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THE DISTINCTIVE FEATURES OF REPRESENTATION IN ENFORCEMENT PROCEEDINGS

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Abstract. *Civil proceedings do not terminate after adoption of a court decision. The enforcement of a material subjective right requires the second stage of legal defence, i.e., compulsory enforcement of a court decision. State courts are authorised to adopt decisions on behalf of the state and to ensure compulsory enforcement of an adopted court decision. Although enforcement proceedings constitute the final stage of civil procedure, it has some specific features, e.g., the representation in enforcement proceedings is distinctive. The article analyzes application of this institute in enforcement proceedings: the subjects eligible to act as representatives in enforcement proceedings, the order of execution of their powers, and the problems of adjudicating remuneration for representation in enforcement proceedings.*

Keywords: *institute of representation, advocate, enforcement proceedings, bailiff, enforcer, debtor.*

Introduction

The relevance of the topic. According to universal principles of law, norms of international law, and the Constitution of the Republic of Lithuania, Lithuania recognizes and ensures human rights and freedoms. These rights are implemented by different ins-

truments in compliance with substantive and procedural law. When human rights are infringed in a private field, they are protected by civil litigation and enforcement proceedings. Enforcement proceedings play an important role in the system for the protection of human rights. The European Human Rights Court recognizes that enforcement proceedings form an integral part of the right to fair hearing.¹

Participation in civil proceedings is a specific activity that requires a special knowledge in this field. Civil litigants do not usually have special legal knowledge, thus defence of their infringed rights in civil proceedings would be ineffective without a representative who is a professional in this field. Participation of a professional lawyer in civil proceedings facilitates the pursuit of objectives of the proceedings to investigate the case within the shortest available time and to adopt a lawful and reasonable decision. These objectives remain important during enforcement proceedings, i.e., the final stage of civil proceedings. Saved by a couple of exceptions, the representatives seek both economic and legal profit.² A favourable court decision does not satisfy their interests. An enforcement of such a decision is necessary — payment of the adjudicated sum, transfer of thing, performance of certain actions, and etc. The enforcer's efforts to force the debtor into compliance with the adopted court decision may be insufficient. Thus professional representatives are necessary at the stage of enforcement proceedings. However, it would be unreasonable to connect representation at the stage of enforcement only with the interests of the bailiff. The bailiff undertakes functions of mandatory enforcement and is one of the main subjects of enforcement proceedings. Enforcement proceedings cannot take place without a debtor — the person who is under the obligation to perform the actions specified in a writ of execution, or to abstain from performance of the actions specified in a writ of execution. These persons may also need an assistance of a representative, and this need is not linked only with a lack of specific knowledge.

The application of the norms on enforcement proceedings under the Civil Procedure Code of the Republic of Lithuania³ (the CPC) has not been widely researched in Lithuania. Although it might seem that the representation has been analyzed in the doctrine,⁴ most often the analysis is limited to investigatory civil procedure.⁵ Two doctoral dissertations analyse the problems of court decisions' enforcement.⁶ The new textbooks on civil procedure law provide a short overview of representation and enforcement pro-

1 *Jasiūnienė v. Lithuania*, No. 41510/98, 6 March 2003.

2 Zwanziger, B.; Heitmann, H. *Erfolgreich als Anwalt praktizieren*. Stuttgart: Boorberg, 1998, s. 180.

3 The Civil Procedure Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 36-1340.

4 Žalėnienė, I. *Representation in the Civil Process: Theoretical and Practical Aspects*. Doctoral dissertation. Social Sciences: Law. Mykolas Romeris University, 2006.

5 Žalėnienė, I. Some problems of obligatory advocate's participation in civil procedure. In *The purpose of modern civil procedure law*. Vilnius: Registry centre, 2008; Žalėnienė, I. Some theoretic aspects of representative's liability in civil procedure. *Jurisprudence*. 2004, 52(44); Žalėnienė, I. Some aspects of representation in civil proceedings under the new Civil Procedure Code. *Jurisprudence*. 2003, 47(39).

6 Višinskis, V. *Procedural problems of execution of court decisions*. Doctoral dissertation. Social Sciences: Law. Mykolas Romeris University, 1999; Stauskienė, E. *Role of Court in Execution Process*. Doctoral dissertation. Social Sciences: Law. Mykolas Romeris University, 2006.

ceedings.⁷ E. Stauskienė, V. Višinskis,⁸ M. Žolynas⁹ and other authors published some articles on the problems of court decisions' enforcement. Nevertheless, these and other studies of Lithuanian authors do not pay sufficient attention to representation in enforcement proceedings nor reveal its distinctive features.

The research object is identification of the subjects eligible to act as representatives in enforcement proceedings, their powers, the order of execution of their powers, and the problems of adjudicating remuneration for representation.

The purpose of the article is to analyze the distinctive features of representation at the final stage of civil litigation, i.e., the stage of enforcement, to identify the subjects eligible to act as representatives in enforcement proceedings, especially regarding representation of bailiffs — the subjects of legal relations who are entitled with the authoritative powers at the stage of enforcement.

The objectives of the article are: 1) to discuss the general features and purposes of representation; 2) to identify the subjects eligible to act as representatives in enforcement proceedings, their powers, and the problems of setting remuneration for representation; 3) to present summaries and conclusions at the end of the paper.

The methods applied in the article were the research methods of analogy, alternative, comparative and etc. The conclusions presented at the end of the paper are based on the method of summarising.

Enforcement proceedings play an important role in the system of human rights because often subjective rights or statutory interests are not protected in practice, even after a court adopting a favourable court decision. There are two stages of legal defence according to civil procedure law — investigatory and executive proceedings.¹⁰ The goal of the investigatory procedure is identifying the disputed legal position, and the object of the executive procedure is implementing of enforcer's rights, resorting to the use of state authority.¹¹ The European Human Rights Court in its case law recognizes enforcement proceedings as an integral part of the right to fair hearing.¹²

7 Mikelėnas, V. *Civil procedure*. Volumes I-II. Vilnius: Justitia, 1997; Laužikas, E.; Mikelėnas, V.; Nekrošius, V. *Civil procedure law. Volumes I-II*. Vilnius: Justitia, 2005-2006; Driukas, A.; Valančius, V. *Civil procedure: theory and practice*. Vilnius: Legal information centre, 2005-2009. T. 1-4.

8 Stauskienė, E.; Višinskis, V. *Execution of court decisions*. Vilnius: Saulelė, 2008; Višinskis, V. Execution documents that are not issued by courts. *Jurisprudence*. 2008, 7(109); Višinskis, V. Inducing enforcement of court decision. *Jurisprudence*. 2008, 1(103); Višinskis, V.; Ambrasienė, D. The order of issuing court's execution documents. *Jurisprudence*. 2008, 2(104); Stauskienė, E. The subjects of legal relations in enforcement proceedings. *Jurisprudence*. 2008, 7(109); Stauskienė, E.; Ambrasienė, D. The forms of implementing legal control in enforcement proceedings. In *The purpose of modern civil procedure law*. Vilnius: Centre of Registry, 2008; Višinskis, V.; Stauskienė, E. Execution documents issued by courts. *Jurisprudence*. 2007, 11(101); Stauskienė, E. The court as a subject of legal relations in enforcement proceedings. In *The right to legal defence and practical aspects of its implementation*. Vilnius: Visus plenus, 2006 and etc.

9 Žolynas, M. The role of court in enforcement proceedings. In *The reform of civil procedure at first instance court in the states of Baltic region and Central Europe. 16-19 September 2004*. Vilnius: VU publishing house, 2005; Žolynas, M. Enforcement proceedings — a stage of civil procedure or independent proceedings? *Teisė*. 2007, 62.

10 Rechberger, W.; Oberhammer, P. *Executionsrecht*. Wien: Facultas Verlags-und Buchhandels AG, 2009, s. 2.

11 *Ibid.*, s. 2.

12 *Jasiūnienė v. Lithuania*, No. 41510/98, 6 March 2003.

The subjects of civil legal relations decide on the measures of defending their infringed or disputed rights and interests protected by law, i.e., whether to choose legal defence or means of alternative dispute resolution. One of the advantages of legal defence is that court decisions may be ensured by procedural compulsion measures because adopting of a lawful and reasonable court decision is not always enough to restore a subjective right. Civil litigation to defend infringed subjective rights and statutory interests is widespread. For instance, first instance district and regional courts heard 229221 civil cases in 2009, 180071 civil cases in 2008.¹³ The courts hear increasingly more cases¹⁴ and these civil cases become more complicated. Participation in civil proceedings is a specific activity that requires special knowledge in this field. Civil litigants do not usually have this special legal knowledge, thus defence of their infringed rights in civil proceedings would be ineffective without a representative who is a professional in this field. Participation of a professional lawyer in a civil procedure facilitates reaching the objectives of the procedure, to investigate the case within the shortest available time, and to adopt a lawful and reasonable decision. These objectives remain important also during enforcement proceedings, i.e., the final stage of the civil procedure. The representatives usually seek both economic and legal profit.¹⁵ Thus only an adoption of a favourable court decision does not satisfy their interests. The enforcement of such a decision is necessary: payment of the adjudicated sum, transfer of thing, performance of certain actions, and etc.

Professional advocates usually represent litigation parties and their infringed rights and interests in civil cases. It may seem that at the final stage of a civil procedure (compulsory enforcement of a court decision), the need for representation is not so high because all legal issues are solved, the litigation is finished, and etc. However, complicated legal issues relating to significant legal consequences may arise at this stage, e.g., mandatory sale of property in an auction, execution of decisions obliging to perform certain actions, and etc. Thus representation cannot be connected only with a physical replacement of a person by a representative or enforcement of his rights and duties through a representative. The representative may also be necessary as a legal advisor. The persons may participate themselves or through their representatives in the final stage of civil proceedings, and representation in this stage has certain distinctive features.

As regards compulsory enforcement court decisions, it must be remembered that not all decisions need to be executed by measures of compulsion. Court decisions are classified according to the necessity of coercive measures into decisions that are executed (to be executed) by compulsory means and decisions that do not need compulsory means of execution.¹⁶ Based on this classification, the doctrine of civil procedure law recognises enforceability as one of the distinctive features of legally binding decisions.

13 Reports on civil cases in Lithuanian courts. 2008 and 2009 [interactive]. [accessed 01-04-2010]. <www.teismai.lt>.

14 E.g., 148750 civil cases were heard in 2005, 145286 civil cases in 2006, which is 80000 less cases to compare with the number of cases analysed in 2009.

15 Zwanziger, B.; Heitmann, H., *supra* note 2, s. 180.

16 Laužikas, E.; Mikelėnas, V.; Nekrošius, V. *Civil procedure law*. Volume II. Vilnius: Justitia, 2005, p. 170.

Enforceability is defined as a personal right to enforce a court's decision through the use of special enforcement proceedings. The compulsory execution procedure is initiated if a debtor does not voluntarily implement a binding court's decision.¹⁷ According to the means of legal defence, court decisions are divided to decisions on recognition, decisions on adjudgement and decisions on modifying legal relations.¹⁸ It is recognized that decisions on adjudgement require compulsory enforcement. These decisions oblige the defendant to undertake certain actions (pay a sum of money or transfer some things, and etc.) or to abstain from performance of certain actions. In cases where the defendant refuses to do it voluntarily, the claimant must invoke the apparatus of state coercion to force the defendant to perform some actions or abstain from their performance, thus satisfying his claims that court approved with a favourable decision. Enforcement proceedings is constituted by the means of state coercion that are used to force the person to comply with a court's decision and implement the orders established in that court decision. Court decisions on recognition and modifying (establishing, amendment and termination) of legal relations have a legal effect without compulsory execution. The state aid and the use of procedural means of coercion is necessary only for enforcement of decisions on adjudgement, when the defendant refuses to implement the order established in a court's decision voluntarily.

The content of decisions on adjudgement varies. Such court decisions may be divided into two types according to the debtor's obligations: court decisions which provide obligations that may be fulfilled by the debtor and third persons, and court decisions that contain obligations only the debtor may perform. Thus it is recognized that the debtor who must implement the decision in person or undertake actions that cannot be performed vicariously (*unvertretbare Handlungen* in German) cannot be represented in enforcement proceedings. Actions that cannot be performed vicariously include actions that depend solely upon the will of the debtor. The CPC does not directly name these cases when the debtor cannot be represented but the analysis of norms on dispute proceedings can help identify such cases. Two types of actions can be distinguished under article 273 (1) and 273 (2). Actions that can be undertaken by the debtor or third persons most certainly include transfer of money. These actions can be undertaken by the debtor and his representative under commission, and they can be undertaken after the use of mandatory means of compulsion. However, different situation arises when the actions mentioned in a court's decision may be undertaken only by the defendant (debtor). In such cases the court sets a term for enforcement in its decision and applies a penalty in case the defendant does not implement the decision in due time.

According to § 888 (1) the Civil Procedure Code of Germany (ZPO), if the debtor fails to undertake actions that cannot be performed by a third persons, and depend solely upon his will, an arrest or penalty up to 25 000 euros is applicable. Penalties applied for the debtor's inaction are much smaller according to the Lithuanian CPC. If a court establishes that the debtor failed to implement the decision, it may apply a penalty up to

17 Laužikas, E.; Mikelėnas, V.; Nekrošius, V., *supra* note 16, p. 168.

18 *Ibid.*; Jauernig, O. *Zivilprozessrecht*. München: Verlag C. H. Beck, 2000, s. 229.

one thousand Litas and set a new term of enforcement (Art. 771 (5) of the CPC). Stricter sanctions apply when personal non-property rights are infringed (honour and dignity, reputation of a legal person), i.e., the penalty for each day of inaction applies. The authors consider that the penalty of a thousand litas does not constitute a sufficient instrument in some cases of failure to implement court decisions. The fine is small and much time passes before bailiffs draft adequate documents, submit them to the court and the court has a hearing on the matter. Thus this sanction does not have an adequate effect and we approve of amendments of Article 771(5) of the CPC to the effect of establishing that a penalty may apply for each day of delay.

The need for representation in a civil procedure arises when the participants of civil procedure face certain difficulties related with incapacity to express their will (e.g. due to partial or full disability), with circumstances affecting incapacity or lack of will to implement their subjective rights or duties in person (e.g. due to lack of legal knowledge, sickness, imprisonment, military service, distance from the court of forum, holiday, secondment, inability to suspend the activities, unwillingness to meet with the defendant, not knowing the state language, wish to avoid negative emotions and etc.)¹⁹ Most common purpose of representation in civil proceedings is to replace the represented party. This purpose remains important in the final stage of civil proceedings, i.e., the stage of enforcement. However, the distinctive features of representation in this stage are revealed by its special purposes, represented subjects, actions performed by the representatives, exceptions to the rule *qui facit per alium facit per se*, the specifics of remuneration for representation, and etc.

Practical activities of the subjects undertaking the functions of compulsory execution – the bailiffs, and other participants of the proceedings are very important at the stage of enforcement. The activities must ensure the balance of the interests of all participants of the procedure which can only be implemented with an establishment of a balanced, constant and universal system of procedural guarantees.

The parties of proceedings, i.e. the debtor and the enforcer, can be represented by representatives. Article 599 of the CPC enlists the subjects who can be the representatives of the debtor and the enforcer under commission and the requirements set for the form of their authorizations. Any private person may represent the debtor or the enforcer. The requirements on education or practicing as a professional advocate or an advocate's assistant, applicable in former stages of the procedure, do not apply at this stage. The persons may participate in enforcement proceedings either by themselves or through their representatives. The German law on civil procedure does not limit the eligible subjects of the procedure either. According to ZPO §79, parties may conduct proceedings themselves or through any other representative with procedural capacity, if the participation of an advocate is not required. This provision applies to enforcement proceedings, thus the enforcer can act himself or through a commissioned person at an executor's office, *rechstspfleger* or first instance court.²⁰ The parties may conduct pro-

19 See Žalėnienė, I., *supra* note 4.

20 Kral, W. *Zwangsvollstreckung I + II. Begleitheft*. Starnberg: Fachhochschule für öffentliche Verwaltung und Rechtspflege in Bayern, 2009.

ceedings themselves or through any other representative with procedural capacity when the participation of an advocate is not required (ZPO § 79). However, the participation of an advocate (*Anwaltzwang*) is obligatory in all courts of higher instance. In Lithuania, when a court is addressed with a claim, a complaint regarding actions or omission of the bailiff, or an application at the stage of execution, the general provisions apply and the person may act through a representative only in compliance with the rules contained in Articles 55-56 of the CPC.

The main representatives in enforcement proceedings are advocates and assistants of advocates. Although legal issues are not solved at this stage, the lawfulness of the procedure must be ensured and the measures of compulsion must be applied legally and proportionately to the objective pursued. The case practice shows that most complaints are on unjust recovery from debtors' funds, infringement of the code of ethics, excessive executor expenses, actions on compulsory sale of property, the value of the compulsory sold property, and etc. A qualified legal assistance is necessary for resolution of these matters and defence of infringed rights. Advocates act as professionals, guarantee adequate legal assistance, and conduct proceedings, thus they have a special role in civil procedure. An advocate must comply with both civil procedure norms and norms regulating his professional activities, as well as certain provisions on professional ethics.

The parties of enforcement proceedings and other interested persons may be represented at the stage of enforcement. Subject to the interest in the procedure, the representatives choose the tactics of the procedure, i.e., enforcement of the writ of execution as fast as possible, ensuring of the rights and lawful interests of the debtors and third persons, and etc.

The bailiff is the main participant of enforcement proceedings. The bailiff is entrusted with functions of enforcement of writs of execution, establishment of facts, transfer of documents and other statutory functions. The bailiff must establish an office to practice, however, the bailiff's office is only his place of work and does not have the features of a legal subject. The bailiff acts as a private person in enforcement proceedings, thus the rules on representation of private persons apply to his representation. It means that the bailiff may be represented in courts when a civil case on damages inflicted by his actions or actions of his workers is initiated. In such cases the representatives may be advocates and assistants of advocates in compliance with article 56 (1)(1) and (2). Other persons, including assistant bailiffs, may be representatives of bailiffs only together with advocates and advocate assistants (Article 56 (2) of the CPC). An assistant bailiff can be a representative only if he satisfies the requirements set for a representative under an authorisation agreement according to article 56(1)(4).²¹ A bailiff cannot be represented by another bailiff.²² However, a substitute bailiff (acting bailiff) or an assistant bailiff may be a representatives if they are appointed by the order of the minister of justice.

The bailiff may resort to assistance of various persons in his activities, including enlisting a bailiff's assistant. An assistant bailiff is acting on behalf of under bailiff and

21 Lithuanian supreme court. 16 December 2004, Consultation A3-117 *Regarding application of some norms of the Civil Code and Civil Procedure Code*.

22 Lithuanian supreme court. 10 January 2005. Order in a civil case No. 3K-3-18/2005.

under his authorization, but his powers in enforcement proceedings are limited. The assistant bailiff has the right to serve written proceedings on behalf of the bailiff and under his written authorisation, to conduct proceedings other than making findings of facts, instituting or staying execution proceedings, returning of a writ of execution, sale of property, collocation and distribution of pecuniary assets to the plaintiffs, computation of enforcement expenses. We think that the limited authorization of the assistant bailiffs could be criticized. The law grants bailiff assistants certain powers to act under bailiff's authorisation and undertake certain procedural actions at the stage of enforcement, thus an assistant bailiff could act as a representative of the bailiff in enforcement proceedings. Usually many procedural actions in enforcement proceedings are undertaken exactly by bailiff's assistants, thus these persons should be able to act as representatives. Moreover, bailiff assistants have an adequate education and the object of the mandatory insurance of the bailiff's professional civil responsibility is the bailiff's civil liability for the damage infringed by the actions of his own, his representative, assistant or a member of his staff (Article 17 (2) of the Lithuanian Law on Bailiffs). We note that a draft law provides for widening of the subjects of representation established in Article 56 of the CPC. It provides that bailiff assistants may represent the bailiff in cases arising from his functions, provided that they have a university degree in law and act under bailiff's authorisation. This is a positive development because the courts hear many cases on the actions of bailiffs.²³ The issue of lawfulness of bailiff's actions often arises in dispute settlement cases, and many applications are submitted on approval of the bailiff's actions in enforcement proceedings.²⁴

If a bailiff is not able to perform his functions through a leave, illness or other cause, a *bailiff's representative or an acting bailiff* is appointed by order of the minister of justice. A bailiff may also be represented by a representative or a substitute bailiff appointed in compliance with the Law on Bailiffs (Articles 35 and 36 of the Law). In such case the order of the minister of justice on appointment of a bailiff as a representative or substitute bailiff must be delivered to the court (Article 34(1) of the Law on Bailiffs), which is the document proving his authorisation to act on behalf of the bailiff.

Before the bailiff's representative starts his activities, the bailiff shall sign with his representative a written agreement of agency specifying the terms and conditions of agency and remuneration for the activities. Where the bailiff's representative is appointed on the initiative of the Minister of Justice, an agreement with the bailiff's representative on the terms and conditions of agency as well as the remuneration for activities of agency shall be concluded by the Presidium of the Bailiffs Chamber of Lithuania. The bailiff's representative has the same disciplinary liability as the bailiff. If the agreement does not provide otherwise, the representative has all rights and duties of the bailiff, including the functions of an employer. The bailiff's representative acts on behalf of the bailiff, uses the bailiff's seal and indicates that he acts as an representative of the bailiff. The damage inflicted by the bailiff's representative is covered by compulsory

23 1567 cases regarding bailiffs' actions were heard by district courts in 2009 and 1273 cases in 2008.

24 E.g., Vilnius 2nd district court heard 853 applications in 2009 and 620 in 2008.

insurance of civil liability. The remaining damage is covered by the bailiff and bailiff's representative jointly and severally according to the Civil Code and the Law on Bailiffs. However, the institute of bailiff's representative under the Law on Bailiffs is not identical to representation under the Civil Code²⁵ or the CPC. Different goals are being pursued in case of the latter. The bailiff's representation is needed to ensure the succession of the bailiff's activities when the bailiff cannot perform his function for various reasons, forbidding the represented bailiff to pursue the bailiff's activities. Thus a parallel activity of the represented person and the representative, common in other cases of representation, is impossible.

Appointment of an acting bailiff ensures that performance of functions related with writs of execution and other functions will be continued, and that activities of bailiff's office are not suspended for the period of the bailiff's incapacity to perform. The Supreme court of Lithuania established²⁶ that article 36 (5) of the Law on Bailiffs establishes the duty of the bailiff to continue the activities of the substituted bailiff. Therefore the acting bailiff must continue activity in execution proceedings independently and through the staff of the office. The succession of bailiff's activities means that employment contracts and agency agreements continue to apply until they are revoked by the acting bailiff.

In civil cases on issues on procedural actions, refusal to take actions and other disputes in enforcement proceedings, the bailiff can be represented by an advocate or advocate's assistant. However, this representation is limited. The bailiff may be represented but his possibilities for reimbursement of representation expenses are limited. Case practice provides that decision of the right to remuneration for the work of an advocate or his assistant, it is necessary to evaluate the statutory status of the bailiff, and the nature of the provided legal aid and the relations which provided the basis for this aid. [...] The state provides bailiffs with exceptional rights to perform these functions and establishes that these functions must be undertaken by bailiffs (Article 21(1) of the Law on Bailiffs). The Law provides persons who can assist the bailiff in his activities, the order and limitations of their participation (articles 28-36 of the Law on Bailiffs). These provisions restrict the right of the bailiff as the person with special authoritative powers to take use of the assistance of persons not provided by the law. Thus a bailiff performs statutory functions acting as a private person but cannot be equal to a private person due to his special legal status.²⁷ The Supreme court has proclaimed that bailiffs can rely on advocates' or advocate assistants' aid only insofar it is consistent with the provisions of the Law on Bailiffs and other laws. In cases when a bailiff does not perform his functions under the law while addressing the court, he can lead his own case or commission a representative, or participate in the proceedings together with a representative and require reimbursement of an advocate's or advocate assistant's expenses under article 88 (1) (6) of the CPC. Thus, participation of a bailiff in civil disputes regarding his services

25 The Supreme Court of Lithuania. Chamber of civil cases. 26 October 2005. Civil case No. 3K-3-508/2005.

26 The Supreme Court of Lithuania. Chamber of civil cases. 5 October 2007. Civil case No. 3K-3-390/2007.

27 The Supreme Court of Lithuania. Chamber of civil cases. 6 October 2008. Civil case No. 3K-3-448/2008.

is not restricted. In other cases involving disputes on performance of bailiff's functions, the bailiff's participation through a representative is not restricted but that does not mean that he will be reimbursed the same expenses on representation as any other person represented by an advocate or an advocate's assistant. According to article 98 (2) of the CPC, the recovery of expenses related with an advocate and advocate's assistance fees is ordered according to the complexity of each case and the input of the advocate or advocate's assistant. The reimbursed expenses must not be higher than those set in Recommendations approved by the minister of justice and Chairman of the Lithuanian Council of advocates. The recommendations are adopted by the 2 April 2004 Order of the Minister of justice No. 1R-85 on Recommendations on the maximum amounts of advocate or advocate assistant's fees that can be recovered in civil proceedings.²⁸ These recommendations set the maximum amounts and certain criteria (point 2) remuneration for legal services. The list of criteria is not a final one and other circumstances may be significant. In cases related to enforcement proceedings, these criteria include the complexity of the specific matter in which the assistance was needed. It is suggested to consider whether the bailiff has a legal education and must be a qualified specialist of enforcement proceedings. Thus the amount of reimbursed expenses can be reduced or refused if it is established that the assistance of an advocate was not necessary (Article 98(2) of the CPC).²⁹

In some cases, the representation at the stage of enforcement is necessary not because of the education requirement or legal status (mandatory participation of an advocate), but because procedural rights cannot be implemented otherwise. Some persons cannot implement their rights and duties by themselves (e.g. persons under age, partially or fully disabled persons). These persons act through their statutory representatives in enforcement proceedings, i.e. their parents, trustees or guardians. However, the statutory representatives can authorise other representatives to act in enforcement proceedings (usually advocates or advocates' assistants). The debtor's acting through a curator is also a form of the mandatory representation. Usually when execution actions are undertaken, the debtor's rights protected by himself, but the debtor cannot protect these rights when his place of residence is not known. When the debtor's place of residence is unknown but his property is located, the enforcer has the right to address the district court of the forum of execution asking to appoint a curator. The enforcer must deliver the written application to appoint a curator to a bailiff. The bailiff must transfer the application and the case of execution to the district court of the territory of execution no later than in three days (Article 601 of the CPC). The debtor's curator has the same procedural rights like the debtor, except for the right to be represented. In comparison to the appointment terms of a curator in civil proceedings (article 38 (1) of the CPC), at the stage of enforcement the curator is appointed only when the additional condition of located property of the debtor is fulfilled. The authors evaluate this position of the legislator positively

28 Order of the minister of justice of the Republic of Lithuania. 2 April 2004. Order No. 1R-85 Recommendations on the maximum amounts of advocate or advocate assistant's fees that can be recovered in civil proceedings. *Official Gazette*. 2004, No. 54-1845.

29 The Supreme Court of Lithuania. Chamber of civil cases. 6 October 2008. Civil case No. 3K-3-448/2008.

because in most cases the compulsory execution of a court's decision would be impossible if the debtor does not have any property.

The persons who cannot use their funds to hire an advocate or an advocate's assistant have the right to the state-guaranteed legal aid. The objective of this aid is to ensure that financially incapable persons have access to primal and secondary legal aid. Consultations related to enforcement proceedings cannot be considered as primal legal aid because it involves only legal information, legal consultations and drafting of documents addressed to the state and municipal institutions, except for procedural documents. Drafting of documents and representation related to enforcement does not necessarily constitute secondary legal aid. According to Article 11(5) and (6), state-guaranteed legal aid is not provided in some cases. Some of these cases could be identified in relation to enforcement proceedings, but only to a limited extent. For instance, such cases include the manifestly unfounded claims of the applicant, or representation in a case which has no reasonable prospects of success but at this stage does not involve solving legal matters. These issues are solved with a binding court decision. Nevertheless, these criteria may be applied in execution proceedings where writs of execution are issued by other institutions than courts.

Execution of authorities. The authorities of representatives in enforcement proceedings are affirmed by these documents:

- 1) In case of representation by an advocate of advocate's assistant, the rights and duties, their limitations, are established in a written agreement with their client or an extract from this agreement;
- 2) In cases when a legal person is represented by its body or a member, the founding documents, rules of association, statutes of an individual company and a document proving the appointment of the representative. The rights of other representatives of the legal person must be described according to an authorisation or representation agreement (its extract) issued according to the laws;
- 3) In case of representation of a private person, the power of attorney needs a notary or equivalent validation.

The representatives perform all actions on behalf of the represented person or on his commission. The authorisations must be specified in the agency or representation agreement. The authorisation to represent a person in court provides the right to undertake all actions on behalf of the represented persons in an execution case, except for the power to conclude peace agreements, transfer authorisation, receive the writs of execution or deliver it for execution, to receive property (Article 59 of the CPC). These powers must be specially defined in the power of attorney. Although the general provisions of the CPC provides that the representative's right to submit the writs of execution for enforcement must be defined, but this requirement applies to all documents of execution described in the CPC (notary writs of execution, orders in administrative cases, and etc). Submission of a document of execution for its enforcement and receiving of property is disposal of the rights of the debtor, thus such actions of a representative have legal effects, e.g. the material legal duty to pay expenses of execution arises, and etc. According to Article 587 of the CPC, the civil procedure applies to court orders, decisions of institutions

and officials in administrative cases, insofar as these decisions are related to claims of proprietary nature and decisions of institutions and officials where execution according to civil procedure is prescribed by law. A question arises whether the requirement of special authorisation applies to issuing and submission for enforcement of other documents of execution? It is important to consider the type of representation while searching for an answer. Special authorisation to conclude a peace agreement, transfer authorisation, receive the writs of execution and submit it for enforcement, to receive property, is not necessary for bodies and member of a legal persons, acting according to law or founding documents, because it is recognised that the legal person itself is acting in these cases. Thus the limits of their competence as defined in laws or founding documents should be considered. However, if a representative is acting on behalf of a legal person under a power of attorney, his powers and their limits must be verified according to the representation agreement or a power of attorney. We consider that special authorisations are needed to receive and submit other documents of execution as well (e.g. orders on application of provisional measures, notary writs, and etc.). The draft law on amending and supplementing of the CPC provides for a change of the execution of the representative's powers. Article 59 (2) of the CPC will be abolished according to Article 26 of the draft law. The applicable norm will continue to provide that an authorisation to represent a person in court grants the representative the right to perform all procedural actions, saved for exceptions established in the authorisation. The exceptions must be discussed by the representatives and the persons represented, in consideration of a possible risk and according to the higher standards of care and thoughtfulness. The same provisions on authorisation of representatives are established in the German ZPO § 80, 81.

Article 56(1)(3) of the CPC provides that one of the accomplice on commission of others may be an authorised representative in court. The institute of complicity is also applicable in enforcement proceedings, execution proceedings may involve joint debtors (accomplices of liability) and a number enforcers, when a decision was favourable to more than one claimant. According to Article 57(4), authorisation of an accomplice can also be approved by an oral declaration of the authorising person and included in the court hearing's minutes. If minutes are not written, the authorisation is approved by notary or according to equivalent order and a legal person's authorisation is issued. The bailiff performs main actions of compulsory execution in the procedure, and the court only monitors these procedural actions, sanctions them, and analyses the disputes arising at this stage, thus an authorisation of an accomplice to act in the procedure must be approved by the notary or according to equivalent order and a legal person's authorisation must be issued.

Conclusions

1. Representation in enforcement proceedings has certain distinctive features: different goals are pursued, limited representation of certain persons and representatives' rights to perform certain actions on behalf of the represented persons and on their commission, the execution of representative's powers and remuneration for representation.

2. In cases related to enforcement proceedings, additional criteria for setting legal assistance remuneration are established. The complexity of the specific matter in which the assistance was needed is considered. It is taken into account whether the bailiff's has higher legal education and is a qualified specialist of enforcement proceedings. Thus the amount of reimbursed legal fees could be reduced or refused if it is established that the assistance of an advocate was not necessary.

3. The authors consider that the restriction of bailiffs' assistants in representation of bailiffs in cases arising from his functions, because they have an adequate education and their civil liability is the object of the bailiff's compulsory insurance.

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ATSTOVAVIMO INSTITUTO TAIKYMO VYKDYMO PROCESĖ YPATUMAI

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Santrauka. Straipsnyje autorės analizuoja atstovavimo instituto taikymo ypatumus baigiamajame civilinio proceso stadijoje – vykdymo procese. Autorių nuomone, galima skirti keletą atstovavimo vykdymo procese ypatumų.

Dalyvavimas civiliniame procese yra specifinė veikla, reikalaujanti specialių šios srities žinių. Atstovaujantieji procese siekia ne tik teisinės, bet ir ekonominės naudos. Jų interesų netenkina vien priimtas palankus teismo sprendimas, būtina tokią sprendimą ir įvykdyti (sumokėti priteistą sumą, perduoti daiktus, atlikti tam tikrus veiksmus ir kita). Priversti skolininką įvykdyti priimtą teismo sprendimą vien paties išieškotojo pastangų gali nepakakti. Todėl ir vykdymo procese išieškotojams tenka pasinaudoti profesionalių atstovų pagalba. Tačiau netikslinga vykdymo proceso atstovavimo institutą sieti tik su išieškotojo interesais. Vykdymo procese vienas iš pagrindinių subjektų – antstolis, įgyvendinantis priverstinio vykdymo funkcijas. Vykdymo procesas neįmanomas ir be skolininko – asmens, įpareigoto atlikti vykdomajame dokumente nurodytus veiksmus arba susilaikyti nuo minėtame dokumente

nurodytų veiksmų atlikimo. Šiems asmenims vykdymo procese taip pat gali priverkti atstovo pagalbos, kurios poreikis nebus siejamas vien su specifinių žinių neturėjimu.

Straipsnio pabaigoje pateikiamos apibendrinančios išvados. Autorių nuomone, keliami skirtingi atstovavimo civilinėje byloje ir vykdymo procese tikslai, ribojamas tam tikrų subjektų atstovavimas bei atstovų galimybės atstovaujamojo vardu ir jo pavedimu atlikti tam tikrus veiksmus, skiriasi atstovo įgalinimų nustatymo tvarka. Bylose, susijusiose su vykdymo procesu, užmokesčio už teisinę paslaugą dydis priklauso nuo to, kokie sudėtingi buvo byloje nagrinėjami klausimai. Siūloma atsižvelgti į tai, kad antstolis pats turi aukštąjį teisinį išsimokslinimą ir privalo būti kvalifikuotas vykdymo proceso specialistas. Dėl to antstoliui priteisiamo išlaidų atlyginimo dydis gali būti mažinamas arba, konstatavus, kad advokato pagalba antstoliui nebuvo būtina, minėtą atlyginimą atsisakoma priteisti. Autorių nuomone, turi būti panaikintas ribojimas antstolio padėjėjams atstovauti antstoliui bylose, susijusiose su antstolio funkcijomis, nes šie asmenys turi reikiamą išsimokslinimą, o jų civilinė atsakomybė yra antstolio profesinės civilinės atsakomybės privalomojo draudimo objektas.

Reikšminiai žodžiai: atstovavimo institutas, advokatas, vykdymo procesas, antstolis, išieškotojas, skolininkas.

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