VII. Povzetki Abstracts

UDK 347.739(497.4)
Pravni letopis 2016, str. 9–17

GREGOR VERBAJS

Javna dražba v izvršbi

Prispevek obravnava javno dražbo v izvršbi, pri čemer osrednjo pozornost nameni skupni prodaji nepremičnin in prodaji nepremičnine kot celote.

Nepremičnine se v izvršilnem postopku prodajajo po določbah Zakona o izvršbi in zavarovanju (ZIZ) predvsem na javni dražbi. To pomeni javno prodajo stvari najboljšemu ponudniku, pri čemer se načini prodaje med seboj razlikujejo, saj na primer Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP) predpisuje več možnih načinov prodaje (z zvišanjem ali znižanjem izklicne cene itd.) kot ZIZ. Zakonodajalec je z novelo ZIZ-J sprejel spremembe, s katerimi naj bi se dosegla boljša realizacija prodanih nepremičnin. Kljub zakonodajalčevemu dobremu namenu pa način prodaje na javni dražbi v izvršbi ni dovolj izkoriščen oziroma je javno dražbo mogoče razpisati tudi na način, ki bi bil za potencialne kupce privlačnejši in za upnike uspešnejši.

V praksi je problem zlasti v tako imenovani skupni (paketni) prodaji večjega števila nepremičnin in v prodaji nepremičnine kot celote. Sodišča načeloma razpisujejo ločeno prodajo posamičnih nepremičnin (v primerih, ko gre za zaokroženo celoto nepremičnin) in ločeno prodajo zgolj solastniškega deleža dolžnika. Drugače kot v izvršilnem postopku je v stečajnih postopkih skupna (paketna) prodaja nepremičnin in prodaja nepremičnine kot celote redna praksa. Prispevek ponudi praktičen način skupne prodaje nepremičnin in prodajo nepremičnine kot celote v izvršilnem postopku.

Ključne besede: javna dražba, izvršilni postopek, izvršba na nepremičnine, skupna prodaja nepremičnin, prodaja nepremičnine kot celote

UDC 347.739(497.4)
Pravni letopis 2016, pp. 9–17

GREGOR VERBAJS

Public Auction in Execution Procedure

The contribution deals with public auction in the execution procedure, wherein it concentrates on the joint sale of real estate and on the sale of a real estate as a whole.

Real estate is sold in the execution proceedings in accordance with the provisions set out in the Claim Enforcement and Security Act (ZIZ), primarily in a public auction. This means a public sale to the highest bidder, wherein the selling methods differ, as per example the Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act sets out more possible ways of selling real estate (by increasing or decreasing the asking price etc.) than ZIZ. The legislator adopted amendments with the amended ZIZ-J, designed to achieve a better realization of the sale of real estate. Despite the good intentions of the legislator, the option of sale by public auction in the execution proceedings is not sufficiently exploited and the public auction can be called in a way that would be more attractive to potential buyers and more successful for the creditors. In practice, there is a problem especially with the so called joint (package) sale of a large number of real estate and the sale of real estate as a whole. In principle, the courts schedule a separate sale of individual real estate (in the cases of a complete network of real estate) and the separate sale of merely a co-ownership share of the debtor. Unlike in the execution proceedings, in the bankruptcy proceedings, the joint (package) sale of real estate as a whole is the norm.

This contribution offers a practical way of joint sales of real estate and the sale of the real estate as a whole in execution proceedings.

Keywords: public auction, the execution procedure, execution on real estate, joint sale of real estate, sale of real estate as a whole

UDK 347.739(497.4)
Pravni letopis 2016, str. 19–31

NINA PLAVŠAK

Prodaja premoženja v stečajnem postopku

V stečajnem postopku se dosežejo najboljši pogoji za plačilo terjatev tako, da se izbere najoptimalnejši način prodaje ali kombinacija načinov prodaje. Najoptimalnejši način prodaje je tisti, za katerega je ob upoštevanju značilnosti premoženja, ki je predmet prodaje, stanja na trgu in poslovno običajnih načinov prodaje premoženja enake vrste, najverjetneje, da bo z njegovo uporabo mogoče doseči najvišjo ceno. Izbira poslovno običajnega načina je pomembna zato, ker neobičajni načini zlasti pri profesionalnih investitorjih (potencialnih kupcih) vzbujajo nezaupanje in jih odvračajo od udeležbe pri postopkih prodaje.

V drugem delu prispevka avtorica razloži, kako je mogoče optimizirati prodajo kontrolnega paketa delnic (oziroma poslovnega deleža) v stečajnem postopku z ustrezno kombinacijo načina prodaje kontrolnega paketa delnic, ki se navadno uporablja v poslovni praksi pri prostovoljni (zunajsodni) prodaji, in kogentnih pravil ZFPPIPP o prodaji premoženja stečajnega dolžnika.

Ključne besede: stečajni postopek, prodaja v stečajnem postopku

UDC 347.739(497.4)
Pravni letopis 2016, pp. 19–31

NINA PLAVŠAK

Sales of Assets in Bankruptcy Proceedings

To achieve the best conditions for the settlement of creditors' claims in bankruptcy proceedings the most optimal method of asset sale shall be chosen. The most optimal method of sale is one which, having regard to the characteristics of the property that is the subject of the sale, the situation on the market and the method of sale that is commonly used in the professional practice for a sale of the property of the same kind, is most likely to achieve the highest price. Selecting the method that is commonly used in the professional practice is an important choice because the unconventional methods, in particular in the case of professional investors (potential buyers) raise suspicion and discourage participation in the proceedings of the sale.

In the second part of the contribution the author explains how it is possible to optimize the sale of a controlling package of shares (shareholding) with the appropriate combination of method, which is usually used in business practice in a voluntary (non-judicial) sales, and compulsory rules governing the sale of the assets of the bankrupt in the Insolvency act.

Keywords: bankruptcy proceedings, sale of assets in bankruptcy proceedings

UDK 347.453:347.282(497.4)
Pravni letopis 2016, str. 35–44

BOJAN BREŽAN

Pogodba o finančnem leasingu (nepremičnin) in predkupna pravica

Pogodba o finančnem leasingu tipično vsebuje določbe, na podlagi katerih ob koncu leasinškega obdobja pride do prenosa lastninske pravice na predmetu leasinga na leasingojemalca. Ker ima v tem delu elemente prodajne pogodbe, se zastavlja vprašanje, ali pridejo v poštev pravila o predkupni pravici, če ta obstaja na predmetu leasinga. Problem je pereč zlasti na področju nepremičninskega prava, kjer so razširjene zakonite predkupne pravice. V prispevku je zavzeto stališče, da pravila predkupne pravice za finančni leasing niso uporabljiva. Stališče je utemeljeno na interpretaciji namena instituta predkupne pravice in na različnosti med pogodbo o finančnem leasingu in prodajno pogodbo.

Ključne besede: leasing, finančni leasing, nepremičnine, leasing nepremičnin, predkupna pravica, zakonita predkupna pravica, prenos lastninske pravice

UDC 347.453:347.282(497.4)
Pravni letopis 2016, pp. 35–44

BOJAN BREŽAN

Financial Lease Contract (regarding Real Property) and the Pre-emption Right

A financial lease contract typically contains provisions, providing for the transfer of ownership over the leased asset from the lessor to the lessee upon the expiration of the lease term. Since it can be said that in this part it contains elements of a sale and purchase contract, it raises the question of whether it is subject to the rules on pre-emption rights, should such rights exist over the leased asset. The issue is particularly topical in the area of real estate law, where statutory pre-emption rights are abundant. The article postulates that pre-emption rights should not apply to financial lease contracts. The position is grounded in the interpretation of the purpose of the institute of pre-emption right and the difference between a financial lease contract and a sale and purchase contract.

Keywords: leasing, financial lease, real estate, lease of real property, pre-emption right, statutory pre-emption right, transfer of ownership

UDK 347.453:340.142(497.4)
Pravni letopis 2016, str. 45–64

ŽIGA RAZDRIH

Finančni leasing v novejši praksi Vrhovnega sodišča RS

Avtor v prispevku obravnava posamezna vprašanja v zvezi s finančnim leasingom, pri čemer posebno pozornost nameni predstavitvi aktualne prakse Vrhovnega sodišča RS s tega področja in njenemu kritičnemu ovrednotenju. Osrednja raziskovalna pozornost je namenjena vprašanju, kakšne so posledice razveze leasinške pogodbe, s posebnim poudarkom na problematiki odškodnine. Avtor razpravlja tudi o vprašanjih nedobave predmeta leasinga, aktivne legitimacije za uveljavljanje plačila zavarovalnine na podlagi pogodbe o premoženjskem zavarovanju predmeta leasinga in poroštva za obveznosti leasingojemalca, pri čemer zavzame argumentirano stališče do nekaterih spornih vprašanj.

Ključne besede: finančni leasing, sodna praksa, razveza pogodbe, odškodnina, nedobava predmeta leasinga, aktivna legitimacija za uveljavljanje plačila zavarovalnine, poroštvo

UDC 347.453:340.142(497.4)
Pravni letopis 2016, pp. 45–64

ŽIGA RAZDRIH

Financial leasing in the Recent Practice of the Supreme Court of Republic of Slovenia

The author discusses some particular questions regarding financial leasing and highlights current jurisprudence of the Supreme Court of Republic of Slovenia in this field and its critical evaluation. The research focuses mainly on the dissolution of a leasing contract with special attention given to the issue of damages. Furthermore, the author deals with undelivery of the object of the lease, legitimacy of insurance claim regarding the object of the lease and guaranty of lease payments, pointing out his view about some of the major open problems.

Keywords: financial leasing – case law – dissolution of a leasing contract – damages – undelivery of the object of the lease – legitimacy of insurance claim regarding the object of the lease – guaranty of lease payments

UDK 347.426.4:340.142(497.4)
Pravni letopis 2016, str. 67–81

ANA BOŽIČ PENKO

Razmislek in sodna praksa Vrhovnega sodišča o nekaterih aktualnih vprašanjih odškodninskega prava v zvezi z nepremoženjsko škodo

Obligacijsko pravo je živo pravo. Še posebej to velja za odškodninsko pravo. To varuje premoženjske in nepremoženjske vrednote. Nepremoženjske vrednote in načini njihove kršitve se s časom in družbenimi razmerami spreminjajo. Pravno varstvo mora tem spremembam slediti in se jim prilagajati. Večinoma je to mogoče brez sprememb obligacijskih predpisov, le z njihovo razlago. Pomembno vlogo pri tem ima sodna praksa, ki ima prav tako zasluge za razvoj pojma nepremoženjske škode v zadnjem času.

Prispevek se ukvarja z aktualnimi vprašanji nepremoženjske škode v novejši praksi Vrhovnega sodišča, predvsem ali Obligacijski zakonik pravno priznane oblike nepremoženjskih škod in upravičence do odškodnine določa taksativno ali primeroma, ali oškodovancu pripada odškodnina za nepremoženjsko škodo zaradi kršitve pogodbe. V zvezi z vprašanjem podedljivosti odškodnine za nepremoženjsko škodo opozori tudi na odločbo Ustavnega sodišča U-I-88/15-9, Up-684/12-32 z dne 15. 10. 2015, s katero je bilo ugotovljena neustavnost v Obligacijski zakonik prevzete določbe 201. člena prej veljavnega Zakona o obligacijskih razmerjih, ki je podedljivost odškodnine pogojevala s pravnomočnostjo sodbe.

Ključne besede: nepremoženjska škoda, priznane oblike škode, numerus clausus, podedljivost odškodnine, nepremoženjska škoda zaradi kršitve pogodbe, sodna praksa

UDC 347.426.4:340.142(497.4)
Pravni letopis 2016, pp. 67–81

ANA BOŽIČ PENKO

The Reflection and the Case Law of the Supreme Court on Certain Topical Issues of Tort Law in Respect of Non-Pecuniary Damage

Law of obligations is a live law. This is particularly true for tort law. It protects pecuniary and non-pecuniary values. Non-pecuniary values and the ways of breaching them are changing over time and due to social circumstances. Legal protection should track these changes and adapt to them. This is possible to a large extent without changing the obligation regulations but merely by using the right interpretation. Judicial practice plays an important role in it. Thanks to judicial practice, the term non-pecuniary damage has recently been introduced.

The article deals with current issues of non-pecuniary damage in the recent practice of the Supreme Court and particularly with the question whether the Code of Obligations conceives legally recognized forms of non-pecuniary damage and the beneficiaries of compensation taxatively or personally, and with the question whether the victim is entitled to compensation for non-pecuniary damage due to the breach of contract. On the issue of heritability of compensation for non-pecuniary damage, it underlines the decision of the Constitutional Court UI-88 / 15-9, Up-684 / 12-32 dated 15. 10. 2015, which proved that provision of Article 201 of the formerly valid Law of Obligations was unconstitutional because it conditioned the heritability of compensation with the finality of judgement.

Keywords: non-pecuniary damage, recognized forms of damage, numerus clausus, inheritability of damages, non-pecuniary damages for breach of contract, case law

UDK 347.426.6:338.486.23(497.4)
Pravni letopis 2016, str. 83–103

NINA ZUPAN

Odškodnina za izgubljeni dopust v domači sodni praksi: kaj se lahko naučimo?

Po odločitvi Sodišča EU v zadevi Leitner v. TUI, ki ima za države članice zavezujoč učinek, se tudi pri nas priznava nepremoženjska škoda zaradi izgube užitka na počitnicah. Vrhovno sodišče je odločilo, da za zagotovitev skladnosti slovenskega prava z Direktivo Sveta 90/314/EGS o paketnem potovanju, organiziranih počitnicah in izletih ni treba (dodatno) spreminjati zakonodaje, temveč je na podlagi pravu EU lojalne razlage mogoče izhajati iz že obstoječega zakonskega okvira. V praksi se lahko pojavijo številna vprašanja v zvezi s tovrstnimi odškodninskimi zahtevki, ki izvirajo iz pomanjkljive implementacije Direktive. Iz razlogov pravne varnosti bi zato vendarle kazalo razmisliti tudi o zakonodajnih spremembah. Poseben izziv pa bo tudi odmera višine odškodnine, glede česar se domača sodna praksa šele vzpostavlja.

Ključne besede: izguba užitka na počitnicah, odškodnina za nepremoženjsko škodo, Leitner v. TUI

UDC 347.426.6:338.486.23(497.4)
Pravni letopis 2016, pp. 83–103

NINA ZUPAN

Compensation for the Loss of Enjoyment of the Holiday: Lessons Learned

Following the ruling of the European Court of Justice in the »Leitner v. TUI« case, which is a binding legal source for the EU member states, compensation for non-material damage arising from the loss of enjoyment of the holiday is now also acklowledged in Slovenia. The Supreme Court of the Republic of Slovenia has held that further legislative changes are not necessary in order to assure the compatibility of national law with the Council Directive 90/314/EEC on package travel, package holidays and package tours, since it can be assured by the interpretation of the existing legislation in conformity with the EU law. However, numerous issues relating to compensation claims may arise due to deficient implementation of the Directive. Legislative changes could, therefore, be contemplated for reasons of legal certainty. Another particular challenge to be resolved in case-law is assessment of the amount of damages.

Keywords: the loss of enjoyment of the holiday, compensation for non-material damage, Leitner v. TUI

UDK 347.953(497.4)
Pravni letopis 2016, str. 107–119

VESNA BERGANT RAKOČEVIĆ

Medsebojna vezanost na odločbe sodišč v civilnih zadevah

Prispevek obravnava vprašanja medsebojne vezanosti na odločbe sodišč v civilnih zadevah. Čeprav se lahko zdi, da so enake odločitve v podobnih zadevah nujnost, ki pogojuje zaupanje v sistem sojenja oziroma je odsev težnje po predvidljivosti sodnih odločb, je to v bistvu izjema, osredotočena na predhodna vprašanja in na intervencijski učinek. Ta vezanost je praviloma pogojena s tem, da se je imela stranka, ki naj jo neka odločitev veže, v postopku sprejemanja te odločitve možnost izreči oziroma v tem postopku sodelovati. Pogoste so sicer situacije, ko je vezanost le navidezna, ker gre le za identična odločilna dejanska vprašanja, kjer pa je vpliv pravnomočne odločitve ali dejanske ugotovitve le tolikšen, kolikor je ta prepričljivo argumentirana, upoštevajoč morebitno različno trditveno in dokazno ponudbo. Nujnost enotne odločitve (vezanost) lahko terja materialnopravna narava razmerja, a jo je včasih procesno težko zagotoviti. Obravnavana so še nasprotujoča si ravnanja iste stranke v več različnih postopkih, kar se lahko prepreči prek instituta prepovedi zlorabe pravic.

Ključne besede: medsebojna vezanost, predhodno vprašanje, intervencijski učinek, identična dejanska vprašanja, nasprotujoča si ravnanja, zloraba pravic

UDC 347.953(497.4)
Pravni letopis 2016, pp. 107–119

VESNA BERGANT RAKOČEVIĆ

Interdependence of Judgments in Civil Proceedings

This article tackles the multifaceted question of interdependence of judgments in civil proceedings in view of the desired predictability of judicial decisions. Although it might seem that conformable decisions (or interdependent judgments) in similar civil matters are a necessity and help build the confidence in the judicial system they are in fact the exception, focused on preliminary questions and the so called intervention effect. This interdependence is generally subject to the condition that the party who is to be bound by a decision from another case had had the opportunity to participate in the process of adopting that decision. More frequent are situations where there is no formal linkage although the relevant facts and issues are identical; the influence of a final decision is then limited to the persuasiveness of its arguments, taking into account the possible difference of pleading and proof submitted by the parties. The requirement of conformable decisions (interdependent judgments) may be required by the nature of the substantive relationships in question, although it is sometimes difficult to ensure. Contradictory action of the same party in different cases can be prevented by the proper application of the general principle against the abuse of rights (venire contra factum proprium).

Key words: interdependence of judgments, conformable decisions, preliminary questions, intervention effect, contradictory action, identical facts, abuse of rights

UDK 343.153:347.951
Pravni letopis 2016, str. 121–140

ALEŠ GALIČ

Predhodno vprašanje in identična dejanska stanja v razmerju med kazenskim in pravdnim postopkom

Avtor obravnava dva položaja, ko se sodišče v pravdnem postopku srečuje s kazensko sodbo oziroma vprašanjem obstoja kaznivega dejanja. Za predhodno vprašanje gre v tistih redkih primerih, ko je obstoj civilnopravne obveznosti odvisen od obstoja kaznivega dejanja. Če kazenskega postopka še ni bilo je sporno, ali tedaj domneva nedolžnosti pravdnemu sodišču preprečuje, da bi samostojno odločalo o obstoju kaznivega dejanja. Glede predhodnih vprašanj je pravdno sodišče vezano na kazensko obsodilno in oprostilno sodbo, sporna pa je vezanost na kazensko zavrnilno sodbo. Pri identičnem dejanskem stanju, je pravdno sodišče, ki obravnava isti historični dogodek kot ga je pred tem kazensko sodišče, vezano le na kazensko obsodilno sodbo. Gre za edini primer, ko je v slovenskem pravu uveljavljena vezanost kot *collateral estoppel*. Vezanost na kazensko obsodilno sodbo je v nasprotju z načelom kontradiktornosti in s pravico stranke do zaslišanja v postopku, v kolikor gre v škodo oseb, ki v kazenskem postopku niso imele možnost sodelovati.

Ključne besede: predhodno vprašanje, kaznivo dejanje, civilno procesno pravo, presumpcija nedolžnosti

UDC 343.153:347.951
Pravni letopis 2016, pp. 121–140

ALEŠ GALIČ

A Criminal Offence as a Preliminary Question in Civil Proceedings and Civil and Criminal Cases Based on the Same Cause of Action

Concerning the interaction between criminal and civil law, there are extremely few cases in Slovenian legislation where the existence of a criminal offence is a pre-condition for the application of a certain consequence in the field of civil law. The only such a case in the field of Law of Obligations concerns the length of the prescription period for obligations in torts; if the event that caused the damage was a criminal offence, the prescription period may be longer (Article 353, Code of Obligations). In such a case, a civil court is bound by both the conviction and the acquittal of the wrongdoer in criminal procedure (thus, if the wrongdoer was acquitted, the civil court may not in a later action for damages use a longer prescription period based on a finding that the wrongful act was a criminal offence). If, however, a criminal procedure has not taken place yet and the civil court is faced with a preliminary question of whether a criminal offence was committed (because this is decisive for the determination of the length of the prescription period), the civil court may not, in principle, decide on this preliminary question by itself. According to the position of the Supreme Court, if a civil court would find, even if just as a preliminary question, that the wrongful act was a criminal offence although a criminal procedure has not been accomplished yet, it would violate the presumption of innocence (Article 27 of the Constitution).

Cases where a criminal offence represents a preliminary question in civil proceedings need to be distinguished from so called »identical historical event«; which are cases, where in order to establish civil liability the court needs to establish (partially) the same facts as were previously established in criminal proceedings. For such cases, the Civil Procedure Act provides for a certain effect of a collateral estoppel, produced by a conviction in a criminal case. In a case when the same cause of action resulted in previous conviction of the wrongdoer in criminal procedure it is easier for the aggrieved party to pursue its civil claim. The CPA (Article 14) determines that when the claim is based on the same state of facts that has already been adjudicated in criminal proceedings, the court shall be bound by the final condemnatory sentence issued in criminal proceedings, but only in respect of the existence of criminal offence and criminal liability of the offender. For instance, in such a claim, the defendant will be precluded from raising an objection that his act was not illegal or objection that there was no causal link or that no damage occurred. In fact, this is the only case of the so-called collateral estoppel in Slovenian civil procedure (there is no such effect between two civil procedures, just between a criminal and a subsequent civil procedure).

Keywords: preliminary question, criminal offence, civil procedure, presumption of innocence

UDK 340.134:373.3(497.4)
Pravni letopis 2016, str. 143–150

ALBIN IGLIČAR

Sistemska in nomotehnična vprašanja splošnih pravnih aktov javnih zavodov

Splošne pravne akte sprejemajo na organiziran način tudi samoupravne skupnosti in javni zavodi. Zgodovinsko gledano je ta funkcija najprej pripadala lokalnim skupnostim, cerkvenim organizacijam in znanstvenim korporacijam (statuti mest, splošni akti kanonskega prava, statuti univerz). V moderni družbi se takim aktom pridružujejo statuti gospodarskih družb, kolektivne pogodbe z veliko vlogo sindikatov in splošni akti javnih zavodov. Po tej poti se uveljavlja pravni pluralizem, ki zmanjšuje monopol države pri sprejemanju splošnih pravnih norm. Organi samoupravnih organizacij in skupnosti tako dopolnjujejo vlogo pravnih institucij.

Ključne besede: civilna družba, samoupravno pravo, splošni pravni akt, javni zavod, osnovna šola

UDC 340.134:373.3(497.4)
Pravni letopis 2016, pp. 143–150

ALBIN IGLIČAR

Systemic and Nomotechnical Questions of General Legal Acts of Public Institutions

Adoption of general legal acts is going on in an organized way also in some self-managing communities and public institutions. Already by tradition such a function belongs to local self-government and to religious organizations and scientific corporations (statutes of towns and/or municipalities, general acts of canon law, statutes of universities), and in modern society to various companies and syndicate associations (statutes of joint-stock companies, collective agreements) and public institutions. In this way pluralism of the legal system is being enforced and monopoly of the state in setting general legal norms is diminishing. Organs of self-managing organizations and communities supplement the role of legal institutions.

Keywords: civil society, autonomy law, general legal act, public institution, elementary school

UDK 342.537(497.4)
Pravni letopis 2016, str. 151–159

ANDREJA KURENT

Nomen est omen

Tako poslovniki slovenske skupščine kot Poslovnik državnega zbora so do leta 2002 uporabljali ime hitri postopek, od tedaj naprej pa je nujni zakonodajni postopek. Zastavlja se vprašanje, ali je bilo preimenovanje upravičeno, saj ni jasno, ali se z nujnim zakonodajnim postopkom želi doseči čimprejšnja uveljavitev zakona ali pa je zakon nujno treba sprejeti. Pojem nujnosti namreč ni dovolj jasno opredeljen, niti z navezavo na druge pravne vire, ki ta pojem uporabljajo. Primerjalno so navedeni primeri pravnih aktov, ki bi jih bilo »nujno« treba sprejeti.

Ključne besede: Zakonodajni postopek, hitri postopek, nujni postopek, Državni zbor, Vlada

UDC 342.537(497.4)
Pravni letopis 2016, pp. 151–159

ANDREJA KURENT

Nomen est omen

In the past, both the Rules of Procedure of the former Slovenian Assembly and the Rules of Procedure of the National Assembly, used the term »fast-track procedure«. In 2002, this type of legislative procedure was renamed to »urgent«. The question that arises is whether such change of denomination is justified. In fact, it is not clear whether urgent legislative procedure means that a law is to enter into force as soon as possible, or that a law must urgently (i.e. necessarily) be adopted. The term »urgent« is not sufficiently clarified, not even by reference to other legal sources that use the same word. Examples of legal acts that need to be adopted »urgently« are provided.

Keywords: Legislative procedure, fast-track procedure, urgent procedure, National Assembly of Republic of Slovenia, Government of Republic of Slovenia

UDK 340.132.6(430:497.4)
Pravni letopis 2016, str. 163–188

MARKO RAVLJEN

Obid zakona

Strokovna literatura utemeljuje trditvi, da je obid zakona (*fraus legis*) »star približno toliko kot pravo samo« in da se nanj gleda kot na »darilo rimskega prava« posameznim področjem evropskega pravnega reda. V zgodnjem rimskem pravu je bila sicer uporaba zakonov podana z vidika strogega formalizma. Zakoni so se razlagali izključno dobesedno po črki zakona, vsakršna povezava s smislom in namenom je bila izključena. Tedaj so zaobideni posli dosegali svoj vrhunec, vendar se je že v poznorepublikanskem in cesarskem obdobju razumevanje rimske pravne znanosti spremenilo v smer interpretacije pomena zakonske norme. Splošna izenačitev kršitve zakona in obida zakona je uspela s Teodozijevo novelo leta 439. Cesar Justinijan je *lex non dubium* vključil v svoj *Codex* (C. 1, 14, 5). V srednjem veku pa so glosatorji v povezavi z rimskim *fraus legisom* razvili lastni nauk o obidu zakona, vendar pa jim pojma še ni uspelo sistematično zajeti. Razvoj v novem veku je bil vse do sprejema BGB zaznamovan s hitrimi spremembami in veliko raznolikosti mnenj. Preobrat pri umestitvi obida zakona v nemško pravno sistematiko je nastopil po tem, ko je ta problem leta 1840 obravnaval Savigny in ga je nato leta 1851 opredelil še Thöl. Na podlagi ugotovitev obeh raziskav, ki sta še danes pomembna podlaga za razpravo, se je v nadaljnjih tridesetih letih oblikovala obsežna literatura k oblikovanju pojma obid zakona. Od tega obdobja naprej se je s problematiko obida zakona začela ukvarjati tudi nemška sodna oblast, ki je pred tem ta pojem komajda uporabljala. Zakonska ureditev *fraus legis* v nemškem prostoru je bila končno urejena s sprejetjem BGB.

Danes obid zakona opredeljujemo kot ravnanje, ki sicer ni usmerjeno proti izrecnemu pomenu zakona, vendar krši njegov smisel. Tukaj pravni posel sicer ne krši iz zakona podane dobesedne razlage zakonske prepovedi, je pa tako ustrojen, da dosega uspeh, ki je v nasprotju z namenom prepovedne norme zakona. Obid zakona je posledično potrebno strogo ločevati od kršitve zakona (*agere contra legem*), čeprav obe ravnanji sprostita enake učinke. V primeru obida zakona tako ni kršen zakon v svojem besedilu, je pa zagotovo zaobidena njegova vsebina (*sententia*) in zakonodajalčeva volja (*voluntas*). In v tem se obid zakona razmejuje od navideznega posla, ki pa je oblika kršitve zakona. V primeru navideznega posla se izkazani pravni posel orientira samo na golo pravo, ne pa tudi na vsaj minimalni dejanski (ekonomski) uspeh. V nasprotju z navideznim poslom pa *fraus legis* ne temelji na »laži«, temveč gre za uresničeni (udejanjeni) pravni posel, vendar na način, ki nasprotuje duhu zakona.

Velja poudariti, da – drugače kot za navidezni posel – za zaobideni posel ne obstaja neko splošno zakonsko določilo. V nemškem civilnem pravu se zaobideni posel sicer v praksi navezuje na določbo o zakonski prepovedi in v nemalo primerih na zakonsko prepoved ravnanja proti dobrim običajem, medtem ko je pravilo *fraus legis* na slovenskem civilnopravnem področju podano zgolj kot teoretična misel, izhajajoča iz rimskega prava. Sicer pa je danes obid zakona v civilnopravni dogmatiki (tako v nemškem kot slovenskem prostoru) potisnjen v ozadje in v sodni praksi redko uporabljen; nasprotno pa igra obid zakona pomembno vlogo na drugih pravnih področjih, kot so delovno, dedno, upravno, kartelno in še zlasti davčno pravo. Nemško davčno pravo ima določbo o davčnem zaobidenju zapisano v par. 42 AO, medtem ko v našem davčnem sistemu to nalogo opravlja četrti odstavek 74. člena ZDavP-2.

Ključne besede: *fraus legis*, *agere in fraudem legis*, obid zakona, zloraba prava, zaobideni posel, navidezni posel, verižne delovne pogodbe, davčno zaobidenje, protizaobidni predpis

UDC 340.132.6(430:497.4)
Pravni letopis 2016, pp. 163–188

MARKO RAVLJEN

Abuse of Law in German and Slovenian Law

In law literature it is given support in arguments that abuse of law (avoidance of law; *fraus legis*) »is about the same age as the law itself« and that it is seen as a »gift of Roman law« for individual legal areas of the European legal system. In the early developing period of the Roman law the application of the law was followed by strict formalism. Laws were exclusively interpreted literally by the letter of the law, any connection with the spirit and purpose of the particular law was excluded. The existence of circumvented transaction achieved its climax in that early period, but already in the late Republican and then following Imperial period understanding of Roman legal science has changed in the way of growing importance of the interpretation of legal norms. General equation of violation of the law and circumvent the law (abuse of law) has succeeded through *Justinianus Codex Theodosianus* in the year 439. Byzantine emperor Justinian also included *lex non dubium* in his *Codex Justinianus* (C. 1.14.5). Later in the medieval period its own doctrine of abuse of law was developed. However, the systematic capture of the notion of abuse of law in that time failed. Development in the modern period was until the adoption of German BGB (Bürgerliches Gesetzbuch) marked through rapid changes and great diversity of opinions. The turnaround in placement of abuse of law in the German legal scheme was done by Savigny (1840) and later by Thöl (1851). Based on the findings of both studies (which even today largely serve as a basis for discussion) in the next thirty years a vast literature was written about development of legal phrase of abuse of law (*Gesetzesumgehung*). From this time onwards also the German judicial authorities started to address the problem of abuse of law, which had previously hardly used this term. Regularization of *fraus legis* in Germany was finally regulated by the adoption of BGB.

Today abuse of law is defined as behavior that is not directed against the strict sense of the law, but violates its meaning. Transaction therefore does not violate the law by virtue of the specified literal interpretation of the statutory prohibition, but is so constituted that achieves success, which is contrary to the purpose prohibitive norms of the law. Consequently Abuse of law must be strictly distinguished from the violation of the law (*agere contra legem*), although both practices released the same effects. In case of abuse of the law there is no violation of the law in its text, but it is certainly bypassed its content (*sententia*) and intention of the legislature (*voluntas*). And in that abuse of law differentiate itself from simulation (sham), which represents violation of law. In the case of simulation the transaction is oriented only

on the bare legal appearance and not on actual (economic) success. In contrast to the sham transaction is *fraus legis* is not based on »lies«, but it is embodies in reality implemented transaction, but in a manner which is contrary to the spirit of the law.

It should be stressed that - unlike for simulation – for *fraus legis* there is no general statutory provision. In practice of the German civil law abuse of law is relates to the provision of basic legal prohibition (§ 134 BGB) and also in many cases to the provision of legal prohibition of unmoral conduct (§ 138 BGB), while the *fraus legis* rule of the Slovenian civil law is given merely as theoretical idea, resulting from Roman law. Otherwise, today is abuse of law in civil dogmatic (both in German and Slovenian area) pushed into the background and in the case-law rarely used. But in contrary to that, abuse of law plays an important role in other legal areas such as labor law, inheritance law, administrative law, cartel law and especially tax law. German tax law has a provision on tax avoidance stated in § 42 AO, while in Slovenian tax system this task has been carried out by the fourth paragraph of Article 74 of the ZDavP-2.

Keywords: *fraus legis*, *agere in fraudem legis*, avoidance of law, abuse of law, transaction of avoidance, sham transaction, chain labor contracts, tax avoidance, anti-avoidance clause