Delegation / Substitution in Enforcement Proceedings
An outline of some relevant issues and literature

Prof. Christoph Paulus

A. The Context

It is a wide-spread (if not global) phenomenon that courts in general – and judges in particular – suffer from a heavy work-load which fairly often leads to long delays in both the deciding of cases and the execution of judgments. The consequence thereof is that those who are seeking the courts’ help become increasingly dissatisfied with the system. Not without justification: since after all, the existence of the judiciary – at least insofar as it is related to private law issues – is not an end in itself, but is rather a tool which a creditor is legally bound to use in order to finally receive what is owed to him or her according to this very legal order. Therefore, seen from a rule of law (sometimes even from a human rights’) point of view, a state can not be content simply to provide substantive rights and to offer a procedural way by which these rights can be realized. Any state must also take into consideration that here (as in any other area of the law) efficiency is of the utmost importance. Consequently, it must provide for a swift procedure without any undue delays.

This need for acceleration is particularly evident at the enforcement stage. This is a phase in which it is already certified by a court decision or other legally acknowledged determination that the creditor is entitled to satisfaction which the debtor refuses to voluntarily present. Any unwarranted delay in the enforcement process leads to, in effect, a kind of “state-subsidized loan” for the debtor the costs of which are to be born by the creditor.

However, to the degree that it is unlikely that a state will increase staff and judiciary in order to avoid delays in proceedings in general and in enforcement in particular, the conflict between the judges’ heavy work-load and the tardiness of the creditors’ satisfaction is inevitable. This leads to the risk that creditors will look for alternative solutions to get what is owed to them in a timely manner. At this point the rule of law is endangered – since paralegal (or even worse: illegal) methods of enforcement might fill the creditors’ expectation gap and thus, undermine any state’s demand that its legal rules be followed.

One solution to the problems arising from this situation would be to reduce the judges’ work-load by means of substitution or delegation. This can be done in several ways – one would be specialization in certain areas\(^1\) (such as commercial law and/or insolvency law), another one would be replacing the court procedure by increasingly acknowledged alternatives (such as mediation or arbitration). A bit more complicated might be the substitution with respect to the enforcement proceeding; since here the coercive power as one of the state’s exclusive prerogatives is at stake: Therefore, in order to find out which particular tasks within enforcement proceedings can be shifted away from the judge’s responsibility and delegated to someone else one has to identify the core elements. As enforcement law deals with a factual situation in which a debtor refuses to do voluntarily what a court decision or another legally binding determination orders him or her to do – and

\(^1\) Specialization leads to a reduction of the work-load and to an improvement of the results; it is a delegation within the judiciary itself and not to non-judicial bodies.
as the enforcement mechanism is based on the idea that instead of the refusing debtor the state fulfills the necessary steps to satisfy the creditor out of the debtor’s estate – the essence of enforcement law is the application of coercive power. This is what appears to be the exclusive domain of state power which, therefore, must remain primarily with the judge. Anything other than the direct application of coercive power, however, might be dealt with by someone other than the judge.

B. Possible Questions for Approaching the Issues

The following remarks and questions are not meant to steer the discussion into a particular direction; they are only supposed to demonstrate the spectrum of issues worth discussing in the present context.

What are the core elements of a court proceeding? If this were the deciding of cases of dispute according to the existing law – what could then be delegated to other institutions or staff? Does the fact that arbitration is widely acknowledged throughout most jurisdictions and that it is done so for a long time imply that mediation can gain a similar prominence in replacing court proceedings? Does the mediation “result” provide the parties with the same strong basis for the future development as the arbitration award does – i.e. can it be used to initiate an enforcement proceeding? Are there particular areas of law in which mediation appears to be advantageous? Are there limitations as to the replacement of court proceedings by arbitration tribunals?

Are there constitutional restraints to the privatization of commercial and insolvency proceedings? If so – how strong are they in light of the long lasting existence and recognition of arbitration proceedings? Further – do possible constitutional restraints request at a minimum that the qualification or selection of the privatized “judges” is legally pre-determined? Are there other requirements which the law must guarantee before permitting further privatization steps?

What are the core elements of enforcement law? If one sees the enforcement proceeding as a procedure with several steps (e.g. issuance of the enforcement order, liquidation of assets, assignment of claims, satisfaction of the creditor, remedies, etc.) – does each one of these steps form such core element? Thinking in terms of potential substitution or delegation, is it feasible to have the execution proceeding in toto or certain of the aforementioned steps delegated and to leave the problem of compliance with the rules to remedies to the court by the debtor?

Who or which institution is a potential candidate for such substitution? Does the person or institution need to have at least some – e.g. contractual – connections with the public authorities or courts? Or is it possible to have enforcement completely privatized? Are there constitutional or just procedural and substantive grounds which form obstacles to such an

---

² In Germany (like in many other countries as well) there is a kind of privatization which is threatening the fundaments of any legal order – diverse Mafias are advertising in the web for their (as they emphasize: always successful) services; cf. Paulus, Die Privatisierung der "Zwangsvollstreckung" – oder: Wie der Rechtsstaat an seinem Fundament erodiert, Zeitschrift für Rechtspolitik (ZRP) 2000, 296 f.; idem, Deutschland ist ein Paradies für Schuldner, Deutsche Gerichtsvollzieherzeitschrift (DGVZ) 2004, 65 ff.
approach? Or are there obstacles outside the legal sphere – such as, e.g., a general perception of the state’s tasks or the judiciary’s role?

Provided certain (or even all) judicial involvement would be substituted by non-judicial personnel would this increase the creditors’ incentive to search for another jurisdiction (forum-shopping)? This might be the case, e.g., when the recognition of the enforcement order in another jurisdiction is uncertain (or even excluded) because of the domestic enforcement proceeding’s lack of “judiciality”.

Is it a viable alternative to skip the execution proceeding completely and instead to treat the debtor’s refusal to voluntarily fulfill his or her obligation as a reason to open an insolvency proceeding? Thereby the enforcement proceeding is substituted by an insolvency proceeding. This approach is not only the ancient Roman law, but also the modern law of Switzerland or Finland which have this solution which can be seen as “partial privatization” when and if the respective insolvency law leaves, e.g., the decision over the validity of claims to the administrator and the administrator is not a state official or judge.

If delegation of some or all judicial tasks appear to be practical (or even desirable) which legislative and other practical steps need to be taken? As budgetary restraints always play a major role in legislative changes will the cheaper solution prevail over the better? Which one is cheaper and which one is better?