

Enforcement of court decisions which are the exclusive competence of the courts in the Republic of Kosovo

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Abstract

Enforcement procedure is the final part and possibly the most sensible part of the civil procedure. With the new legal changes, apart from the court as a competent institution and authority, it is also the private enforcement agent, a body which in its work will have full legal public authority. However, with the new Law on Enforcement Procedure of The Republic of Kosovo (LEPRK), for certain cases, the court will be competent for execution. In this regard, the LEP also emphasizes the role of the court in the implementation of this procedure so that the realization of the subjective civil rights of the parties in the procedure is expressed as soon and as fairly as possible. LEP has envisaged in detail the rules and conditions under which the execution can be commenced and performed, including the enforcement carried out by the private enforcement agent. The focus of this paper is only the enforcement for which the court has exclusive jurisdiction.

Keywords: creditor, debtor, enforcement document, confidential document, private enforcement agent.

Introduction

The new Law on Enforcement Procedure (LEP) in the Republic of Kosovo is considered as one of the laws which have brought radical changes to the legal enforcement system in the area that it regulates, while also incorporating new law institutes of enforcement which did not exist. These innovations, not rarely, and especially at the initial stage of its implementation, have created various dilemmas in implementation. Thus, in the jurisprudence regarding the competence, there have been different interpretations that when this law enters into force, creditors are entitled to refer all matters back to the court or they should address the court for enforcement only on certain matters. However, Article 5 paragraph 2 of this law provides that "Competent Court shall hold the subject matter jurisdiction to order and to carry out enforcement as well as to decide on other matters during the procedure pursuant to the provisions of this Law, unless other courts and enforcement authorities, respectively, have competence to order and carry out enforcement as well as to decide on other matters during the procedure". Therefore, in this regard, it seems that the aspects of the court's competence to deal with n enforcement case are clarified and limited only to matters pertaining to the two above-mentioned spheres, for which the focus of this work will be in enforcement of cases which are the exclusive competence of the court.

2. Exclusive competence of the courts

Article 5 par. 6 of the LEP provides that “Court shall be competent to decide over the enforcement procedure and enforce court decision related to:

- all issues related to family law, and
- reinstating employees and civil servants at work, and other compensations¹.

This provision is a derogating provision for the court to decide on matters, unless it is provided by law, regarding any objection, appeal, irregularities in enforcement procedure under Articles 52 and 67 of this law, or any other procedure against actions of a private enforcement agent, in which case the jurisdiction is within the competent court in the territory in which the debtor’s residence is located, and if he does not have residence in Kosovo, then in the territory in which he stays, if debtor is a physical person².

If debtor is a legal person, territorial jurisdiction rests in the competent court in the territory in which its seat is located. If the debtor does not have a temporary residence or seat in Kosovo, the basic court in the territory in which the movables or immovable items that are the object of enforcement are located will have jurisdiction.

Regarding the issue of decision where in the first instance enforcement procedure is conducted and decided by the private enforcement agent, whereas exceptionally the individual judge (alone) when by this Law is assigned that execution is determined and enforced by the court (the body of the first instance), a deadline has been set where the enforcement body decides on the enforcement proposal within 7 days after the receipt of the proposal. According to the above-mentioned provision “in the second instance, decisions are issued by an individual judge”, which has not been the practice until now when it is known that in the second instance the panel decides on the review of the complaint.

3. Enforcement of decision on reinstating to working place

The most important and most sensitive issues have remained the competence of courts. The court has exclusive competence over the enforcement of the enforcement decision in relation to reinstatement of the employees and civil servants to work. To decide on enforcement proposal based on enforcement document forcing the employer to reinstate the employee to work, or to assign him/her to appropriate position and for application of enforcement, territorial jurisdiction is with the court in whose territory the employment relation is created³.

Enforcement proposal based on enforcement document for reinstatement to work may be presented within ninety (90) days from the day when the decision becomes final. Enforcement based on enforcement document forcing the employer to reinstate the worker, or to provide him/her appropriate working position, shall be applied through fines against the employer and responsible person of the employer. Fine shall be determined according to the provisions of Article 15 and 16 of this law and

¹ See Article 5 of LEP.

² See Article 52 and 67 of LEP.

³ See Article 312 of LEP.

enforcement provisions for purpose of settlement of credit for action that may be performed only by debtor⁴.

Pursuant to the provisions of the LEP regarding the remuneration in case of return of the employee to work, creditor who has submitted the proposal for return to work, has the right to request the court the issuance of the decision forcing the debtor to pay him/her monthly salaries which become claimable, from the day when the decision became final until the day of return to work. Through the same decision, the court assigns enforcement for settlement of monthly salaries. Compensation of monthly salary is assigned in amount which the worker would earn if at work.⁵

The provisions of the LEP stipulate that enforcement creditor shall reserve his right for payment or compensation of monthly salaries or other payments while he was unemployed due to illegitimate decision of the employer for his dismissal from duty and may request his case to be processed in contested procedure⁶.

If the enforcement court only partially approves the request for payment of monthly salary, then the court will instruct the enforcement creditor to settle the other part of his request in contested procedure.

4. Hand over and taking of child

The court of general territorial jurisdiction for the party who requests the enforcement, but also the court in whose territory is the child is located shall have the jurisdiction to decide on proposal for enforcing the court order ordering the handover of a child to parent, or to other person, respectively institution to which the child is entrusted for custody and education.

Territorial jurisdiction for application of enforcement is with the court in territory of which the child is located at the time of enforcement⁷.

Proposal for enforcement of decision may be presented by a parent or other person to whom the child is entrusted for custody and education, and also authority of custody. In case of application of enforcement, court shall especially regard the need for protection of interests of the child in highest possible extent. Through the enforcement decision, the court shall assign to the debtor three (3) days from the day of delivery of decision to hand over the child to the parent or other person respectively institution to which the child is entrusted for custody and education, under the threat of fine.

If the enforcement may not be applied through sentencing and enforcement of decision on fine, the enforcement will be applied by taking the child from the person where the child is held, and hand over to the parent, or other person respectively institution to whom the child is entrusted for custody and education. Taking and hand over of child according to paragraph 4 of this Article may be conducted only by the judge in cooperation with psychologist from the custody institution, school, family consultation centre, or other specialized institution for mediation in family relations. Court, upon proposal by the party to whom the child is entrusted, shall continue the

⁴ See Article 314 of LEP.

⁵ See Article 315 of LEP.

⁶ Article 317 of LEP.

⁷ Article 318 of LEP.

enforcement according to the same enforcement decision, if the child within three (3) months from the day of child's hand over is found to be again with the person from whom it was taken.

Exceptionally from provisions of Article 320 of this law, in the case it is concluded that his life, health or psycho-physical development is threatened, court shall apply the enforcement without assigning deadline for handover of child and without giving court fines, by taking the child and handing him/her over to the parent or other person respectively institution to whom the child is entrusted for custody and education.

5. Role of judges and enforcement agents

In our system it is the competence of the judge to allow the enforcement, but that does not mean that at this stage of the procedure, it does not have the assistance of the enforcement agent especially in cases that are not complicated.

The Basic Court has the general jurisdiction over the enforcement of court rulings in civil and criminal cases. This court is also competent for the enforcement of the rulings allowed on the basis of "credible documents" such as invoices, bills of exchange, cheques etc. On the other side of the enforcement judge, there is also the duty of the enforcement officer, i.e. enforcement agent.

The Court of Appeal functions as a court of second instance

The judge has the responsibility under the law for these enforcement actions:

- To verify the enforcement proposal,
- To decide on objections and complaints and the disputes arising during the enforcement procedure,
- As well as other tasks stipulated by the law that are within the competence of the enforcement judge, i.e. conducting of enforcement procedure regarding the enforcement related to reinstatement of an employee to work or handover of child.

The enforcement officer has administrative duties which include but not exclude:

- Maintaining of enforcement records,
- Proceeding notices to parties
- As well as drafting minutes regarding the registration and sequestration of movable property, seizure of pledge, emptying and handover of immovable property.

Obligations of enforcement judge and officer are:

- Respecting the debtor's dignity,
- Timely proceeding of enforcement proposals and in the order of their receipt.

In the enforcement procedure, the court has a duty to act urgently. The court is obliged to take cases in the proceeding in the order in which the enforcement proposals have come, except when the nature of the credit or the special circumstances require the court to act differently.

The law has not clearly defined what these particular circumstances are, but the court will act by evaluating each case individually, unless they are of priority as in family matters or the reinstatement of the worker to the workplace.

6. Private enforcement agents

LEP regulates the procedure in which courts and private enforcement agents determine and carry out enforcement, on the basis of the enforcement titles and authentic documents, unless if with the special law it is foreseen otherwise. From this derives that since 1 January 2014, besides the courts, competent for the enforcement are also private enforcement agents⁸.

“Private Enforcement Agent” - the natural person appointed by the Minister of Justice in accordance with the provisions of the present law, who in the performance of public authorizations entrusted to him/her as provided by the present law, decides on the actions arising from his/her competency in the enforcement of allowed enforcement, and undertakes enforcement actions.

“Writ of enforcement” - the decision of the private enforcement agent by which the proposal for carrying out enforcement is accepted either in whole or in part.

Private Enforcement Agent issues a writ based on the enforcement proposal and performs the enforcement in order to fulfil the debtor’s request based on the enforcement document, unless otherwise provided by the law that orders enforcement and carries out the enforcement within the jurisdiction of the Court.

The territorial jurisdiction to decide on matters related to the application of the enforcement procedures is determined by the provisions of this law, depending on the means and scope of execution, as well as based on the status of the enforcement body.

The private enforcement agent is competent to undertake all actions defined by this law and other actions permitted or assigned to him under the law, except where expressly forbidden under the law. he private enforcement agent shall undertake actions to implement the enforcement within the territory for which he/she has been appointed.⁹

At the request of the creditor, the private enforcement agent may undertake actions to implement the enforcement also outside the territory for which he/she has been appointed, either in person or through a private enforcement agent of the other territory.

The organs of state administration may entrust the private enforcement agent with the implement of enforcement in the procedures, which are applied based on the decisions of these state organs, unless it is provided otherwise with a special law. The seat of the private enforcement agent shall be located within the territory of the basic court for which he/she has been appointed.

The enforcement authority may conclude that the nature of a credit requires expedited treatment of a case if there is a legitimate risk that the debtor’s assets in that case may become unavailable for seizure or significantly diminished in value if enforcement is delayed. A court may also recognize special circumstances, and act promptly, in cases dealing with employment, family matters, alimony, or child welfare if the interests of a party may be adversely affected by delay.

Upon carrying out enforcement procedure, care shall be paid to protect the dignity

⁸ Article 1 of LEP.

⁹ See Article 323 of LEP.

of the debtor, and to ensure that the enforcement is as little detrimental as possible on debtors.

Our country, as well as other countries in the region, since 2014 has functionalized the private enforcement system.

This system through private enforcement agents is thought to offer solutions to all existing problems that exist in Kosovo. Private enforcement agents tend to be highly motivated and professional in their work, and provide a high level of services to ensure their competitive success. They have direct control over the management of offices that personally run and benefit from their performance, bringing a high level of responsibility for issues such as engagement and removal, budgeting, information technology systems to support their work and management of the office.

In addition, because the enforcement process becomes private business instead of the public function, the costs of supplying and maintaining the enforcement offices and the training of their agents and employees have been totally removed from the state budget although the state holds most of the expenses of monitoring of enforcement agents to ensure the legality of their functions, and disposing with them when required.

The private enforcement system also has the advantage of removing the responsibility of managing the enforcement process from judges and court enforcement officers. These responsibilities are transferred to private agents.

However, the direct involvement of judges in the enforcement process ends with leaving judges with their fundamental responsibility to adjudicate judicial contexts between the parties and by removing the burden of some management responsibilities that often take an important part of their time.

Enforcement systems based on private enforcement agents have become a standard in most of Western Europe and in the former socialist countries and in Central Europe as well.

The private enforcement agent in Kosovo should not refuse the enforcement requests unless the exclusion criteria and the provisions applicable to the exclusion of judges as well are met.

7. Legal remedies

In the enforcement procedure, regular legal remedies are: objection and complaint¹⁰. Objections may be presented only against the decision allowing the enforcement. Objections shall be filed in written in the basic court that issued the challenged enforcement, when the court is the enforcement body.

Objections shall be filed in written, in the basic court as provided under paragraph 5 of Article 5 of this Law when the enforcement body is a private enforcement agent. The basis for the objection must be stated and supported by appropriate evidence. Evidence for objection must be submitted in written otherwise the objection shall be rejected.

The decision by which the enforcement proposal is rejected or refused may be attacked only by an appeal of the enforcement creditor.

¹⁰ See Article 67 of LEP.

Court may decide on the objection out of court session. Alternatively, the court may schedule a public hearing if in the court's view it is necessary for a full understanding of the validity of the objection. The court shall notify all parties of the public hearing. If the court chooses to hold a public hearing, the hearing shall be held within five (5) days after the responses to the objection were required to be received by the court. This law regulates to a certain extent the limitation of filing a complaint only in certain cases that has affected the procedure to be faster and more efficient, but it does not strictly regulate the limitation of filing a complaint only in certain cases, while it has foreseen:

- setting the time limit for the review of the complaint;
- guaranties in the filing of the complaint, which were not earlier.

The objection against the enforcement writ allowed on the basis of the credible document so far has been considered a claim and the further procedure was conducted according to the provisions of the Contested Procedure, where the judicial proceedings have lasted for years but this case has not been foreseen by law.

Also, under the LEP, against the decision on objection parties have the right on appeal. The appeal against the decision on objection shall be filed through the first instance court for the second instance court within seven (7) days from the day of acceptance. Copy of the appeal shall be submitted to opposing party and other participants who may present response to the appeal within three (3) days.

This law will bring security and efficiency as it has set deadlines for undertaking actions both for the court of first instance and for the Court of Appeal, which have not previously been foreseen.

Following receiving the response to appeal or following the deadline for response, the case with all submissions shall be sent to the second instance court within three (3) days. Regarding the appeal, the second instance court shall decide within fifteen (15) days, thus setting a deadline for filing the complaint foreseen in the enforcement procedure.¹¹

In the event the debtor as appealing party is successful in its appeal, and if its assets have been enforced against upon pursuant to the enforcement decision, he may seek counter enforcement.

8. Legal remedies against writ of enforcement

To decide matters regarding any objection, appeal, irregularities in enforcement procedure or any other procedure against actions of a private enforcement agent, jurisdiction is within the competent court in the territory in which the debtor's residence is located, and if he does not have residence in Kosovo, then in the territory in which he stays, if debtor is a physical person.

If debtor is a legal person, territorial jurisdiction rests in the competent court in the territory in which its seat is located. If the debtor does not have a temporary residence or seat in Kosovo, the basic court in the territory in which the movables or immovable items that are the object of enforcement are located will have jurisdiction.

¹¹ See Article 77 of LEP.

Conclusions

Contrary to the old LEP in which the possibility of enforcement through the private enforcement agent did not exist but this procedure was conducted exclusively through the court, as outlined above, the new LEP foresees in itself the private enforcement agent institute and the enforcement procedure through private enforcement agent. With the new LEP, the jurisdiction and obligation of the court and the private enforcement agent to conduct the enforcement procedure in the cases that they are competent are clearly defined, depending on the nature of the enforcement case. According to the LEP, the role of the courts continues to be very important because more sensitive issues such as family matters remain the exclusive jurisdiction of the courts, as well as remedies remain in court rulings, and other important function is oversight because the parties who think that the private agent has violated any of their rights may appeal to the court.

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