic (entrepreneurial) matters including administrative disputes. The adjudication in commercial courts and general aspects of the enforcement of judicial decisions is governed by the Commercial Procedure Code of the Russian Federation [hereinafter ComPC]. Courts of general jurisdiction have residual competence and mainly settle civil, housing, land, labor and social disputes between individuals, and individuals and legal entities. The Civil Procedure Code of the Russian Federation [hereinafter CivPC] and the Administrative Procedure Code of the Russian Federation [hereinafter AdmPC] govern adjudication in the courts of general jurisdiction.

The AdmPC will come into force on September 15, 2015, and will govern the proceedings over disputes with a public element in the courts of general jurisdiction (so called administrative cases such as the validity of the regulatory and individual acts, compensation for judicial delays, collection of taxes and fees, etc., excluding cases concerning administrative offences). The administrative cases concerning economic (entrepreneurial) matters are adjudicated by commercial courts under the ComPC.

It is worth mentioning that the judicial reform is now in progress in Russia. In 2014 the Supreme Commercial Court (that was an inspirer of the Russian *astreinte*) was merged with the Supreme Court of the Russian Federation. Now, we have two systems of courts, which are crowned by the Supreme Court of the Russian Federation. And, we are moving towards the unification of civil and commercial procedure codes.<sup>56</sup>

<sup>56</sup> Irina Reshetnikova, *Judicial Reforms in Russia: 1864 to 2014*, 3(2) Russian Law Journal 110 (2015), available at <<http://www.russianlawjournal.org/index.php/jour/article/download/85/97>> (accessed Jul. 25, 2015). doi:10.17589/2309-8678-2015-3-2-109-118

The Concept of the Unified Code of Civil Procedure was prepared by the special committee.<sup>57</sup> This Concept mentions the *astreinte*, which is defined as a new type of sanction in case of non-enforcement of a judicial act. The Concept refers to the draft of the Enforcement Code (Arts. 101 and 102)<sup>58</sup> which was elaborated in 2007 but has never been enacted. In this draft of the Enforcement Code *astreinte* was defined as a 'continually increasing penalty for the non-enforcement of non-property obligations.'

Three procedural codes govern the general aspects of the enforcement proceedings in the same manner. These codes determine some direct and indirect coercive measures to motivate a debtor to enforce voluntarily and to protect creditors' rights in case of non-enforcement. Procedural codes mainly aim to regulate the role of the judge in enforcement proceedings. A judge not only issues execution writs and has control and regulative functions over enforcement proceedings, the judge determines the possibility and quality of the enforcement proceedings. According to the procedural codes, a judge has the following main powers concerning the enforcement proceedings: 1) to issue an execution writ; 2) to terminate or to suspend enforcement; 3) to clarify the substance of judgments and execution writs for the enforcement agent; 4) on the motion of the party to control bailiff's actions and inactions; 5) to decide to execute an indexation of adjudicated sums of money; 6) to decide on the motion of the party to award interests for the non-performance of the pecuniary obligations; 7) on the motion of the claimant to change the enforcement measures, set in the operated part of the judgment.

But currently none of the codes includes rules concerning the power of the judge to impose the *astreinte* and the procedure for its application.

On January 15, 2013, the Supreme Commercial Court issued the Information Letter No. 153 'Review of Judicial Practice on Some Issues to Protect the Rights of the Owner from Violations Not Related to Deprivation of Possession',<sup>59</sup> where the Court pointed out that in case of violations of the property rights not connected with the deprivation of possession (*actio negatoria*), the court may impose on the offender the obligation to perform certain actions, as well as to refrain from action. In the draft of this information letter there was a recommendation that in cases where the execution of the decision cannot be performed independently by the plaintiff, the court may, at the request of the plaintiff, impose on the defendant an obligation to pay the plaintiff the sum of money for each day of non-enforcement of the judgment. In the final version of the Information Letter

<sup>57</sup> The Concept of the Unified Code of Civil Procedure available in Russian at <[http://www.consultant.ru/document/cons\\_doc\\_LAW\\_172071](http://www.consultant.ru/document/cons_doc_LAW_172071)> (accessed Jul. 25, 2015).

<sup>58</sup> Исполнительный кодекс Российской Федерации. Проект [*Ispolnitel'nyi kodeks Rossiiskoi Federatsii. Proekt* [Enforcement Code. Draft]] 63–65, 80 (Vladimir M. Sherstyuk & Vladimir V. Yarkov, eds.) (Prospekt 2008).

<sup>59</sup> 2013(4) Bulletin of the Supreme Commercial Court of the Russian Federation.

this recommendation was excluded. But it was first step towards introducing the *astreinte* in Russia.<sup>60</sup>

Shortly thereafter, the Supreme Commercial Court (as a cassation court) adjudicated a case between a state body and a legal entity. The state body had to enforce the judgment and pay a sum of money to the legal entity. However, the state body did not enforce this decision voluntarily and the legal entity brought an action against the state body requesting compensation for the violation of the right to enforcement of a judicial act within a reasonable time. The court of first instance awarded such compensation that was quite small. In the Decision No. 8711/2012 of March 12, 2013, the Presidium of the Supreme Commercial Court pointed out that, in connection with the failure of the enforcement of the judicial act, the debtor (state body) shall pay the annual interests until the full payment of the amount of compensation. To justify the award of said interest, the Presidium referred to the Eur. Ct. H.R. concerning the implementation of indirect measures against the defendant to force him to enforce the judgment. The Court explained that a judge must, in each case, provide an individual approach to the determination of the amount of compensation for the violation of the right to trial within a reasonable time, or right to the performance of a judicial act within a reasonable time. In particular, the amount of such compensation shall be determined by the court. Also the Court referred to the position of the Eur. Ct. H.R. set out in the judgment in case *OOO PKG 'Sib-YUKASS' v. Russia*<sup>61</sup> concerning the amount of the *astreinte*. The rate should be based on the interest rate of the Central Bank plus 3%.

This decision of the Supreme Commercial Court set up some distinct rules concerning *astreinte*. The first one is that we can apply *astreinte* to the performance of the pecuniary obligations. The second one is that *astreinte* is applicable to the enforcement of a decision against a state body. Third, the Court gave some reference points on how to count the amount of the *astreinte*.

Finally, on April 4, 2014, the Plenum of the Supreme Commercial Court adopted recommendations<sup>62</sup> to state commercial courts introducing the possibility of

<sup>60</sup> In the final version of the Information Letter the Court determined that in case of failure by the defendant to perform the duties of action based on the decision of the court the plaintiff has the right to perform himself, previously or subsequently recover from the defendant the money according to the rules about changing the methods of enforcement of the judgment (Art. 324 of the ComPC), or by the rules of Art. 174(3) of the ComPC, if the claimant requested the recovery of funds in case of non-performance of the judicial act. So the Court only applied a rule known in many jurisdictions that in case of non-performance a plaintiff is entitled to take appropriate actions and collect his expenses from the defendant who fails to execute the court decision (Art. 174 of the ComPC).

<sup>61</sup> *OOO PKG 'Sib-YUKASS' v. Russia*, no. 34283/05 (Eur. Ct. H.R., Nov. 8, 2007).

<sup>62</sup> See Постановление Пленума ВАС РФ от 4 апреля 2014 г. № 22 «О некоторых вопросах присуждения взыскателю денежных средств за неисполнение судебного акта» // Вестник ВАС РФ. 2014. № 6 [Postanovlenie Plenuma Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 4 aprelya 2014 g. No. 22 'O nekotorykh voprosakh prisuzhdeniya vzykskatelyu denezhnykh sredstv za neispolnenie sudebnogo akta' // Vestnik Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii. 2014. No. 6 [Ruling of the Plenum of the

imposing a penalty on a defendant who does not voluntarily comply with the obligation imposed by an enforceable decision. Such a penalty is imposed for the benefit of the prevailing party. This penalty is an analogue of the French *astreinte*, but according to this recommendation, *astreinte* can be applied only to *non-monetary claims or compensation for enforcement delays* at the request of the plaintiff, in the statement of claim or in the application during the course of the proceedings. In the operative part of the judgments, the court defines a sum of money for non-enforcement of the judicial act that will be awarded to the creditor. The size of this penalty is determined by the amount awarded by the court based on the principles of fairness, proportionality and non-benefiting from illegal or dishonest behavior (Art. 1(4) of the Civil Code of the Russian Federation). In determining the size of the award in case of non-enforcement, the court shall consider the degree of difficulty of the execution of a judicial act, the possibility of the defendant's voluntary execution of a judicial act as well as other relevant circumstances.

Ruling No. 22 introduced *astreinte* that has the following essential characteristics: 1) it can be applied to the non-monetary obligation and the pecuniary obligation of the state to pay compensation for trial and enforcement delays; 2) *astreinte* is imposed by the final judgment on the motion of the party; 3) *astreinte* is a monetary penalty that is increased for every day of the non-performance; 4) the amount of the *astreinte* is determined by the general principles of civil law. The Court did not explicitly exclude the possibility to impose *astreinte* in administrative cases. But multiple references to the Civil Code of the Russian Federation that does not regulate public relations suggest that the Court did not intend to extend *astreinte* to all possible disputes (including bankruptcy, paying of administrative fines, public disputes).

The Ministry of Finance of the Russian Federation responded to this recommendation in quite a negative way. In Letter No. 08-04-06/3095 of September 16, 2014, it explained that all recommendations of the Supreme Commercial Court concerning indirect measures of enforcement of pecuniary and non-monetary decisions are inapplicable to state and municipal bodies. The enforcement of any pecuniary obligations of state bodies is regulated by the Budget Code of the Russian Federation and operated by the Federal Treasury Office. In particular, Arts. 242.1 and 242.2 of the Budget Code stipulate the procedure of execution of court decisions in claims against the Russian Federation, states of the Russian Federation and municipal entities for compensation for damage caused by unlawful actions (inaction) of state bodies of the Russian Federation or their officials, as well as the judicial acts of other claims for the recovery of funds by the Treasury of the Russian Federation. Executive writs should be sent directly to the Ministry of Finance of the Russian Federation,

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Supreme Commercial Court of the Russian Federation No. 22 of April 4, 2014, 'On Some Aspects of the Awarding of Sum of Money to the Claimant in Case of Non-Enforcement of the Judgment', 2014(6) Bulletin of the Supreme Commercial Court of the Russian Federation]] [hereinafter Ruling No. 22].

the financial body of the Russian Federation and municipalities for execution. In accordance with Art. 242.2(6) of the Budget Code, the enforcement of judgments is made within three months from receipt of the documents for execution. At the same time, both in the literal meaning of Art. 242.1 of the Budget Code and in the meaning drawn from the judicial practice, the authorized financial body would enforce (pay) only under the condition that it is confirmed by an act adopted by the court. This requirement is followed by the principle of immunity of the budget fixed by Art. 239 of the Budget Code. This means that an executive state body does not intend to enforce such judicial decisions that provide any indirect coercive measures like *astreinte* or interests.

### **2.3. The *astreinte* in the Civil Code of the Russian Federation**

On June 1, 2015, the new amendments to the Civil Code came into force. The new Article 308.3 of the Civil Code establishes that, in case of non-performance of the obligation, the creditor has the right to claim the specific performance of the obligation, unless otherwise provided by the Code, other law or contract or follows from the nature of the obligation. A court, at the request of the creditor, is entitled to award in his favor a sum of money in case of non-enforcement of this judicial act in the amount determined by the court based on the principles of fairness, proportionality and non-benefiting from illegal or unfair conduct. That is the legal definition of the *astreinte*.

The Civil Code itself explains the nature of this sum of money making references to Art. 330 of the Code ('Forfeit'). It means that lawmakers see *astreinte* as a forfeit (penalty) that can be applied along with the liability for failure or improper performance of an obligation.

The Civil Code establishes that any obligation can be performed specifically except in cases where it contradicts the nature of this obligation. It is obvious that the Civil Code distinguishes specific performance, performance of pecuniary obligation and damages and confines the scope of application of the *astreinte* to an obligation to do something including an obligation to transfer something (*obligation de faire* and *obligation de donner*). The *astreinte* is applied only to secure the specific performance. The other set condition of applying the *astreinte* is the motion of the party (creditor). A judge could not apply *astreinte ex officio*.

The Civil Code is an act of substantive law and we could not expect that it would explain the procedural aspects of the *astreinte*. So now it is unclear whether a party who demands *astreinte* should prove the necessity of it? What facts should be determined by a judge to decide to apply *astreinte*? Should a judge ascertain whether there is any chance of non-performance or any impediments to perform? It gets more complicated if we take into consideration that the *astreinte* has the same character as a forfeit, which can be decreased on the substantiated request of a defendant.

The scope of the application of the Civil Code is private civil relations. It does not apply to administrative (public) cases. So, literally, the fact that the *astreinte* is now introduced by the Civil Code excludes application of the *astreinte* in the administrative cases.

As we show above, the *astreinte* has appeared in Russian case law in connection with the adjudication of a dispute with the public element. It was a case involving a state body concerning the compensation for a delay in the enforcement of a judicial decision. But later the *astreinte* mainly develops in case law concerning private civil disputes. The Ruling No. 22 which determined indirect coercive measures for non-enforcement has some deficiency. It does not expressly exclude relations regulated by the public law from its regulation, but while it is obscure, we shall apply this act to administrative (public) disputes as, literally, the rules of this act refer only to the Civil Code.

The attitude of the public authority towards this question, which was voiced by the Ministry of Finance of the Russian Federation, is negative. It is understandable that the idea of the application of any coercive measures towards a state authority would not be met with approval.

The case law of the commercial courts shows that these courts have no intention to apply the Ruling No. 22 to disputes with state bodies. Even in the cases where plaintiffs demand compensation for the delay of the enforcement of the judicial decision by state bodies, courts only award the compensation and refuse to impose *astreinte* for possible non-enforcement of this compensatory decision. The reasoning of these judgments is: 1) the literal interpretation of the Ruling No. 22, which refers primarily to the Civil Code, civil relations, non-monetary obligations; 2) the *extra legem* character of the *astreinte*; 3) the public nature of the disputes concerned as opposed to the private nature of the *astreinte*; 4) a balance between public and private interests when an individual or a legal entity obtains the right to received money for non-performance that would be taken from public state budget; 5) whether *astreinte* has both a private (compensation) and a public (punishment) character is a theoretical question about the possibility of applying this responsibility to the state bodies.<sup>63</sup>

#### **2.4. The Possibility of the *astreinte* in Administrative (Judicial) Proceedings in Russia**

The AdmPC determines the following administrative cases that should be adjudicated under its regulation by the courts of general jurisdiction:

- avoidance of the regulatory acts in whole or in part;
- avoidance of the decisions, actions (inaction) of state bodies, other state bodies, military administration bodies, local government bodies, officials, public and municipal employees;

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<sup>63</sup> Decision of the Commercial Court of St. Petersburg and Leningrad Region of July 3, 2013. Case No. A56-30865/2013.

- challenging the decisions, actions (inaction) of non-profit organizations, endowed with certain state or other public authority, including self-regulatory organizations;
- challenging the decisions, actions (inaction) of the qualifying boards of judges;
- challenging the decisions, actions (inaction) of the High Examination Committee and examination boards;
- protection of electoral rights and the right to participate in a referendum;
- compensation for the violation of the right to trial within a reasonable time or right to performance of a judicial act within a reasonable time;
- the suspension of operations or liquidation of a political party;
- termination of the activities of the media;
- the recovery of sums of money for the payment of statutory compulsory payments (including tax) and penalties on individuals;
- the hospitalization of an individual in a medical organization; and others.

As we can see, not all judicial decisions on administrative cases would need any enforcement, because most of them are constitutive and declaratory. But there would be some decisions on administrative cases that need compulsory enforcement. Thus, the court in its decision could impose the obligation of the public authority to perform certain actions aimed at the elimination of the violations of the rights, freedoms and legitimate interests of the complainant (*obligation de faire*). Moreover, the decision can impose an obligation to pay (return) money from the state budget (in case of compensation for trials or enforcement delays or refund of overpaid sums of money from the budget). So, in cases where a decision imposes an obligation to do something or not to do, or even to pay sum of money, a state, regional or municipal authority would not enforce their obligations.

Also, we should remember that, in Russia, in administrative proceedings the claimant is not always an individual. In some cases an administrative claimant is a state body, *e.g.* tax authority which claims the recovery of the unpaid taxes from individuals. And the question arises if it would be possible to apply *astreinte* in such administrative cases.

So, in administrative cases, the beneficiary of the *astreinte* can be both the state and the individual (a legal entity). The problem of imposing the *astreinte* to the state is that it should be paid from the state budget, which contradicts the principle of budget immunity. Furthermore, the state could not be liable under the civil law for non-performance of the obligation arising from a public (administrative) relation. But non-enforcement of a judgment by a state authority can result in the same or even greater damage as a non-performance by an individual or legal entity. There is no barrier in administrative proceedings to apply the *astreinte* against an individual or legal entity. But, if we presume the principle of the equality of the parties of the dispute in litigation and enforcement proceedings, there is no reason why a state body could not be forced to enforce voluntarily by means of the *astreinte*.



The new AdmPC does not mention *astreinte* or other indirect measures. In Art. 16, it sets forth that non-performance of the judicial act in administrative cases, as well as delays in its performance, entails the application of the measures provided by the Code, or the *liability* established by federal laws. Only one said measure can be applied in case non-enforcement: judicial penalty. And it seems that we could not apply Art. 308.3 of the Civil Code here because, firstly, the Civil Code regulates private civil relations and, secondly, *astreinte* is not a kind of liability.

So the situation regarding the application of the *astreinte* in administrative proceedings is the following: there is no legal prohibition to impose the *astreinte* in the judgment during administrative proceedings. There is a possibility of applying this institute based on general fundamental principles of civil procedure and enforcement proceedings. But Russian judges are wary of applying the *astreinte* as a private measure in public (administrative) disputes with a state authority without imperative detailed rules established by law.

After studying the regulation of the *astreinte* in Russia, we should determine the nature of the *astreinte* as public or private. We suggest that the aims of the *astreinte* are public. The *astreinte* forces the debtor to enforce not an obligation, but a judicial decision. The *astreinte*, with its *in terrorem* nature, guards against violation of public interests (non-performance of judicial decision). The public nature of the *astreinte* allows one to apply it to any disputes (administrative or private). On the other hand, *astreinte* is collected in favor of an individual (or a legal entity) and the Civil Code regulates the correlation between the *astreinte* (as penalty) and damages that can be collected regardless of the sum of this penalty. This private nature of the *astreinte* brings us to multiple questions concerning the nature of the monetary obligation to pay *astreinte* under the Civil Code: 1) can a sum of money collected as *astreinte* be considered as unjust enrichment; 2) if *astreinte* has a compensatory nature and should it be calculated based on eventual or real loss; 3) can the sum of the *astreinte* be transferred under the rules of legal succession (in case of inheritance or reorganization); *etc.* We have to admit that these questions could not be answered by the categories of the administrative relations and disputes.

Nevertheless, the *astreinte* as an obligation to pay a sum of money can now be based only on the relations regulated by the Civil Code. This obligation has a subsidiary and derivative nature. The Civil Code establishes that the *astreinte* is derived from the non-performance of the obligation regulated by this code. This private nature of the *astreinte* puts obstacles in the way of its implementation in the administrative disputes. There is quite an extraordinary situation when a judge is allowed to impose a pecuniary (civil) obligation to the party of the public (administrative) relation.

The *astreinte* as a judicial penalty is regulated also by the Art. 7.2.4 of the UNIDROIT Principles of International Commercial Contracts (2010) [hereinafter

UNIDROIT Principles].<sup>64</sup> This voluntary act recommends that the court direct the debtor to pay a penalty if it does not comply with the court order. The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages. This recommendation does not endue the *astreinte* with this pure private nature as the Russian Civil Code does.

It is interesting to compare these recommendations with the regulation of the Civil Code of the Russian Federation.

1. The UNIDROIT Principles do not confine the application of the *astreinte* to any kind of performance. Such sanction is applicable to all kinds of court orders for performance including those for the payment of money. The Civil Code of the Russian Federation prescribes the application of *astreinte* in case of specific performance, but does not precisely exclude monetary obligations from the scope of its application. Contrariwise, the Ruling No. 22 separates the consequences of the non-performance of the pecuniary and non-monetary obligations. For further regulation of the *astreinte* in civil and administrative proceedings it is essential to determine the kind of performance when it could be applied. For example, the performance of the judicial decisions to pay compensation for the trial or execution delays has a pecuniary nature and Russian case law shows that courts are ready to set *astreinte* for this kind of monetary obligation of the state. But, if we would adhere to an opinion that the *astreinte* is suitable only for the non-monetary obligation to do or not to do something, we should exclude such administrative cases from the regulation of the *astreinte*, which is not reasonable.

2. The UNIDROIT Principles allow a court to impose an *astreinte* at its own discretion (*ex officio*). It is explained that in the case of money judgments, a penalty should be imposed only in exceptional situations, especially where speedy payment is essential for the aggrieved party. By contrast, in the case of obligations to do or to abstain from doing something, enforcement by means of judicial penalties is often the most appropriate solution. The Civil Code of the Russian Federation, as was mentioned above, establishes that an *astreinte* can be imposed only by the motion of the party. The AdmPC sets forth the principle of adversary proceedings and it means that the party of the administrative proceedings should prove the threat of a non-performance and the size of the *astreinte* (if we presume that *astreinte* is applicable in such proceedings). It should also be additionally explained if the *astreinte* can be imposed by another judicial act besides the judicial decision, *e.g.* after a trial, during enforcement proceedings. And, if an *astreinte* can be imposed only by a judgment, how it can be changed or cancelled (a judicial decision can be changed or cancelled only by the court of appeals or the court of cassation).

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<sup>64</sup> UNIDROIT Principles of International Commercial Contracts 2010 245 (UNIDROIT 2010), available at <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>> (accessed Jul. 25, 2015).

3. The UNIDROIT Principles admit that legal systems differ as to the question of whether *astreinte* should be paid to the aggrieved party, to the State, or to both. Some systems regard payment to the aggrieved party as constituting an unjustified windfall benefit which is contrary to public policy.

The beneficiary of the *astreinte* is the most important and disputable question of the *astreinte* in civil and administrative proceedings. The beneficiary determines the legal nature of the *astreinte* and its applicability in administrative proceedings. If the beneficiary of the *astreinte* is a claimant, it means that the possible penalty for non-performance will be paid from the state budget. The idea of the enrichment of a private person at the expense of state budget does not correspond with the principles of the budget law. If the beneficiary is a state, the penalty for non-performance will be paid from state budget to state budget (which is absurd).

4. The UNIDROIT Principles distinguish an *astreinte* from damages for non-performance. The *astreinte* paid to the aggrieved party does not affect its claim for damages. Payment of the penalty is regarded as compensating the aggrieved party for those disadvantages which cannot be taken into account under the ordinary rules for the recovery of damages. But since payment of damages will usually occur substantially later than payment of an *astreinte*, courts may be able, in measuring the damages, to take the payment of the *astreinte* into account.

The same idea can be found in the Civil Code of the Russian Federation. This conception shows the private side of the *astreinte*. When we begin to discuss the *astreinte* from the point of damages and a correlation between damages and penalties (fines) we consider the *astreinte* as one of the institutes of securing of the performance of obligation. In case of administrative proceedings and public legal relations, these institutes are not applicable. We could see the obstacles of applying the institute of civil law to the administrative legal relations.

5. Two more questions that are raised by the UNIDROIT Principles are: 1) the possibility for arbitrators to impose the *astreinte*; and 2) the competence of a court to recognize and enforce of judicial decisions and of arbitral awards imposing the *astreinte*. There are no special rules on this matter that can be found in Russian law. It is worth mentioning that there is one interesting judicial decision of the US court against the Russian Federation which imposed the obligation to pay \$50,000 a day as *astreinte* for the non-enforcement of the obligation to return the sacred manuscript and books to the Agudas Chasidei Chabad.<sup>65</sup> This decision has not been enforced.

### **2.5. The Question of the Necessity of the *astreinte* for the Russian Legal System**

So, in general, before a replication of the French *astreinte* we should determine its legal nature. French scholars admit a peculiar mixed (both public

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<sup>65</sup> *Agudas Chasidei Chabad of United States v. Russian Federation et al.*, at <[http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_05-cv-01548/content-detail.html](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_05-cv-01548/content-detail.html)> (accessed Jul. 25, 2015).

and private) character of the *astreinte*. The *astreinte* guarantees and motivates (*in terrorem*) the performance of the obligation (private side) and the enforcement of the judgment (public side). This conception is close to the institute of punitive damages which is not widely recognized by the scholars of the continental legal system. It is complicated to perceive the *astreinte* while there are many aspects of this institute that are already employed in Russian civil and administrative proceedings: judicial and administrative penalty, interim measures, payment of interest and others.

As in most countries, in Russia, the debtor (defendant) is obliged to enforce a judgment voluntarily (Art. 210 of the CivPC, Art. 318 of the ComPC and Art. 30 of the Federal Law No. 229-FZ of October 2, 2007, 'On Enforcement Proceedings'<sup>66</sup> [hereinafter Federal Law on enforcement proceedings]). Certain judgments, like constitutive and declaratory judgments, are self-executing and do not require voluntary or compulsory enforcement. Other judgments require some actions or refraining from actions by a defendant. Such judgments can be compulsorily enforced.

Judicial decisions of commercial courts and courts of general jurisdiction, both in civil and public (administrative) matters, can be compulsorily enforced by a special government agency separate from these courts (bailiffs or enforcement agents). It is possible, in some restricted cases, to enforce a final judgment and an executive writ without the participation of a bailiff, *e.g.* in the case of the recovery of funds, a writ can be represented by the creditor directly to the debtor's bank and the latter is obliged, by law, to enforce this writ.<sup>67</sup>

The enforcement proceedings are unified and established by the Federal Law on enforcement proceedings. This federal law defines the conditions and the procedure of the compulsory execution of judicial acts and acts of other bodies and officials, which impose on individuals, legal entities, the Russian Federation, the states of the Russian Federation and municipalities obligations to transfer a property, to pay money or perform certain actions or refrain from performing certain actions.

There are various enforcement measures, which can be legally applied to a debtor by an enforcement agent. The Federal Law on enforcement proceedings establishes a list of such measures, including:

- the foreclosure of the debtor's assets, including cash and securities;
- the foreclosure of the periodic payments received by the debtor;
- the foreclosure of the debtor's property rights;
- the withdrawal of the debtor's property which was awarded to the claimant;
- the seizure of the debtor's property, located at the debtor or third parties;

<sup>66</sup> Федеральный закон от 2 октября 2007 г. № 229-ФЗ «Об исполнительном производстве» [*Federal'nyi zakon ot 2 oktyabrya No. 229-FZ 'Ob ispolnitel'nom proizvodstve'*].

<sup>67</sup> Other examples: 1) when judgment awards stocks (shares) to a plaintiff the execution writ can be directly enforced by a depositary or register; 2) the process of enforcement of an alimony obligation can be imposed on employer of the debtor.

- the request to the registration authority for registration of transfer of the property, including securities from the debtor to the creditor;
- the performance, on behalf of and at the expense of the debtor, of actions specified in the writ of execution, if this action can be done without the personal participation of the debtor;
- the compulsory moving-in of the creditor into the residence;
- the forced eviction of the debtor and debtor's premises;
- forced deportation from the Russian Federation of foreign citizens or persons without citizenship;
- other actions under federal law or an executive document.

The creditor has no right to change or to choose the enforcement measures. That is the exclusive authority of the enforcement agent. The enforcement measures are determined by the chosen remedy and the substance of a judicial decision.

One more advantage of the *astreinte* in comparison with other measures is that a plaintiff has the right to demand determination of an *astreinte* and to prove its necessity. The point is that the legal status of the parties of the enforcement proceedings and the parties of the court proceedings are completely different now. In the enforcement proceedings, parties do not enjoy such autonomy and discretionary powers as in civil litigation. In civil, and even administrative proceedings, a plaintiff can determine the commencement of the proceedings, the scope of his claim and remedy; it can participate in the fact-finding process or stay passive. In enforcement proceedings, the creditor has only two main discretions: to initiate proceedings (concerning only courts of general jurisdiction) and to terminate them. A creditor has no right to choose an enforcement agent or enforcement measures (both direct and indirect). In one of its rulings, the Constitutional Court of the Russian Federation proved the inapplicability of adversarial principle to enforcement proceedings as a whole. The Court pointed out that the main principle of enforcement proceedings is to protect preferentially the interests of a claimant. Observance of the principle of equality of the parties of the enforcement proceedings is understood from point of the necessity to restrict the property rights of the debtor.<sup>68</sup> A debtor also has no regulatory (dispositive) rights in the process of enforcement, but he would

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<sup>68</sup> Постановление КС РФ от 12 июля 2007 г. № 10-П «По делу о проверке конституционности положения абзаца третьей части первой статьи 446 Гражданского процессуального кодекса Российской Федерации в связи с жалобами граждан В.В. Безменова и Н.В. Калабуна» // Собрание законодательства Российской Федерации. 2007. № 30. Ст. 3988 [*Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 12 iyulya 2007 g. No. 10-P 'Po delu o proverke konstitutsionnosti polozheniya abzatsa tret'ego chasti pervoi stat'i 446 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Fedratsii v svyazi s zhalobami grazhdan V.V. Bezmenova i N.V. Kalabuna' // Sobranie zakonodatel'stva Rossiiskoi Federatsiiu 2007. No. 30. St. 3988*] [Ruling of the Constitutional Court of the Russian Federation No. 10-P of July 12, 2007, 'In the Case Concerning the Review of the Constitutionality of the Provision of Paragraph 3, Section 1, Article 446 of the Civil Procedure Code of the Russian Federation in Connection with Complaints of V.V. Bezmenov and N.V. Kalabun,' 2007(30) Collection of Russian Federation Legislation, item 3988].

have no motivation to exercise them, as his passive role in the enforcement can successfully result in termination of the enforcement on the grounds of 'impossibility to enforce.' The only person who has interest in these proceedings is a creditor, but he has no legal possibilities, forms and established mechanisms to stay active and participate in the process of enforcement. That is also not accurate from the position of any substantive law, which usually gives a party legal instruments to secure his / her rights and obligation, and mechanisms of exercising their rights. In the enforcement proceedings all powers of the enforcement of obligation are transferred to the 'impartial' (means passive and uninterested) enforcement agent. That is not quite an adequate and fair situation neither from position of adversarial adjudication, nor from the position of a substantive law. In the existing system of legal regulation, the claimant only has to send an executive writ to a bailiff for initiating enforcement proceedings in accordance with Art. 30(1) of the Federal Law on enforcement proceedings, then he is entitled only to require the timeliness and the compliance with the requirements of the executive writ. The *astreinte* changes the role of the plaintiff in the enforcement procedure, because it gives him / her the right to influence (at least indirectly) the enforcement.

The Federal Law on enforcement proceedings and other legislation set up a wide range of indirect coercive measures that can force a debtor to at least cooperate with a creditor and an enforcement agent or voluntarily enforce a judgment. The number of possible instruments that can motivate a debtor to enforce voluntarily questions the necessity of the new measures including *astreinte*.

We will briefly describe these measures in comparison with the *astreinte*. The *first one* is an execution fee that a debtor should pay in case of failure to enforce an execution writ within five days after receiving a written notice from an enforcement agent. This fee is a monetary penalty imposed on the debtor and it is equal to 7% of the amount to be recovered or the value of the property, but not less than 1,000 rubles from an individual and 10,000 rubles from a legal entity. Among Russian scholars, there are still some debates about whether the enforcement fee is a state duty, tax, administrative penalty, or measure of specific procedural responsibility. Federal Law on enforcement proceedings defines this fee as a monetary penalty imposed on the debtor.

The Constitutional Court of the Russian Federation called the enforcement fee a 'coercive measure in case of non-compliance with the legal requirements of the state.'<sup>69</sup> The Court pointed out that this measure does not have a compensatory nature,

<sup>69</sup> Постановление КС РФ от 30 июля 2001 г. № 13-П «По делу о проверке конституционности положений подпункта 7 пункта 1 статьи 7, пункта 1 статьи 77 и пункта 1 статьи 81 Федерального закона «Об исполнительном производстве» в связи с запросами Арбитражного суда Воронежской области, Арбитражного суда Саратовской области и жалобой открытого акционерного общества «Разрез «Изыжский»» // Собрание законодательства Российской Федерации. 2001. № 32. Ст. 3412 [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 30 iyulya 2001 g. No. 13-P 'Po delu o provere konstitutsionnosti polozhenii podpunkta 7 punkta 1 stat'i 77 i punkta 1

but is a penalty, the substance of which consists in the obligation of a debtor to make certain additional payments as a measure of its public liability arising in connection with violations committed in the course of the enforcement proceedings. Moreover, the Russian Constitutional Court found that the enforcement fee has punitive features inherent to administrative penalties: it is a fixed sum of money, exacted by force, charged in the case of an offense and shall be credited to the state budget.

The enforcement fee has a public nature, collected by the state budget based on the decision of the bailiff. The sum of this fee for non-performance of non-monetary obligations is negligible both for individuals and legal entities. It is paid just once and further non-performance cannot be punished by this instrument. It is obvious that the *astreinte* has a different nature. It is imposed by the judge, who determines its size based on the different circumstances and it provides a real threat of loss of considerable sums of money for non-performance. It is much more favorable to perform than not in case of the *astreinte*. The enforcement fee could not guarantee such an advantage.

The *second instrument* is the penalty which is determined by the Code of Administrative Offences of the Russian Federation. There are two offences concerning our subject. The first one is a violation by the debtor of the enforcement proceedings, including violations of legitimate requests of the bailiff, presenting false information about rights to property, failing to report dismissal from work, a new place of work or place of residence. Such violation is punishable by an administrative fine imposed on individuals in the amount of 1,000 to 2,500 rubles; on officials – from 10,000 to 20,000 rubles; for legal entities – from 30,000 to 100,000 rubles. The second violation is non-enforcement of non-monetary obligations imposed by a judgment. This violation is punishable by an administrative fine on individuals in the amount of 1,000 to 2,500 rubles; on officials – from 10,000 to 20,000 rubles; for legal entities – from 30,000 to 50,000 rubles. The procedure of the imposition of this penalty is quite complicated and the bailiff is not interested in it, because he does not benefit from it.

The *third similar instrument* is criminal responsibility. The procedure for prosecution is much more complicated and there are not many sentences concerning this violation in Russia.

The *fourth instrument* is a judicial penalty which can be imposed by a commercial court under Art. 332 of the ComPC. This measure is the closest one to the nature of *astreinte*. This penalty can be imposed by a judge, but only after the occurrence of

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*stat'i 81 Federal'nogo zakona "Ob ispolnitel'nom proizvodstve" v svyazi s zaprosami Arbitrazhnogo suda Voronezhskoi oblasti, Arbitrazhnogo suda Saratovskoi oblasti i zhaloboi otkrytogo aktsionernogo obshchestva "Razrez "Izykhsky" // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 2001. No. 32. St. 3412 [Ruling of the Constitutional Court of the Russian Federation No. 13-P of July 30, 2001, 'In the Case Concerning the Review of Constitutionality of the Provisions of Sub-Paragraph 7 of Paragraph 1 of Article 7, Paragraph 1 of Article 77 and Paragraph 1 of Article 81 of the Federal Law "On Enforcement Proceedings" in Connection with Requests of the Court of Arbitration of the Voronezh Region, Court of Arbitration of the Saratov Region and the Complaint of the Open Joint-Stock Company "The Cut "Izykhsky""; 2001(32) Collection of Russian Federation Legislation, item 3412]].*

non-enforcement by a debtor. The judicial penalty is small and a judge can impose only a fixed sum of money. The judge has no authority to determine that the penalty be collected every day until the judgment is enforced. But there is no barrier to impose the penalty as often as necessary right up to the day of the enforcement. The judicial penalty as an instrument of menace is quite an effective one. Russian scholars agree that if Russian lawmakers revised this legal measure and gave a judge the power to impose this penalty in a judgment and the right to determine the amount of this penalty payable for every day of non-enforcement there would be no need for *astreinte* either in administrative or civil proceedings.

Now, these penalties (execution fee, administrative and judicial penalties) are quite small and do not guaranty the enforcement, they do not motivate the debtor to enforce the judgment voluntarily. Moreover, to recover these penalties we should have effective enforcement machinery. In case of lack of working instruments of enforcement, these penalties would be also unpaid.

The *fifth instrument* is a payment of interests which can be used for pecuniary claims. Use of another's money as a result of its unlawful withholding, refusal to return it, or other delays in its payment or unjustified receipt or saving at the expense of another person shall be subject to the payment of the interest on the amount of these funds. The interest rate is determined at the place of residence of the creditor or if the creditor is a legal entity, its location, and published by the Bank of Russia (Art. 395 of the Civil Code of the Russian Federation). The Supreme Commercial Court of the Russian Federation pointed out that Art. 395(1) of the Civil Code can be applied to any monetary claims arising from civil relations or transaction, as well as court costs. The Court arrived at the conclusion that the legislation allowed the collection of interest on sums awarded by judgment as a consequence of the non-enforcement of this judicial act.<sup>70</sup>

For this reason, and in order to ensure the timely enforcement of the judgment, the court can award interests that shall be collected through to the day of the payment of the amount of these funds to the creditor. A court can increase the rate fixed by the Bank of Russia if a plaintiff can prove the necessity to do so. If the court has not considered the question of awarding interest in the event of non-enforcement of the judgment, the claimant shall have the right to apply for an additional decision on this issue (Art. 178(1)(2) of the ComPC).

It is generally accepted that the *astreinte* is applied to the non-enforcement of the non-monetary obligation. For pecuniary obligation we use instrument of civil law such as collecting interests and payment of damages.

The *sixth instrument* is indexation. At the request of the creditor or debtor, the court who heard the case can execute the indexation of the sum of money which was

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<sup>70</sup> See Ruling No. 22. The Plenum solves the most important issues relating to the work of the commercial courts of the Russian Federation, including adoption of resolutions mandatory for the commercial courts.



collected by the court on the day of execution of the judgment. The Constitutional Court of the Russian Federation considers indexation as a mechanism to fully reimburse the claimant's losses caused by prolonged non-enforcement of decisions in the situation of inflationary processes in the country. These extra features do not deprive the claimant's right to appeal in an independent claim for the recovery of the compensation for unjust enrichment. The indexation differs from the *astreinte*, because the latter does not have a primarily compensatory nature as does the indexation.

There are some measures that cannot be described as indirect measures, but also have to be considered by the defendant before and during enforcement proceedings.

1. A claimant has the right to claim prejudgment remedies which can guarantee the enforceability of the judicial decision. The prejudgment remedies themselves can be compulsorily enforced, which makes possible and simplifies the enforcement of the final judgment.

2. In the process of adjudication, a judge has special competence to determine course and measures of the enforcement, which should be pointed out in the judgment. According to Art. 204 of the CivPC, the court can establish certain enforcement measures and terms of the execution of the judgment; it also can prescribe measures to ensure its enforcement. The court, on motion of the party or the bailiff, can postpone payment or change the enforcement measures (which are indicated in a final judicial decision).

It is important to point out that in Russian legislation there is no provision that obliges a judge to examine the enforceability of his / her decisions. On the contrary, the judge is limited by the principle of the parties' autonomy and has no competence to change the chosen remedy or claim. Even if the court realizes that the enforcement of the decision will be impossible (technically or legally), it has no right to change the claim or remedy at its discretion. In court proceedings, it is the task of the parties to ensure the accuracy and relevance of the remedy and effectiveness of enforcement measures.

3. In accordance with Federal Law No. 68-FZ of April 30, 2010, 'On the Compensation for the Violation of the Right to Trial within a Reasonable Time, or Right to the Enforcement of a Judicial Act within a Reasonable Time' a creditor has right to appeal to the court for compensation. The nature of this compensation is the same as compensations which are awarded by Eur. Ct. H.R. But the compensation is paid only in case of the long enforcement of a judicial decision which was against a state executive body.

4. After a trial, a judge has competence to secure the possibility of enforcement of his judgment. The nature of this legal instrument is the same as prejudgment remedies or interim measures. Article 213 of the CivPC contains a reference to the chapter of the Code devoted to interim measures. Thus, the court has competence to decide to:

- 1) seizure of the debtor's property;

- 2) prohibit the debtor from performing certain actions;
- 3) prohibit other persons from performing certain actions relating to the matter in dispute;
- 4) attributing to the defendant and other persons duties to perform certain actions relating to the subject matter of the infringement of exclusive rights to films, including films, television movies, in information and telecommunications networks, including the network 'Internet;'
- 5) suspend of the sale of property in case of a claim for the release of property from seizure; and others.

These remedies secure the possibility of the enforcement proceedings, but a judge does not impose any additional obligation on the debtor in case of non-performance as he does in case of the *astreinte*.

Russian legislation establishes a complicated system of different measures and instruments that aim to secure the enforcement of the judicial act and to motivate (or to menace) a debtor to enforce. Unfortunately this system is not effective. The *astreinte* which was introduced in 2014 was intended to add one more indirect coercive measure that can be applied by the court on motion of the claimant.

### 3. Final Remarks

The solution offered by the *Consiglio di Stato* appears to be the only interpretation of Art. 114(4)(e) of the APC capable of understanding the actual traits and position of the *astreinte* in administrative proceedings.

Indeed, the reader should not fall into the easy temptation to unquestioningly juxtapose this rule with Art. 614-*bis* of the CPC and, therefore, see the *astreinte* provided for civil proceedings as the source of mandatory guidelines for the application of those provided for administrative proceedings.

It is true that the two provisions have many similarities, but many are also the differences. Specifically, the main difference is to be found in the modalities of the enforcement between the civil and the administrative systems:<sup>71</sup> as a matter of fact, in civil proceedings not every decision may be enforced through specific performance and, consequently, the introduction of the *astreinte* for those decisions that are not enforceable through specific performance aims at introducing a form or indirect coercive measure compensating for the absence of a specific performance instrument.<sup>72</sup> Conversely, in administrative proceedings – thanks to the structure of the enforcement procedure which allows the appointment of an *ad acta* commissioner with substitution powers – all performances are fungible. This is the

<sup>71</sup> In these terms, see Cons. Stato, Ad. Plen., sentenza 25 giugno 2014, n. 15, *supra* n. 47.

<sup>72</sup> In this regard, note that scholars disagree on the applicability of Art. 614-*bis* of the CPC also to fungible obligation, while the majority appears to believe such rule should have a restrictive scope of application. See Delle Donne, *L'introduzione*, *supra* n. 32, at 126–37.

reason underlining the position according to which the *astreinte* of the administrative procedure should not be excluded with respect to monetary obligations.

The decisiveness of this last reasoning – supported by other arguments, including the literal interpretation of the rule – seems to have been shared by the case law subsequent to the decision of the *Consiglio di Stato* in plenary session mentioned above, which has so far complied with the most important of the administrative courts.<sup>73</sup>

From the Russian perspective, the *astreinte* has a mixed nature and includes both private and public elements that appear differently in civil and administrative disputes. Thus it is important, in the continental legal system, to regulate this institute by different legislation like budget, civil, procedural and others. The *astreinte* is a punitive and menacing measure. Application of the *extra legem* regulations or liberal interpretations of the existing rules concerning the *astreinte* is not possible here. As long as there is no acceptable regulation of the *astreinte* both in civil and administrative procedure in Russia, the *astreinte* will not fulfill its function and remain one of the inexplicit institutes of the foreign law. The applications of the *astreinte* in civil and administrative proceedings have considerable differences, which are explainable by the nature of the obligations from which the *astreinte* is derived. The *astreinte* in civil cases is connected with the non-monetary private obligation. Even beyond the *astreinte*, the non-performance of this obligation can be punished and applicable losses would be compensated. In public (administrative) relations, non-performance and compensation or liability for it has different nature that should be taken into consideration. It is inaccurate to apply civil law rules to the public relations, so the administrative *astreinte* needs its own separate detailed regulation.

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<sup>73</sup> See: Trib. ammin. reg. Lazio, sez. I-bis, sentenza 15 gennaio 2015, n. 629; Trib. ammin. reg. Calabria, sez. II, sentenza n. 291/2015; Trib. ammin. reg. Catania, sentenza 23 ottobre 2014, n. 2814; Trib. ammin. reg. L'Aquila, sentenza 24 luglio 2014, n. 640.

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