

COUNTER-ENFORCEMENT

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Professional article

Abstract: *Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina* (“Official Gazette of the Federation of Bosnia and Herzegovina”, No. 23/03, 52/03, 33/06, 39/06, 39/09, 35/12 and 46/16; and “Official Gazette of Bosnia and Herzegovina”, No. 42/18 - Decision of the Constitutional Court; hereinafter: ZIP) prescribes the rules of procedure on the basis of which the counter-enforcement procedure is conducted. Paragraph 1 of Article 54 of the ZIP stipulates: “After the enforcement has already been carried out, the enforcement agent may in the same enforcement proceedings request the court to order the enforcement seeker to return what he received by enforcement, if: the enforcement document is revoked, modified, annulled, put out of force or otherwise determined to be without effect, if the decision on enforcement is revoked or modified and if during the enforcement procedure he settled the claim against the claimant, outside the court, so that the claimant is doubly settled. “

This paper will analyse the institute of counter-enforcement, i.e., the conditions for initiating the counter-enforcement procedure, the procedure for deciding on counter-enforcement, as well as the active legitimacy for initiating that procedure.

Keywords: *Law on Enforcement Procedure, counter-enforcement, decision on counter-enforcement, third party*

1. INTRODUCTION

Counter-enforcement is a complex civil court procedure, which is regulated in our legislation by the provisions of enforcement law. Counter-enforcement is an institute of executive procedural law, which is enforced in court enforcement proceedings, and which stipulates that the enforcement agent has the possibility in the same enforcement proceedings, and after the enforcement is carried out, to submit a proposal for counter-enforcement to the court. In practice, this means that the executor now has the role of an enforcement seeker. In that way, the executor has an active legitimacy with that proposal to ask the court to order the claimant to make a refund, to return to him what he received from him, when there are legal preconditions for that. However, even when the legal conditions for counter-enforcement are met, the ZIP does not prescribe that the court issue a decision on counter-enforcement *ex officio*. Therefore, initiating the counter-enforcement procedure is at the disposal of the actively legitimized party. What further legally defines this procedure is, in fact, the fact that it consists of two parts. In one part, the decision is made on the right, and in the other part on the realization of that right (execution), which is explained in more detail in the following text of this paper.

2. COUNTER - ENFORCEMENT

As it follows from the provisions of the ZIP, i.e. the provisions of Articles 54 to 59 of that law, counter-enforcement is a set of actions by which the executor (debtor) is returned what the enforcement seeker (creditor) received during the enforcement proceedings, if there was no basis for it at the time of initiating enforcement proceedings or if the basis ceased to exist in the further course of enforcement proceedings [...].

“In the counter-enforcement procedure, party roles change: the executive creditor from the previous enforcement procedure becomes the executive debtor in the counter-

enforcement procedure (counter-debtor), and the former executive debtor becomes the executive creditor (counter-creditor). The ultimate goal of counter-enforcement is enforcement (counter-enforcement) which moves in the opposite direction from what has already been carried out: this time in favor of the enforcement debtor from the previous enforcement proceedings, against the former enforcement creditor.” (S. Triva et al., 1984, pp. 343-344.).

“The counter-enforcement procedure is complex and consists of two, temporally and functionally, separate stages.” (S. Triva et al., 1984, p. 344.).

In the first stage, the request of the executor from the previous enforcement procedure to order the previous enforcement seeker to return to him what he received by enforcement is being judged; i.e. the counter-cognitive procedure defined by the reverse role of the parties in the procedure. If the court finds that the proposal is well-founded, a decision on counter-enforcement is issued. This decision orders the claimant to return what he received. Thus, in that procedure, in fact, the cognitive part is contained, that is, the part that is identified by the civil procedure by which a certain right is determined by the court decision of the civil procedure. In the second stage, enforcement proceedings (counter-enforcement) are carried out on the basis of (enforcement documents) issued in the first stage. In this part, in fact, enforcement is carried out on the basis of an enforcement document (Article 23 of the ZIP).

“The first of the mentioned stages is an independent cognitive procedure in which the subjective rights of the parties are judged, which ends with the finality of the decision on the enforcement debtor's request that the enforcement creditor be ordered to return what he received by enforcement (argument 61/1). In essence, it is a lawsuit based on the mandatory institute of acquisition without a legal basis, but is conducted according to the rules of enforcement law as adhesion and pre-trial procedure to obtain an enforcement document that will serve as a basis for enforcement proceedings (counter-enforcement in the narrow sense) [...].” (S. Triva et al., 1984, p. 344.)

According to the above, in that one procedure,

two procedures legally exist - the procedure of issuing an executive document and the procedure of realization of that executive document. So, two proceedings in one, which depends on the change of the decision that will affect the change of active and passive legitimacy, and which was the executive title, in terms of the provision of Article 23 of the ZIP, the previous enforcement procedure.

"Historically, the institute of counter-enforcement arose as a legal alternative to litigation for unjustified acquisition, as a parallel and competitive remedy whose choice depended on the will of the debtor from the previous enforcement proceedings [...]" (S. Triva et al., 1984, p. 346.).

Namely, paragraph (1) of Article 54 of the ZIP stipulates that "After the execution has already been carried out, the executor may in the same enforcement procedure ask the court to order the enforcement seeker to return to him what he received by execution if:

- 1) the executive document has been legally revoked, modified, annulled, put out of power or otherwise determined to be without effect;
- 2) the decision on execution is revoked or modified by a final decision;
- 3) during the enforcement procedure, the enforcement seeker has settled the claim outside the court so that the enforcement seeker has been settled twice. "

In addition to the conditions listed above, which must be met in order to allow counter-enforcement, attention must be paid to the deadline within which a proposal for counter-enforcement can be submitted.

Namely, a motion for counter-enforcement may be submitted within a subjective period of 30 days from the day when the executor learned of the reason for counter-enforcement, and no later than within an objective period of one year from the day of completion of enforcement proceedings [paragraph (2) of Article 54 ZIP]. It is also stipulated that before the expiration of the subjective deadline of 30 days from the day of finding out the reason for the counter-

enforcement, i.e. within the period of one year from the end of the enforcement procedure, no counter-enforcement can be requested. So, this procedure is also limited in time.

However, what can be defined as a problem in initiating counter-enforcement is, in fact, the existence of an objective deadline for submitting that proposal. Namely, with the expiration of the objective deadline, certain consequences occur for the new enforcement seeker (former executor). They are reflected in the fact that after the expiration of the objective deadline, counter-enforcement cannot be requested by applying the provisions of the enforcement procedure. This, in fact, causes a situation where the enforcement seeker can only request in a special civil procedure to determine his right, therefore, to conduct a special civil procedure.

In practice, it happened that after the expiration of the objective period of one year, after the audit, the executive document was revoked or changed. Therefore, the motion for counter-enforcement was rejected, and the enforcement debtor had to exercise his right through civil proceedings. Therefore, it is good that there is no objective deadline in a situation where the reason for counter-enforcement is if the enforcement document is revoked, modified, annulled or otherwise put out of power, as well as when the decision on enforcement is revoked or modified, as well as in a situation where inadmissibility of execution was determined by a final court decision. (N. Šarkić, M. Nikolić, 2009, pp. 351–352.).

"Counter-enforcement aims to eliminate or reduce the consequences of illegal or unnecessarily conducted enforcement proceedings." (D. Lazarević, 2016, p. 309).

"In the counter-enforcement procedure, the creditor is considered to be the person (natural or legal) when two properties are accumulated - the property of the party in the procedural sense (marked as a creditor by the decision on execution) and the property of the party in the material-legal sense (in the process of enforcement restitution is achieved by counter-execution)" (D. Lazarević, 2016, p. 310)

3. PROCEDURE FOR INITIATING COUNTER-ENFORCEMENT

The counter-enforcement procedure is initiated by the executor by submitting a counter-enforcement proposal to the court, and the court is obliged, before deciding on the merits of the proposal itself, to examine the existence of procedural preconditions for deciding on the counter-enforcement proposal, which means that the court examines whether the proposal was submitted within the subjective or objective deadline, and whether the proposal is complete so that the court could act on it, as well as whether it was submitted for the reasons prescribed by law. (A. Daupović et al., 2005, p. 219.).

If the procedural preconditions for submitting a proposal for counter-enforcement are met, the court will submit the proposal for counter-enforcement to the enforcement seeker and invite him to state his opinion on the proposal for counter-enforcement within three days. (A. Daupović et al., 2005, p. 219.).

This is because it is the right of the enforcement seeker to get acquainted with the proposal for counter-enforcement, i.e. to apply the principle of contradiction in the enforcement procedure.

“The court is obliged to submit the proposal for counter-enforcement to the opposing party and invite her to declare herself on that proposal within the legally prescribed deadline. Otherwise, it violates the provisions of the ZIP procedure in connection with Art. 354, paragraph 2, item 7 of the ZPP.” (VPSH, Pž-1579/82, according to: Svetislav Vuković, Commentary on the Law on Enforcement Procedure, Belgrade, 2000, page 122.” (A. Daupović et al., 2005, p. 220).

Depending on whether the enforcement seeker opposes the motion for counter-enforcement, or the enforcement seeker does not want to comment on the motion for counter-enforcement at all, a further course of action is determined according to the motion for counter-enforcement. Namely, if the enforcement seeker opposes the motion for

counter-enforcement, it is obligatory to schedule a hearing, after which the court will decide on the motion for counter-enforcement, while, on the other hand, if the enforcement seeker does not oppose the motion for counter-enforcement, the court will decide whether hearings expediently in the present case.

There are two phases in the procedure of deciding on counter-enforcement: the first phase of the procedure is the phase in which a positive decision on counter-enforcement is made, i.e. the phase in which the executive document is issued, while the second phase is the one in which the executive document is implemented. (N. Šarkić, M. Nikolić, 2009, p. 355.).

“The decision on accepting the proposal for counter-enforcement is made in the first phase of the counter-enforcement procedure. This phase of the counter-enforcement procedure, in which the ‘right to counter-enforcement’ is tried, ends when the decision ordering the enforcement seeker to return to the executor what he received by enforcement becomes final [...].” (A. Daupović et al., 2005, p. 221.).

“The counter-enforcement procedure in this (second) phase, which is temporally and functionally separate from the counter-enforcement procedure in which, as stated above, the ‘right to counter-enforcement’ is decided, begins with the submission of a proposal for counter-enforcement. This proposal (unlike the proposal for counter-enforcement which is decided in the first phase of the counter-enforcement procedure), as well as the proposal for enforcement, should contain two requests: an enforcement request and a request to return to the executor what the enforcement seeker received by enforcement [...].” (A. Daupović et al., 2005, pp. 221–222.).

Thus, the proposal for counter-enforcement contains two requests that are decided separately and separate decisions are made, although one request is decided in one procedure.

“Counter-enforcement determined by a decision on counter-enforcement shall be enforced like any other decision on enforcement issued on the basis of an enforcement document, applying the general rules of enforcement procedure prescribed by this Law for determining and enforcing enforcement determined

on the basis of an enforcement document." (A. Daupović et al., 2005, p. 222.).

The provision of Article 57 of the ZIP prescribes the following:

"A counter-enforcement motion will not be accepted if, in respect of what the enforcement seeker has obtained through enforcement, there have been such real and legal changes that recovery is no longer possible."

Therefore, this provision prescribes the fulfillment of the conditions for counter-enforcement, i.e. the reasons for which such a request cannot be allowed. This refers to the content of what needs to be returned. In this context, it is necessary to mention, as a reason to prevent the return of things, the fact of the effect of change on that particular thing.

Namely, as "**Changes to the thing** that was the subject of execution, the return of which is requested in the counter-execution procedure, **can be real and legal**. Real changes to things are all those changes due to which a certain thing has lost its original identity. Legal changes to things are those changes that significantly change the legal regime of things." (A. Daupović et al., 2005, p. 224.).

Therefore, if there are such changes to things (real or legal) that make it impossible to return to the executor what the enforcement seeker received by enforcement, the court may decide negatively on the enforcement agent's proposal, which is subject to the court's assessment.

"A decision approves a proposal for counter-enforcement only if it is founded; if it is unfounded, it will be rejected by a decision. An inadmissible counterclaim motion will be rejected by a decision (e.g. if restitution is requested for a reason other than the counter-enforcement, etc.)." (S. Triva et al., 1984, p. 360.).

"Unlike the previous law, counter-enforcement is envisaged at the suggestion of

a third party and a participant in the proceedings." (V. Mišić, p. 94).

The first novelty is that the counter-enforcement procedure can also be conducted at the proposal of a third party (Article 58 of the ZIP), i.e. a person who did not participate in the enforcement proceedings either as an enforcement seeker or as an executor, but a third party who for certain reasons has a legal interest that the counter-enforcement procedure is carried out at his proposal and to which such a property has been recognized by this legal provision. Passively legitimized person in the counter-enforcement procedure at the proposal of a third party is the enforcement seeker from the conducted enforcement procedure; and actively legitimized person is the person at whose expense the claim of the enforcement seeker is settled, who is not marked as an executor in the enforcement decision which means he is not obliged even by an executive document to fulfill the obligation to which the enforcement request reads.

Therefore, a third party may, in the event that the claim of the enforcement seeker is settled at his expense even though the third party is not designated as the executor in the enforcement decision - within the deadlines prescribed for the counter-enforcement procedure request the court to order the enforcement seeker to return that which he obtained by execution. (See Mišić, p. 94).

The second novelty is the counter-execution at the proposal of the participants in the procedure in the sense of the provision of Article 59 of the ZIP. Namely, in the sense of that legal provision, a participant is a person who is not a party in the enforcement procedure, and participates in the procedure because it decides on some of his rights or because he has a legal interest in it. This legal provision stipulates that a participant in the procedure may request counter-enforcement in the procedure and within the deadlines provided for counter-enforcement at the proposal of the executor referred to in paragraph 1 of Article 54 of the Law on Enforcement Procedure of the F BiH.

4. CONCLUSION

The topic of this paper is the analysis of the counter-enforcement procedure, which is essentially

an enforcement procedure but in the opposite direction, unlike the previous enforcement procedure, having in mind the position of the parties in the procedure (active and passive legitimacy). Namely, according to the above, it follows that the previous enforcement seeker has the position of executor, and vice versa, i.e. now the active and passive legitimacy has been changed. Although *prima facie* it seems to be one procedure, in fact it is two separate procedures. Initially, it is decided on the merits of the proposal for counter-enforcement, which represents one procedure, and the other, in fact, refers to the procedure of decision-making on the proposal for counter-enforcement (decision on counter-enforcement).

Thus, legally there are two proceedings in one. In order to initiate counter-enforcement proceedings, it is necessary that the actively legitimized party fits into the deadlines that are divided into objective and subjective deadlines. According to all the above, it is evident that the institute of counter-enforcement is quite complex, but, on the other hand, it prescribes the possibility of recovering unjustifiably lost in enforcement proceedings, which, again, is on the side of disposition in that sense of active legitimacy.

As previously mentioned in the text, in order to initiate counter-enforcement proceedings, it is necessary that two additional conditions are met, namely the objective and subjective deadline. What was perceived as one of the criteria that should be reconsidered is the possibility of prescribing only a subjective deadline for submitting a proposal for counter-enforcement. The authors find the basis for their opinion in the expression of Nebojša Šarkić and Mladen Nikolić in the Commentary on the Law on Enforcement Procedure, with case law and forms, p. 351-352, commentary to Article 59.

Namely, as stated in the quoted text of the comment, this is because it can happen that after the objective deadline of one year, in the revision procedure, the enforcement document is revoked or changed, and thus the executor is prevented from initiating counter-enforcement. Therefore, the opinion of the

authors of this paper is that the legislator in future amendments to the Law on Enforcement Procedure should give up the objective deadline, and keep only the subjective deadline for initiating counter-enforcement proceedings. This is because in that way the executor can no longer initiate the counter-enforcement procedure, which is much more economical and efficient, but only has the possibility to re-initiate the civil procedure. According to all the above, it is evident that the institute of counter-enforcement is quite complex, and that the proposed change could facilitate the exercise of the rights of the current enforcement seeker (former executor) in enforcement proceedings, because it has a shortened procedure, which is a more expeditious, efficient and economical phase in exercising the rights of the enforcement seeker.

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