

THE BAILIFF FOR VIETNAM LEGAL SYSTEM UNDER THE LAWS AND REGULATIONS.

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I. THE BAILIFF’S INSTITUTION IN SOME LEGAL SYSTEMS *(*This section was referred and used some information and documents of University of Zagreb)*

1. Legal position of a bailiff

Vietnamese government is under the consideration to establishment the bailiff agencies. The bailiff is a civil society organization, operated in civil judgment enforcement. Not state budget, but management activities and having the monitoring and inspection. About the expertise, the bailiff has the right to verify the implementation and conditions of execution and directly executed, the decision at the request of claimant, served papers by the court.

So we try to go to another legal systems of other countries and comparative how it can be applied to our bailiff system under processing. It is difficult to speak about all persons involved in enforcement services under the same heading. The practice of enforcement is so diverse in the different countries that it is almost impossible to find common ground for understanding. Even the very notion of bailiffs may be controversial, starting with the problem of translation into different European languages. Those denoted as “bailiffs” in whatever sense also play in practice rather different roles and appear in rather different forms. One typical demonstration of such differences could be acquired by assessment of social status and respect enjoyed by those who are called “bailiffs” in different legal systems. Without prejudging the precise results of such possible research, it could be stated with certainty that some of the systems regard the bailiff’s profession as a very desired, esteemed and attractive post within the legal system, whereas in the other system it is associated with hard, repelling and poorly paid jobs. In the latter systems, bailiffs are almost viewed as the “pariahs of the legal order” – as “those whose occupations and habits of life involve polluting activities” such as sweeping the unclean situations in which debtors do not want (or cannot) fulfill their obligations.

However, in many jurisdictions that know and use the term “bailiff”, this term is usually associated with a distinct private profession. In such a meaning, the term bailiff is reserved for members of a liberal profession that is authorized by law to perform some or all of the services directly linked to the process of enforcement of court decisions and, where applicable, other legal acts that fulfill conditions for direct enforcement (enforcement titles). In order to avoid confusion, we will in this paper use the term “bailiff” as bailiff in broad sense, i.e. encompassing both “public” enforcement agents and private bailiffs.

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2. The tasks of Bailiff in some legal systems

According to dominant features, especially with respect to allocation of the main responsibility for enforcement, there may be three types of enforcement systems:

- (i) Court system of enforcement
- (ii) System of enforcement by the executive branch of government;
- (iii) System of enforcement by private bailiffs.

Bailiffs have rather different overall tasks in different systems. In some of the systems, they are the main “players” when the need of compulsory enforcement arises. In other systems, they only play the role of assisting staff and limit their participation to rather technical tasks. Therefore, the strategic choice that is made in every system is whether to limit the role of bailiffs to full control of the enforcement process or to reduce it to implementation only of substantive decisions taken elsewhere (e.g. by enforcement judges, by parties or by some other agencies).

Further questions with respect to bailiffs’ role would relate to the main logic and rules of their operation. It is generally agreed that enforcement should be regulated by law, in a transparent and sufficiently precise fashion. However, there could be different views with respect to strictness of regulation. Actions of bailiffs in enforcement may be motivated by the strict principle of legality (there should either be a detailed legal provision, or court order), or bailiffs may be given discretionary powers to make certain choices in the process.

An interrelated question is about the main source of arguments in the strategic decision making - whether they are drawn from law or from economy, i.e. whether bailiffs should follow only legal or commercial logic, too - especially when liquidation of debtor’s assets is concerned (auction etc.).

Additional question about the role of bailiff is when a bailiff should be engaged. Namely, bailiffs may be engaged either immediately after completion of the process of adjudication, at the point when the court judgment becomes final and binding. However, it may be only at a later stage, i.e. after certain number of formal and/or substantive decisions is taken. For instance, after judgment there may be a process of certification that the judgment has become enforceable. It may be required that judge or other official issues a writ of execution. Conditions that may be required, and the time needed can vary considerably.

A lot of the preceding questions depend on the determination of the functions of bailiffs in the enforcement process. The principal issue here is linked with the scope of authorities given to bailiffs. One of the principal dilemmas here deals with the extent of initiative that bailiffs should have, especially with respect to determining means, scope and time of execution. This initiative is also reflected in the active or passive role that bailiffs could have in respect of collecting information relevant for enforcement process, in particular with respect to assets owned by the debtor. Bailiffs’ role could be limited to the role of executors only (i.e. persons that act upon information obtained by the court or the parties) or can extend to the role of active collectors of information. In the latter case, bailiffs should have sufficient authorities and

means, in particular in relation to various public registers (company register, registers of immovable property; registers of motor vehicles; IP registers; registers of addresses and bank accounts etc.). They may also have public authorities with respect to private persons (companies and/or individuals). In the search for information, some of their authorities might need to be balanced with other values and human rights - e.g. their right to have insight into bank accounts has to be compatible with the right to privacy and the protection of sensitive information. Bailiffs and/or other agents (judges, public officials) may also have right to request directly from the debtor/defendant a solemn declaration of the assets owned.

3. Regarding the provision of training qualifications for a bailiff

a) What are the initial conditions for entry into profession?

The type and level of education required for prospective bailiffs may be poles apart. Some systems require only a low-level grade of whatever type (e.g. any secondary education). In other systems, a university degree is needed, but not necessary of a specific type. Those systems that pay even more attention to the education of bailiffs require from candidates to have a law degree, and sometimes in addition to such degree or degrees, specialized professional education has to be completed, combined with a certain period of training. It is also possible to impose obligation of obtaining certain grades and/or pass additional professional exams prior to obtaining a license to discharge bailiff's duties.

b) Is there an obligation to engage in continuing education and training?

Once after having obtained the license to carry out enforcement, bailiffs may consider their education and training finished. However, this is often not the case. Laws may change, and with them practices and routines in the enforcement process. New environment may need new knowledge.

Therefore, it is always desirable to **continue education and training** even after initiation of professional activities. However, there may be different types and programmes of continuing education; their intensity, complexity and sophistication could vary. It could also be distinguished between **obligatory** courses and those of **voluntary** nature, as well as between those programs that end with evaluation and grading of success and those that only require (active) participation.

c) Who should be responsible for the programmes of education and training?

The organization of educational programmes and professional training can be arranged under auspices of different bodies and agencies. That can be courts, state ministries, professional organizations ("bars"), educational institutions (e.g. law schools), special professional schools etc. In any case, good education and training may be vital for the overall efficiency and effectiveness of the enforcement process.

In a narrow perspective, it should be pointed out that every type of legal process in the countries in transition can suffer from the lack of efficiency – not only enforcement, but also other stages of the legal process (litigation, administrative proceedings, criminal procedure etc.). Typical

symptoms of such inefficiency are overload of cases and excessive length of any type of legal action. This creates an atmosphere that also has an important negative impact on enforcement.

Other problems, could be applied to Vietnam's legal system encountered deal with the lack of legal certainty, transparency and foresee ability of the legal process. The collateral facts here are the lack of experience and reliability in the appropriate institutions, as well as outside interference and/or corruption. If all these factors lead to a poor quality of judicial decisions, a desire to ensure swift implementation of such decisions may be reduced.

Finally, it should be noted that a significant change happens only if it is both needed and desired. However, since any change unavoidably also creates distress, it is not always desired by all or even by majority. The change from an ineffective to an effective system of enforcement also has its winners and losers. Therefore, changes often encounter strong resistance, especially from those who would lose their privileges - those who were previously regarded as immune from the state actions. Only a sincere, persistent and strong wish to change the situation can achieve real progress - and such wish may not be always present in any given country in transition.

II. THE BAILIFF'S INSTITUTION IN VIETNAMESE LAW

1. History of development of Vietnamese bailiff 's institution

The word "Bailiff" in Vietnam has its roots in Sino-Vietnamese origin and possesses high historical value (Tuyen, 2017), is a longstanding legal institution that has been existed since 1950 in Northern Vietnam and since 1975 in the Southern Vietnam (Ha B. T., 2016). According to the definition at that time, Bailiff was individual who met the legal requirements, appointed, managed by the Minister of Justice, practiced their profession in accordance with legal regulations and got remuneration from clients based on the prescribed rates (Cuong, 2014). Vietnam was referred to by different names depending on the region of Vietnam (Enforcement, 2009), however, all of names had a common origin from the French word "Huissier" (Chinh, 2003).

Although the institution of bailiff has been established in Vietnam for over 100 years, the legal regime on bailiffs has been restored in Vietnam since 2009, specifically the Government began to organize experiments in Ho Chi Minh City according to Decree 61/2009/ND-CP dated July 24, 2009 regulating the organization and operation of pilot bailiffs in Ho Chi Minh City (hereinafter referred to as "Decree 61/2009/ND-CP"). Afterwards, the Vietnamese Government expanded the pilot program to include the 13 provinces and centrally-governed cities as stipulated in Decree 135/2013/ ND-CP dated 18/10/2013 on the amendment and supplementation of the title and some provisions of Decree 61/2009 and finally expand nationwide according to Decree 08/2020/ND-CP on the organization and operation of bailiffs (hereinafter referred to as "Decree 08/2020/ND-CP"). It may be said that the enhancement of legal regulations and nationwide implementation demonstrate the significance of bailiffs in the process of judicial reform. The existence of a bailiff presents two main purposes: Firstly, to alleviate the workload of court and judgment enforcement agencies in resolving cases via civil proceedings and judgment enforcement procedures; Secondly, to encourage individual to be

proactive in documenting legal occurrences through the request to bailiffs for establishing bailiff's report that serve as evidence (Suong & Tung, 2020).

2. Definition of bailiff in Vietnamese Law

According to the Vietnamese Dictionary, "a bailiff is a court officer who is responsible for executing court orders" (Xo, 2009). According to current law provisions in Clause 1, Article 2 of Decree 08/2020, the bailiff means "a person who is qualified and appointed by the State to serve proceeding documents, make bailiff certificates, verify conditions for execution of civil judgments, and organize the execution of civil judgments in accordance with Decree and relevant laws".

As the current legal definition, Bailiff has the following characteristics (Thoai, 2015):

Firstly, the activities of bailiff are characterized as "half private, half state-owned". Bailiff refers to those who meet the standards set by the government, but they are not officials, civil servants, or public employees. They are appointed by the State and given authority to carry out the tasks of the authorities (the People's Courts or Department of Civil Judgement Enforcement) and are subject to supervision and inspection by competent state authorities (the People's Procuracy, Department of Justice).

Secondly, as bailiff is not employed as a state civil servant, he/she does not get a salary from the state budget, however, bailiff receives remuneration at a certain rate prescribed by the State from financial resources paid by customers (Ha L. T., 2015).

Thirdly, bailiff not only operates for profit purposes, but also serves an important function in providing additional evidence for the authorities and individuals involved in litigation, in order to enhance the quality of adjudication by the judicial bodies.

3. Some analysis on the tasks of Bailiff in Vietnamese law

According to Article 3 of Decree 08/2020/ND-CP, Bailiffs are allowed to carry out 04 activities as follows:

- (i) The service involves the delivery of legal documents and records from the People's Court, People's Procuracy, Civil Judgment Enforcement Agency, as well as papers and data connected to mutual legal assistance in the civil sector from foreign competent authorities.

In the current procedural activities of the court, serving documents is considered one of the first tasks that the court must do during the trial process. Therefore, if the service of documents is carried out quickly, promptly and to the correct recipient, it will not only help the court process the trial on time according to the provisions of procedural law but also help the litigant having time to prepare for the Court's trial process. Thanks to the existence of bailiffs, the service of documents by the bailiff helps relieve some of the burden of the current works that the court and civil judgment enforcement agencies are carrying out.

- (ii) To make bailiff certificates upon request of individuals, agencies or organizations.

A bailiff certificate is an official document that records factual events and actions that have been personally seen by the Bailiff. It is created at the request of an individual, authority, or organization. Bailiffs are appointed to document genuine occurrences and actions at the request of authorities, organizations, and individuals throughout the country (Clause 3 Article 2 Decree 08/2020/ND-CP). Actually, the bailiff is the only entity with the authority to create a bailiff certificate, which means that they must bear full responsibility for the certificate created. Not all cases where bailiffs have the right to create a certificate at the request of the customer. However, the law imposes restrictions on the content and extent of such bailiff certificates, as stipulated in Article 37 of Decree 08/2020/ND-CP.

(iii) Verification of the conditions for enforcement of the judgment.

The verification of conditions for judgment execution is the bailiff's procedure of confirming the assets and income of the judgment debtor to ensure that they satisfy their property duties during the execution of the judgment.

(iv) Implementing the Judgments and Decisions of the People's Court.

In practical, the activity to implement the judgment of the Court has many shortcomings. This reduces the bailiff's ability to operate in accordance with legal regulations. A typical example case is when the bailiff's office in Binh Thanh District carried out the implementation of Judgment No. 13/2012/DS-ST, issued on April 6, 2012 by the People's Court of Binh Thanh District on the dispute over asset deposit contract. As part of the judgment enforcement procedure, the bailiff's office had issued a Decision to apply measures to ensure judgment enforcement. This measure blocked company A's bank account at Nam Viet Joint Stock Commercial Bank - Ho Chi Minh City and deducting money from company A. Nevertheless, the Bank declined to adhere to the request based on the argument that the Bailiff did not qualify as a competent governmental entity as per the legal framework. Consequently, the Bank could not be obligated to block customers' accounts and transfer money unless the consumer provides consent.

4. Regarding the criteria and procedures for appointment of the Bailiff

a) Based on the suggestion of the Ministry of Justice, the Minister of Justice will appoint successors for individuals who meet all the requirements specified in Article 6 of Decree 08/2020/ND-CP as follows:

- Being a Vietnamese citizen aged 65 years or under, permanently residing in Vietnam, strictly abiding by the Constitution and law, and possessing good ethical qualities.
- Possessing a university or postgraduate degree in law.
- Having at least 3 years' working experience in the legal affairs sector in an agency or organization after having obtained a university or postgraduate degree in law.
- Having graduated from a bailiff training course or having the equivalence of his/her overseas bailiff training diploma recognized or having completed a bailiff further training course as specified in Article 7 of the Decree 08/2020/ND-CP.
- Having passed the exam of bailiff practice probation results.

The Ministry of Justice issued Circular 08/2022/TT-BTP on November 1, 2022, which introduced the Code of Ethics and conduct of Vietnamese Bailiff. Promulgation is crucial for establishing ethical standards in the Bailiff's practice procedure. Circular 08/2022 not only includes overall rules but also specifies the aspects of the relationship between the Bailiff and other entities, including clients, state agencies, and the Bailiff's Office.

In order to become a bailiff, the individual selected for the role must adhere to rigorous criteria and requirements as mandated by legislation. Generally, lot of countries establish regulations for Bailiffs that fall into three main categories: (i) General standards, which include requirements related to citizenship, age, background, and career suitability; (ii) professional standards, which encompass professional qualifications, training, degrees, and certificates; and (iii) ethical standards and criminal record, which entail having no history of violating the law or moral principles. The purpose of these criteria is to guarantee that the actions of bailiffs align with the objectives of facilitating court proceedings and conforming to legal requirements (Tuan, Model of organizing bailiff activity in the world, 2018).

In contrast to Vietnamese law, the French Republic has a well-established tradition of developing the bailiff profession. In order to become a bailiff in France, individuals are required to undergo a 2-year training period. This training involves spending half of the time at the Bailiff's Office and the other half interning at various institutions such as notary offices, law firms, auctioneers, court of appeal lawyers, state administrative agencies, legal departments, and tax departments of enterprises. These internships may be located either domestically or internationally, as long as they are associated with a legal or judicial practice organization that is subject to state management. An individual is limited to a maximum of four attempts to take the professional examination. If they fail the test for the fourth time, they will be unable to continue their application (Tuan, Model of organizing bailiff activity in the world, 2018).

b) Regarding the appointment procedure, the appointment is carried out according to the procedure specified in Clause 1, Article 10 of Decree 08/2020/ND-CP: Individuals who want to be appointed as an bailiff must submit their application dossier to the Department of Justice. The dossier comprises:

- (i) A request for bailiff appointment based on a form which is provided by the Minister of Justice;
- (ii) A criminal record certificate; A certified copy of the Bailiff's diploma of university or higher degree in law; Papers evidencing the requester's working experience in the legal affairs sector, including the recruitment decision; A certified copy of the certificate of bailiff practice probation results.

5. Costs associated with the execution of a bailiff's tasks

The costs of performing the Bailiff's work are recorded in the contract between the Bailiff's office and the requester based on Article 61 of Decree 08/2020/ND-CP:

- The cost of serving paperwork, documents, and files by the People's Court, the People's Procuracy, and the Civil Judgment Enforcement Agency is agreed upon in the contract with the Bailiff's Office.

- The expenses for serving paperwork, documents, and related materials for legal assistance in the field of civil law by foreign authorities are regulated by the Minister of Justice.
- The costs of establishing and verifying the conditions for the execution of a judgment are agreed upon between the requesting party and the Bailiff's Office based on jobs to be performed or working hours.
- For the organization of judgment enforcement, the Bailiff's Office is entitled to collect fees according to the civil judgment enforcement fees prescribed by the law on fees and charges. In complicated cases, the Bailiff's Office and the person requesting execution of the judgment can agree on the cost of performing the work.

The Bailiff's Office is responsible for listing the costs of performing the work and collecting the correct costs agreed with the requester.

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