Povzetki
Abstracts
VII.

UDK 347.9:343.157.5
Pravni letopis 2020, str. 9–24

ALEŠ GALIČ

O protiustavnosti ureditve zahteve za varstvo zakonitosti v pravdnem postopku

Reforma, ki bi zagotovila, da zahteva za varstvo zakonitosti v pravdnem postopku v Sloveniji ne bo zgolj relikt sovjetskega prava, mora spremeniti dvoje. Prvič, poudarjeno mora biti, da namen tega pravnega sredstva ni nadzor nad delovanjem nižjih sodišč ali preverjanje pravilnosti vseh sodb, temveč mora cilj tega pravnega sredstva presegati pomen konkretne zadeve in korist strank v tej konkretni zadevi. Cilj je zagotavljanje objektivne koristi za pravni red v celoti, torej da se Vrhovno sodišče izreče o pravnih vprašanjih, ki so pomembna za razvoj prava skozi sodno prakso in za enotnost sodne prakse. Drugič, ker ne gre za pravno sredstvo strank v konkretni zadevi, saj je vložitev tega pravnega sredstva neodvisna od volje strank, je treba zagotoviti, da odločitev ne bo posegala v pravnomočno zaključeno zadevo. Učinek sme biti le ugotovitveni. Za cilj, ki ga to pravno sredstvo želi doseči – učinek za naprej, tj. usmerjevalna vloga vrhovnega sodišča ter s tem zagotavljanje predvidljivosti in pravne varnosti, prispevek k razvoju prava in enotnosti sodne prakse – je to povsem dovolj.

Ključne besede: državni tožilec, pravdni postopek, pravica do dostopa do sodišča, avtonomija strank, vrhovno sodišče, izredno pravno sredstvo

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Pravni letopis 2020, str. 9–24

ALEŠ GALIČ

On Unconstitutionality of the Extraordinary Appeal of a Public Prosecutor in Civil Proceedings

There are two necessary elements of a reform of the extraordinary appeal of a public prosecutor to a Supreme Court in Slovenian Civil Procedure Act; otherwise this instrument will remain a relict of a soviet type of civil procedure. First, it should be emphasized that the purpose of this appeal is not opening doors for an unlimited control of lawfulness of all judgments of lower courts. Rather, its purpose should be linked to a public function of a Supreme Court in creating precedents and thus strengthening the Supreme Court's role in developing law through case law and ensuring its uniform application. Second, as this is not a Party's appeal and it is filed regardless of the Parties will and thus should not affect the individual Parties' civil rights and obligations, it must be ensured that it will result only in a declaratory judgment of a Supreme Court. For the purpose which this appeal pursues – the effect of creating a precedent and thus strengthening a legal certainty and predictability for future litigants and offering a valuable guidance for lower courts – a merely declaratory effect of the Supreme Court's judgment, rendered on the Public Prosecutor's extraordinary appeal is entirely sufficient.

Keywords: public prosecutor, civil procedure, right of access to court, party autonomy, supreme court, extraordinary appeal

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Pravni letopis 2020, str. 25–56

NINA BETETTO

Novela ZPP-E in postopek pred Vrhovnim sodiščem RS

Z novelo ZPP-E je pomembnost spornega pravnega vprašanja, razen nekaj izjem, postala edino merilo dovoljenosti revizije. Javna funkcija Vrhovnega sodišča se zagotavlja z omejenim in objektivno zasnovanim dostopom do njega, čemur je treba prilagoditi oblikovanje predloga za dopustitev revizije. V prispevku je prikazana sodna praksa v zvezi z zahtevo ZPP po obveznih sestavinah, ki jim mora imeti popoln predlog za dopustitev revizije. Pravni standard »pomembnega pravnega vprašanja« sodišče zapolnjuje v soodvisnosti od konkretnih okoliščin. Temeljno merilo je, da mora pomen zadeve segati prek konkretne zadeve. V nadaljevanju je obravnavan institut pritožbe zoper razveljavitveni sklep sodišča druge stopnje, katerega cilj je povečati število zadev, v katerih bo višje sodišče meritorno odločilo sámo. Prispevek se osredotoča na sodno prakso po uveljavitvi noveli ZPP-E, ki zapolnjuje pomensko odprtost standarda (ne)odpravljivosti kršitve na drugi stopnji tako glede procesnih kršitev kot glede kršitev v zvezi z dokaznim postopkom in ugotovljenim dejanskim stanjem.

Ključne besede: dopuščena revizija, dopustitev revizije, vrhovno sodišče, pomembno pravno vprašanje, pritožba, razveljavitev sodbe sodišča prve stopnje

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Pravni letopis 2020, str. 25–56

NINA BETETTO

ZPP-E Amendments and Proceedings Before the Supreme Court of the Republic of Slovenia Abstract

With the ZPP-E amendments to the Civil Procedure Act, the importance of the disputed legal issue, with a few exceptions, became the sole criterion for the admissibility of the extraordinary legal remedy of a revision. The public function of the Supreme Court is ensured through a limited and objectively designed access to it, which must be taken into account when drafting a motion for leave to file a revision. The article presents the case law concerning the mandatory components of such a motion under the Civil Procedure Act. The legal standard of an "important legal issue" is defined by the court depending on the specific circumstances of the case. The basic criterion is that the significance of the matter must extend beyond the concrete matter. Also discussed is the institute of an appeal against the decision of the second instance court to remand the case for further proceedings, the aim of which is to increase the number of cases where the higher court itself decides on the merits of the case. The article focuses on the case law after the entry into force of the ZPP-E amendments, which closed the semantic openness of the (in)remediability of the violation at the second instance, both with regard to procedural violations as well as violations related to evidentiary procedure and the established facts of the case.

Keywords: admissible revision, leave to appeal, supreme court, important legal issue, appeal, anullment of the judgement of a court of first instance

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Pravni letopis 2020, str. 57–67

VESNA BERGANT RAKOČEVIĆ

Učinki novele ZPP-E na odločanje pritožbenega sodišča

Prispevek analizira učinke sprememb, ki jih je v pritožbeni postopek vnesla novela Zakona o pravdnem postopku ZPP-E s ciljem zmanjšanja števila razveljavitev sodb sodišč prve stopnje in s tem skrajšanja predvidenega časa sojenja. Za najučinkovitejšo spremembo se je izkazala uvedba pritožbe zoper sklep o razveljavitvi sodbe sodišča prve stopnje, medtem ko preostale novosti, denimo možnost izdaje nadomestne sodbe in obvestilo stranki, da njena pritožba nima možnosti za uspeh (v gospodarskih sporih), v praksi niso zaživele. Čeprav se sami pogoji za razveljavitev sodbe sodišča prve stopnje z novelo ZPP-E niso spremenili, je možno ugotoviti, da se je že zaradi uvedbe možnosti pritožbe zoper sklep o razveljavitvi delež razveljavljenih sodb bistveno zmanjšal. Skozi sicer ne posebno obsežno prakso senatov vrhovnega sodišča pa so se trdneje izoblikovali nekateri kriteriji, ki ustrezajo zakonskim pogojem za razveljavitev prvostopenjske sodbe.

Ključne besede: pritožba zoper sklep o razveljavitvi sodbe sodišča prve stopnje, omejitev kasacijskih pooblastil pritožbenega sodišča, kontrolna funkcija pritožbenega sodišča, pritožbena obravnava

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Pravni letopis 2020, str. 57–67

VESNA BERGANT RAKOČEVIĆ

The Effects of the Amendments to the Civil Procedure Code on the Decisions of the Court of Appeal

The article analyzes the effects of the changes introduced to the appeal procedure by the amendments to the Civil Procedure Code of the CPC-E, which aimed at reducing the number of reversals of judgments of courts of first instance and thereby shortening the estimated time of trial. The most effective change was the possibility to appeal against the decision of reversing the judgment of the court of first instance, while other innovations, such as the possibility of issuing a substitute judgment and informing the party that its appeal had no chance of success (in commercial disputes) are practically not being used at all. Although the conditions for the reversal of the judgment of the court of first instance did not change with the amendment of the CPC-E, it may be concluded that the share of the reversed judgments has significantly decreased due to the mere possibility of the appeal against the decision of reversal. However, led by not very high number of decisions of the Supreme Court Chambers, certain criteria have been more firmly established that meet the legal requirements for the annulment of the first instance judgment.

Keywords: appeal against the decision to reverse the judgment of the court of first instance, restriction of cassation powers of the court of appeal, control function of the court of appeal, appeal hearing

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Pravni letopis 2020, str. 69–97

ĐORĐE GRBOVIĆ

Novela ZPP-E in postopek pred sodišči prve stopnje

Glavnina članka obravnava trenutni neuspeh osrednje novosti zadnje novele v zvezi s prvostopenjskim postopkom, pripravljalnega naroka, ki je podoben nemškemu naroku, imenovanemu *früher erster Termin.* Razloge za neuspeh pripisuje značilno prenagljenemu sprejemanju nove zakonodaje, katerega posledica so nejasne določbe, in podcenjevanju močno prisotne, če že ne prevladujoče kulture pravdanja, skladno s katero stranke vseh svojih navedb, dokazov, argumentacije in zahtevkov ne priskrbijo, kolikor izčrpno in zgodaj v postopku je mogoče. Članek opozarja na zapostavljeni protitok iz pravne teorije in sodne prakse, ki izvira iz predzadnje novele ZPP-D, s pomočjo katerega bi se navedena kultura lahko začela preobražati in bi tudi navedeni novi narok morda lahko kdaj zaživel. Preostanek članka vsebuje komentar nekaterih drugih (pre)nov(ljen)ih institutov prvostopenjskega postopka.

Ključne besede: pripravljalni narok, program vodenja postopka, ZPP-D, neomejeno izjavljanje na prvem naroku, omejeno izjavljanje na prvem naroku, obveznost glavne obravnave, nepristop na narok, ravnanje s tajnim gradivom, sankcioniranje žalitev sodišča

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Pravni letopis 2020, str. 69–97

ĐORĐE GRBOVIĆ

Civil Procedure Act ZPP-E Amendment and First Instance Proceedings

The main part of the article examines the current failure of the central first instance feature of the last CPA amendment, the preparatory hearing - which corresponds to the German *früher erster Termin* and attributes this to, on the one hand, the characteristically hasty adoption of the new legislation, which led to confusing legal provisions; and, more generally, to the underestimation of the strong, if not pervasive, legal culture of the parties, who do not present all relevant facts, evidence, arguments and requests as early and fully as possible in the course of the procedure. The article also draws attention to the largely ignored undercurrent in jurisprudence and legal theory, that emanates from the penultimate CPA amendment ("ZPP-D") and works in the opposite direction, promoting it as an opportunity to correct the ignoble tradition while making the new type of hearing possibly viable in the future. The second part of the article is a commentary on some other (re)new(ed) provisions of the first instance proceedings.

Keywords: preparatory hearing, proceedings programme, ZPP-D, unlimited submissions at the first hearing, limited submissions at the first hearing, obligatory hearing, non-appearance, handling of secret material, sanctioning of insults directed at the court

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Pravni letopis 2020, str. 99–108

BOJAN BREŽAN

Vpliv novele ZPP-E na položaj odvetnika v pravdi

Prispevek obravnava vpliv novele E Zakona o pravdnem postopku na položaj odvetnika v pravdi. Spremembe postopka priprave za glavno obravnavo so analizirane pod predpostavko, da je predvidljivost poteka postopka ključna za odvetniško delo. Avtor ugotavlja, da cilj novele ni bil dosežen, vendarle pa bi novela lahko imela večji praktični učinek, če bi bil namen njenih določb dosledneje spoštovan. Prispevek obravnava tudi nekatere spremembe instituta vročanja in novosti, usmerjene v izboljšanje položaja strank glede postavljanja zahtevkov in dokazovanja. Sklepni del podaja kratko analizo glavnih sprememb v postopkih s pravnimi sredstvi.

Ključne besede: priprava za glavno obravnavo, vročanje, stopničasta tožba, izvedensko mnenje, pravna sredstva

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BOJAN BREŽAN

Effect of amendment E of the Slovenian Civil Procedure Act on the position of party's counsel

The article considers the effect of amendment E of the Civil Procedure Act on the position of the party's counsel in a litigation. The amendments to trial preparation are analysed under the assumption that it is the predictability of the process that is key for counsel work. The author finds that the amendment failed to reach this goal, but a greater practical effect of the amendment could nevertheless be achieved should the purpose of its provisions be more consistently honoured. The article also considers certain changes regarding the service of documents and the novelties aimed at improving the parties' position regarding the making of claims and presenting of evidence. It concludes with a brief analysis of the changes in the legal remedies procedures.

Keywords: trial preparation, service of documents, action by stages, expert evidence, legal remedies

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Pravni letopis 2020, str. 111–127

VESNA KRANJC

Uporaba pravil FIDIC pri oddaji javnih naročil

Uvodoma članek obravnava splošne pogoje FIDIC in poslovna razmerja, ki so lahko podrejena pod posamezne akte FIDIC. Rdeča knjiga je namenjena izvajanju del, ki jih načrtuje naročnik. Po Rumeni in Srebrni knjigi je za načrtovanje in izvedbo del odgovoren izvajalec, a morata biti načrt in izvedba skladna z zahtevami naročnika. Uporaba aktov FIDIC je ustrezna tudi pri oddaji javnih naročil. Ureditev posameznih vprašanj po pravilih FIDIC pa zahteva posebno pozornost in drugačno ureditev v pogodbah o javnem naročanju. Obravnavani so položaj nominiranih podizvajalcev, referenčni pogoj o izvedbi preteklih del po aktih FIDIC in omejene možnosti za sklenitev poravnave v pogodbah o javnem naročanju.

Ključne besede: gradbena pogodba, javno naročilo, javno naročilo gradnje, splošni pogoji FIDIC, podizvajalec, nominirani podizvajalec, referenca, poravnava

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Pravni letopis 2020, str. 111–127

VESNA KRANJC

Application of FIDIC terms in public procurement

The article introduces the role of FIDIC Conditions and business relationships which could be subordinated to the FIDIC Red, Yellow and Silver Book. Under Red Book the contractor constructs the work in accordance with a design provided by the employer. Under Yellow and Silver Book contractor has the responsibility for design and work performance, but plan and work performance should be alligned with employer's requirements. The use of FIDIC acts also faciliates the award of public procurement contracts. However, the regulation of individual issues according to the FIDIC rules requires special attention and a different regulation in public procurement contracts. The position of nominated subcontractors, the reference condition on the performance of previous works according to FIDIC acts and the limited possibilities for concluding a settlement in public procurement are discussed.

Keywords: building contract, public procurement, public work contract, FIDIC Conditions, subcontractor, nominated subcontractor, reference, settlement

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Pravni letopis 2020, str. 131–148

KARMEN LUTMAN

Vpliv pandemije covid-19 na pogodbe o paketnih potovanjih

Turizem velja za eno tistih panog, ki jih je pandemija koronavirusne bolezni najbolj prizadela. Letovišča so pretežni del leta ostala prazna, turistična sezona za prihodnje leto pa je prav tako negotova. Zaradi množičnih odpovedi potovanj so se ponudniki turističnih storitev znašli v nezavidljivem položaju, saj je zakonodaja na tem področju pogosto precej naklonjena potnikom. Prispevek obravnava vpliv pandemije na pogodbe o paketnih potovanjih, ki so urejene z Direktivo EU 2015/2302. Pri tem se osredotoča na pojem »neizogibnih in izrednih okoliščin« ter njihovih posledic za pogodbeno razmerje. Pravna analiza je prilagojena posameznim fazam pandemije, avtorica pa ponudi smernice za reševanje morebitnih bodočih sporov na tem področju. Zaključni del prispevka omogoča vpogled v prve (tuje) sodne odločbe, ki obravnavajo vpliv pandemije na pogodbe o paketnih potovanjih.

Ključne besede: turistično pravo, pogodba o paketnem potovanju, Direktiva EU 2015/2302, potnik, organizator potovanja, izredne razmere, odstop od pogodbe, pandemija

UDC 347.447.82:338.48:616-036.22
Pravni letopis 2020, str. 131–148

KARMEN LUTMAN

The Impact of the covid-19 Pandemic on Package Travel Contracts

Tourism is one of the most affected sectors in the ongoing covid-19 crisis. The resorts remained empty for the most of the year and it is still difficult to predict how travel will look like next year. Due to the mass cancellations, tourism service providers have found themselves in an unenviable position, as legislation in this area is often more favourable to passengers. This article deals with the impact of the pandemic on package travel contracts regulated by the EU Directive no. 2015/2302. It focuses on the concept of „unavoidable and extraordinary circumstances" and their consequences for the contractual relationship. The legal analysis takes into consideration different stages of the ongoing pandemic and offers guidelines for resolving possible future disputes in this area. The final part of the article provides an insight into the first (foreign) court decisions dealing with the impact of the pandemic on package travel contracts.

Keywords: tourism law, package travel contract, Directive (EU) 2015/2302, passenger, travel organiser, extraordinary circumstances, the right of withdrawal, pandemic

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Pravni letopis 2020, str. 151–161

JERNEJ VEBERIČ

Zavarovanje odgovornosti – nekateri izzivi slovenske zakonodaje

Zavarovanje odgovornosti je urejeno v poglavju o zavarovalni pogodbi (zgolj) v 964. in 965. členu Obligacijskega zakonika. Ureditev izhaja iz jugoslovanskega Zakona o obligacijskih razmerjih iz leta 1978, ki je bil za tiste čase sodoben, danes pa se kaže kot pomanjkljiv in zastarel. Dobra podlaga je sicer klasični kontinentalni civilnopravni pristop, vendar bi ga bilo treba nadgraditi s sodobnimi zakonodajnimi rešitvami, ki so uveljavljene v zahodnoevropskih državah in se odražajo v Načelih evropskega zavarovalnega pogodbenega prava (Principles of European Insurance Contract Law – PEICL). Še posebno bi bilo treba ustrezneje opredeliti pojem in pojavne oblike zavarovalnega primera ter vprašanje neposrednih zahtevkov oškodovancev. Prispevek kritično obravnava nekatere segmente veljavnega Obligacijskega zakonika in jih prepleta s predlogi za sodobnejšo ureditev, ki bi (izhajajoč iz primerjalnopravne prakse) bila primerna tudi za slovenski zavarovalni in pravni prostor.

Ključne besede: zavarovanje odgovornosti, zavarovanec, oškodovanec, zavarovalni primer, neposredni zahtevek

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Pravni letopis 2020, str. 151–161

JERNEJ VEBERIČ

Liability Insurance – Challenges Of Slovenian Legislation

In Slovenia liability insurance is regulated in the chapter regarding insurance contract in articles 964 in 965 (only) of the Obligations Code. The regulation originates from the former Yugoslav Obligations Act from year 1978 which was modern at that time, but today it is considered deficient and outdated. Classic continental civil law approach is a good basis however it needs to be upgraded with up-to-date legislative solutions that are established in the Western European countries and are reflected in the Principles of European Insurance Contract Law – PEICL. This applies in particular to the concept of *the insured event* and to the issue of *direct claims* of third parties (victims). This article critically discusses some of the segments of the valid Obligations Code legal solutions and intertwines them with suggestions for a contemporary regulation which (based on the comparative legal practice) would be suitable for the Slovenian insurance and legal space.

Keywords: liability insurance, insured person, third party, victim, insured event, direct claim

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Pravni letopis 2020, str. 163–172

MARKO FRANTAR

Zavarovanje jamstev iz prodajne pogodbe

V poslovni praksi sklepanja t. i. transakcij M & A je običajno, da prodajna pogodba vsebuje določena prodajalčeva jamstva glede predmeta prodajne pogodbe. V primeru njihove kršitve lahko prodajalec odškodninsko odgovarja za škodo, ki zaradi tega nastane kupcu. Ker imajo jamstva učinek prenosa tveganj na prodajalca, je razumljivo, da sta pogajalski izhodišči strank z vidika obsega jamstev različni. Kupec si bo skušal zagotoviti širok nabor jamstev, prodajalec pa si bo razumljivo prizadeval njihov obseg čim bolj skrčiti. Ta razkorak je mogoče premostiti s sklenitvijo zavarovanja jamstev. Produkt strankama omogoča prenos rizika škode zaradi kršitve prodajalčevih jamstev na zavarovalnico, kar ima lahko znaten vpliv na dinamiko pogajanj o prodajni pogodbi.

Ključne besede: jamstva in zagotovila, zavarovanje jamstev, prodajna pogodba, porazdelitev tveganj, zavarovalna pogodba

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MARKO FRANTAR

Warranty and indemnity (W&I) insurance

A sale and purchase agreement (SPA) negotiated in the context of an M & A transaction will typically include a set of seller's representations and warranties (R&W) around the object of sale. A breach of R&W can entitle the purchaser to seek indemnification from the seller for any resulting loss. R&W serve the purpose of allocating certain risks to the seller. Understandably, the parties will have different positions on the scope of R&W. The purchaser will want to see a wide R&W catalogue, while the seller will wish to narrow its scope to the maximum extent possible. Warranty and indemnity (W&I) insurance can assist in bridging the gap between parties' expectations around the scope of R&W. W&I insurance effectively allows for transferring the risk of liability for breach of R&W to an insurer. This can have a significant impact on the course of SPA negotiations.

Keywords: representations and warranties, warranty and indemnity insurance, sale and purchase agreement, risk allocation, insurance contract

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Pravni letopis 2020, str. 175–199

ANA JEREB

Žaljive objave na družbenih omrežjih kot moderni izziv sodišč: so lahko tudi všečki protipravni?

Sodišča skušajo pri odločanju o protipravnosti objav na družbenih omrežjih dohajati razvoj teh omrežij. Prispevek se osredotoča na primere žaljivih objav prek družbenih omrežij, ki so jih obravnavala domača in tuja sodišča, ter skozi sodne odločbe predstavi štiri bistvene okoliščine: (1) Ali posameznika na družbenih omrežjih varuje svoboda izražanja in proti komu? (2) Kako pravilno razumeti kontekst posamezne objave na družbenem omrežju? (3) Kakšen pomen pripisati všečkom, čustvenčkom in drugim simbolom? (4) Kakšne možnosti ima posameznik za učinkovito sodno varstvo svojih pravic?

Povprečen oziroma razumen bralec na družbenem omrežju je drugačen od bralca na primer tiskanih medijev. Pomen določene objave je mogoče določiti šele ob upoštevanju njenega besednega in družbenega konteksta. Podlaga za odškodninsko odgovornost je lahko že samo deljenje objave, njeno všečkanje in celo uporaba ključnika ali čustvenčka. Poleg odškodninskega zahtevka ima tarča žaljivega zapisa možnost po sodni poti od avtorja objave ali od upravljalca družbenega omrežja zahtevati izbris sporne objave.

Ključne besede: družbena omrežja, pravo družbenih omrežij, svoboda izražanja, žaljive objave, sodna praksa, Twitter, Facebook

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Pravni letopis 2020, str. 175–199

ANA JEREB

Offensive Posts on Social Media as a Modern Challenge for the Courts: Can Likes Lead to Liability?

When dealing with defamation on social media, courts try to follow the development and popularity of this new means of social interaction. The article focuses on foreign and domestic defamation cases regarding the social media. This case law distinguishes four different elements: (1) Does the freedom of speech protect posts on social media and against whom? (2) What is the right context of a certain social media post? (3) Could the use of symbols "like", "emoji" and others invoke liability? (4) How can a defamed individual effectively protect his or her rights in court? A "reasonable user" of social networks is different from the reader of written media. The meaning of a particular post can only be determined by considering its verbal and social context. The mere sharing of the post, its liking and even the use of a hashtag or emotion can form a basis for liability. In addition to the claim for damages, the target of defamation has the possibility to request the removal of the post from the author of the publication or from the social network provider.

Keywords: social media, social media law, freedom of speech, defamation, case law, Facebook, Twitter

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Pravni letopis 2020, str. 201–218

PETRA WEINGERL

Potrošnik kot uporabnik spletnih storitev

Politika varstva potrošnikov v EU temelji na logiki, da je potrošnik šibkejša pogodbena stranka, ki potrebuje posebno varstvo. Pri razmerjih na spletu ni vedno jasno, kdo je šibkejša stran, ki potrebuje zaščito. Posledično se pojavi vprašanje, ali je klasična binarna delitev na potrošnika in trgovca še vedno ustrezna za opredelitev potrošnika v posameznem pogodbenem razmerju v digitalnem okolju, v katerem je meja med trgovcem in potrošnikom pogosto zabrisana. Prispevek obravnava tri zadeve, v katerih je odločalo ali še odloča Sodišče EU o statusu potrošnika kot uporabnika spletnih storitev. Zadeva *Schrems* se nanaša na status potrošnika v okviru pogodbe, sklenjene za uporabo spletnega družbenega omrežja, torej za daljše časovno obdobje. Zadevi *Kamenova* in *Personal Exchange Information* pa obravnavata dobičkonosno dejavnost posameznikov na spletu – spletno prodajo in igranje spletnih iger na srečo. Te zadeve nazorno prikažejo, da je uporaba klasične binarne delitve na trgovca in potrošnika v digitalnem okolju otežena. Za presojo statusa potrošnika v konkretni zadevi je ključnega pomena sodna praksa Sodišča EU, saj je to edino pristojno za razlago avtonomnih pojmov prava EU, kot je tudi pojem potrošnika.

Ključne besede: potrošnik, trgovec, internet, družbena omrežja, spletna prodaja, spletne igre na srečo

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PETRA WEINGERL

Consumer as a user of e-services

EU consumer protection policy is based on the logic that the consumer is a weaker contracting party in need of special protection. In online relationships, it is not always clear who is the weaker party that needs protection. Consequently, the question arises as to whether the classical binary division between consumer and trader is still appropriate to define the consumer in a digital environment in which the boundary between trader and consumer is often blurred. The article deals with three cases in which the Court of Justice of the EU has ruled or is still ruling on the status of the consumer as a user of e-services. The *Schrems* case concerns the status of a consumer as a user of an online social network, i.e. for a longer period of time. The *Kamenova* and *Personal Exchange Information* cases, on the other hand, relate to the lucrative activity of individuals online – online sales and online gambling. These cases clearly illustrate the challenging use of the classical binary division between trader and consumer in the digital environment. The case law of the Court of Justice of the EU is crucial for assessing the status of the consumer in a specific case, as the Court of Justice of the EU has sole jurisdiction to interpret autonomous concepts of EU law, including the notion of "consumer".

Keywords: consumer, trader, internet, social networks, online sales, online gambling

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MAJA OVČAK KOS, JASNA ZAKONJŠEK

Družbena omrežja, mediji in pravica do izbrisa

Pri presoji kolizije med pravico do pozabe in svobodo izražanja je pomemben element vir spletnega mesta objave podatka, katerega izbris se zahteva, saj je treba upoštevati različnost položajev spletnih iskalnikov, izvornih spletnih mest in družbenih omrežij. Izbris podatkov, objavljenih na platformah družbenih omrežij, je mogoče v določenih primerih uveljavljati tudi na podlagi Direktive o elektronskem poslovanju. Ozemeljska implementacija izbrisne obveznosti ponudnika storitev spletnega gostovanja platforme družbenega omrežja ne bi smela presegati tistega, kar je nujno potrebno za varstvo oškodovanca, kar zahteva presojo od primera do primera. Odrejanje globalnih učinkov bi moralo biti zato *extrema ratio*. Izbrisna obveznost bi morala biti tudi časovno omejena. Nejasnost glede meril opredelitve enakovredne vsebine v zadevi C-18/18, *Eva Glawischning-Piesczek proti Facebook Ireland Limited*, postavlja vprašanje, ali ni dejansko uvedena obveznost uporabe (preventivnega) avtomatiziranega sistema splošnega filtriranja skozi zadnja vrata. Čeprav se morda na prvi pogled zdi, da Direktiva o elektronskem poslovanju omogoča širše pravno varstvo glede izbrisa *on-line* vsebin, podrobna analiza pravnih podlag za izbris Splošne uredbe o varstvu osebnih podatkov in Direktive o elektronskem poslovanju pokaže, da to ni nujno tako.

Ključne besede: pravica do izbrisa, pravica do pozabe, svoboda izražanja, iskalniki, spletni mediji, družbena omrežja, Splošna uredba o varstvu osebnih podatkov, Direktiva o elektronskem poslovanju

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MAJA OVČAK KOS, JASNA ZAKONJŠEK

Social networks, media and the right to erasure

In the assessment of the conflict between the right to be forgotten and freedom of expression, the source of the site where the data to be erased is published represents an important element, since diverse positions of web browsers, source sites and social networks need to be taken into account. In certain cases, the erasure of the data published on social network platforms may also be enforced on the basis of the e-Commerce Directive. Territorial implementation of the erasure obligation of the social network hosting service provider should not exceed what is urgently required for the protection of the injured party, which calls for a case-by-case assessment. Therefore, imposing global impacts should have to be extrema ratio. Also, the erasure obligation should have to be time-restricted. The ambiguity regarding the criteria for the classification of equivalent contents in the case C-18/18, *Eva Glawischnig-Piesczek versus Facebook Ireland Limited*, raises the question of whether the obligation to use (preventive) automated general backdoor filtration system had actually been introduced. Even though it may appear at first glance that the e-Commerce Directive provides for a broader legal protection with regard to the erasure of on-line contents, a more detailed analysis of legal bases for erasure laid down in the General Data Protection Regulation and the e-Commerce Directive show that this is not necessarily the case.

Keywords: Right to erasure, right to be forgotten, freedom of expression, browsers, online media, social media, General Data Protection Regulation, e-Commerce Directive.

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MARCELA DOLENC

Odgovornost za vsebino hiperpovezave

Osrednje vprašanje prispevka je vprašanje odgovornosti za hiperpovezavo. Povezovanje s hiperpovezavami je danes priljubljen način nudenja dostopa do informacij na spletu, ki uporabnikom omogoča, da s klikom na hiperpovezavo prehajajo od enega spletnega mesta do naslednjega, ki ga želijo obiskati. Uporabnik je s klikom na hiperpovezavo preusmerjen na spletno stran, ki dopolnjuje vsebino prve strani. Vsebina na drugi spletni strani je lahko iz različnih razlogov nezakonita. Takrat se pojavi vprašanje, kdaj in pod kakšnimi pogoji za tako nezakonito vsebino odgovarja oseba, ki je ustvarila hiperpovezavo.

Namen prispevka je ugotoviti, pod kakšnimi pogoji bi bil lahko ponudnik hiperpovezave odgovoren za vsebino, do katere ta vodi. Pravo tega vprašanja ne regulira izrecno, zato se odgovornost presoja po splošnih pravilih. Predstavljena bo splošna ureditev odgovornosti internetnih posrednikov in njenih izjem v skladu z Direktivo o elektronskem poslovanju. Hiperpovezave v tej direktivi niso izrecno urejene, vendar so nekatere države po zgledu ureditve iz direktive določile splošna pravila za hiperpovezave. Obravnava odgovornosti za vsebino hiperpovezave je odvisna od področja prava, na katero sega domnevna kršitev, in v veliki meri od dejanskih okoliščin primera. Prispevek je zato osredotočen na pravna področja časti in dobrega imena ter avtorskega prava, saj se pri vsakem področju hiperpovezava obravnava drugače. Z analizo odločitev iz sodne prakse bodo predstavljena skupna izhodišča, ki bi lahko pomenila temeljna načela splošne ureditve pri presoji odgovornosti za vsebino hiperpovezave.

Ključne besede: odgovornost za hiperpovezavo, hiperpovezava, ponudnik hiperpovezave, nezakonita vsebina, žaljiva vsebina, avtorsko pravo, davek na hiperpovezave

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MARCELA DOLENC

Liability for hyperlinked content

The focal point of this article is the issue of responsibility for hyperlinking. Hyperlinking is a popular way of providing access to information online, allowing users to move from one site to the next by clicking on a hyperlink. The users are redirected to a web page that complements the content of the first page. The content on the linked website may be illegal for a variety of reasons. This raises the question of when and under what conditions the person who created the hyperlink is responsible for its illegal content.

This article aims to determine the conditions under which a hyperlink provider could be responsible for the content to which the hyperlink leads. The law does not explicitly regulate this issue, so liability is assessed according to general rules. The general regime of liability of Internet intermediaries and exceptions to it in accordance with the Electronic Commerce Directive will be presented. Hyperlinks are not explicitly regulated in this Directive; however, following its example, some countries have formulated some general rules for hyperlinks. The assessment of liability for hyperlinked content largely depends on the actual circumstances of the case and the area of law covered by the alleged infringement. Therefore, the article focuses on the areas of honor and reputation, and copyright. Following an analysis of the case law, the article presents shared starting points which could represent the basic principles of general regulation in the assessment of responsibility for the hyperlinked content.

Keywords: hyperlink liability, hyperlink, hyperlink provider, illegal content, offensive content, copyright, hyperlink tax

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PETRA LAMOVEC HREN

Pomen obličnostnih zahtev pri oporočnih poslih

Vsaka oporočno sposobna oseba lahko sestavi oporoko in razdeli premoženje, upoštevaje svoje želje in preference. Pri tem je temeljno načelo oporočna svoboda, ki daje zapustniku prosto pot pri izbiri med različnimi oblikami oporok, vendar se mora držati predpisanih obličnostnih zahtev, ki veljajo za vsako izmed njih. Zahteve, ki jih vsebuje vsak dednopravni akt, opravljajo različne funkcije, a vse si prizadevajo za isti cilj, da oporočna razpolaganja izražajo pravo zapustnikovo voljo. Poznamo štiri temeljne obličnostne funkcije: dokazno, usmerjevalno, solemnitetno in varovalno. Predpisane zahteve glede oblike in postopka sestave, ki ponujajo sodišču zanesljiv dokaz glede oporočiteljeve prave volje in kažejo avtentičnost zapisa (dokazna funkcija), hkrati varujejo oporočitelja pred nedovoljenimi vplivi ali zamenjavo listine (varovalna funkcija). Predpisana oblika pomeni pravni okvir, ki ga zapustnik zapolni s svojimi dejanji in besedami. Standardizacija oblike ima usmerjevalno funkcijo, ki izkazuje oporočiteljev namen, ali je zapis štel za oporoko ali ne. Pompoznost celotnega postopka opravlja solemnitetno funkcijo z namenom, da opozarja oporočitelja na pomen njegovih dejanj.

Ključne besede: oporoka, obličnostne zahteve, dokazna funkcija, usmerjevalna funkcija, solemnitetna funkcija, varovalna funkcija

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PETRA LAMOVEC HREN

The purpose of formal requirements in testamentary dispositions

Every person with a testamentary capacity can make a will and divide his property according to their wishes and preferences. Freedom of disposition is a fundamental policy giving the testator a free choice regarding the form of the will; however, certain formalities that are bound to each form of a will must be followed. Testamentary formalities have different roles, but one common goal – to fulfil testator's true intentions. There are four main functions of the formalities: evidentiary function, channelling function, ritual or cautionary function and protective function. They enable the court to decide whether a purported will is authentic (evidentiary function). Besides that, they protect testator against imposition or substitution (protective function). Formalities standardise the form and unambiguously show whether the document was meant as a will (channelling function). They also try to impress testator with the seriousness and remind him about the significance of making a will (ritual or cautionary function).

Keywords: will, formalities, evidentiary function, channelling function, ritual (cautionary) function, protective function

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Pravni letopis 2020, str. 289–309

MEDEJA ŠUŠTAR

Varstvo jedi in kuharskih receptov s pravicami intelektualne lastnine

Cilj prispevka je ugotoviti, ali so kulinarične stvaritve lahko predmet varstva pravic intelektualne lastnine, in podrobneje opredeliti pogoje, pod katerimi je takšno varstvo možno. Za potrebe tega prispevka so kulinarične stvaritve razdeljene v naslednje tri kategorije: kuharski recept, videz jedi in okus jedi. Kuharski recept sam po sebi ne pomeni individualne stvaritve, zato ne more biti predmet avtorskega varstva. Načeloma pa je kuharski recept mogoče patentirati. Pri videzu jedi prihaja do prikrivanja varstev različnih pravic, in sicer je videz lahko varovan z avtorsko pravico, blagovno znamko oziroma modelom. Pri tem je z blagovno znamko mogoče zaščititi zgolj tiste jedi, katerih vizualne lastnosti so sredstvo za razlikovanje podobnih proizvodov. Okus jedi ne more biti predmet varstva pravic intelektualne lastnine, saj ne izpolnjuje osnovnega predpogoja za zaščito, tj., da je kot predmet varstva objektivno določljiv. Okus pa je posredno oziroma v omejenem obsegu varovan z zajamčeno tradicionalno posebnostjo, kar je po mojem mnenju sporno, saj varstvo subjektivno opredeljivih stvaritev nasprotuje temeljnemu ustavnemu načelu pravne varnosti.

Ključne besede: kuharski recept, okus jedi, videz jedi, patent, blagovna znamka, model, avtorska pravica, zajamčena tradicionalna posebnost

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MEDEJA ŠUŠTAR

Protection of food and recipes with intellectual property rights

The aim of this article is to determine whether culinary creations can be protected with intellectual property rights and to define the conditions under which such protection is possible. For the purposes of this article, culinary creations are divided into three following categories: the recipe, trade dress, and the taste of food. The recipe itself does not represent an individual creation, therefore, it cannot be protected by copyright. However, the recipe can be patented, whereas the trade dress can be protected by multiple rights, such as copyright, trademark, and model. Trademark only provides protection for the trade dress which serves as a means to distinguish similar products. The taste of food cannot be protected with intellectual property rights, as it does not meet the basic precondition for protection, i.e. that the object of protection is objectively identifiable. Taste, on the other hand, is indirectly protected by guaranteed traditional specialty. In my opinion, this is controversial since the protection of subjectively definable creations contradicts fundamental constitutional principle of legal security.

Keywords: recipe, taste of food, trade dress, patent, trademark, model, copyright, traditional specialty guaranteed