THE ENFORCEMENT OFFICER IN CHILE'S PROPOSED CIVIL JUSTICE SYSTEM REFORM

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ABSTRACT

Effective credit protection requires mechanisms designed to facilitate and expedite compliance with monetary obligations. The European trend toward dejudicialization of enforcement is mirrored in the *enforcement officer* proposed in Chile's planned civil justice system reform. This article reviews the proposed legislation and attempts to outline the distinguishing characteristics of the new function.

Keywords: ENFORCEMENT – DEJUDICIALIZATION – CIVIL ACTION

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I. INTRODUCTION

The growing trade in goods and services and the potential for conflict as regards observance and compliance of obligations require States to offer efficient credit protection mechanisms.

The right to simple and prompt recourse in Article 25 and Article 6 of the American and European human rights conventions, respectively, is not exhausted in court orders based on merit –it also expects justice systems to guarantee enforcement, even forcibly if required.

As such, rather than a secondary or incidental component of court duties, enforcement is a fundamental instrument of individual rights protection. This circumstance necessitates credit protection systems capable of effectively executing enforceable debt documents.

Agents are a key aspect to consider when pondering an enforcement procedure. Legal doctrine and comparative experience provide several options, notably enforcement officers.

While the new *enforcement officer* advanced in the civil justice system reform proposed by the Chilean government is being hailed as a key innovation, the proposal provides no details about their profile or status within the new civil justice system. This is due in part to the fact that the legislation regulating organizational aspects of the reform has yet to be introduced in Congress.

This article examines the proposed Code of Civil Procedure and the role of enforcement officers in enforcement procedures. It outlines the constituent elements of the new function and likely organizational alternatives based on European civil procedural law.

The first section describes leading procedural trends in European civil enforcement, followed by a review of proposed regulations on enforcement officer role and an outline of profile and status options.

The article ends with conclusions and bibliographical notes.

II. CURRENT TRENDS IN CIVIL ENFORCEMENT

In matters of civil enforcement, European procedural law is currently geared toward facilitating and streamlining compliance with monetary obligations and increasing the effectiveness of enforcement procedures.[2]

This trend is part of what Michelle Taruffo, writing about changes in traditional common and civil law systems, posits about the emergence of new procedural systems, especially those she characterizes as *functional*. In these systems, procedures are a means to settling disputes under criteria of justice, and as such, must be effective "especially in terms of access to courts, interim relief and executive protection",[3] as well as prompt and adequate to the purposes of the protection sought.[4]

[2] Villadiego (2008), p. 3.

[3] Taruffo (2006), pp. 69-94.

[4] Ibid.

European legislation is strongly oriented toward shifting enforcement from the courts to public or private agents. Executive protection ceases to be the sole province of magistrates, and some stages of execution -particularly non-contentious ones- are turned over to specialized professionals.[5]

Accounting for this is the structure of enforcement procedures, inter alia. Generally speaking, enforcement procedures have two stages. The first includes collection from execution debtors and interim relief such as asset attachment and other precautionary measures. Absent debtor opposition, the second stage involves liquidation of debtor assets at auction or otherwise, which concludes the execution process.[6] Debtor opposition, on the other hand, triggers a third, contentious stage that must be settled by a judge.

A comparative review of European enforcement systems requires an examination of structural and organizational issues, namely: (a) centralization vs. decentralization, (b) enforcement agent regulation and qualification, and (c) enforcement agencies and agents.[7]

The first of these issues is a key organizational distinction. Some countries, such as Sweden, have opted for a centralized scheme where the task of executing court orders (including administrative and arbitral) falls to a single agency. Elsewhere, as in Germany, England, and Wales, the structure is somewhat fragmented, with enforcement agencies and agents using a range of methods.[8]

Enforcement officer regulation and qualification also vary widely –from requiring a university degree, as in France and Belgium, to systems operated by magistrates and/or judicial officers as in Spain, to countries where professional credentials are not relevant given the limited role of enforcement officers, as in Germany.[9]

Competent execution bodies, for their part, are either (a) An annex to the court, (b) Mixed, (c) Administrative agencies, or (d) Judicial officers (bailiffs or *huissiers de justice*). The first system is part of the Judiciary, including judges as in Spain and/or court clerks as in Austria.

In mixed systems such as those in Germany and England, enforcement procedures are handled jointly by judges and enforcement officers (bailiffs or sheriffs).[10] In Finland and Switzerland, execution is in the hands of administrative agencies that are fully autonomous from the courts.

Elsewhere in Europe, as in France, Belgium, Scotland, and Portugal, inter alia, execution is handled by *huissiers de justice* overseen by the authorities but operating outside the justice system, without intervention from judges and/or judicial officers.[11]

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[5] Efficiency can also be improved through collection or litigation courts and/or online attachment. Feil Ponciano (2008), pp. 343-354.

[6] Pérez Ragone (2009), p. 4.

[7] Hess (2005), pp. 25-51.

[8] Ibid., p. 33.

[9] Ibid., p. 37.

[10] Ibid., p. 34-35.

[11] Ibid., p. 34.

This is the scheme adopted by most European countries, with specialist enforcement agents in private practice, as in Belgium, Hungary, and Ireland, or working for the public sector, as in Austria, Denmark, or Italy.[12]

Agent roles vary from one jurisdiction to the next. In general, they are officers authorized by the State to execute enforcement orders. They can serve related notices, liquidate debtor assets (e.g., at public auction) and, depending on the legislation, may perform other duties such as real estate management, contract drafting, and providing general legal advise.[13]

French *huissiers de justice* have a monopoly on execution and their fees are paid by debtors based on a public rate schedule.[14] They are appointed by the Ministry of Justice following a stringent selection process. Applicants are members of the bar who must undergo a two-year apprenticeship with a practicing enforcement officer, pass qualification courses, and write a final exam. They are members of the *Chambre Nationale des Huissiers de justice* (CNHJ)[15] and serve in jurisdictions determined by debtor place of business or residence. France currently has 3,300 enforcement officers, including 750 women.[16]

Agents operating outside the justice system are also potentially subject to court action. If debtors argue against execution, their claim must be heard by a *juge de l'exécution* (executive magistrate).[17]

While over 40 European countries have adopted this model, procedural regulations differ widely. In 25 jurisdictions enforcement officers are public employees, while in 18 others they practice privately under public oversight.[18]

All across Europe, this strong discipline continues to expand. The International Union of Judicial Officers, for example, was founded as early as 1952 by enforcement officers from across the continent.[19]

Interest in increasing the execution effectiveness is evident in specific member country legislation and across the European Union. The intent is to harmonize legal systems, as local legislation differences increase costs and may render execution unfeasible. Some authors note that credit execution in the European Union lags behind global market development,[20] an issue that the EU has moved to address in several ways.

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[12] Villadiego (2008), p. 28.
[13] www.uihj.com. Retrieved on 3 August 2010.
[14] Théry (1997), pp. 261-318.
[15] See www.huissier-justice.fr. Retrieved on 2 August 2010.
[16] www.uihj.com. Retrieved on 3 August 2010.
[17] Hess (2005), pp. 25-51.
[18] Villadiego (2008), p. 28-29.
[19] www.uihj.com/index.php?lg=ang. Retrieved on 3 August 2010.
[20] Andenas (2005), pp. 7-23.

Chief among these are Green Papers on the Attachment of Bank Accounts (2006)[21] and the Transparency of Debtors' Assets (2008).[22] The EU has also issued rules on various aspects of the execution process, notably a European Enforcement Order for Uncontested Claims (2004),[23] a European Order for Payment Procedure (2006),[24] and a European Small Claims Procedure (2007).[25]

Special mention should be made of *Improving the Effectiveness of Transboundary Execution in the European Union,* a research group concerned with the practical aspects of cross-border enforcement. The group has met in 2009 and 2010. The 2010 meeting, held in Budapest in January 2010, reviewed Community regulations on civil enforcement, establishment of a European enforcement order, and attachment of bank accounts as an interim measure.[26]

III. CHILE: CIVIL JUSTICE SYSTEM REFORM AND ENFORCEMENT OFFICERS

Chilean civil justice system reform is predicated on the need for a conflict resolution system in tune with the times.[27] Both the legal profession and academia agree that the current system has serious flaws that may jeopardize constitutional guarantees of due process. Barriers preventing access to justice by those most vulnerable, excessive delays, and poor governance are just some of the critical issues facing the Chilean civil justice system. Credit protection is no exception.

There is agreement that Chilean civil enforcement fails to meet the simplicity and promptness requirements in the American Convention on Human Rights. While Chile does have procedures in place, they centralize most functions on the courts -whether debtors oppose execution or not- and offer little oversight, notably of asset attachment and auction. This is compounded by the burden placed on execution creditors who, regardless of a favorable verdict, must start new judicial proceedings if respondents fail to comply with rulings.

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[21] Green Paper on improving the efficiency of the enforcement of judgments in the European Union: The attachment of bank accounts (24 October 2006). eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0618:FIN:EN:PDF. Retrieved on 30 July 2010.

[22] Green Paper on the effective enforcement of judgments in the European Union: The transparency of debtors' assets (6 March 2008). eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0128:FIN:EN:PDF. Retrieved on 30 July 2010.

[23] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0015:0039:EN:PDF.

[24] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:399:0001:0032:EN:PDF.

[25] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0022:EN:PDF. Retrieved on 30 July 2010.

[26] Pérez Ragone and Miquel (2010), pp. 1-16.

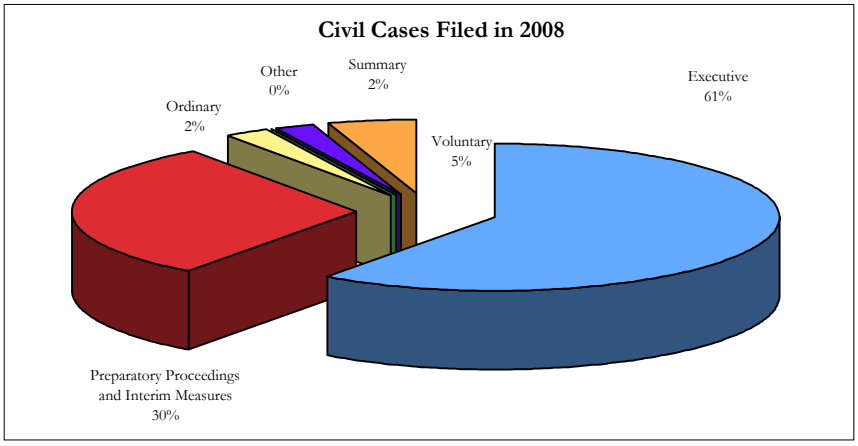
[27] Presidential Address 398-357 announcing a new Code of Civil Procedure. Santiago, 8 May 2009.

Critics also note the sluggishness and ritualism of enforcement procedures and a series of barriers impacting prompt redress, including trouble serving defendants, concealment of property, unwarranted exceptions, and overextended courts.[28]

The impact of these issues is amplified if reviewed in light of system statistics. In 1995-2000, nearly 75 percent of the civil justice caseload involved collection and enforcement actions.[29]

In 2008 alone some 1,687,784 claims, including 1,011,000 executive proceedings and 513,207 preparatory proceedings and interim measures, were filed with the civil court system.[30] Executive proceedings alone account for nearly 60 percent of the caseload, a figure that climbs to 90 percent if preparatory proceedings are factored in. As preparatory proceedings and interim measures data is not disaggregated, the actual percentage of executive plus preparatory proceedings cannot be ascertained with precision.

Even at 60 percent, enforcement procedures account for the single largest issue in the civil justice system. Second are preparatory proceedings and interim measures with 30.4 percent, with voluntary matters at a distant 5.05 percent. Ordinary and summary proceedings stood at a mere 2.38 percent and 2.03 percent, respectively.[31] This chart illustrates court caseload in 2008.



Source: Author research.[32]

Recognizing the importance of the issue for social harmony and system legitimacy[33] and its impact on system caseload, the proposed legislation radically changes the existing system and ushers in several innovations, notably dejudicialization of non-contentious stages of enforcement. Under the proposed system, non-controversial aspects of enforcement pass from judges to enforcement officers tasked with overseeing collection and liquidation of assets.

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[28] Ried (2006), pp. 475-491.

[29] García and Leturia (2006), pp. 31-82.

[30] Source: Rodrigo Zúñiga, Justice Ministry Judicial Division and Civil Procedural Law Forum coordinator.

[31] Ibid.

[32] "Other" includes bankruptcies (448 cases), domestic violence (3 cases) and a category termed "special" (3,250 cases).

[33] Presidential Address (2009).

Per Book IV of the draft legislation, enforcement begins with an application to the enforcement officer. If legal requirements are met and the application is found admissible, the officer will issue an administrative enforcement declaration. The officer may, without prior notice to the execution debtor, take steps to discover and determine the assets subject to execution. Once the execution debtor is notified in person or in writing, the enforcement officer may adopt steps (including asset seizure) against the debtor, who will have 10 days to oppose the execution order.

Opposing the execution order triggers an eminently contentious stage heard by an executive magistrate. The court may halt attachment and other precautionary measures and notify the execution creditor, who will have 5 days to reply. Depending on the arguments cited, the magistrate may rule forthwith or summon the parties to a hearing in order to decide on the merits of the case whether execution should proceed.

Whether the counterclaim is dismissed or admitted, the parties may appeal, in the former case with devolutive effect and in the latter with both devolutive and suspensive effects. If opposition stands, execution is overturned and attachments and other precautionary measures are lifted so as to return the execution debtor to his previous standing. If dismissed, enforcement goes back to the enforcement officer for liquidation of execution debtor assets.

A substantial part of the novelty of the proposed legislation lies precisely in the agencies and agents responsible for execution. In fact, the initial stage is placed in the hands of enforcement officers, and while the proposal does not expressly say so, it can be inferred that their role is essentially administrative and can even take place off court venues.

This is what follows from, inter alia, the language used in the proposed legislation, which requires execution creditors to submit an "application" (rather than a claim) to an enforcement officer. If legal requirements are met, the officer will then issue "an administrative declaration" (rather than a statutory ruling).

Indeed, Article 367 of the draft Code of Civil Procedure states: *"Enforcement Application. Execution creditors seeking an enforcement procedure will, without need for legal counsel or other representation, submit to the competent enforcement officer an application which will contain…"*. A step that does not require legal counsel appears intended to be a simple, non-formal procedure.

In turn, Article 396(2) establishes: *"Writ of Execution. Enforcement orders will be issued under an administrative resolution. Execution debtors may file a counterclaim with the executive magistrate, per the rules in Articles 374 et seq."*

Conversely, the contentious nature of the second stage is clear. It requires the involvement of an executive magistrate, a specialist judge who will hear and rule on the counterclaim. The claim may be based on defects of form (failure to meet legal requirements or *lis pendens*, inter alia) or of substance. Depending on the arguments cited, the executive magistrate may rule

forthwith or after an opposition hearing, should accompanying documents fail to support an immediate ruling.[34]

The executive magistrate issue bears an observation. While there is no express rule, the adjectival "executive" suggests that this judge is not be the same individual hearing ordinary and summary proceedings; otherwise the proposal would simply have used the plain "magistrate". If this is the case, perhaps it would be convenient to have the contentious stage heard by an ordinary judge through a simplified procedure such as that in criminal law.[35]

To return to enforcement officers, the regulations in Book IV of the draft legislation provide no clues about key aspects of the new function, such as its profile and status within the new civil justice system. Will enforcement officers be autonomous or part of the judiciary? Will they be members of the bar, or could they be, say, business administrators or economists? Will the State or the parties involved pay their fees? Who will oversee them? Will they be chosen by the parties or appointed by competent authority?

The draft legislation in question provides no organizational and functional details about enforcement officers, a matter that is to be addressed in additional legislation which we understand is being drafted. As such, details on the profile, status, funding sources and requirements for the position remain unclear.

That said, a prospective review in the light of European experience may suggest some very general alternatives.

One possibility is to make enforcement officers part of the judiciary, as in Austria's court clerk, but this option mimics the existing Chilean system and thus fails to achieve the dejudicializing objective stated in the Presidential Address.

A second option is the Swedish scheme, which involves an administrative agency under a ministry –e.g., Finance, Economy- with a mandate to enforce all orders (court, administrative, arbitral) with full autonomy. While this option does meet Chile's intended goal, it may encroach on inherently vast and complex areas such as administrative law, not to mention the cost of setting up a new government agency.

A third option is a system of private enforcement officers working outside the justice system, yet vested with ample powers. These officers should be members of the bar and could privately practice the profession. Yet, such a scheme raises questions about State control, as a substantial part of the legitimacy and trust invested in the system would fall to enforcement officers –and legitimacy and trust are hard to win but easily lost.

This option bears some resemblance to existing Chilean justice system functions, including notaries public, process servers, and bankruptcy receivers. As auxiliaries of justice reporting to superior courts whose fees are paid by the parties, the first two share some attributes. While

[34] Article 376, Draft Code of Civil Procedure (examination and resolution of opposition over defects of form) and Article 378 (examination of opposition over substantive issues).
[35] Articles 388-399. Simplified procedure. Code of Criminal Procedure.

notaries public must be members of the bar (although they cannot privately practice), the law does not require process servers to hold specific qualifications.

The situation varies in the case of receivers, the officers (lawyers and others) who oversee bankruptcy proceedings and legally represent the insolvent. While they are court-appointed, they report to the Office of the Superintendent of Bankruptcy[36] and their fees are paid from bankruptcy assets per the order of precedence set in the law.

These functions vary significantly in terms of status within the system, service payment, performance oversight, and credentials required. As such, this inventory is merely intended to illustrate some of the profile options available, without necessarily favoring one over another or dismissing options combining elements from all three.

Clearly, enforcement officer profile and system status are questions that are not easily addressed. Defining them involves a series of challenges and arguments which should be closely scrutinized by lawmakers, academics, and law practitioners in order not to squander an historical opportunity to design an effective enforcement procedure that respects constitutional guarantees of due process.

IV. CONCLUSIONS

The reform agenda advanced by the *Concertación* governments in the past few years was aimed at improving court system efficiency and more precisely focus public funding earmarked for rights protection and conflict resolution. In civil procedural law, achieving these objectives presupposes a thorough institutional and procedural revamping of the court system –one of whose centerpieces is dejudicialization.

In matters of execution, absent opposition from the execution debtor, there is no reason for court intervention in the collection and asset liquidation stages, which can be handled by an outside function operating off judicial venues. In the draft legislation in question, these administrative matters do not require a court ruling to be effective. An enforcement officer vested with ample powers under the law would suffice, helping reduce court system overload while also contributing to function specialization.

Also underlying this proposal are cost considerations related to the public resources, including human, material, and time, spent in these processes. Consider for a moment the time spent by judges handling routine orders which could very well be issued by an administrative unit or a body of specialists assisting the court. New technologies such as electronic signatures or the ability to conduct transactions online could also be of value.

While defining the profile and status of enforcement officers is best left to justice policymakers, comparative experience, especially that of Europe, provides a wide range of options with widely varying officer roles, degrees of decentralization, and justice system intervention.

[36] www.squiebras.cl/index.php?option=com_content&view=category&layout=blog&id=59&Itemid=104.

Everything suggests that the Chilean proposal is inspired by European schemes based on *huissiers de justice* –public agents supervised by competent authorities with sole responsibility for execution of court orders. Should that be the case, a review of quantitative and qualitative studies of system performance, including impact on obligation observance and compliance and system user satisfaction, is desirable.

The material provided by comparative experience can contribute to a debate that is new to Chile and to adopting informed decisions designed to ensure system quality.

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