SUMMARY

The study undertaken in the present thesis began from the analysis of the different means that our legal system adopted throughout the years to assure effectiveness of legal rights' protection. Such prerogative finds its full legitimation in our Constitution that grants respect of the principle of "due process." As a consequence, any discussion regarding the protection of such rights necessarily entails the analysis of the different means of protection offered by the legal system. The enforcement phase plays a crucial role in such system, since it has the specific goal to reach the effectiveness of the protection through judicial demand. Such protection would otherwise remain a dead sentence stated in a statutory provision. The undisputed acknowledgment of the judicial nature of the enforcement process inevitably entails the right of bringing judicial action in case of the debtor's failure to fulfill his obligation, so as to have redress in relation to the breached legal right. This possibility is reflected in a Court's judgment. From these concepts most scholars drew the principle that there can only be a court sentence when the legal system provided the possibility of enforcement, expressly excluding from the concept of enforcement any form of indirect coercion. However, this view soon appeared incompatible with a proper understanding of Art. 24 of the Constitution, which, as well known, grants *everyone* the right to bring legal action to protect their own rights and legitimate interests. In fact, a strict application of the above mentioned theory leads to exclude protection for all of those situations where there is no mechanism of direct enforcement, such as obligations for non-fungible performances. Such setting of principles leads to the necessity of overcoming the correlation between court sentence and enforcement. And this goal can only be reached by breaking the theoretical link between court sentence and enforcement and therefore by extending such notion to every court order or disposition, including those related to non-fungible performances, which can still be fully enforced through different means and systems, such as indirect enforcement. Indirect enforcement is made possible through the application of the so called coercive measures, which are adequate penalties for delay in compliance, threatening the debtor with a harm bigger than the advantage he would acquire by failing to comply, so as to push him to comply with the court order. The need for a general civil coercive measure in our legal system has always been felt as a transversal need, until fully realized in the D.L. 27-6-2015 n. 83, then converted into in L. 6-8-2015 n. 132, modifying the previous art. 614 bis of the Italian Code of Civil Procedure (*hereinafter also "i.c.c.p.")*. originally introduced by L. 18-6-2009 n. 69. The introduction of the new art. 614 *bis* i.c.p.c. was inspired by the institute of *astreinte* set forth in the French legal system. Whereas, the mechanisms of Art. 614 *bis* i.c.p.c. is significantly different from the provisions set forth in Germany and in England regulating penalties for delay in compliance. Therefore such provisions do not appear of any help in understanding and applying article 614 bis i.c.p.c. The French legislator conceived the *astreinte* as a two-stage process. This can be easily inferred from Articles L.l3l-l a L.131-4 of the *Code des procédures civiles d'exécution*, which set forth the power of the judge to order a preliminary *astreinte* to be subsequently liquidated, notwithstanding the lack of an express legislative provision in this sense. With law n. 91-650, July 9, 1991, the French legislator gave the judge of the enforcement phase the power to order the *astreintes* to assure enforceability of any order and in 2011, gave even to arbitrators the power to issue an *astreint*. Notably, while on one hand the study of the experience of other countries with indirect forced execution helps in better understandanding the origin, contradictions, and difficulties of the Italian *astreinte*; on the other hand, pursuant to the principle of the prevalence of the special law over the general law, the important innovation of the *astreintes* did not undermine the importance of the different specific coercive execution measures which were already part of the Italian legal system and which continue to be applied. Among

the most important penalties for delay in compliance introduced in the Italian legal system before the introduction of art. 614 *bis* i.c.p.c., it should be mentioned article 86, paragraph 1, of the so-called Invetions Law (*"Legge Invenzioni")* and article 66, paragraph 2, of the so-called Marchi Law ("*Legge Marchi")*. Those provisions were then implemented in art. 124 of Code of Industrial Property; similarly, we must note art. 140 of Italian Consumer Code (corresponding to the previous art. 3, law 30 July 1998, n. 281, "Regulation of consumers and users' rights" ("*Disciplina dei diritti dei consumatori e degli utenti*"), which provides an indirect coercive measure aimed at assuring the effectiveness of injunction orders issued to protect consumers' interests. This said, the analysis of the historical evolution and of the rationale of Art. 614 *bis* i.c.p.c. appeared of fundamental importance for the study of the new 2015 reform: its title "*Misure di coercizione indiretta*" and its applicability to assure the fulfillment of all types of obligations, with the only exception of pecuniary obligations. The measure at issue has been addressed differently by scholars: according to some of them it is a subjective right, according to others it is also a procedural one. With sentence dated April 15, 2015, n. 7613, the Supreme Court clarified that pecuniary compulsory measures represent a mean of protection, i.e., a technical tool aimed at strengthening the court sentence so as to facilitate its enforceability. From the incipit of art. 614 *bis* i.c.p.c. ("*Con il provvedimento di condanna, il giudice...*"), the doctrine derived the possibility to issue the measure for any type of order with a condemnation nature coming from a judicial authority. Therefore, on one hand, scholars tried to understand if the "provvedimenti cautelari" and the "verbale di conciliazione" can be the basis for issuing an*astreinte*. On the other hand, scholars examined the related institute of Art. 709 *ter* i.c.p.c., dealing with the protection of minors and the late compliance penalty contained in the code of administrative procedure. As a consequence, it was possible to solve the last hermeneutic knot raised by the new provision: whether such provision is applicable to arbitration proceedings. Adhering to the view that considers the applicability of this provision to arbitration proceedings or to the view that denies such possibility is a matter of the exact juridical qualification attributed to the institute at issue, besides the proper outlining of the judicial powers pertaining to arbitrators. Both the affirmation of the judicial effectiveness of the arbitration order, as provided in Art. 824 *bis* i.c.p.c., and the examination of the enforcement e and injunctive powers of arbitrators had a central importance in the above described investigation.

Therefore, once we prove and recognize (i) that coercive measures pertain to the scope of the protection of the sentence – and not to the scope of protection of the execution and injunctive stage, and (ii) that the ordinary process and the arbitration process are fully interchangeable, the denial of the power of arbitrators to issue *astrainte* appears an unjustifiable limitation, fathered by a mindset that nowadays can hopefully only be a distant memory. Outside of those ones who maintained that such power should be expressly given to arbitrators in the arbitration clause, since it is a judicial tool contained in the code, the parties, pursuant to art. 816 *bis* i.c.p.c., can surely assign such power in the arbitration clause, just like they can specify that such power cannot be exercised by the arbitrators. In conclusion, the result of our analysis is that, in the absence of any express will of the parties, there is no valid reason to prevent the arbitrators from issuing the measure provided for in art. 614 *bis* i.c.p.c., upon request by the moving party.