VII. Povzetki Abstracts

UDK 347.51-057.177:347.952.8
Pravni letopis 2019, str. 9–32

ANDREJ FATUR, DINO ZADNIKAR

Pravni položaj upnikov pri uveljavljanju odškodninske odgovornosti organov vodenja ali nadzora

Prispevek primarno obravnava odškodninsko odgovornost članov organov vodenja ali nadzora, ki je v temelju zasnovana kot odgovornost v notranjem razmerju. Na splošno velja, da je po ZGD-1 upnik aktivno procesno legitimiran za uveljavljanje odškodninskega zahtevka družbe do članov organov vodenja ali nadzora, da bi tako prišel do poplačila terjatve, ki jo ima do družbe. Glavni pogoj pri tem je, da družba te terjatve upnika ne more poplačati. Če je nad družbo začet stečajni postopek, terjatve upnik ne more več uveljavljati v svojem imenu in za svoj račun, temveč le za račun družbe kot stečajnega dolžnika.

Glede na število vpletenih subjektov so zanimivi predvsem odškodninski zahtevki upnikov, ki izvirajo iz materialnih statusnih preoblikovanjih. ZGD-1 vzpostavlja sistem neposredne odškodninske odgovornosti članov organov vodenja ali nadzora prevzete/prenosne družbe pri združitvah/delitvah, pri čemer pa ni povsem jasno, ali sta režima odškodninske odgovornosti v razmerju do upnikov izenačena. Prav tako izboljšan je koncept varovanja upnikov odvisnih družb pri dejanskih in pogodbenih koncernih, ki tudi z vidika odškodninskih zahtevkov ponuja jasnejše odgovore, zlasti ker ZGD-1 ureja še odrek in pobot zahtevkov.

Posebna odškodninska odgovornost članov organov vodenja ali nadzora, ki nima značilnosti odgovornosti za nastanek finančnega položaja insolventnosti družbe, temveč ima naravo neposlovne odškodninske odgovornosti, ko družba postane insolventna, je urejena v ZFPPIPP. Člani organov poslovodstva oziroma nadzornega sveta so upnikom solidarno odgovorni za škodo, ki so jo ti imeli, ker v stečajnem postopku niso dosegli polnega plačila, če je bil nad družbo začet stečajni postopek in če jim je mogoče očitati kršitev obveznosti, ki izraža protipravnost ravnanja. Tudi v tem primeru je upnik upravičen odškodninski zahtevek uveljavljati v svojem imenu, toda le za račun družbe kot stečajnega dolžnika. Vloga upnika je torej v stečaju zreducirana na nosilca procesne legitimacije za sodno uveljavljanje zahtevka, saj iz tega naslova nima materialnopravnih upravičenj. S tem je dosledno spoštovano načelo enakega obravnavanja upnikov, pri čemer pa veljavna zakonodaja upnikom omogoča uveljavljanje odškodninske odgovornosti, ko višina škode še ni v celoti znana. Zakonsko je urejena tudi regresna pravica člana poslovodstva ali nadzornega sveta, da v stečajnem postopku zahteva povrnitev tistega, kar je preveč plačal.

Ključne besede: upnik, odškodninska odgovornost, član organa vodenja ali nadzora, skrbnost dobrega strokovnjaka, pravilo podjetniške presoje, obrnjeno dokazno breme, koncern, statusno preoblikovanje, insolventnost, omejitev odgovornosti

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ANDREJ FATUR, DINO ZADNIKAR

Legal Status of Creditors in the Enforcement of Liability of Members of Management or Supervisory Bodies

This article primarily deals with damage liability of members of management or supervisory bodies, which is fundamentally designed as an internal liability. As a general rule under ZGD-1, the creditor has the capacity to file the company's action for damages against members of management or supervisory bodies in order to collect the claim he has towards the company. The main condition linked to this option is the inability of the company to repay its obligations towards the creditor. If bankruptcy procedure is initiated against the company, the creditor can no longer claim compensation in his own name and for his own account, but only for the account of the company as the debtor in bankruptcy.

Given the number of stakeholders involved, action for damages by creditors in material reorganisation of companies are of particular interest. ZGD-1 establishes a system of direct liability for members of management or supervisory bodies of acquired/transferor companies in mergers and divisions, whereas it is not entirely clear if the damages liability regimes are balanced in relation to creditors. The concept of protection of creditors of controlled companies in actual or contractual group companies has also been improved, offering clearer answers in regard to action for damages, especially since ZGD-1 now additionally governs waiving and offsetting of claims.

Special damages liability of members of management or supervisory bodies, not having the characteristics of liability for the occurrence of the company's financial position of insolvency, but rather the nature of non-commercial liability for damages at the moment when the company becomes insolvent, is governed by ZFPPIPP. The members of management or supervisory boards are jointly and severally liable to creditors for damages incurred due to their failure to achieve full settlement in bankruptcy procedure if the bankruptcy procedure was initiated against the company and if they could be accused of a breach of an obligation that reflects unlawful conduct. In this case, the creditor would also be entitled to file action for damages in his own name, but only for the account of the company as the debtor in bankruptcy. The creditor's role is thus reduced only to the holder of capacity to bring proceedings for the judicial enforcement of the claim, since he does not hold any substantive rights in this regard. With this, the principle of equal treatment of creditors is consistently respected, while the current legislation also allows the creditors to seek damages when the amount of damages is not yet fully known. The right of recourse of a member of management or supervisory board is also governed by law in order for him to claim back what has been overpaid in the bankruptcy procedure.

Keywords: creditor, damage liability, member of management or supervisory body, diligence of a conscientious and fair manager, business judgement rule, reverse burden of proof, group companies, reorganisation of companies, insolvency, limitation of liability

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DEJAN SRŠE

Zavarovanje odgovornosti članov organov vodenja in nadzora družbe

Člani organov vodenja in nadzora družbe odgovarjajo družbi z vsem svojim premoženjem. Nastanek odškodninske odgovornosti člana organa vodenja ali nadzora je zanj riziko, ki ga je mogoče s sklenitvijo zavarovalne pogodbe proti plačilu premije prenesti na zavarovalnico.

Zavarovalno zaščito za te primere predstavlja zavarovanje odgovornosti članov organov vodenja in nadzora. Takšno zavarovanje lahko sklene družba za člane organov vodenja in nadzora (korporativno zavarovanje), lahko pa ga sklene tudi posamezen član organa vodenja ali nadzora (individualno zavarovanje). S sklenitvijo korporativnega zavarovanja družba ne zagotovi zaščite le članom organov vodenja in nadzora, temveč posredno tudi sebi, za primer nastanka škode, za katero so odgovorne osebe, ki jo vodijo ali nadzirajo.

Ključne besede: odškodninska odgovornost, člani organov vodenja in nadzora, zavarovanje odgovornosti, korporativno zavarovanje, individualno zavarovanje

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DEJAN SRŠE

Directors & Officers Liability Insurance

Directors and Officers of the company are liable for its negligent acts and omissions with all their personal assets. Personal liability of Directors and Officers represents a risk for them that can be transferred to the insurance company by entering into an insurance contract.

The insurance protection for these cases is a Directors & Officers Liability Insurance (D&O Insurance). Such insurance may be stipulated by the company for its members of the management and control bodies (corporate D&O insurance), but it can also be concluded by individual member of such body by himself (personal D&O insurance). By concluding corporate D&O insurance, the company does not provide protection only to its members of the management and supervisory bodies, but also provides protection indirectly to itself, in case if the damage to the company is caused by the person, who is responsible for company's management or control.

Keywords: liability for damages, members of management and supervisory bodies, D&O liability insurance, corporate D&O insurance, personal D&O insurance

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VESNA RIJAVEC

Odločanje o varstvu in vzgoji otrok

Zakon o nepravdnem postopku z novo ureditvijo postopkov v družinskih razmerjih sledi Družinskemu zakoniku. Prispevek upošteva le odločanje o varstvu in vzgoji otrok. Urejanje tega dela starševske skrbi je predstavljeno s poglavitnimi procesnimi instituti in temeljnimi načeli, upoštevaje posebne procesne rešitve, prilagojene posebni naravi postopka in varstvu otrokovih koristi. Postopki se praviloma začnejo na predlog upravičenega predlagatelja, vendar ima sodišče številna oficialna pooblastila, ne samo za vodenje postopka, temveč tudi pri ugotavljanju dejanskega stanja. V nadaljevanju je podrobneje opredeljen položaj otroka in CSD. Tek postopka je obravnavan tudi z analizo prilagojenih procesnih dejanj, kot so poravnava, odločbe in pravna sredstva.

Ključne besede: Družinski zakonik, ZNP-1, varstvo in vzgoja otrok, skupno starševstvo, otrok, udeleženec, načelo največje otrokove koristi, mediacija

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VESNA RIJAVEC

Decisions on the Custody and Upbringing of the Child

Act on non-contentious procedure, with the new procedural rules of family matters, completes the regulation of Family Code. The paper only deals with the proceedings on care and education of children. The regulation of this part of parental care is presented by the main procedural institutes and fundamental principles, taking into account specific procedural solutions tailored to the specific nature of the procedure and the protection of the child's benefits. As a rule, these proceedings are initiated on the motion of the eligible participant, but the court has a number of official powers, not only to conduct the procedure, but also to collect the facts in official manner. The position of the child and Centre of Social Work is further defined below. The course of the proceeding is also addressed by the analysis of personalized procedural actions such as settlement, decisions and remedies.

Keywords: Family Code, Act on Non-Contentious Civil Procedure, care and education of children, joint custody, participant, best child's interest

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Pravni letopis 2019, str. 79–91

MATEJ ČUJOVIČ

Odvzem in namestitev otroka v postopku odločanja o varstvu in vzgoji

Tako kot vsi ukrepi za varstvo otrokove koristi sta tudi odvzem otroka staršem in posledična namestitev drugam namenjena izključno varovanju otrokove koristi. Če je treba otrokovo koristi zaščititi, se mora država odzvati, in to ne glede na to, ali je med staršema tega otroka v teku kak postopek ali ne. V tujini (na primer na Hrvaškem) otroka iz matične družinske celice izločijo takoj, ko v razveznem postopku ugotovijo, da je postal sredstvo medsebojnega obračunavanja. Na tak način je otrok najbolje zaščiten, matična družina pa dolgoročno prav tako lahko le pridobi. Tudi DZ vzpostavlja številna varovala (načelo najmilejšega ukrepa, čas trajanja ukrepa itd.), da je matična družina razdružena le toliko časa, dokler ogroženost otroka, ki je bila razlog za izrek ukrepa, ne izzveni, zato se sodišča ne bi smela obotavljati, da otroka umaknejo iz ogrožajočega okolja, pa čeprav le za kratek čas.

Ključne besede: otrokova korist, varstvo otrokove koristi, ukrepi za varstvo otrokove koristi, vzgoja in varstvo, nujni odvzem otroka, razlogi za odvzem otroka iz matične družine

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MATEJ ČUJOVIČ

Removal and Placement of a Child in Custody Proceedings

Like all measures for the protection of the child's best interest, the removal of a child from his parents and his subsequent placement elsewhere are intended solely to safeguard the child's best interest. If the child's best interests are to be protected, the state must respond regardless of any ongoing official proceedings between the child's parents. In some countries (e.g. in Croatia), a child is removed from the parent family cell as soon as it is established in the divorce proceedings that the child has become a means of confrontation between the parents. In this way, the child is best protected, which can only benefit the parent family in the long term. The Family Code also establishes a number of safeguards (principle of the least restrictive measure, duration of the measure, etc.) to ensure that the parent family is separated only until the threat to the child that gave rise to the measure is resolved. Thus, the courts should not have too many reservations about removing a child from a threatening environment, even if only for a short period.

Keywords: child's best interest, protection of the child's best interest, measures for the protection of the child's best interest, custody, emergency removal of the child, reasons for the removal of the child from the parent family

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JERNEJ VEBERIČ

Zavarovanje motornih vozil danes in jutri – problematika zavarovanja avtonomnih vozil

Zavarovalništvo se vselej prilagaja razvoju tistih dejavnosti, ki jih ščiti. Pri zavarovanju vozil in njihove uporabe je ponudba zavarovalnih storitev pestra in zaokrožena. Pojavljajo pa se nove oblike imetništva in (so)uporabe vozil, vozila so vse bolj zmogljiva, varna, »pametna« in samostojna. Razvoj avtomobilske industrije, ki se nakazuje in napoveduje, bo povzročil napredek tudi v zavarovalniški dejavnosti. Prispevek ponuja kratek pregled sedanjega stanja na področju avtomobilskih zavarovanj in zavarovanj, povezanih z uporabo vozil, ter poskus pogleda v prihodnost: kakšen bo nadaljnji razvoj avtomobilske industrije in kako mu bo sledilo zavarovalništvo.

Ključne besede: avtomobilsko zavarovanje, avtonomno vozilo, odškodninska odgovornost, subrogacija, zavarovanje avtomobilske odgovornosti, zavarovanje proizvajalčeve odgovornosti, zavarovalnica

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JERNEJ VEBERIČ

Motor Vehicles Insurance Today and Tomorrow – Autonomous Vehicles Insurance Issues

The insurance business is always adapting itself to the development of the activities that it protects. For the insurance of vehicles and their use, the offer of insurance services is various and complete. However, new forms of car-sharing are emerging, vehicles are more and more powerful, safe, "smart" and autonomous. The indicated and announced development of car industry will result in the progress of the insurance activity. This contribution offers a short overview of the present situation of car insurance and insurance related to the use of vehicles and tries to look ahead: What will be further development like and how will the insurance business follow?

Keywords: autonomous vehicle, car insurance, insurance company, liability for damages, motor third party liability insurance, product liability insurance, subrogation

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ĐORĐE GRBOVIĆ

Zavarovanje dokazov pri uveljavljanju pravic intelektualne lastnine: praktične izkušnje

Zavarovanje dokazov po zakonodaji o intelektualni lastnini zagotavlja veliko učinkovitejše, vendar tudi veliko bolj invazivno varstvo od klasičnega zavarovanja dokazov po pravilih pravdnega postopka. Zanaša se namreč na pravo začasnih odredb, pri katerih je mogoče doseči prisilno izvršbo. To je mogoče tudi brez poprejšnjega zaslišanja nasprotne stranke, katere pravna sredstva niso suspenzivna. Institut je bil uzakonjen leta 2006, prvič pa uporabljen šele leta 2018. Prispevek opisuje to prvenstveno uporabo. Zaradi njegove silovitosti je institut treba razumeti v širšem kontekstu, ki ga sestavljajo idejni tok, ki zavrača absolutizacijo načela *nemo contra se edere tenetur* in primerjalnopravno pridobiva veljavo, direktiva o uveljavljanju pravic intelektualne lastnine ter britansko in francosko pravo, po katerih se je zgledoval evropski zakonodajalec, in nenazadnje naše ustavno pravo. Prispevek se dotika vseh naštetih tem. Njihovo razumevanje omogoča iskanje ustreznih ravnovesij med zagotavljanjem učinkovitega sodnega varstva imetniku pravice intelektualne lastnine in varstvom upravičenih interesov nasprotne stranke, kar je prikazano ob povzetku navedene prvenstvene uporabe.

Ključne besede: zavarovanje dokazov, direktiva o uveljavljanju pravic intelektualne lastnine, *Anton Piller order, saisie-contrefaçon*

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ĐORĐE GRBOVIĆ

Preserving Evidence in IP-Rights Enforcement Context: Slovenian Experience

Evidence preservation affords a much more effective, albeit a much more invasive protection under intellectual property statutes than conventional evidence preservation in general civil procedure law. It relies on the law of interim measures. These can be enforced *inaudita altera parte,* whose legal remedies are non-suspensive. The measure was enacted in 2006 but only first used in 2018. The article details its first application. Because of its forcefulness, it is imperative the measure be understood in its broader context: the rejection in contemporaneous comparative law of the absolute principle of *nemo contra se edere tenetur,* the Enforcement Directive as well as British and French law that inspired the European legislator, and our own constitutional law. The paper touches upon all of these topics. Understanding them allows for the search of the right equilibrium between providing effective protection to the IPR holder while at the same time protecting the counterparty's legitimate interests. An attempt at this calibrating exercise is shown in a case-study of the abovementioned pioneering application.

Keywords: preserving evidence, Enforcement Directive, *Anton Piller order, saisie-contrefaçon*

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GREGOR KLUN

Zavarovanje zahtevka za odvzem premoženjske koristi v (pred)kazenskem postopku – med kazenskim in civilnim pravom

Začasno zavarovanje v (pred)kazenskem postopku je stična točka kazenskega in civilnega (procesnega) prava, saj omogoča zavarovanje kazenske terjatve (odvzem premoženjske koristi) in civilne terjatve (premoženjskopravni zahtevek). Kljub različnemu izvoru sta obe terjatvi usmerjeni v vzpostavitev stanja pred kaznivim dejanjem, v njuni konkurenci pa ima prednost civilna terjatev, zato se ureditev zavarovanja v (pred)kazenskem postopku precej opira na pravila civilnega zavarovanja. Po drugi strani je kazensko zavarovanje mogoče le, če je zavarovana terjatev povezana s kaznivim dejanjem, zato vsaj za del njenega temelja veljajo pravila za odločanje o krivdi. Ta povezanost načenja številna problematična vprašanja, na katera zakonsko besedilo ne daje jasnih odgovorov (npr. smiselna uporaba zakonov, dokazno breme in dokazni standard, domneva nedolžnosti, pravica do izjave) in ki jih je zato treba reševati z ustrezno razlago. Cilj prispevka je opozoriti na nekatere sporne položaje, osvetliti njihovo ozadje in pomen ter ponuditi izhodišča za odločanje v konkretnih primerih.

Ključne besede: predkazenski postopek, začasno zavarovanje, začasna odredba, odvzem premoženjske koristi, premoženjskopravni zahtevek, domneva nedolžnosti, dokazno breme, dokazni standard, pravica do izjave

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GREGOR KLUN

Temporary Securing of the Claim for the Seizure of the Proceeds in Pre-Trial Criminal Procedure – Middle Ground Between Criminal and Civil Law

Temporary securing of claims in pre-trial criminal procedure is the middle ground between criminal and civil law, as it enables interim measures in relation to both criminal claims (seizure of the proceeds) and civil claims (indemnification). Despite their different origins, both said claims strive for civil restitution, thus civil law provisions concerning the conditions and procedure are applicable *mutatis mutandis*. On the other hand, such temporary securing is only possible if the claim is connected to the alleged crime, which in turn implies the use of certain safeguards regarding the decision-making in terms of suspect's guilt. From such interdisciplinarity arise many difficult issues (e. g. *mutatis mutandis* application, burden of proof, standard of proof, presumption of innocence, right to be heard) that can be resolved only by thoroughly interpreting the law. The goal of the article is in identifying such issues, explaining their context and importance, and finally providing the grounds for decision-making in such cases.

Keywords: pre-trial procedure, criminal procedure, temporary securing, interim measure, seizure of proceeds, claim for indemnification, presumption of innocence, burden of proof, standard of proof, right to be heard

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DAMJAN MOŽINA

Obresti in plodovi pri neupravičeni obogatitvi

Dolžnost vračila tistega, za kar je bil nekdo obogaten brez pravne podlage, poleg vračila samega predmeta obogatitve zajema tudi naravne in civilne plodove. Avtor v prispevku obravnava nekatera vprašanja, ki se v zvezi s tem zastavljajo v slovenskem pravu. Ugotavlja, da 193. člen OZ ureja le postroženo odgovornost nepoštenega prejemnika, in meni, da mora tudi pošteni prejemnik povrniti plodove in obresti, pa tudi (druge) koristi od uporabe. Izhodišče je, da je treba doseženo korist konkretno izkazati, okoliščine pa lahko utemeljujejo tudi abstraktni pristop ali (izpodbojno) domnevo o pridobitvi določene koristi. Povrne se le korist, ki sama po sebi izhaja iz predmeta obogatitve, ne pa tudi tista, ki je rezultat znanj, odločitev ali drugih okoliščin pridobitelja. Za vrnitvene zahtevke po prenehanju pogodb veljajo nekatere posebnosti, ki jih narekuje sinalagmatska narava pogodb. Poseben pristop zahtevajo tudi posojilne in druge pogodbe, pri katerih se odplačno prenaša raba stvari ali pravic. Prispevek se sklene z obravnavo obrestne mere obogatitvenih obresti.

Ključne besede: obligacijsko pravo, neupravičena obogatitev, plodovi in obresti, koristi od uporabe, posledice prenehanja pogodbe

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DAMJAN MOŽINA

Interest and Fruits in Restitution Claims

The obligation of restitution in case of unjustified enrichment does not only refer to the object of unjustified enrichment, but also to natural and civil fruits of that object. The paper deals with some of the questions which arise in Slovene law. Art. 183 of the Obligations Code only regulates the aggravated restitution obligation of a dishonest recipient. The author is of the opinion that an honest recipient is under the restitution duty, too. In principle, the use value is to be assessed concretely, but circumstances may call for an abstract approach or an assumption of benefit in a certain amount. Only the benefit independently arising from the object of unjustified enrichment is to be compensated, not the benefit which is the result of knowledge, decisions or other circumstances of the recipient. Some modifications arising from the reciprocity of claims apply to restitution claims after termination of contract (unwinding of contracts). Credit contracts and other contracts where the use of goods or rights is exchanged for money require some adaptations, too. The paper closes with some thoughts on restitution interest.

Keywords: obligations, unjustified enrichment, restitution, fruits and interest, use value, unwinding of contracts

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KARMEN LUTMAN

Povrnitev vlaganj v tujo nepremičnino

Pravila o povračilu stroškov, ki so bili opravljeni v tujo korist, so pri nas urejena razpršeno, v okviru prava neupravičene obogatitve, poslovodstva brez naročila, pogodbenega in stvarnega prava. Kljub izhodiščno podobnim položajem se pravila med seboj razlikujejo. Nekatera bolj varujejo interes upnika, da dobi povrnjenih čim več vloženih sredstev, druga pa se nagibajo k zaščiti dolžnika pred prisilnim financiranjem tujih ekonomskih odločitev. Prispevek se osredotoča na nekatera odprta vprašanja pri povračilu stroškov v širšem kontekstu in v okviru prava neupravičene obogatitve. Avtorica zagovarja stališče, da je treba pravila o stroških razlagati čim bolj enotno, ne glede na to, ali gre za kondikcijske ali verzijske zahtevke. Čeprav so pravila o stroških v SPZ v nekaterih primerih specialnejša od tistih v OZ, pa se ni mogoče strinjati, da molče derogirajo pravila o stroških prava neupravičene obogatitve. V prispevku so predstavljeni tudi pomisleki o uveljavljenem stališču glede 48. člena SPZ, po katerem upnik, ki je vlagal v tujo nepremičnino, ne more zahtevati povrnitve stroškov vlaganj, temveč le toliko, kolikor je zaradi vlaganj narasla tržna vrednost nepremičnine.

Ključne besede: neupravičena obogatitev, kondikcija, verzija, restitucija, povrnitev stroškov, povečanje vrednosti nepremičnine, obogatitveno načelo, stroškovna metoda, metoda tržnih primerjav, najemna pogodba

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KARMEN LUTMAN

Restitution of Improvements on Land of Another

Rules on reimbursement of expenditures incurred on someone else's property can be found in various branches of private law, such as the law of unjustified enrichment, negotiorum gestio, contract law and property law. Even though these rules to certain extent deal with very similar situations, they differ from one another in various aspects. While some of them are more favourable to the creditor in getting his investment back as much as possible, the others are more inclined toward protecting the debtor against forced financing of foreign economic decisions. The paper focuses on some open issues concerning reimbursement of costs in a broader context and under the law of unjustified enrichment. The author takes the view that the rules on reimbursement of costs should be interpreted as uniformly as possible, regardless if they stem from performance-based or non-performance-based enrichment claims. Even though the rules of the owner/possessor model are more specific than the rules on unjustified enrichment, the author does not share the view that the owner/possessor model silently derogates the restitutionary rules of the law of unjustified enrichment. The paper also presents concerns against the established position that a creditor investing in someone else's land cannot recover from its owner the value of the costs, but only the increase of market value of the property which occurred due to such improvements.

Keywords: unjustified enrichment, performance-based enrichment claim, non-performance-based enrichment claim, restitution, reimbursement of costs, increase in property value, enrichment principle, cost method, market comparison approach, lease contract

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KARMEN LUTMAN

Neupravičena obogatitev v večosebnih razmerjih

Prispevek obravnava položaje neupravičenega prenosa premoženja v večstranskih razmerjih, torej razmerjih, v katerih je – posredno ali neposredno – udeleženih več oseb. Če v takšnih razmerjih pride do prenosa premoženja, za katerega ni veljavnega pravnega temelja, se zastavi vprašanje, od koga je prikrajšani izpolnitelj upravičen zahtevati vrnitev izpolnjenega, torej ali obstaja obogatitveni zahtevek le med strankama, med katerima je prišlo do neposrednega prenosa premoženja, ali pa je zahtevek mogoč tudi zoper (posredno) obogateno tretjo osebo. Avtorica v prispevku predstavi temeljne dileme, ki se odpirajo pri določanju upnika in dolžnika pri obogatitvenih zahtevkih v večstranskih razmerjih, in predlaga pristop k njihovemu reševanju v tipičnih tristranskih razmerjih, kot so asignacija, cesija, pogodba v korist tretjega, poroštvo, prevzem dolga, pristop k dolgu in prevzem izpolnitve.

Ključne besede: neupravičena obogatitev, kondikcija, cesija, asignacija, pogodba v korist tretjega, poroštvo, pristop k dolgu, prevzem dolga, prevzem izpolnitve

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KARMEN LUTMAN

Unjustified Enrichment in Multi-Party Relationships

The paper deals with the issue of invalid transfers of assets in multi-party relationships – the relationships involving (directly or indirectly) more than two persons. In cases of such transfers the issue arises, who is the recipient that has been unjustly enriched at the claimant's expense. First, the party immediately enriched at the claimant's expense shall be identified and second, it shall be examined whether it is possible to sue party remotely enriched at his expense. The author gives an overview of dilemmas posed by searching for a right claimant and defendant in multi-party enrichment cases and proposes solutions for typical instances of such relationships, such as assignment of claim, transfer order, contract in favour of third party, suretyship, accession to debt, takeover of debt and takeover of performance.

Keywords: unjustified enrichment, performance-based enrichment claim, assignment of claim, transfer order, contract in favour of third party, suretyship, accession to debt, takeover of debt, takeover of performance

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ALBIN IGLIČAR

Pravno zavezujoča moč zakona v treh obdobjih novejše pravne zgodovine Slovenije

Za konec zakonodajnega postopka v širšem pomenu besede sta potrebni še razglasitev in objava zakona. S tem postane zakon obstoječ, eksistenten. Slovenska ustava določa, da morajo biti zakoni objavljeni, preden začnejo veljati. Začetek veljavnosti je postavljen na petnajsti dan po objavi, če sam zakon ne določa drugače. Tedaj zakon dobi obvezno pravno moč. Ta trenutek je ustavna ureditev v Sloveniji pred drugo svetovno vojno označila za začetek obvezne moči, po drugi svetovni vojni pa za začetek veljavnosti. Zakonodajna praksa v zadnjem obdobju je uvedla še oznako začetek uporabe.

Ključne besede: razglasitev, objava, veljavnost, začetek zavezujoče moči zakona, uporaba zakona

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ALBIN IGLIČAR

The Binding Power of Law Through Three Periods of Recent Slovenian Legal History

To finalise the legislation procedure, the law has to be promulgated and published to come into existence. According to the provisions provided by the Constitution of the Republic of Slovenia, laws have to be published before they enter into force. The beginning of validity is set on the fifteenth day after the publication, unless the law itself states differently. Only at that point the law gets legal force and effect. In the period before Second World War, this moment was described as the "beginning of compulsory power" (the law comes into force), after 1945 the term changed to "beginning of validity". Legislative practice in the recent period introduced yet another term – "the beginning of the application of the law".

Keywords: promulgation, publication, validity, coming into force, application of law

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GORDANA LALIĆ, KATJA BOŽIČ

15 let članstva v Evropski uniji – prehojene (nomotehnične) poti

Obveznost držav članic, da delujejo v skladu s pravom EU in uskladijo svoje predpise z njim, bodisi glede prenosa direktiv bodisi glede dolžnosti spoštovanja prava EU, ki se neposredno uporablja, je absolutna. Že nekaj let je ena glavnih prioritet EU krepitev boljše zakonodaje, ki naj izpolnjuje svoj namen, je preprosta za izvajanje, zagotavlja varnost in predvidljivost. Tretja, dopolnjena izdaja Nomotehničnih smernic vsebuje tudi nabor vsega tistega, kar se je zdelo pomembno in koristno tistim, ki smo aktivno vključeni v postopek priprave predpisov, s katerimi se prenaša ali izvaja pravni red EU. Tako so napotki še obsežnejši in podrobnejši, da bi bilo delo vsem, ki sodelujejo pri pripravi predpisov, dodatno olajšano. Načini prenosa in izvedbe pravnih aktov EU z nacionalnimi predpisi po petnajstih letih še vedno nenehno nihajo med teorijo in prakso, predvsem pa je spet in spet neizogibno razumevanje hkratnega sobivanja normativnih nacionalne ravni in ravni EU. Nomotehnika pri prenašanju in izvajanju pravnih aktov EU ostaja živ pripomoček, ki glede na stalno spreminjanje številnih spremenljivk spet in spet išče »presečne množice« ter utemeljuje »trmaste posebnosti« ob srečevanjih dveh pravnih redov – nacionalnega in pravnega reda EU.

Ključne besede: članstvo v EU, petnajst let izkušenj, pravni akti EU, novosti, sobivanje dveh pravnih redov, posebnosti in skupne točke

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GORDANA LALIĆ, KATJA BOŽIČ

15 Years of EU Membership – Traveled (Legislative Drafting) Paths

The obligation of all the member states of the EU to comply with the EU law with regard to transposition of directives or the obligation to comply with the EU law that is directly applicable is absolute. For several years now, one of the EU's priorities has been to strengthen better regulation; namely, regulation should fulfil its purpose, be simple to implement, ensure security and be predictable. The third, supplemented edition of the Rules on Legislative Drafting contains a set of all that seemed important and useful to those of us who are actively involved in the process of legislative drafting through which the *acquis* is either transposed or implemented. This set is even more extensive and detailed in order to make the job easier for everyone involved in legislative drafting. The manner of transposition and implementation of EU legal acts on the national level continues to fluctuate between theory and practice even after fifteen years. The set of rules on legislative drafting as regards transposition and implementation of the EU legislation remains a living device, which, in the face of constant change in many variables, again and again searches for "intersections" and justifies "stubborn peculiarities" at the encounter of two legal systems – national and EU.

Keywords: membership of the EU, fifteen years of experience, EU legal acts, novelties, coexistence of two legal orders, peculiarities and common points

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KATJA TRILLER VRTOVEC

Vloga zakonodajno-pravne službe v ustavnem sporu

Zakonodajno-pravna služba (ZPS) je služba Državnega zbora Republike Slovenije. Njena primarna naloga je sodelovati pri sprejemanju zakonov v zakonodajnem postopku, sekundarna naloga pa je pripravljati vsebinske podlage za odgovore Državnega zbora v ustavnih sporih. Mnenje ZPS o skladnosti predlogov zakonov z Ustavo običajno spodbudi predlagatelja, da v zakonodajnem postopku k predlogu zakona vloži amandmaje oziroma dopolni svojo obrazložitev. V ustavnem sporu, ki je po preizkusu izpolnjenosti procesnih predpostavk zrel za vsebinsko presojo, mnenje ZPS pojasni, katerim ciljem je pri sprejemanju izpodbijanega zakona sledil zakonodajalec. Prispevek obravnava posebni situaciji v ustavnem sporu, ko argumenti ZPS, politike in Ustavnega sodišča ostanejo neusklajeni: prvič, kadar se v ustavnem sporu izpodbija zakon in politični argumenti pri njegovem sprejetju niso bili usklajeni s strokovnimi argumenti ZPS, hkrati pa se na mnenje ZPS iz zakonodajnega postopka sklicujejo pobudniki in predlagatelji v ustavnem sporu; in drugič, kadar Ustavno sodišče kljub vzpostavitvi kontradiktornega postopka abstraktne ustavne presoje in pridobitvi mnenja ZPS o skladnosti izpodbijanega zakona z Ustavo ustavni spor zaključi s sklepom o zavrženju zaradi neizpolnjenosti procesnih predpostavk.

Ključne besede: Zakonodajno-pravna služba, Državni zbor, Ustavno sodišče, ustavni spor, ocena ustavnosti predpisov, pravica do izjave, načelo kontradiktornosti, nasprotni udeleženec

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KATJA TRILLER VRTOVEC

The Role of Legislative and Legal Service of the National Assembly in Disputes Challenging the Constitutionality of Laws before the Constitutional Court

The Legislative and Legal Services (thereafter named LLS) is a professional service of the National Assembly of the Republic of Slovenia. Its primary task is to participate in the legislative process with its opinions, whether or not proposed legislative bills are in compliance with the Constitution. Its secondary part is to draft the National Assembly's statement of defence in the constitutional dispute proceedings. The opinion of the LLS typically encourages the proposer to amend the proposed bill. In the constitutional dispute proceedings the opinion of the LLS explains the arguments of the legislator for passing the contested law. The article deals with two specific situations when the arguments of the politics, the Constitutional Court and the LLS remain in disagreement. Firstly, when the legislator did not consider the arguments of the LLS when drafting the bill, but the plaintiff in the constitutional dispute relies on the same LLS' arguments. Secondly, when the constitutional dispute proceedings end with the formal order dismissing the case, although the LLS prepared the statement of defence on the merits of the case.

Keywords: The Legislative and Legal Service of the National Assembly, The National Assembly of the Republic of Slovenia, The Constitutional Court of the Republic of Slovenia, the constitutional dispute, constitutional review, the right to be heard, the adversarial principle, the opposing party

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TADEJA ZIMA JENULL

Nomotehnika v gospodarski zakonodaji – pogled iz prakse

Prispevek obravnava pogled sodnika, ki odloča v gospodarskih sporih, insolvenčnih, nepravdnih in drugih gospodarskih postopkih ter mora pri svojem delu uporabiti več zakonov, na nomotehniko. Med vsemi pomembnimi načeli za pripravo predpisov, ki so določena v Resoluciji o normativni dejavnosti (ReNDej), je posebej poudarjeno načelo določnosti. Sodnik največkrat naleti na težavo, če nomotehnično niso usklajeni enaki pojmi v različnih pravnih besedilih. Pojasnjeno je, da mora sodnik v posamezni zadevi uporabiti več predpisov, ki se lahko medsebojno prepletajo in dopolnjujejo. Sodnikova naloga je, da vsak predpis razlaga ustavnopravno skladno. Predstavljeni so tudi pojmi nujne zadeve v insolvenčnih postopkih, kdaj je treba v postopku sodnega registra in pri začasni odredbi odločati hitro ter o katerih vrstah zadev odloča sodišče prednostno. Obravnavano je tudi razreševanje pravnih položajev, urejenih v različnih predpisih, ki različno urejajo ista ali primerljiva pravna dejstva ali razmerja. Opozorjeno je na razmerje med neposredno zahtevo podjemnikovih sodelavcev do naročnika po 631. členu Obligacijskega zakonika in razmerji s podizvajalci pri javnih naročilih po Zakonu o javnem naročanju. Poudarjeno je, da avtentična razlaga za sodišče ni zavezujoča. Posebna previdnost zakonodajalca pri spremembah zakona je potrebna, ko ta vpliva na pravni promet v stečajnih postopkih. Na koncu prispevka je poudarjeno, da mora različne pojme v zakonu (ZGD-1 in ZFPPIPP), ki bi morali biti v različnih predpisih uporabljeni za enak položaj enako, pravilno razložiti sodna praksa.

Ključne besede: načelo določnosti, nujna, prednostna zadeva, hitrost postopka, prepletanje in prekrivanje zakonskih vsebin, sodna praksa

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TADEJA ZIMA JENULL

Nomotech in Commercial Law – Practical View

The article deals with the view of the judge who decides in commercial disputes, insolvent, non-litigation and other economic proceedings on nomotechnics and must apply several laws in his work. Among all the important principles for drafting the rules set out in the Resolution on regulatory activity (ReNDej), the principle of certainty is particularly emphasized. The judge most often encounters a problem if the same concepts are not harmonized nomotechnically in different legal texts. It is clarified that the judge in a particular case must apply several rules that can be intertwined and complementary. It is the judge's job to interpret each regulation constitutionally in accordance with the law. The concepts of urgent cases in insolvency proceedings are also presented, when it is necessary to decide quickly in the proceedings of the court register and in the interim order and which types of cases are decided by the court as a matter of priority. The resolution of legal situations regulated by different regulations that differently regulate the same or comparable legal facts or relationships is also discussed. The relationship between the direct request of the contractor's associates to the contracting authority under Article 631 of the Obligations Code and the relations with subcontractors in public procurement under the Public Procurement Act are pointed out. It is emphasized that an authentic interpretation is not binding on the court. Special care should be taken by the legislator to amend the law when it affects legal transactions in bankruptcy proceedings. At the end of the paper, it is emphasized that the different terms in the law (ZGD-1 and ZFPPIPP), which should be used equally in different regulations for the same position, should be properly explained by the case law.

Keywords: principle of certainty, urgent, priority matter, speed of the process, overlapping legal content, Slovenian case law (Slovenia)