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(May 19th – 21st 2016, Portorož Slovenia)

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dr. Vesna Rijavec


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A General Overview of Enforcement in Commercial and Civil Matters in Austria

PHILIPP ANZENBERGER

Abstract Although created 120 years ago, the Austrian Execution Code has not yet been consigned to the scrap heap. Quite the contrary: After passing through some serious refurbishment throughout the last 25 years, Austria nowadays disposes over a quite well-functioning enforcement law that at most needs some little beauty treatment here and there. This paper will provide a rough overview of the history and process of reform of Austrian enforcement law, point out some of the relevant ideas of its dogmatic framework, sketch the most important aspects of the procedures for enforcement and for security measures in Austrian Civil Procedure law, and finally give some suggestions for possible improvement.

Keywords: • enforcement law • procedural principles • security measures • foreign enforceable instruments • conduct of enforcement

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1 Legal sources and reform process

In Austrian law, enforcement in civil and commercial matters is mainly regulated in the Austrian Execution Code **(Exekutionsordnung – EO)**. Subsidiarily, the rules of the Austrian Civil Procedure Code **(Zivilprozessordnung – ZPO)** apply in relation to several parts of the enforcement procedure (e.g. the taking of evidence, the rules for the parties or the court's resolutions and the means of legal recourse; cf. § 78 EO). Also, some relevant provisions can be found in other legal acts, such as the Jurisdiction Act **(Jurisdiktionsnorm – JN),** the Court Organization Act **(Gerichtsorganisationsgesetz – GOG),** the Act on Judicial Officers **(Rechtspflegergesetz – RPflG)** or the Act on Land Valuation **(Liegenschaftsbewertungsgesetz – LBG).**

The Austrian Execution Code dates back to the year 1896 and has remained in force in large parts up until today. Over the last 25 years, however, the Execution code has been reformed in several (individual) steps (cf. Konecny, 1998: 107): Starting with a large rework of the enforcement of claims in 1991[1], the legislator most importantly launched a reform of the enforcement out of tangible movables as well as the introduction of a simplified procedure for issue of an enforcement order in 1995[2], followed by a vast redraft of the enforcement out of immovable property in 2000[3] and another rather large rework of forced administration of immovable property in 2008[4]. The next big reform will come into force in 2017[5], mainly containing several adaptations and implementations necessary due to the Brussels Ia-Regulation and the European Account Preservation Order-Regulation.

2 Dogmatic framework of the Austrian system of enforcement

2.1 Competence of the courts and distribution of tasks

The Austrian enforcement procedure is initiated at and carried out **by the courts.** Despite the existence of deviating models in other European countries, this was explicitly desired by the legislator of the ZPO and the EO (cf. Rechberger, 1988: 120-121): *"Whenever state authority is in service of civil law, as with enforcement law, it is appropriate, that this is done by state officials, so that everyone can see, that it is not private persons that act as empowered representatives"*[6] (Materialien II 2). Because: *"Enforcement is never a purely private affair and just a matter of the parties; instead each individual enforcement procedure – even if its dimensions were utterly insignificant – always touches the general interest, in fact in a very meaningful way"*[7] (Materialien I 458; also c.f. Rechberger, 1988: 121). The underlying idea is of course the general purpose of civil procedure (established by *Franz Klein*) as a means of social welfare that solves conflicts in a fast and efficient way (cf. Fasching, 1990: p 45; Konecny, 2013: Einleitung p 12). However, more recent voices in the literature have criticized this structure as "out-dated" (Rechberger and Oberhammer, 2009: p 19).

The individual steps of enforcement are distributed amongst various court members: Several – rather standardized – types of enforcement procedures (for example large parts

of the process of enforcement out of tangible movables and claims, which represent the vast majority of enforcement proceedings) are nowadays in the hands of **judicial officers** (Neumayr and Nunner-Krautgasser, 2011: 4 and 7). **Judges** are competent for the more complicated matters, such as the forced sale of immovable property, the execution to effectuate a conduct, toleration or omission of an action as well as the declaration and confirmation of enforceability of **foreign decisions** (§ 17 para 3 nr 1 RPflG). Finally, **court bailiffs** are competent for several (factual) enforcement acts, such as the seizure and sale of tangible movables or the eviction (Neumayr and Nunner-Krautgasser, 2011: 4-5).

2.2 Procedural principles in Austrian enforcement law

As far as the **conduct of the proceeding** goes, the Austrian enforcement law is largely characterized by the principles of **free disposition of parties** (Heller, Berger and Stix, 1969: 3), the weakened **inquisitorial principle** (Rassi, 2014: § 55 EO p 25-27; Rechberger and Simotta, 1992: p 111) and the principle of ***ex officio* conduct** of the proceedings (Heller, Berger and Stix, 1969: 3). Any enforcement procedure is started by an application; the applying party there decides what method of enforcement he or she wants to use and may stop the enforcement at any time on application (§ 39 para 1 nr 6 EO; cf. Neumayr and Nunner-Krautgasser, 2011: 27-28). The court **may collect all evidence necessary** for its decision (§ 55 para 3 EO); however, there is no obligation to investigate facts that were not brought forward by the parties (Rassi, 2014: § 55 EO p 27). Also, in the proceedings for the issue of an enforcement order, the court is not allowed to ask the parties to provide further evidence (§ 55 para 2 EO; Rassi, 2014: § 55 EO p 27). Once started, the enforcement procedure is generally carried out *ex officio* (Rechberger and Simotta, 1992: p 117); however, in some situations the applying party needs to participate in the procedure (for example by providing the necessary manpower and means of transport for an eviction; cf. § 349 para 1 EO) or file further applications (for example the application to set a new auction date in relation to enforcement out of immovable property, if the bids have not met the reserve price; cf. § 151 para 3 EO; Neumayr and Nunner-Krautgasser, 2011: 29-30). In order to speed up the enforcement procedure, applications are usually *ex parte*; especially in the procedure on the approval of enforcement (§ 3 para 2 EO; Neumayr and Nunner-Krautgasser, 2011: 31). Also a recourse (the legal remedy against court resolutions) is generally *inter partes* in enforcement proceedings (Neumayr and Nunner-Krautgasser, 2011: 31). There is **no strict principle of written proceedings** in Austrian execution law; instead there are flexible rules that mainly promote the efficient conduct of the proceedings: Applications, for example, can also be filed orally at the court and parties and third persons can be examined by the court if necessary (Neumayr and Nunner-Krautgasser, 2011: 31-32). Enforcement proceedings are (with the exception of auctions) **not public** (Rechberger and Simotta, 1992: p 130-131).

The enforcement procedure shall be carried out in a **fast and economic way** (Heller, Berger and Stix, 1969: 4) in order to enable an efficient satisfaction of creditors (if the matter in dispute was a money claim: according to the **priority principle;** cf. Neumayr

and Nunner-Krautgasser, 2011: 32). However, numerous provisions on the **protection of the debtor** (for example on items and claims immune from seizure [§§ 250-251, 290 EO] or on restrictions regarding the seizure of claims [§§ 290a-293 EO]) ensure, that the debtor's livelihood is secured and that the debtor's assets are not diminished more than necessary (Heller, Berger and Stix, 1969: 3).

3 Conduct of enforcement

3.1 General aspects

Any enforcement according to the Austrian Enforcement Code requires a previous authorization by the court; therefore the enforcement procedure is split up into two parts: The **"proceedings to obtain an order for enforcement"** and the **"enforcement proceedings"** as such (Rechberger and Oberhammer, 2009: p 74), the latter of which are (generally) divided into the three subphases **seizure, realisation of the value of the asset** and **satisfaction** of the creditors, whenever the enforcement of money claims is involved (Rechberger and Oberhammer, 2009: p 141-143). In order for the court to grant an enforcement order, the creditor needs to produce an **enforceable instrument;** enforceability usually needs to be **confirmed** by the authority that issued the enforceable instrument (Jakusch, 2015: § 7 EO p 98-100/1). Foreign enforceable instruments generally need to be **declared enforceable;** however, many European enforceable instruments are now to be enforced without a previous declaration of enforcement (cf. Art 39 Brussels Ia-Regulation).

3.2 Enforceable instruments

§ 1 EO contains a definitive (Rechberger and Oberhammer, 2009: p 77) list of all the *"acts and documents"* that serve as a ground for the issue of an enforcement order **("enforceable instruments").** Those enforceable instruments can be issued by a **court** (such as judgements and resolutions from civil courts [nr 1]; payment orders [nr 3]; court settlements [nr 5] or criminal court´s findings on the procedural costs or on private claims [nr 8]), by an **administrative authority** (such as decisions by administrative authorities on civil claims [nr 10]; decisions by public insurance institutions, granting or refusing services [nr 11]; or the fiscal authorities' payment orders or confirmations of payment default [nr 13]), or by **unofficial bodies** (such as an arbitral award or an arbitral settlement [nr 16]).

3.3 Confirmation of enforceability

The confirmation of enforceability serves as a certification that the enforcement title is (formally) enforceable. This means, that the enforceable instrument **has come into effect** (which is for example the case, when it was served on the defendant) and that **no legal remedy with a suspensory effect** is available (Höllwerth, 2009: § 7 EO p 150; Jakusch, 2015: § 7 EO p 95). According to case law, the confirmation of enforceability also provides proof of the fact that the **time limit for complying with the instrument** (which

is usually set in the instrument) has **expired**[8]**.** The issuing of the confirmation of enforcement is still part of the procedure in the main case and therefore performed by the court or authority that issued the enforceable instrument (Jakusch, 2015: § 7 EO p 98-100/1).

3.4 Foreign enforceable instruments: Declaration of enforceability

Foreign enforceable instruments (generally) need to be **recognized and declared enforceable** according to European law, bi- or multilateral treaties, or (subsidiarily) § 406-416 EO. This (again generally) requires the enforceability in the state of origin as well as the reciprocity of enforceability (cf. Garber, 2015: § 79 EO p 16-19). However, after the abolition of the exequatur procedure in Brussels I-recast, most enforceable instruments (cf. Art 1 Brussels Ia-Regulation) stemming from European Member States do not require the previous declaration of enforceability any more (Art 39 Brussel Ia-Regulation). Nevertheless, upon application of any interested party, recognition (Art 45 Brussels Ia-Regulation) and enforcement (Art 46 Brussels Ia-Regulation) may be refused under the grounds named in Art 45 Brussels Ia-Regulation. According to Art 47 Brussels Ia-Regulation, the procedure for refusal of enforcement shall be governed by national law; in Austria this shall be done with an application for the cessation of enforcement (§ 418 para 1 EO).

3.5 Order for enforcement

The **proceedings to obtain an order for enforcement** starts with the **application** by one party. Such an application shall contain (according to § 54 para 1 EO): The names of the applying **party** and the party against whom enforcement is sought (nr 1), any circumstances that are relevant for determining the court's **jurisdiction** (nr 1), a description of the **claim** to be enforced and of the **relevant enforceable instrument** (nr 2), a specification of the **method of enforcement** desired as well as (in the case of a money claim) of the objects that shall be subject to enforcement proceedings (nr 3). Additionally, the party filing the application needs to produce the enforceable instrument, including the confirmation of enforceability and (if it is a foreign title) the declaration of enforceability (§ 54 para 2 EO).

The court then has to investigate, whether the **procedural requisites for enforcement** (such as jurisdiction, the capacity to be a party, the existence of an enforceable instrument with the conformation of enforceability, the existence of an application that includes the necessary content, etc.; for an extensive list cf. Neumayr and Nunner-Krautgasser, 2011: 101) are met and if the application is **"objectively founded"** (which – according to the prevailing opinion – means that there is an **identity between the parties** named in the enforceable instrument and in the application and that the enforceable instrument contains a well-determined order to pay or to act or refrain from acting; cf. Jakusch, 2015: § 7 EO p 12-73; Neumayr and Nunner-Krautgasser, 2011: 102-103). The court usually does so merely on the **basis of the court file;** however, in some circumstances the debtor may be heard prior to the issue of an enforcement order (for example when authorising

enforcement of a prohibitory or mandatory injunction; cf. § 358 EO). A failure to satisfy the procedural requisites leads to a dismissal of the application as inadmissible, a lack of the objective foundation leads to dismissal of the application on the merits. However, according to § 54 para 3 EO, the court has to give the party a chance to make corrections, if the application is incomplete or the necessary documents are not attached. The legal remedy against a decision on an application for an enforcement order is the **recourse** (§ 65 para 1 EO).

If the creditor seeks satisfaction for a **money claim below 50.000 Euro,** he or she **has to apply** for enforcement in the **simplified procedure for grant of an enforcement order,** unless (§ 54b para 1 EO):

- The creditor applies for enforcement out of immovable property (nr 1).
- The creditor needs to produce documents other than the enforceable instrument (nr 3).
- The instrument is a foreign enforceable instrument that still needs to be declared enforceable (nr 4).
- The applying creditor can give evidence that the item sought to be seized would be hidden or withdrawn if the debtor was served with the enforcement order prior to seizure (nr 5).

The simplification consists in the fact, that the creditor **does not need to produce the enforceable instrument** (§ 54b para 2 nr 2 EO); instead he or she only has to name the day of issue of the confirmation of enforcement (§ 54b para 2 nr 1 EO). The idea behind this simplified procedure is to enable and facilitate the use of the **electronic communication** in enforcement procedures (Neumayr and Nunner-Krautgasser, 2011: 104). Since the formal requirements for obtaining the issue of an enforcement order are significantly lowered, the debtor is granted an additional legal remedy, called **"objection"** ("Einspruch"; § 54c EO). Through this (additional) legal remedy, the debtor may assert that the applying creditor does not hold the enforceable instrument that was named in the application or that the asserted data in the application does not match the enforceable instrument (§ 54c para 1 EO).

3.6 Carrying out of the enforcement

Depending on whether the debtor has a money or a non-money claim, the Austrian Execution Code offers various types of enforcement procedures: **Money claims** can be enforced by the means of enforcement out of immovable property (§§ 87-247 EO), enforcement out of tangible movables (§§ 249-289 EO), enforcement out of claims (§§ 290-324 EO), orders (§§ 325-329 EO), or execution out of other assets (such as companies, intellectual property rights, shareholder rights, etc.; §§ 330-345 EO). Regarding **non-money claims** the Austrian Execution Code contains very diverse provisions; for example for the distribution of moveable assets (§§ 346-348 EO), for eviction (§ 349 EO), for granting or rescinding rights laid down in the land register (§ 350 EO), or for enforcing mandatory (§§ 353-354 EO) or prohibitory injunctions (§ 355 EO).

The following three sections shall give a rough overview of enforcement out of immovable property, enforcement out of tangible movables and enforcement out of claims.

3.6.1 Enforcement out of immovable property

The Austrian Execution Code knows three subtypes of enforcement out of immovable property: The **registration of a charge on the property, forced administration** and **forced sale of the property.** Notice of the enforcement order in each of those three subtypes needs to be entered into the land register (§ 88 para 1, §§ 98 and 137 EO). As far as **forced administration** goes, the court has then to appoint an administrator (§ 99 para 1 EO) that shall take over and manage (§ 108 EO) the property; at the end of every year he or she has to render account (§ 115 EO). The enforcment court has to approve the accounting (§ 116 EO) and distribute the surpluses to the creditors (§§ 122-128 EO). Regarding **an order for sale,** the court will appoint an expert to appraise the value of the property (§ 140-145 EO). Then the auction conditions (including a date for the auction) shall be set and made public by edict (Neumayr and Nunner-Krautgasser, 2011: 208). The auction itself is open to the public and held by the judge; the lowest valid bid equals half the estimated value of the real estate (§ 151 para 1 EO). Whoever bids most during the auction and can immediately deposit a security worth 10% of the appraised value (§§ 147 and 148 EO) wins the auction; the buyer then has two months to pay the bid amount (§ 152 EO). While the passing of risks happens on the "fall of the hammer" (§ 156 para 1 EO), the property is only handed over after all the requirements (especially the full payment of the bid amount) are met (§ 156 para 2 EO; Rechberger and Oberhammer, 2009: p 308-312). Thereupon, the court schedules a hearing with the creditors and decides on the distribution of the highest bid. Once the decision on the distribution becomes *res judicata*, the creditors can be satisfied and the land register is adjusted (Neumayr and Nunner-Krautgasser, 2011: 209).

3.6.2 Enforcement out of tangible movables

Authorisation of enforcement out of tangible movables lies within the competence of the **judicial officers** (§ 17 para 2 nr 1 lit b EO); the seizure and realization of those assets, however, is conducted by the **court bailiffs** (Neumayr and Nunner-Krautgasser, 2011: 227-228). After the authorisation of enforcement, the court instructs the bailiff where (§ 25b EO) to **attempt seizure** (Neumayr and Nunner-Krautgasser, 2011: 229). The seizure is accomplished by **registering the assets in the seizure report** (§ 253 EO); this grants the creditor a form of lien for the purposes of enforcement (Neumayr and Nunner-Krautgasser, 2011: 231). On the application of the creditor, the assets have to be taken into custody (§ 259 para 1 EO; Rechberger and Oberhammer, 2009: p 355). The realisation of the assets happens in an open sale (§§ 268 and 271a EO) or in an auction (§ 270 EO); the distribution of the revenues largely follows the relevant rules in the context of enforcement out of immovable property (§ 286 EO).

3.6.3 Enforcement out of claims

The enforcment of claims is carried out by the **judicial officers** as well (§ 17 para 2 nr 1 lit b EO). While there are some special provisions for negotiable instruments (such as passbooks; cf. § 296 EO) or claims documented in the land register (§§ 320-324 EO), the vast majority of claims are executed according to the rules in §§ 290-319 EO on "ordinary claims" (Rechberger and Oberhammer, 2009: p 373). After the issue of the enforcement order, the court issues a **double order:** The third-party debtor is served with an **order prohibiting payment** (this also effects the seizure of the claim; cf. § 294 para 1 EO), while the debtor is served with a **freezing order** (§ 294 EO). If the creditor doesn't know the third-party debtor, he or she instead may provide the debtor's **date of birth** in the application to obaint an enforcement order; in this case the court requests the main association of social security providers to find out, whether the debtor is employed somewhere (§ 294a para 1 EO; Oberhammer, 2015: § 294a EO p 4). If the creditor does not dispose of the debtor's date of birth either, the **register office** has to provide that information, if the creditor produces the enforceable instrument there (§ 294a para 3 EO; Oberhammer, 2015: § 294a EO p 4). Upon receiving the order prohibiting payment, the third-party debtor shall give a declaration on all facts of interest regarding the existence and the extent of the claim as well as the probability of actual satisfaction of the creditor (so-called "third-party declaration"; § 301 EO). There are several ways of **realizing** the claims; the practically most relevant way is the **assignment for the purposes of enforcement** according to § 308 EO (Oberhammer, 2015: § 308 EO p 1): In this case, the creditor may demand the claim from the third-party debtor as if it was his or her own claim; however, the claim against the debtor is paid off only in accordance with the actual payment the third party debtor makes (§ 312 EO; Neumayr and Nunner-Krautgasser, 2011: 246).

4 Security measures

There are two very distinct security measures in Austrian Civil Procedure Law, both of which are (despite of some criticism on that systematic positioning; cf. Holzhammer, 1993: 442) laid down in the Austrian Execution Code: **Asset freezing** (or forced administration) **as a stage in the enforcement process** (§§ 370-377 EO) and **interim measures** (§§ 378-402 EO).

Any creditor that has obtained an instrument relating to a **money claim** may apply for freezing measures (§ 370 EO) before the title has become *res judicata* (Neumayr and Nunner-Krautgasser, 2011: 275). However, there is the requirement of an **objective endangerment** of the creditor's satisfaction (Neumayr and Nunner-Krautgasser, 2011: 277-279): Depending on the instrument (for the exceptions cf. §§ 371-373 EO), the creditor therefore has to prove, that the enforcement of his claim would otherwise be significantly more difficult or even rendered impossible or would have to be enforced in a country, where enforcement is not assured by European or international law (§ 370 EO). Nevertheless, the creditor cannot obtain full satisfaction by the means of asset freezing

as a stage in the enforcement process: security enforcement can (generally) not go further than the "seizure phase" (cf. § 374 para 1 EO; cf. Rechberger and Oberhammer, 2009: p 450 and 463). As soon as the instrument becomes enforceable, the asset freezing measure **automatically transforms** into enforcement that serves the satisfaction of the creditor (Sailer, 1999: § 375 EO p 18); any further steps to realise the value of the frozen asset, however, still require an application of the creditor (Sailer, 1999: § 375 EO p 19). If asset freezing as a stage in the enforcement process is admissible, the creditor cannot apply for an interim measure (§ 379 para 1 EO).

Interim measures are issued in a **summary procedure** and shall secure the success of the main procedure (Neumayr and Nunner-Krautgasser, 2011: 287). They can be issued and enforced during and even before the commencement of the main procedure (Neumayr and Nunner-Krautgasser, 2011: 287). While the dogmatic framework of interim measures is quite controversial (Konecny, 1992: 7-52), it is undisputed that there are three "archetypes" of interim measures:

1. Measures to secure a money claim (§ 379 EO).
2. Measures to secure a non-money claim (§ 381 nr 1 EO).
3. Measures to secure a right or a legal relation (§ 381 nr 2 EO).

Generally, for all three types, the applying party (called "the endangered party") needs to assert and to prove the **existence of the claim or of a right or legal relation** that needs to be clarified (Neumayr and Nunner-Krautgasser, 2011: 292, 295 and 297) as well as an **interest in issuing an interim measure** (which consists either in the danger of not being satisfied [§ 379 para 2 EO; § 381 nr 1 EO] or in the necessity to prevent imminent violence or an irretrievable damage [§ 381 nr 2 EO]). There is a vast range of possible security measures, such as custody of moveable tangible assets (§ 379 para 3 nr 1 EO; § 382 para 1 nr 1 EO), prohibitions towards the opposite party to set some defined actions (§ 379 para 3 nr 2 EO; § 382 para 1 nr 4 EO) or third party prohibitions (§ 379 para 3 nr 3 EO; § 382 para 1 nr 7 EO). The standard of proof in a proceeding on an interim measure is lowered to **predominant likelihood** (Neumayr and Nunner-Krautgasser, 2011: 292, 295 and 297). If the interim measure is issued before the due-date of the claim or before initiating the procedure, the endangered party has to be given a time limit to initiate the main procedure (§ 391 para 2 EO).

5 Suggestions for an improvement

Due to the constant reform process that started in the 1980's,[9] Austria currently disposes of a rather modern and well-functioning enforcement law. Nevertheless, there is room for improvement in various aspects: For example, roughly one third of all executions of moveable tangible assets does not yield any income; however, the debtor is only obliged to compile a list of assets **after** an unsuccessful execution of moveable tangible assets or an unsuccessful execution of claims (§ 47 para 1 EO). Obliging the debtor to **deliver a list of assets beforehand** (or providing other means of detecting assets[10]) could result in a **higher success rate** of enforcement procedures (partly because assets could be detected

more easily, partly because many unpromising enforcement procedures would not even be initiated).

Another – a little more technical – point of criticism is the lack of rules on **enforcement out of companies:** According to § 341 EO, companies can be subject to forced administration and forced rental, but there are no provisions on selling the debtor's company, which is why the prevailing opinion is opposed to such a possibility under current law (cf. Frauenberger, 2014: § 341 EO p 3). For systematic reasons (especially at the interface between property law and enforcement law; cf. Oberhammer, 2015: § 331 EO p 79-84) this is understandable; from an economic point of view, however, it is curious that a company can be sold according to civil law and can be transferred in an insolvency procedure, but cannot subject to seizure in an enforcement procedure (which means that instead the creditor needs to enforce out of all the company's assets – obviously for far less revenue).

Another point of criticism to mention is that there could be a better **"interconnectivity" between enforcement law and insolvency law.** In the absence of an application for the opening of an insolvency procedure (or in default of sufficient money to carry it out), an insolvency procedure will not be opened, meaning that enforcement procedures are piling up, creating more and more debts for the debtor (and possibly even for the creditors, if they are unable to recover that money). One possible measure there could be to allow the *ex officio*-opening of an insolvency procedure if many execution proceedings have been unsuccessful.

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I would like to express my sincere thanks to Dr. Wendy Kennett (Cardiff University) for providing very helpful advice regarding English terminology in enforcement law.

Opombe / Notes

[1] Bundesgesetzblatt 628/1991 (available at www.ris.bka.gv.at -> Bundesrecht).
[2] Bundesgesetzblatt 519/1995.
[3] Bundesgesetzblatt I 59/2000.
[4] Bundesgesetzblatt I 37/2008.
[5] Bundesgesetzblatt I 100/2016.
[6] In German: „Wenn die Staatsgewalt in die Dienste des Privatrechts tritt, wie es bei der Execution der Fall ist, so ist es entsprechend, daß dies durch die Staatsbeamten geschieht, damit man es sehe, daß nicht Private als Bevollmächtigte der Staatsgewalt auftreten…".
[7] In German: „Die Execution ist niemals reine Privatsache und bloße Parteienangelegenheit; jedes einzelne Executionsverfahren – und wären seine Dimensionen noch so unscheinbar – berührt immer auch das Gesammtinteresse, und zwar ganz nahe".
[8] OGH 3 Ob 289/04b; 2 Ob 232/08v; 4 Ob 16/10x; RIS-Justiz RS0000188 (available at www.ris.bka.gv.at -> Judikatur -> Justiz).
[9] See above chapter 2.
[10] One will be implemented in the course of the national implementation of the Regulation establishing a European Account Preservation Order: According to the new § 424 para 2 EO, the debtor will have to reveal the bank account he owns in Austria.

References

Fasching, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2nd ed., Vienna: Manz 1990.

Frauenberger, A. '§§ 325-345 EO'. In *Exekutionsordnung – Kommentar*, edited by A. Burgstaller & A. Deixler-Hübner. Vienna: LexisNexis, 2014.

Garber, T. 'Vor § 79 EO (p 1-530), §§ 79-81 EO'. In *Kommentar zur Exekutionsordnung*, 3rd ed., edited by P. Angst & P. Oberhammer. Vienna: Manz, 2015.

Heller, L. V., F. Berger & L. Stix. *Kommentar zur Exekutionsordnung*. 4th ed., Vol I. Vienna: Manz, 1969.

Höllwerth, J. '§ 7 EO'. In *Exekutionsordnung – Kommentar*, edited by A. Burgstaller & A. Deixler-Hübner. Vienna: LexisNexis, 2009.

Holzhammer, R. *Österreichisches Zwangsvollstreckungsrecht*. 4th ed. Vienna: Springer 1993.

Jakusch, W. '§§ 1-78 EO'. In *Kommentar zur Exekutionsordnung*, 3rd ed., edited by P. Angst & P. Oberhammer. Vienna: Manz, 2015.

Kodek, G. 'Artikel 36-60 EuGVVO'. In *Europäisches Gerichtsstands- und Vollstreckungsrecht – Brüssel Ia-Verordnung (EuGVVO 2012) und Übereinkommen von Lugano 2007*, 4th ed., edited by D. Czernich, G. Kodek & P. G. Mayr. Vienna: LexisNexis, 2015.

Köllensperger, B. 'Die neue Brüssel Ia-Verordnung: Änderungen bei Anerkennung und Vollstreckung'. In *Europäisches Zivilverfahrensrecht in Österreich IV – Die neue Brüssel Ia-Verordnung und weitere Reformen*, edited by B. König & P. G. Mayr. Vienna: Manz, 2015, 37-59.

Konecny, A. *Der Anwendungsbereich der einstweiligen Verfügung.* Vienna: Manz 1992.

Konecny, A. 'Die Exekutionsordnung nach 100 Jahren'. In *100 Jahre österreichische Zivilprozeßgesetze*, edited by P. G. Mayr, Vienna: Verlag Österreich, 1998, 95-122.

Konecny, A. 'Einleitung'. In *Kommentar zu den Zivilprozessgesetzen*, Vol I, 3rd ed., edited by H. W. Fasching & A. Konecny. Vienna: Manz, 2013.

Materialien zu den österreichischen Civilproceßgesetzen. Vol I and II, edited by k. k. Justizministerium. Vienna: Manz, 1897.

Neumayr, M. & B. Nunner-Krautgasser. *Exekutionsrecht*, 3rd ed. Vienna: Manz, 2011.

Oberhammer, P. '§§ 290-340, 342-345 EO'. In *Kommentar zur Exekutionsordnung*, 3rd ed., edited by P. Angst & P. Oberhammer. Vienna: Manz, 2015.

Rassi, J. '§§ 55-73a EO'. In *Exekutionsordnung – Kommentar*, edited by A. Burgstaller & A. Deixler-Hübner. Vienna: LexisNexis, 2014.

Rechberger, W. H. 'Franz Klein und das Exekutionsrecht'. In *Forschungsband Franz Klein*, edited by H. Hofmeister. Vienna: Manz, 1988, 119-131.

Rechberger, W. H. & P. Oberhammer. *Exekutionsrecht*, 5th ed. Vienna: facultas.wuv, 2009.

Rechberger, W. H. & D.-A. Simotta. *Exekutionsverfahren*, 2nd ed. Vienna: WUV-Universitätsverlag, 1992.

Sailer, J. '§§ 370-377 EO'. In *Exekutionsordnung – Kommentar*, edited by A. Burgstaller & A. Deixler-Hübner. Vienna: LexisNexis, 1999.

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A General Overview of Enforcement in Commercial and Civil Matters in Lithuania

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Abstract: The article analyses different aspects of enforcement procedure in Lithuania and gives general overview of the recent situation. Legal regulation of the enforcement, enforcement titles, means of enforcement, order of proceedings, division between enforcement and security measures – those questions are explored jointly with others in the light of experience of the Republic of Lithuanian. Authors show several moments of recent reforms that took place in Lithuania. One co-author professor E. Tamošiūnienė (previously E. Stauskienė) is one of the well-known researches who formed the doctrinal framework for the enforcement regulation.

Keywords: • judicial officers (bailiffs) • enforcement procedure • enforceable instruments • the warning to execute • executing recovery

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1 Legal sources regulating the enforcement

Constitution of the Republic of Lithuania and international legislation establish a person's right to judicial protection[1]. In some cases we can speak about a complete exercise of the right to judicial protection only when court not only makes a court judgement, but also the judgement is implemented. The implementation of court judgement is recognised according to Article 6(1) of the integral part of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Baltutytė, 2007) and Constitutions of most countries establish the right to judicial protection. The country that has accepted the duty to ensure the protection of rights of material subjects, shall implement it by ensuring to every legal subject the protection of its violated rights and interests and a forced execution of a court judgement made during the civil process. The mechanism of this coercion is in the hands of the government. The process of enforcing court judgements determines the implementation of the constitutional right to judicial protection and an effective protection of subjective rights or interests protected by law of injured or disputed persons. Otherwise, both the right to judicial protection and the court judgement would be declaratory, and that at the same time reduces society's confidence in courts and their authority.

Upon recognising the enforcement of court judgements as an integral part of the right to judicial protection, it is important to ensure that the process of enforcement went in compliance with all rules established by law and legal principles. Norms regulating the enforcement process in Lithuania, as in many other European countries, are incorporated in to code of civil procedures. The procedure for applying the provisions of the enforcement procedure established in Part VI of CPC of the Republic of Lithuania (Article 583(1) of CPC of the Republic of Lithuania) shall be prescribed by the Judgement Enforcement Instruction[2]. The source of enforcement process is the Law on Bailiffs of the Republic of Lithuania. Separate issues of the enforcement process are also regulated by other legislation: Registry Law on Acts of Property Arrest[3]; provisions of the Bailiffs' Information System[4]; Provisions of Information Systems of Cash Restrictions[5] and other legislation, mostly intended to regulate the bailiff's and assistant bailiff's activity.

2 The reform of the enforcement procedure

The section of CPC of the Republic of Lithuania of 1964 (was valid until 31 December 2002) that regulated the enforcement process was amended a lot of times after the restoration of the Lithuanian Independence on 11 March 1990. These amendments were made because public relations were changing fundamentally, market tendencies were starting to be applied to them, and the legal norms of that CPC were not applicable. Legal norms regulating the enforcement process did not comply with the needs of that time, therefore, together with the reform of an entire legal system, the reform of enforcement of court judgements had to also take place. New legal forms regulating the enforcement process were implemented in 2002 in the CPC of the Republic of Lithuania, and the institutional reform of bailiffs was carried out according to the outline of this reform [6]. The following main goals were established to the institutional reform of bailiffs: 1)

establish to bailiffs a status of persons providing professional services; 2) create a modern and effective procedure of enforcing decisions made by courts and other institutions; 3) legally confirm the principal provision that the costs of enforcing the decisions made with regard to the dispute of individual persons shall be covered not by the government, but by the parties of the dispute.

Until 01 January 2003 there was a system of governmental offices of court bailiffs in Lithuania. Each district court had a bailiff office that had 2-36 bailiffs. In total, before the reform there were around 300 governmental court bailiffs in Lithuania. On 01 January 2003 the bailiff reform was implemented, the goal of which was to create an effective system of enforcing decisions made by court and other institutions and ensure the prevention of failure to pay debts. The reform was implemented upon establishing the Law of the Republic of Lithuania on Bailiffs in 2002 and the Code of Civil Procedures of the Republic of Lithuania in 2002. The functions of enforcing court judgements after the reform are performed by private persons providing professional services – bailiffs.
Prior to the reform, around 3 million EUR out of state budget were spent annually to support governmental court bailiffs but the system of enforcing decisions was ineffective: court bailiffs would recover only around 9 percent to the creditors out of the recovered debt. The system with the main function to make decisions performed this function episodically, operated at loss and basically deteriorated the work of other law enforcement authorities. Such in effectiveness of the system is related to insufficient qualifications of court bailiffs (around 70 percent did not have a legal education); court bailiffs were not concerned financially (they basically did not receive (they received 5 off the actually recovered amount but such system was effective only upon recovering higher amounts) a payment for a successful enforcement of court judgement).

After reforming the system of governmental offices of court bailiffs to a private system, from 1 January 2003, instead of 338 court bailiffs started working 126 private bailiffs who were granted a status of persons providing professional services, by leaving certain obligations of the Minister of Justice to control the bailiffs' activities. Legally a principal provision was established which declared that the costs of enforcing the decisions made with regard to the dispute of individual persons shall be covered not by the government, but by the parties of the dispute[7].

In 2015 Lithuanian authorities have implemented changes of legal regulation and organizational reformation, according to which function of service of judicial and extrajudicial documents since 2016 is delegated from cities and districts courts to the court bailiffs. The Chamber of Judicial Officers of Lithuania is appointed as competent authority accepting documents, sent from other EU states according to the European Parliament and Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.
In 2015 there was implemented a new electronic enforcement tool. From mid-September of 2015 the Judicial Officers Information System was supplemented by a new electronic

debt management tool – Information System of Constraints of Financial Resources. In the system there is integrated data of 18 different institutions and all data, which the bailiffs have on debts and their recovery progress. Debtors' funds from accounts in banks and other credit institutions are debited electronically. Orders of write-off via Internet are provided by the bailiffs, the State Tax Inspectorate, the Customs of the Republic of Lithuania and the State Social Insurance Fund Board. The system provides not only completely automatic but as well proportional distribution of recovered funds to all the bailiffs according to the size of their requirements.

Since the beginning of 2013, when the e-auction service was introduced, already 3000 auctions, published by the bailiffs, have been held, during which the property for 94 million EUR was sold, the average of selling price 2.5 times bigger than the initial price of the objects, presented to the auctions. Since November of 2015 auctions, published by the bailiffs, are carried out in a joint portal www.evarzytynes.lt, where bankruptcy administrators' auctions, auctions of municipalities are carried out as well as auctions of Turto bankas (Bank of Property) and auctions of other institutions, executed by Turto bankas (Bank of Property). The new electronic platform creates preconditions for improving of pledged and unencumbered property auctions, which are executed by the bailiffs and which are still held by the meeting. The Chamber of Judicial Officers of Lithuania seeks that auctions, published by the bailiffs, would be transferred to the electronic space and would be executed together with other auctions and e-biddings[8].

3 The doctrinal approach to the recent development of the enforcement procedures

Systematic research of the enforcement process since 1988 basically concentrated at the Institute of Civil Procedure (now Institute of Private Law) of the Faculty of Law of Mykolas Romeris University. The interest in this topic was firstly taken by V. Višinskis, later he was joined by E. Tamošiūnienė. Both before the reform and after it, the issues of the enforcement process was rather widely discussed in dissertations and academic publications (Višinskis, 2000; Stauskienė, 2006a; Stauskienė & Višinskis, 2008; Stauskienė, 2005; 2006; Stauskienė, 2006a, Stauskienė, 2006b, Vėlyvis, Višinskis & Žalėnienė, 2007; Vėlyvis, Stauskienė & Višinskis, 2007; V. & Žalėnienė, Ambrasienė & Višinskis, 2008; Višinskis & Ambrasienė, 2008; Višinskis; 2006a; Višinskis, 2008; Višinskis, 2008a; Višinskis, 2006; Višinskis, 2005; Stauskienė & Žalėnienė, 2010; Stauskienė & Višinskis, 2010; Višinskis & Stauskienė, 2010). These authors contributed greatly to reforming the system of enforcing court judgements in Lithuania: they took part in preparing amendments and supplements to CPC, Law on Bailiffs, Judgement Enforcement Instruction, currently they are included in the CPC supervision committee compiled by the Minister of Justice of the Republic of Lithuania. V. Višinskis was the first founder of the project of part VI of CPC regulating the enforcement process.

4 Judicial officers (court bailiffs)

A lot of actions in the enforcement process in Lithuania are taken by the subject enforcing court judgements – the bailiff. The main bailiff's objective is to execute by force the order formulated in the execution document. The latter are not deemed jurisdiction because disputed material legal issues are not settled here, related evidence is not investigated and the material law is not resolved.

The bailiff gains a right to perform its rights and provide services in presence of all terms and conditions established in Article 8 of the Law on Bailiffs of the Republic of Lithuania that grant the right to operate as bailiff: the person seeking to become a bailiff must have won a public procurement, insured his/her civil liability, must be assigned by the minster as bailiff, and given an oath under the procedures of the Law on Bailiffs of the Republic of Lithuania. The person recognised as bailiff, after giving an oath under the established procedures, is included in the list of Lithuanian bailiffs, he/she is provided with a certificate confirming the right to operate as bailiff and the bailiff's certificate and badge. The main participant of the enforcement processes is the bailiff. He/she is empowered by the State to carry out the enforcement of writs of execution, to make material ascertainments on the factual circumstances, to serve written proceedings, and any other functions provided by law. The main acts regulating the bailiff's legal status are the Law on Bailiffs of the Republic of Lithuania[9] and CPC of the Republic of Lithuania. Separate issues related to the bailiffs' activities are also regulated by other legislation. According to Article 585 (1) of the CPC of the Republic of Lithuania, the bailiff's requirements are to implement the decisions, provide available information about the debtor's financial situation, access the documents necessary to enforce judgements or to refrain from action that would interfere with the enforcement of judgements, except for cases prescribed by law, binding on all parties and should be met through the time limit set by bailiff. The bailiff's authorisations are provided only to perform functions, the bailiff's requirements are not related to the enforcement of judgements, e.g. while providing intermediary and other services, to other persons are mandatory as much as it is established by law. In all cases during the bailiff's activities, the priority should be given to the performance of functions. He/she may provide services only if they do not contradict the performance of other functions. Overbearing powers to ensure jurisdiction are granted to the bailiff only when performing functions that are performed in a process form. When providing services, the bailiff has not got such overbearing powers and acts only as a person providing free professional services.

Upon performing enforcement actions, the bailiff may not exceed his/her powers. The bailiff must act in such a way that enforcement actions are legitimate and carried out not only complying with the law, but actually ensuring the protection of the enforcement parties' rights and legitimate interests (Article 3 of the Law on Bailiffs of the Republic of Lithuania). It is marked in the practice of the Supreme Court of the Republic of Lithuania that the rules of enforcing court judgements require from a bailiff, as from a subject of public law, to act only in accordance with his/her powers (competence) (*intra vires*), and any action *ultra vires* is deemed a breach of the principle of legality (refer to

the Ruling of the Extended Panel of Judges of the Civil Case Division of the Supreme Court of Lithuania of 11 June 2008 made in the civil case No. 3K-7-277/2008; ruling made on 08 February 2010 in the civil case of bailiff No. 3K-3-40/2010; ruling made on 25 May 2012 made in the civil case No. 3K-3-157/2012; etc.). The provisions above and their explanation in the practice of the Court of Cassation pose a conclusion that the bailiff's duty to seek a faster and real enforcement of judgement must be carried out with the consideration that the requirements of law and the enforcement parties' rights and legitimate interests must not be violated. A person who fails to comply with the demand of the bailiff or otherwise hinders the bailiff from executing enforceable instruments, may be imposed a fine in the amount of up to two hundred eighty nine EUR by the court for every day of failure to perform obligations or impediment. If a bailiff is hindered from executing enforceable instruments, the bailiff may call the police to eliminate the hindrance (Article 585 (2) of CPC of the Republic of Lithuania). The hindering of the bailiff's activities to enforce the court judgement is sanctioned under criminal law. According to Article 231 of CC of the Republic of Lithuania, like the liability for other crimes and criminal offences, hindering the activities of a judge, prosecutor, pre-trial investigation officer, lawyer, or bailiff is sanctioned under criminal law. For such acts the following punishments may be applied: public works, fine, arrest, restriction of freedom, and imprisonment.

Bailiffs, upon performing their functions, must comply with the principles of legality of activities, cooperation and democracy and civil process. The bailiff must perform professional functions in fairness, refrain from disclosing circumstances of a personal life that became available to him/her during professional activities, keep commercial secrets and other secrets protected by law. Upon executing enforcement documents, the bailiff must take all legal measures to properly protect the judgement creditor's interests, without violating rights and interests of other parties of the enforcement process. In compliance with Article 3(2) of the Law on Bailiffs of the Republic of Lithuania, bailiffs are independent and their activities are regulated by the Constitution of the Republic of Lithuania, international treaties of the Republic of Lithuania, Law on Bailiffs of the Republic of Lithuania, other legislation Code of Ethics for Bailiffs.

In the enforcement process of bailiffs there is a series of procedural rights and duties established. A bailiff must on his own initiative undertake every legal measure to ensure that a judgement is satisfied as quickly and realistically as possible and actively help the parties to defend their rights and legally protected interests (Article 634(2) of CPC of the Republic of Lithuania). The bailiff performs his/her functions for a reward. According to Article 610 of CPC of the Republic of Lithuania, all enforcement costs shall be covered by the judgement creditor. After the judgement has been enforced, such costs shall be recovered from the debtor. Exceptions to the payment of enforcement costs may be specified in the Judgement Enforcement Instructions (Article 609(2) of CPC of the Republic of Lithuania).

Certain procedural enforcement actions may be carried out by the assistant bailiff. According to Article 30 of the Law on Bailiffs of the Republic of Lithuania, an assistant

bailiff shall have a right to serve written proceedings on behalf of the bailiff and under his written authorisation, to conduct proceedings other than making material ascertainments, instituting or staying execution proceedings, returning of a writ of execution, sale of property, collocation and distribution of pecuniary assets to the plaintiffs, computation of enforcement expenses. Upon carrying out enforcement actions, the assistant bailiff must indicate that he/she is acting on behalf of the bailiff and indicate that he/she has got a written authorisation issued by the bailiff to carry out such actions. Some functions that were previously performed by courts have been transferred to bailiffs. Besides, the field of services provided by judicial officers is also widened.

Since 1st October 2011, the institution of preliminary investigation of complaints/petitions concerning procedural actions performed by a bailiff (established in Article 510 of the Code of Civil Procedure) has been successfully functioning. At first, a complaint/petition concerning procedural actions of a judicial officer is submitted to him directly. The bailiff examines the complaint/petition within 5 working days after the date of receipt thereof, and adopts the respective bailiff's order. If the judicial officer rejects the complaint/petition completely or in part, the complaint/petition, the bailiff's order and the file of enforcement proceedings are transferred to the district court. After this amendment has entered into effect, courts receive less complaints/petitions concerning procedural actions of bailiffs, as this ensures communication between the parties of the procedure and the bailiff's office, consequently, the judicial officer is able to resolve many questions independently.

Since 1st October 2011, the act of saled property is no longer sent to the court for approval (amendments of Article 602 of the Code of Civil Procedure). This act signed by a bailiff is the property ownership document.

Since 11th November 2011, the procedure for recovery of enforcement costs from a debtor has become more flexible. A bailiff does not need to address the court concerning enforcement costs not paid – the bailiff recovers the enforcement costs in the same enforcement proceedings in the performance of which they are calculated (amendments if Article 611 of the Code of Civil Procedure). The bailiff adopts a procedural order in accordance with the set form and under this order the enforcement costs are transferred into the bailiff's deposit account. If the debtor disagree with the calculation of the enforcement costs, he/she can submit a complaint/petition concerning the bailiff's actions in accordance with the procedure laid down in Article 510 of the Code of Civil Procedure[10].

5 Enforcement titles

Enforceable instruments shall be the following: enforcement orders issued on the basis of court judgements, sentences, decisions, rulings, court orders, resolutions of institutions and officials in the proceedings regarding administrative law violations to the extent they relate to the exaction of possessions, other decisions of institutions and officials the execution of which is regulated by law under the procedures of the civil procedures.

Court judgements do not become enforcement documents by themselves that are enforced by bailiffs. Exceptions – court order regarding the application of provisional safeguards and court orders that may be provided by the judgement creditor to the bailiff for execution. In all other cases, on the basis of judgements made, court issues a separate enforcement note to the judgement creditor.

The judgement creditor is entitled to to provide such enforcement document to the bailiff of his/her choice, acting in the territory of the judgement creditor's property, residential or work area. Enforcement actions are carried out on the basis of the enforcement documents. According to Article 586(2) of CPC of the Republic of Lithuania, it is prohibited to carry out execution actions without an enforceable instrument.

The procedures of the enforcement are applied not only to court judgements or other procedural documents, but also to enforcement documents issued by other institutions (e.g. arbitrage judgements, prosecutor sanctions regarding eviction of physical persons of residential buildings and other prosecutor's rulings as far as they are related to the recoveries of property type; notary's enforcement notes according to protested or non-protested bills or cheques and notary's executive orders regarding compiling a description of inherited property (supplement of the description of inherited property); decisions of the labour disputes committee). It is one of the exclusive features of the enforcement process as the final stage of civil procedures. Enforcement procedures may begin not only after the court makes a judgements, i.e. after the process finishes the preceding stages: after bringing the civil proceedings, preparation and legal investigations and maybe case investigation under the appeal and cassation, but also after no investigation of the case in court, e.g. enforcement of rulings of institutions and officers in the cases of administrative law violations as far as they are related to o the recoveries of property type (Article 587(3) of CPC of the Republic of Lithuania). These documents are executed under the civil proceedings because there are no special proceedings created to execute the documents issued both in the administrative process, the arbitrage, and other institutions that would help to enforce the decisions made by these institutions. The list of documents subject to enforcement is provided in Article 584 of CPC of the Republic of Lithuania that establishes that the documents subject to enforcement are the following:

Enforcement notes issued on the basis of court judgements may be submitted for execution within 5 years after the court decision became effective. However, in some cases shorter terms are established. For instance, if the enforcement documents are issued because of the administrative fines that are not paid, if they are issued not by courts but by other institutions on the basis of decisions made not under the dispute procedures. The terms for submitting the rulings of officers or institutions for execution are established by respective laws.

6 Means of enforcement

The bailiff notifies the debtor by a warning that the enforcement instrument is submitted and, if the actions listed in this document are not performed during the term established

by the bailiff, enforcement procedures shall begin. In case the debtor does not execute the court judgement in good will, enforcement measures are used against him/her. Such measures are started to apply no later than within ten days from the day the term to execute the ruling ended. Coercive enforcement measures that are applied in case the debtor does not execute the court judgement within the term indicated in the warning, are established in Article 624 of CPC of the Republic of Lithuania: 1) exaction from the debtor's funds and property or from his property rights; 2) exaction from the debtor's property and pecuniary amounts placed with other persons; 3) prohibiting other persons from handing over to the debtor money, property or perform any other obligations for the debtor; 4) taking of the documents proving the debtor's rights; 5) exaction from the debtor's wage, pension, scholarship or other income; 6) taking of particular property items indicated in the court judgement from the debtor and conveyance thereof to the judgement creditor; 7) administration of the debtor's property and using the proceeds received therefrom to cover the debt; 8) obligating the debtor to carry out or refrain from specific actions; 9) set-off of the recoverable amounts in counter-claims; 10) other measures provided for by law. Several coercive enforcement measures may be applied concurrently.

There are also rules established that regulate the order of recovery from the property of a debtor who is a natural person (Article 664 of CPC) and the order of recovery from the property of a debtor who is a legal person (Article 665 of CPC). A judgement creditor, pursuant to the order established in Articles 664 and 665 of this Code, prior to the beginning of the compulsory execution may indicate in writing from which of the debtor's property or income recovery shall be made first. This instruction is mandatory for the bailiff. If the judgement creditor fails to indicate from which property to make the recovery, a bailiff, pursuant to the procedures established, shall himself/herself establish from which of the debtor's property or income to make the recovery. Recovery can be made from property further down in the order only if the bailiff is unaware of the existence of any property prior to it in the order, this property may be insufficient to cover the amount to be recovered and the execution expenses, this property has been liquidated, or if the debtor so requests in writing. The requirements concerning the order of recovery shall not be applicable if recovery is being made from mortgaged property.

The Code of Civil Procedures separately regulates the recovery from the debtor's property, i.e. possessed by the debtor at the start of the recovery (its main rules are established in Chapter XLVII), from wage and other income (Chapter LI of CPC). According to the Article 668(1) of CPC regulating recovery from the debtor's property, in performing a recovery from a natural person, the recovery cannot be directed to any household items, economic, work and learning tools and other property that are necessary for the debtor or his/her family to make a living, necessary to use for work according to his/her profession or studying, all necessary items of children and disabled people. The list of this property is established in the Judgement Enforcement Instruction. Moreover, the recovery may not be directed at an amount of money not exceeding the minimum wage for one month (MMW) established by the Government (since 01 January 2016 – 350 EUR). It is possible to recover from a dwelling belonging to a debtor, in which he

lives, only if the amount being recovered exceeds two thousand thirty EUR (Article 663(3) of CPC). According to part 4 of the same article, a court on the petition of the debtor or his family members, after a flat or residential home has been attached when recovering amounts outstanding for energy resources consumed, utilities, and other services, may establish that recovery should not be made from the last flat, residential home, or a part thereof, which is necessary for these persons to live. A court may establish this by taking into consideration the material situation and interests of the children, disabled persons, and welfare beneficiaries. The restrictions established in this Article shall not be applicable when recovering from pledged property.

7 Order of proceedings

According to a general rule, enforcement shall start at the time the warning to execute a judgement has been sent to the debtor. A warning to satisfy a judgement shall mean a document, by which a bailiff notifies a debtor about the fact that an enforceable instrument has been served on him for execution and that if the actions referred to in this document are not accomplished within the term established by the bailiff, compulsory enforcement proceeding shall be begun (Article 655 (1) of CPC). That way a debtor is notified about the enforcement procedures in effect together providing him/her with a chance to execute the requirement during a term specified and avoid enforcement measures and consequential additional costs. Execution of the requirement of this norm is one of the debtor's rights and guarantee forms of interests because the debtor, even though aware of the judgement made to him/her,, having the elements of type of obligation of prohibition, is informed that an enforcement document has been submitted for execution and, in case the debtor does not perform the actions listed in this document during the term established by the bailiff, enforcement procedures shall take place (the ruling of the Panel of Judges of Civil Case Division of the Supreme Court of Lithuania of 16 March 2005nutartismade in the civil case No. 3K-3-192/2005; ruling of 05 December 2012, made in the civil case No. 3K-3-541/2012; ruling of 13 January 2015, made in the civil case No. 3K-3-71/2015). However, there are a few exceptions established in the law. According to Article 661 of the Code of Civil Procedures, a warning to satisfy a judgement shall not be sent out if the satisfaction terms are indicated in the laws or enforceable instrument. No warning shall be sent in expeditious enforcement proceedings, cases concerning the confiscation of property and cases of recovery of debts under fifty seven EUR.

Upon executing recovery of small amounts (under 57 EUR), simplified proceedings are applicable. Clause 5 of the Judgement Enforcement Instruction establishes that the sum of the debt and recovery costs is firstly directed at the funds contained in the debtor's bank account. In case the debt and recovery costs are not recovered from the funds in the bank account within 30 days, the bailiff may begin recovery under general procedures. In cases when there are no possibilities to deliver the warning to the debtor by post services, it is delivered in the manner of public announcement – posted in the official website www.anstoliai.lt. The day of announcing a warning is deemed the day of delivering the warning.

In case the debtor does not satisfy the obligation during the term established, the bailiff starts the search of his/her property. The extent of these actions depends on the size of the debt, the specificity of the debtor's activities and knowledge about the debtor. All credit institutions with the measures of electronic connections are provided with the bailiff's instructions to limit the dispose monetary funds or deduct the debtor's monetary funds by force. Necessary restrictions are imposed on the person's bank accounts. Information on the debtor's property is searched in the state registers. It is checked in the Real Property Register what immovable property is owned by the debtor. In case the debtor is a physical person, data about his workplace and income are checked; it is investigated through the State Enterprise Regitra, whether the debtor has any vehicles registered under his/her name. In case it is found that the physical person has no property, his/her spouse's material status may be inspected because debts may be recovered from the debtor's property share in the spouse's assets. Depending on the individual debtor's qualities, more information may be searched in other registers (e.g. the Register of Seagoing Ships, the Register of Inland Waterways Craft, etc.).

In case it is found during the investigation that the debtor has no assets, nor money, the bailiff usually carries out repeated inspection of financial state. When the property that may be subject to recovery is found, an auction of that property is announced. The debtor may avoid them if he/she finds a buyer of the property arrested and offers him/her to the bailiff before the auction. In that case, the property is sold to the person offered by the debtor and the debt is covered without an auction. After selling the property to the buyer offered by the debtor or after realising it at an auction, the funds received for it are divided for the judgement creditors. In case more than one debt needs to be recovered, all judgement creditors' demands are satisfied in order that is established in Article 754 of the Code of Civil Procedures.

All costs related to the enforcement are established in the Judgement Enforcement Instruction approved by the minister of justice. Structurally, enforcement costs are divided into two parts: 1) administrative fee, that consists of general expenses and additional expenses paid for particular operations performed by bailiff; 2) - remuneration to a bailiff for enforcement of enforcement of writs of execution or part of them. Necessary execution fees must be covered to the bailiff by the judgement creditor upon submitting the enforcement document to be executed. However, if agreed with the bailiff, the bailiff may postpone remuneration for the necessary costs and execute the enforcement document by covering these enforcement costs from turnover funds. After the funds are recovered, firstly all judgement creditor's execution costs are covered. The bailiff's remuneration share is also covered that is proportional to the amount of debt recovered. Then the debt itself is covered.

8 Division between enforcement and security measures

A great importance with regard to ensuring the execution of a future court judgement is given to the institute of provisional safeguards. As court applies provisional safeguards, the relationship between the contradictory procedure and the enforcement process and

the mutual dependency of the two institutes is revealed. Even though the terms for case investigation in Lithuania are recognised as some of the shortest terms in Europe[11], quite a long time may pass from going to court to court judgement becoming effective. Hence, because of various reasons, may arise for the execution of the court judgement. In order to ensure that the enforcement of the court judgement favourable to the plaintiff did not become worse or impossible, the provisions of CPC of the Republic of Lithuania establish the institute of provisional safeguards. The provisional safeguards may be applicable in any stage of the process, except for the final stage of the civil process. According to Article 144(3) of CPC of the Republic of Lithuania, provisional safeguards may be applied even before filing of a claim. It confirms that the application of provisional safeguards regardless of whether they are applied before filing of a claim or after that in other stages of the process, is an effective guarantee for enforcing a real court judgement. This institute ensures the effectiveness of enforcement procedures. Intention of provisional safeguards is to prevent impediment of enforcement of a court judgement or making it impossible (Article 144(1) of CPC of the Republic of Lithuania). The final judgement is a procedural court document that solves the dispute finally and grants the claim and/or counter-claim of claimed material legal demands in full or in part, or to dismiss the claim and/or counter-claim (Article 260(1) and 270(5.1) of CPC). Hence, the possible content of the future court judgement should be evaluated according to the legal requirements stated in the case. Since the future court judgement grants the claimed requirements in the claim (counter-claim), in establishing, whether there is a reason to apply provisional safeguards, it should be assessed if, after the court judgement favourable to the plaintiff is made, i.e. after his/her claims are satisfied, execution of such judgement may become worse or impossible. Due to this reason, it is rightfully acknowledged in court practice that court may apply only those provisional safeguards that are related to the claims made and can ensure the enforcement of the future court judgement if these requirements are satisfied[12].

The goals of both enforcement of court judgements and provisional safeguards actually coincide, though the difference between these two institutes is preserved. Provisional safeguards have to do with the procedural legal and not material legal nature. Even though these safeguards are intended to ensure the requirements of material legal manner, they are not material legal civil remedies, i.e. persons' right restrictions of the material legal nature are applied for the procedural purposes[13]. Procedural legal nature of provisional safeguards determine the following: 1) provisional safeguards are always interim restrictions[14], their application is limited with respect to time and they are valid only until the final dispute resolution; 2) such measures are applied for prevention[15], in attempt to avoid the impossibility or worsening of the enforcement of the future court judgement; 3) provisional safeguards have no preliminary or *res judicata* power[16]. Upon making a judgement, court may also apply the measures of ensuring enforcement of the judgement that differ from provisional safeguards, even though they both may be (with certain exceptions, e.g. entry in one register regarding prohibition to transfer property rights, as per Article 145(1.2) of CPC of the Republic of Lithuania) executed under the procedures of enforcement. The defendant may request the court to substitute a provisional safeguard or eliminate it. Debtor has no such right, but he/she has a right to appeal the bailiff's

actions if he/she it considers the provisional safeguards to be applied illegally. The defendant also is entitled to appeal the bailiff's actions to arrest property that cannot have recovery directed at it. In case of the application of provisional safeguards, the defendant's interests are also protected, by establishing the security of possible defendant's loss regarding the security of provisional safeguards. In the enforcement process, this institute is not applied because the validity of the judgement creditor's requirements is already established by the court judgement in effect. In our opinion, with the application of provisional safeguards and measures to ensure the enforcement of judgement, security for the enforcement of a possible court judgement is created. These measures are used to seek the enforcement itself. They are different stages of execution of one goal: remedy of the rights that are possibly violated by ensuring the security for the enforcement of future judgement if the rights are acknowledged and the rights defended under judicial proceedings. The last stage of executing this goal is the actual enforcement of court judgement.

Notes:

[1] European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms // State Gazette. 1995. No. 40 987; Constitution of the Republic of Lithuania // State Gazette. 1992. No. 33 1014; Code of the Civil Procedure of the Republic of Lithuania // State Gazette. 2002. No. 36 1340; Law on Courts of the Republic of Lithuania // State Gazette. 2002. No. 17 649.

[2] Order by the Minister of Justice of 07 August 2015 No. 1R-222 "Regarding the Amendment of the Order by Minister of Justice of 27 October 2005 No. 1R-352 "Regarding the Confirmation of the Judgement Enforcement Instruction" (TAR, 2015-08-10, No. 2015-12177)

[3] Registry Law on Acts of Property Arrest of the Republic of Lithuania (Gazette 1999, No. 101-2897; 2012, No. 6-182).

[4] Order by the Minister of Justice of the Republic of Lithuania of 30 December 2002 No. 400 "Regarding the Provisions of Public Procurement of Bailiffs, Policy of Public Procurement of Bailiffs, Policy of Inspecting Bailiffs' Activities, Provisions of Bailiffs' Information System, Committee Provisions of Bailiffs' Assessment, and Confirmation of Bailiffs' Assessment Rules" (Gazette 2003, No. 2-75).

[5] Order by the Minister of Justice of the Republic of Lithuania of 19 April 2012 No. 1R-126 "Regarding the Confirmation of Provisions of the Information System of Cash Restrictions" (Gazette 2012, No. 48-2359).

[6] Decisions of the Government of the Republic of Lithuania of 27/12/1999 No. 1484 "Regarding the Confirmation of Outline of the Institutional Reform of Court Bailiffs" // State Gazette. 1999. No. 114.

[7] Information provided by the Lithuanian Chamber of Bailiffs, www.antstoliurumai.lt.

[8] Stauskiene. D. Report for EuroDanube meeting. 2016

[9] Law on Bailiffs of the Republic of Lithuania // State gazette, 2002, No. 53-2042.

[10] D. Satkauskienė. Report for the international forum the 10th anniversary of the private enforcement in Bulgaria

[11] http://www.teismai.lt/data/public/uploads/2016/04/2016-eu-justice-scoreboard.pdf

[12] Supreme Court of the Republic of Lithuania, Review of General Questions Regarding the Application of Provisional Safeguards, Court Practice No. 34

[13] Ruling of the Court of Appeal of Lithuania of 12 May 2016 made in the civil case No. 2-1021-241/2016.

[14] Ruling of the Court of Appeal of Lithuania of 14 January 2016 made in the civil case No. 2-25-407/2016.
[15] Ruling of the Court of Appeal of Lithuania of 20 November 2014 made in the civil case No. 2-1857/2014.
[16] Ruling of the Court of Appeal of Lithuania of 28 January 2015 made in the civil case No. 2-90-241/2015.

References

Ambrasienė, D. & Višinskis, V. (2008) Vykdymo proceso šaltiniai, *Šiuolaikinės civilinio proceso teisės paskirtis*, pp. 44–60 (Vilnius: Centre of Registers).

Baltutytė, E. (2007) Application aspect of Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms, *Lietuvos CPK įgyvendinimo problemos: nacionaliniai ir tarptautiniai aspektai*, pp. 38-45)Vilnius: Legal Information Centre).

Stauskienė, E. & Višinskis, V. (2008) *Teismo sprendimų vykdymas* (Vilnius: Saulelė).

Stauskienė, E. & Višinskis, V. (2010) Problems of forced execution of resolution to impose fine in the republic of Lithuania, // *Visuomenės saugumas ir viešoji tvarka (4) : mokslinių straipsnių rinkinys = Security of society and public order : proceedings of scientific articles* (4), pp. 202-215, available at http://www.mruni.eu/kpf_dokumentai/fakultetas/Leidiniai/visuomenes_saugumas_ir_viesoji%20tvarka_4.pdf (July 15, 2016) (Mykolas Romeris University).

Stauskienė, E. & Žalėnienė, I. (2010) The distinctive features of representation in enforcement proceedings, *Jurisprudencija*, 2(120), pp- 273-287.

Stauskienė, E. (2005) Skubiai vykdytinų teismo sprendimų instituto taikymo problemos, *Jurisprudencija*, 2005, 69(61), pp. 90–98.

Stauskienė, E. (2006) Teismas – teisinių santykių vykdymo procese subjektas,. *Mokslinės praktinės konferencijos* „*Teisė į teisminę gynybą bei jos realizavimo praktiniai aspektai*“, *vykusios 2006 09 14–15, Vilniuje, mokslinių pranešimų rinkinys* (Vilnius: Mykolas Romeris University).

Stauskienė, E. (2006a) Teismo sprendimų įvykdymo atgręžimas,. *Jurisprudencija*, 2006, 4 (82), pp. 76–82.

Stauskienė, E. (2006b) *Teismo vaidmuo vykdymo procese.* Doctoral Dissertation, social science, law (01 S). (Vilnius: Mykolas Romeris University).

Vėlyvis, S., Stauskienė, E. & Višinskis, V. (2007) Pagrindinės teismo sprendimų vykdymo taisyklės romėnų teisėje, *Jurisprudencija*, 2007, 2(92), pp. 10–20.

Vėlyvis, S., Višinskis, V. & Žalėnienė, I. (2007) Antstolio veiksmų apskundimas,. *Jurisprudencija*. 2007, 1(91), pp. 21–27.

Višinskis, V. & Stauskienė, E. (2010) Resolution to impose an administrative fine as executive document, // *Visuomenės saugumas ir viešoji tvarka (4) : mokslinių straipsnių rinkinys = Security of society and public order : proceedings of scientific articles*, available at http://www.mruni.eu/kpf_dokumentai/fakultetas/Leidiniai/visuomenes_saugumas_ir_viesoji%20tvarka_4.pdf (July 15, 2016) (4) (Mykolas Romeris University).

Višinskis, V. & Ambrasienė, D. (2008) Teismo vykdomųjų dokumentų išdavimo tvarka. *Jurisprudencija*, 2008, 2(104), pp. 39–47.

Višinskis, V. (2000) *Teismo sprendimų vykdymo procesinės problemos.* Doctoral Dissertation, social science, law (01 S). (Vilnius: Lithuanian Academy of Law, 200).

Višinskis, V. (2005) Kai kurios turto realizavimo vykdymo procese problemos, *Jurisprudencija*, 2005, 77(69), pp. 108–114.

Višinskis, V. (2006) Skolininko turto paieška vykdymo procese, *Jurisprudencija*, 2006, 3(81), pp. 99–105.

Višinskis, V. (2006a) Teismo sprendimo vykdymo vieta, *Jurisprudencija*, 2006, 1(79), pp. 128–137.
Višinskis, V. (2008) Ne teismo išduodami vykdomieji dokumentai, *Jurisprudencija*, 2008, 7(109), pp. 47–55.
Višinskis, V. (2008a) Raginimas įvykdyti sprendimą, *Jurisprudencija*, 2008, 1(103), pp. 22–29.

Changed Circumstances in Slovene Case Law

KLEMEN DRNOVŠEK

Abstract The aim of this paper is to introduce an overview of Slovene case law relating to usage of the change of circumstances institution. It is the institution which enables the rescission of a contract if, after the contract is concluded, circumstances arise that render the performance of obligations by one party more difficult or owing to which the purpose of the contract cannot be achieved. Firstly, the author analyses case law in relation to substantive issues of the changed circumstances institution and defines his position towards the question of which are the changed circumstances that allow the rescission of a contract. In the second part, he uses the newest case law examples to analyse the appropriate manners of exercising the recession of a contract and the most common mistakes by parties, which have consequences in refuting of claims without consideration of their substantive justification. With regard to the fact that the parties may waive any reference to specific changed circumstances in advance, the author concludes his contribution with an overview of limitations and discusses the permission of this type of contract termination.

Keywords: • changed circumstances • rebus sic stantibus • pacta sunt servanda • real estate market breakdown • economic crisis • financial crisis • termination of the contract • rescission of the contract.

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1 Introduction

In the area of contract law, autonomy of contracting parties' intentions is considered of high importance. As a rule, a party has the right to decide as to whether he/she will enter and with whom he/she will enter a specific contractual relationship. In addition, parties are enabled to regulate the contents of relationships freely but may not act in contravention of the Constitution, compulsory regulations, or moral principles. However, autonomy of contracting parties' intentions ends when the contract is concluded. In that moment, a party no longer has the option to withdraw from the concluded agreement (one-sidedly) and has to fulfil the obligations deriving from the agreement respectively. The cited rule follows the principle of pacta sunt servanda (meaning; "agreements must be observed"), which is the basic principle of contract law as well as the basis for organizing this area of the law (Driesen, 2011: 310). Nevertheless, the principle is not absolute. Sometimes, strict application of this principle may lead to infringements on justice, reasonableness, and good faith (Baranauskas and Zapolskis, 2009: 198).

In Slovene legal order, the aforementioned principle is regulated by Article 9 of the Obligation Code[1] (hereinafter referred to as "OZ"[2]), which determines that participants in an obligational relationship shall be obliged to perform their obligations and shall be liable for the performance thereof. Nevertheless, in certain cases such circumstances arise that a strict usage of the stated rule would not be logical and just. Based on Article 116 of the OZ, obligation of a party expires if performance of obligations becomes impossible. It is a logical exception from the principle of pacta sunt servanda, as we cannot demand the party to perform something that objectively is no longer possible to perform.[3]

And sometimes, after the conclusion of a contract, specific circumstances arise where for one party it is still possible to perform an obligation, but because of the changed circumstances, it becomes more difficult or without meaning. The most common causes that render the performance of obligations and make the contract lose its purpose are natural disasters, prohibition or restriction of import or export, armed conflicts, monetary devaluation (Rösler, 2008: 47), and more recently, crash of the real estate market, high fluctuation of energy products prices, and the economic crisis.

If in the case of changed circumstances parties consent with the termination of obligations, then the obligation expires.[4] Nevertheless, the question that arises is whether one party can one-sidedly achieve the obligation to expire even if the other party opposes, for example, in the case of changed circumstances. The exposed question was developed as a part of the theory on the rebus sic stantibus clause, which determines that a legal relationship shall remain valid only if the circumstances, under which the contract was concluded, do not change significantly (Cigoj, 2003: 334). This rule means a deviation from the basic principle stating that a contract must be performed as agreed upon and derives mostly from the assumption that a party would not conclude a contract if he/she would, at the time of conclusion, know that the circumstances will change significantly. The deviation from the basic principle of contract law is justified on the basis of the equivalence principle, principle of conscientiousness and fairness, and principle of

justice.[5] Content of the rebus sic stantibus clause is regulated in various ways in different legal orders.[6] In Slovene legal order, the clause is regulated in provisions from Article 112 to Article 115 of the OZ, under the title "Rescission or Amendment of Contract Owing to Change of Circumstances".

2 Change of circumstances institution in Slovene legal order

On the basis of Article 112 of the OZ, a party may request for rescission of a contract if, after the conclusion of a contract, circumstances arise that render the performance of obligations of one party more difficult or owing to which the purpose of the contract cannot be achieved and in both cases to such an extent that the contract clearly no longer complies with the expectations of the contracting parties and in the general opinion it would be unjust retain it in force as it is.

Therefore, a party may request for the rescission of a contract in two cases. Firstly, if after the conclusion of a contract circumstances change to such an extent that the party still has the possibility to perform an obligation but this becomes more difficult. Secondly, if changed circumstances cause situations where performance of obligations is not "more difficult", however, the purpose of the contract cannot be achieved. In both cases, a certain amount of influence by changed circumstances is still demanded as a party may request the rescission of a contract only when the contract clearly no longer complies with his/her expectations and if it is the general opinion that it would be unjust to retain it in force as it is. When ruling on a request to rescind a contract for reason of changed circumstances, the court primarily considers the purpose of the contract, the risks customary for contracting parties in commercial transactions during the performance of contracts of the same type, and the balance of interests of the two contracting parties.[7] Irrespective of the aforementioned, a party may not request the rescission of a contract if changed circumstances arise after the deadline stipulated for the performance of such party's obligations, or if the party should have considered such circumstances when the contract was concluded, or could have avoided them or could have averted the consequences thereof.[8]

Furthermore, the law stipulates that a contract (regardless of the existing changed circumstances) shall not be rescinded if the other party offers to have the relevant contract conditions justly amended or allows such. But failing to do so and the court rescinding a contract owing to changed circumstances, the court can instruct the party, who requested the rescission, to reimburse the other party for an appropriate part of the damage incurred for the reason of rescinding the contract.[9] However, the appropriate part of the damage does not cover the damage deriving from lost profit.[10]

3 Substantive issues in Slovene case law

A party may request the rescission of a contract if, after the conclusion of a contract, circumstances arise which render the performance of obligations more difficult and to such an extent that the contract clearly no longer complies with the party's expectations and in the general opinion, it would be unjust to retain it in force. Considering the fact

that the OZ only descriptively defines circumstances, the question then arises: which are the circumstances that allow a party to request the rescission of a contract?

Development of Slovene case law relating to usage of the change of circumstances institution was influenced mostly by events from the past years, which were marked by major economic shocks. December 2007 marked the beginning of credit freezes and mortgage crises, sparkling the Great Recession in the U.S., which led to a worldwide economic crisis (Bush, 2013: 1189). In Slovenia, radical alterations began in the beginning of 2008 with the real estate market breakdown and continued with the economic crisis that strongly affected most of country's economic sectors.

3.1 Market price movement causes disproportion of mutual obligations

Market price movement that occurs after the conclusion of a contract can cause disproportion of mutual obligations between contracting parties. On the one hand, price movement can cause one party to pay significantly more than what is the (present) estimated value of the subject to contract, and on the other hand price movement can also cause a party to sell the subject to contract at a price that became significantly lower than what is the (present) estimated value.

More recent Slovene case law adopted the position that it is also possible to rescind a contract in cases of difficulties with fulfilment of party's monetary obligations. In a judgement with reference number I Cp 1507/2010, Ljubljana Higher Court has granted the claim for rescission of a sales contract on the grounds of changed circumstances on the market. The party referred to the crash of the real estate market that supposedly disturbed the equivalence between the agreed purchase money and the estimated value of the real estate.[11] In the time between the phase of conclusion and the phase of performance of the contract, such a quick and significant fall in housing prices occurred that fulfilment of the equal value of performance principle was made impossible. Furthermore, performance would no longer comply with the purpose of the contract, as the party, considering the changed circumstances, would definitely not conclude the contract with the same content again.

However, a significant fall or increase in prices (e.g. of real estate) does not necessarily mean the fulfilment of presumptions that allow the rescission of a contract on the grounds of changed circumstances. If the increase in prices occurs because of the long-term upward trend (e.g. because of real estate price growth trend in the economic sector), this does not constitute as an unforeseen development. Therefore, a party may not refer to changed circumstances even though this means a 100% or more in price increase.[12] In this particular case, the two parties concluded a precontract by which they bounded themselves to conclude a sales contract after the finished denationalisation procedure. The court reinforced its decision to reject the request for rescission with indications that in the time of the conclusion of the precontract, an obvious trend of real estate price growth was evident in the Republic of Slovenia. For that reason, the party that requested the rescission of a contract on the grounds of significant increase in prices should have

considered the possibility of price growth, particularly because of the long-term denationalisation procedures.

When assessing the disturbance of equivalence of mutual obligations, only the difference between the expected and the unexpected price increase is considered and not its absolute increase in a specific time period. In fact, only such increase that exceeds the increase, which a party should expect with regard to the current trend, is considered as a changed circumstance.[13]

Even though a trend of increase or decrease in prices cannot be detected at the time of the conclusion of the contract, a party should always consider the possibility of price changing to some extent. If the market price movement is not significant than this is a matter of a customary business risk, which excludes the possibility of rescission of a contract on grounds of changed circumstances.[14] Therefore a usual rise (or fall) in prices has to be considered and it is possible to demand the rescission of a contract only in the case of a significant rise (or fall) in prices that causes a clear disproportion in value of mutual contractual performance.[15]

For illustration purposes, we may take the example where the parties concluded a contract with which one party committed to pay a fixed price for the supply of electrical energy and the other party committed to supply the electrical energy at the agreed price for the duration of the contract. As the other electrical energy suppliers lowered their prices, the fixed price from the aforementioned contract became 30% higher than what the rest of suppliers offered. The court rejected the party's claim to rescind the contract for reason that "the change in electrical energy prices in the time period of three years represents a business risk that the plaintiff should be aware of" as in a way, the contract was speculative for both parties.[16]

3.2 Change of circumstances that affects the party's financial position

In Slovene law theory and case law there is a far more open question regarding the possibility of rescinding a contract when performance of obligations by one party becomes significantly more difficult as a result of a deteriorating financial position but the proportion between mutual obligations stays the same.

Cigoj takes the position that financial solvency represents a business risk and that the debtor is obliged to consider his/her potential insolvency even though it can emerge suddenly and is not a result of his culpability (Cigoj, 1984: 443). Dolenc takes a similar standpoint when saying that a debtor cannot reference to his/her financial difficulties (e.g. illiquidity) or state that he/she did not receive a promised credit (Dolenc, 2003: 601). The mentioned conclusions are based on the argument that financial solvency belongs under the operating risk which a party must consider at all time. Nevertheless, more recent case law in a way departs from the abovementioned positions as it allows that, in certain cases, a party may also indirectly reference his/her financial difficulties.

However, the financial position of a party by itself cannot represent what is legally considered as the changed circumstances institution. Otherwise, all of the commercial entities without assets to repay their obligations would be able to rescind contracts referring to changed circumstances. "Operating loss or illiquidity of a commercial entity can only be seen as a consequence of changed circumstances that made performance of obligations by one party more difficult and not as a changed circumstance by itself."[17] What this means is that poor financial position can emerge because of other changed circumstances (e.g. low production because of a natural disaster) which by themselves, however, are a relevant basis for rescission of a contract. In such cases, the court has to assess the influence of the changed circumstances on business, therefore also on the financial solvency of the party, and the party has to provide the court with concrete contents, as only general and flat rate reference to changed circumstances cannot be sufficient.

3.3 Economic crisis as a changed circumstance

Recently, a question arose if the preceding economic crisis can also be considered as a changed circumstance based on Article 112 of the OZ. Grilc dealt with the mentioned question in more detail and emphasised that the main problem of exercising the economic crisis as a changed circumstance is in determining the presumption if the crisis may be considered unexpected or not.[18] He finished his research with a conclusion that "referring the economic crisis is not prima facia a changed circumstance; however, exercising this reference could be successful under the condition that the claim is supported by facts and evidence" (Grilc, 2001: 40). Furthermore, he listed some proposals about the contents that a party should reveal and explain if he/she wishes to request the rescission of a contract on the grounds of the economic crisis. Case law almost entirely adopted his preposition which is evident from the Ljubljana Higher Court ruling with reference number I Cpg 772/2013. In the mentioned matter, the party requested the rescission of a contract based on Article 112 of the OZ, referring to the economic crisis which caused smaller production volume and consequently, plummeting of natural gas consumption. Subsequently, the party wanted to reduce the agreed quantities of daily gas offtake but the other party opposed. The court rejected the request for rescission of a contract for reasons of economic crisis and justified its decision mainly with the explanation that "exercising the economic crisis as a changed circumstance can only be successful if the claim is supported by facts and evidence whereby the plaintiff should reveal and explain: (1) change in revenue and expenditure caused by the crisis; (2) his/her reaction to changed circumstances so far and how are the circumstances unexpected or external; (3) how do changed circumstances influence the contract and the general position of the plaintiff; (4) how did he/she evaluate the risk; (5) how did he/she act so that he/she cannot be blamed for the lack of necessary diligence and what did he/she do in order to fulfil the basic principle of pacta sunt servanda.« [19] On the other hand, the party's definition was completely general, flat rate, and without content as it only cited that the worldwide economic crisis caused smaller production volume and consequently, plummeting of natural gas consumption.

4 Exercising rescission or amendment of a contract referring to changed circumstances

After inspecting case law, it is possible to determine that only a minority of cases relate to content assessment of the change of circumstances institution as mostly, cases are being assessed according to the relevancy of the way that the institution is exercised. As a result, courts often do not deal with the question of fulfilling substantive presumptions at all, but rather reject the party's claim solely on the grounds of inadequacy in exercising the claim. This finding is even more surprising as the legal norms seem to be perfectly clear and beyond reasonable doubt.

To the extent that the circumstances change after the conclusion of a contract, a question arises of what, if anything, must a party do if he/she no longer wishes to be bound by the contract. What derives from Article 113 of the OZ is that a party, who intends to request the rescission of a contract, must notify the other party of the changed circumstances as soon as he/she learns that such circumstances have arisen. Omission of the obligation to notify, however, does not mean that the party loses the right to request the rescission of a contract. The notification is important only to avoid potential liability for damage.[20]

On the other hand, there is also the question regarding the actual exercising of a claim. Based on the first paragraph of Article 112 of the OZ, in case of changed circumstances, a party may request the rescission of a contract. Therefore, a party is expected to be active, as the rescission of a contract does not occur only because of law but it is necessary for a party to exercise the rescission at court.[21] The rescission of a contract can thus occur only based on the court's judgement.[22]

A good example of inadequate exercising of the changed circumstances institution is evident from the Ljubljana Higher Court ruling with reference number VSL ruling I Cpg 803/2013. In the stated matter, the parties concluded a contract on sale of electrical energy for two measuring stations at two separate addresses. After some time, the agreed price of electrical energy became 30% higher than what the rest of the suppliers offered. For this reason, one party sent the other a declaration on withdrawal from the contract. The other party did not consent with the withdrawal and demanded payment of compensation deriving from lost profit or contractual penalty owing to unentitled withdrawal from the contract on the sale of electrical energy. In the proceedings, the defendant claimed that the withdrawal from the contract was a reaction to the fact that the plaintiffs' price of electrical energy was 30% higher than with the rest of the suppliers. The court rejected the defendant's objection stating inadequacy in exercising the claim and it never addressed the question whether the cited difference in price could in fact represent a changed circumstance in terms of Article 112 of the OZ.

From the ruling of the referral, different ways of inadequate exercising of a claim may be established that also repeat in other judicial cases. If one party (merely) notifies the other about the withdrawal from the contract and the other party does not consent, the notification is not sufficient in order to exercise changed circumstances based on Article 112 of the OZ.[23] The contract also remains valid in cases where the opposing party does

not expressly oppose the withdrawal but does not respond to the notification on withdrawal either. In fact, silence does not state for consent, therefore, the contract remains valid and both parties have to perform the obligations deriving from the contract.[24]

If the other party does not consent with the withdrawal, the party who wishes to exercise the claim can only do that at court with a lawsuit. The same conclusion is evident from other rulings of higher courts and the Supreme Court of the Republic of Slovenia.[25]
In case law, parties often refer to changed circumstances in a form of objection to the opposing party's performance claim. In the past, some law theoreticians argued that alongside a lawsuit to rescind a contract and a counterclaim, the party is also entitled to an objection (Dolenc, 2003: 605). Case law, including the Supreme Court of the Republic of Slovenia, adopted a clear position stating that exercising the rescission of a contract with an objection is not sufficient.[26] Consequently, in such a case, a party must issue a counterclaim in order to demand the rescission of a contract.

Regardless of the fact that from Article 112 of the OZ, it clearly derives that in the case of changed circumstances a party may (only) request for the rescission of a contract, in case law there are also many cases where parties sue for amendment of contracts. By doing that, they wish the contract to remain valid and at the same time force the opposing party to accept the changed circumstances.

If changed circumstances make the performance of obligations by one party more difficult, he/she may propose an amendment of the contract to the other party (which is also advisable) but cannot demand it or force it in court.[27] Therefore, when a party requests for amendment of the contract by issuing a lawsuit claim, the claim is not substantively justifiable and has to be rejected. However, the option to amend the contract is given to the opposing party if he/she wishes to retain the contract as valid. In this way, the other party may offer or allow having the relevant contract conditions justly amended.[28]

In case law, another question arisen regarding the time limitation of a claim to rescind a contract. In a way, time limitation derives from substantive presumptions stated in Article 112 of the OZ, as a party may only refer to the change of circumstances that arose after the conclusion of the contract and before the deadline stipulated for the performance of obligations.[29] Nevertheless, the possibility of exercising the claim is not time limited, as the law does not prescribe a deadline for issuing a claim.[30]

Furthermore, there is one more interesting question which relates to the party's possibility to request the rescission of a contract even after the obligation is already (partially) performed. It refers to the fact that legislative provisions on rescission of a contract do not expressly regulate the question on how the performance of contractual obligations influences the court's decision on a claim to rescind a contract for reasons of changed circumstances.

Even though Ljubljana Higher Court[31] adopted a position that in such cases the rescission of a contract is no longer possible, as the purpose of the changed circumstances provision

should only be intended to regulate the risks that arise between the conclusion and the performance of a contract, the Supreme Court of the Republic of Slovenia only partially agreed to that conclusion. According to the opinion of the Supreme Court of the Republic of Slovenia, "the rescission of a contract for reasons of changed circumstances should normally not be possible if parties already fully performed the contractual obligations, but exceptionally, it could happen". This mostly applies to cases when certain expectations, relating to the contract, refer to the time after the performance of contractual obligations and due to changed circumstances, one party cannot achieve the contract's purpose.[32] Nevertheless, in order to possibly exercise the rescission of a contract, all presumptions must be met; those that relate to the significance of the changed circumstances, as well as those that relate to the changed circumstances being unexpected and inevitable.

5 Optional nature of rules regarding the change of circumstances institution

Even though the OZ regulates the institution of changed circumstances in detail, the provisions are optional by nature. Based on Article 115 of the OZ, through a contract, the parties may waive any reference to specific changed circumstances in advance unless this opposes the principle of conscientiousness and fairness.

According to the legal formulation, mostly two elements are important. Firstly, the law stipulates that the parties may waive reference to "specific" changed circumstances. The aforementioned means that the contractual parties by themselves determine when and under which conditions are the circumstances regarded as changed and which are the consequences of those circumstances.[33] However, at the same time, the parties may not waive the option to rescind a contract owing to changed circumstances in general or waive every possible circumstance for that matter (Dolenc, 2003: 610).[34] In the concrete case, the parties agreed for a fixed price that also included a possible increase of taxes. Therefore, the party could not request for a rescission of the contract even though the tax rate increased from 3% to 19%.[35]

Agreement of the parties must not be in opposition to the principle of conscientiousness and fairness though. Regardless of the fact that in practice parties do make use of waiving the reference to specific changed circumstances, there is practically no case law discussing its permitted usage. Furthermore, among the published case law of higher courts and the Supreme Court of the Republic of Slovenia, there are no cases where a court would decide (or at least asses) if a certain waiving of reference to specific changed circumstances opposes the principle of conscientiousness and fairness. Nevertheless, we can conclude that courts could regard the waiving of reference to specific changed circumstances as impermissible mostly in the following cases: (a) where the waiving of reference would be to general; (b) in cases where an obvious exploitation of one party by the other party because of the first party's stronger position on the market would be evident; (c) in cases where one party knows that the circumstances will shortly change significantly and does not share this information with the other party when concluding the contract.

6 Conclusion

Nevertheless the parties can freely regulate the change of circumstances with a contractual clause, legal regulation of the rebus sic stantibus clause is still of great importance. The fact is that the parties often do not think about the possible change of circumstances and even if they do, it is not possible to foresee all the possible changes that make the performance of a contract more difficult or that prevent achieving the purpose of a contract. After inspecting Slovene case law regarding the usage of the change of circumstances institution that derives from Article 112 of the OZ, we can conclude that the courts address both, procedural and substantive issues. Change of circumstances allows the party to request for the rescission of a contract but not its amendment. A party cannot simply withdraw from the contract. Moreover, under established case law, it is not sufficient to exercise the change of circumstances institution with an objection to the plaintiff's claim. A party has to exercise the rescission of the contract with a lawsuit.

Relating to the assessment of substantive presumptions, we can conclude that it is practically impossible to generally determine the circumstances that are considered justifiable by law and therefore enable the rescission of a contract. Consequently, we also cannot a priori exclude any change of circumstances but rather assess each specific case from the perspective if a certain circumstance makes the performance of a contract more difficult or if it prevents the achievement of the contract's purpose. Alongside the aforementioned, we also have to assess if a circumstance can be considered as such, that when concluding the contract, the party could not consider, avoid, or advert its consequences. In respect to the stated, this means that with fulfilling the listed presumptions, we can request the rescission of a contract also when referring to the real estate market breakdown, economic or financial crisis, and in any case of other significant and unexpected changes.

Notes

[1] Obligation code (OZ), (Official Gazette of the RS, Nos. 83/2001, 32/2004, 28/2006 – Decision of the Constitutional Court, 40/07).
[2] OZ is an official acronym of the Obligations Code in Slovene language.
[3] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 1382/2012 from 11 February 2014.
[4] See Article 9, paragraph 2, of the OZ.
[5] For a more detailed discussion of the deviation from the basic principle of contract law and clarification of the role of the listed principles, see Cigoj, 1984: 433 – 438.
[6] For more details on regulations in German and international law, see Rösler, 2008: 47-57.
[7] See Article 114 of the OZ.
[8] See Article 112, paragraph 2 and paragraph 3, of the OZ.
[9] See Article 112, paragraph 4 and paragraph 5, of the OZ.
[10] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 696/2009 from 23 June 2010.
[11] Decision of the Higher Court of Ljubljana, No. VSL I Cp 1507/2010 from 15 September 2010.
[12] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 573/2015 from 8 July 2015.
[13] Decision of the Higher Court of Ljubljana, No. VSL II Cp 829/2012 from 16 May 2012.
[14] Decision of the Higher Court of Maribor, No. VSM I Cp 581/2015 from 13 October 2015.

[15] Decision of the Higher Court of Ljubljana, No. VSL II Cp 3916/2009 from 7 April 2010.
[16] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 803/2013 from 7 January 2015.
[17] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 606/2010 from 7 September 2010.
[18] For more details on the ability to anticipate the financial crisis, see (Adebambo et al., 2015: 647-669).
[19] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 772/2013 from 11 February 2015.
[20] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 599/2011 from 11 January 2011.
[21] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 599/2011 from 11 January 2011.
[22] Decision of the Higher Court of Ljubljana, No. VSL II Cp 152/2009 from 6 May 2009.
[23] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 803/2013 from 7 January 2015.
[24] Decision of the Higher Labour and Social Court of the Republic of Slovenia, no. VDSS Pdp 1063/2008 from 26 February 2009.
[25] See decisions of the Supreme Court of the Republic of Slovenia, Nos. II Ips 735/2007, II Ips 897/2007, II Ips 1034/2007, II Ips 94/2008, III Ips 36/2012 and decisions of the Higher Court of Ljubljana Nos. VSL II Cp 152/2009, VSL II Cp 3849/2010, VSL I Cpg 599/2011, VSL I Cpg 241/2013.
[26] Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 74/2011 from 19 June 2014; similarly also in decisions Nos. II Ips 153/2011, III Ips 17/2012, and decision of the Higher Court of Ljubljana No. VSL II Cp 3849/2010.
[27] Decision of the Higher Court of Ljubljana, No. VSL II Cp 1820/2014 from 12 November 2014.
[28] See Article 112, paragraph 4, of the OZ.
[29] See Article 112, paragraph 1 and paragraph 3 of the OZ.
[30] Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 1034/2007 from 11 December 2007; similarly also in decisions Nos. II Ips 735/2007 and II Ips 897/2007.
[31] Decision of the Higher Court of Ljubljana, No. VSL I Cpg 212/2011 from 25 May 2011.
[32] Decision of the Supreme Court of the Republic of Slovenia, No. III Ips 40/2012 from 25 March 2014.
[33] Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 153/2011 from 15 September 2011.
[34] Decision of the Higher Court of Ljubljana, No. VSL II Cp 3000/2011 from 29 February 2012.
[35] Decision of the Supreme Court of the Republic of Slovenia, No. III Ips 224/2008 from 15 November 2011.

References

Adebambo B., Brockman P., Yan (Sterling) X. (2015) Anticipating the 2007-2008 Financial Crisis: Who Knew What and When Did They Know It?, *Journal of financial and quantitative analysis*, 50(4), pp. 647-669, doi: 10.1017/S0022109015000381.

Baranauskas E. & Zapolskis P. (2009) The Effect of Change in Circumstances on the Performance of Contract, *Jurisprudence*, 4(118), pp. 197-215.

Bush, M. (2013) From the Great Depression to the Great recession: (Non-)Lawyers Practicing Deregulated Law, *West Virginia Law Review*, 115(3), pp. 1185-1220.

Cigoj S. (2003) *Teorija obligacij: splošni del obligacijskega prava* (Ljubljana: Uradni list Republike Slovenije).

Cigoj S. (1984) *Komentar obligacijskih razmerij, Veliki komentar Zakona o obligacijskih razmerjih* (Ljubljana: Časopisni zavod Uradni list SR Slovenije).

Dolenc, M. (2003), in: Juhart, M., Plavšak N. (eds.) (2003), Obligacijski zakonik s komentarjem, 1. knjiga (Ljubljana: GV Založba).

Driesen, M. D. (2011) Contract Law's Inefficiency, *Virginia Law & Business Review*, 6(2), pp. 301-340.

Grilc P. (2011) Gospodarska/finančna kriza kot spremenjena okoliščina, In: *Pravni letopis 2011*, pp. 33 - 46 (Ljubljana: GV Založba).

Rösler H. (2008) Changed and Unforeseen Circumstances in German and International Contract Law, *Slovenian law review*, 5(1/2), pp. 47-57.

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A General Overview of Enforcement in Commercial and Civil Matters in Italy

ANDREA GIUSSANI

Abstract The following essay deals with the basic features of Italian law governing enforcement proceedings in civil and commercial litigation. Special attention is given to aspects relevant for comparative analysis. Most recent developments, aimed at fostering efficiency, are also highlighted.
Firstly, the main sources of law are listed, with a subsequent analysis of the actual status of traditional principles like par condicio creditorum and nemo precise ad factum cogi potest. A distinction between different forms of applicable proceedings, depending on the kind of credit to enforce, is then offered to the reader, together with an explanation of the allocation of roles within the various enforcement authorities. Enforcement titles are also defined and listed, and different means of enforcement descripted, with an outline of the order of proceedings. Illustration of special rules for enforcement of provisional measures precedes final considerations on perspectives of further reforms in the near future.

Keywords: • comparative law • civil procedure • enforcement proceedings • jurisdiction • court system • seizure • assignment • sale of assets • specific performance • provisional remedies

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1 Legal sources regulating enforcement

The highest source of law with respect to enforcement in civil and commercial litigation in Italy is Art. 24 of the Constitution, granting effectiveness to judicial protection of rights.

The most relevant statutory law provisions are Book III of the Code of Civil Procedure (Artt. 474-632), and the 2nd Chapter of Title IV of Book VI of the Civil Code (Artt. 2910-2933). Many other rules of the Code of civil Procedure, however, do frequently apply (such as, e.,g., rules on venue for enforcement proceedings in Artt. 26 ff., and rules on enforceability of appealed judgments in Artt. 282 f.). Several special provisions help public entities both as creditors (e.g., Art. 52, § 1, of Presidential decree no. 602 of 1973, exempting from judicial approval of sale of assets) and as debtors (e.g., Art. 42, § 7 novies of law no. 207 of 30 December 2008, excluding attachment of public entities' credits against tax collection agents). Special provisions may also apply to various situations (e.g., Art. 137 of the Code of Industrial Property provides special rules for seizure, attachment, and sale of patents).

With respect to transnational enforcement, nationality and domicile of creditor and debtor are in principle irrelevant, insofar as an asset located in Italy may be attached, and provided that no sovereign immunity applies. Recent amendment of art. 26 bis of the Code of Civil Procedure (introduced by law no. 162 of 10 November 2014), may imply, according to some scholars, that attachment of credits is available only if the debtor is domiciled in Italy ([1]), but no case law followed this path so far (the Court of Cassation, however, has not yet settled the issue).

Enforcement of foreign judgments, court settlements, and authentic instruments, whenever no Union law nor special international convention applies, is governed by Artt. 64 ff. of law no. 218 of 31 May 1995.

2 Recent reforms and ongoing reform in progress

In recent years Italian government gave high priority to improvement of effectiveness of enforcement procedures, enacting several reforms: the latest are law no. 132 of 6 August 2015, confirming law decree no. 83 of 27 June 2015, and now law decree no. 59 of 3 May 2016 (waiting to be confirmed by the Parliament within sixty days).

3 Underlying dogmatic framework

Some of the traditional general principles of enforcement proceedings still apply, while other ones have lost most of their cogency.

It is still true that self-enforcement is allowed only in strictly exceptional cases, and that enforcement proceedings are governed by courts and not by administrative agencies

(albeit public entities may be partly dispensed by court control in the enforcement of their credits, pursuant to special provisions ([2])). It is also still true that the debtor cannot plead that the credit does not exist within the enforcement proceedings: to that end, the debtor must file an action on the merits. It is also still true that the creditor may file several enforcement proceedings at the same time against the same debtor until the credit is fully satisfied: it is up to debtor to plead that attachments are excessive or abusive. It is also still true that in principle only specific assets may be attached and sold: attachment and sale of all the debtor's assets is available, however, is the debtor is an insolvent entrepreneur.

A most important development concerned the traditional principle "nemo precise ad factum cogi potest": according to this principle, injunctions were enforceable only if no personal specific performance by the debtor was required. After introduction of Art. 614 bis of the Code of Civil Procedure by law no. 69 of 18 June 2009 this is no longer true: in principle, a debtor violating an injunction requiring personal specific performance incurs in monetary sanctions, proportionate to the depth and length of the violation, to be paid to the creditor. Amendment of Art. 614 bis by law no. 132 of 2015 expanded its scope, allowing sanctions for violation of injunctions regardless of the kind of performance required. However, Art. 614 bis still does not apply to labor disputes.

Another traditional principle was that every creditor of the same debtor had a full right to participate to the proceedings and to the distribution of the revenues of the sale of assets on an equal footing (par condicio creditorum), unless a special protection of the credit applies (such as a mortgage, or a legal preference in the distribution of the revenues, e.g. for wages). After law no. 80 of 14 May 2005, however, this participation is allowed only to enforce credits assisted by a special protection with respect to the attached asset (such as a mortgage, or a previous seizure), or autonomously enforceable (however, all credits still concur in insolvency proceedings).

The same reform, however, also expanded (through amendment of art. 474 of the Code of Civil Procedure) the scope of autonomously enforceable credits: not only those affirmed by a judgment or a notary act, or by a bank check or a promissory note, but also money credits affirmed in private documents whenever a public officer certified the authenticity of their signatures.

4 Different types of enforcement procedures

A main subdivision may be traced between direct and indirect enforcement, the latter consisting in sanctions for noncompliance to injunctive remedies: sanctions, in fact, do not actually satisfy the credit, but force the debtor to comply spontaneously. Note, however, that no special proceeding is contemplated to determine the amount due for noncompliance: the injunctive order must set the sum due for any violation, and the creditor may file a direct enforcement proceeding for the total as an autonomously

enforceable money credit (being up the debtor to plead that there was no violation, or that the total is wrong).

Another subdivision is traced by the Code of Civil Procedure between generic and specific enforcement, the former consisting in enforcement of money credits through attachment and sale, or assignment, of debtor's specific assets (Artt. 483-604 of the Code). Amongst generic enforcement proceedings, the Code of Civil Procedure also distinguishes depending on the kind of asset involved: different rules apply to attachment and sale of immovable and movable assets (respectively Artt. 555-598 and 413-542 of the Code), and special provisions regulate attachment and assignment of debtor's credits (Artt. 543-554 of the Code). Amongst specific enforcement proceedings, different rules apply respectively to delivery of movable assets or release of immovable ones (Artt. 605-611 of the Code) and to other instances of specific performance (Artt. 612-614 of the Code).

Enforcement of the State's tax credits is governed by so many special rules that it may also qualify as a different procedure ([3]).

5 Decentralized system

In every Italian Tribunal there is an enforcement division competent to govern enforcement proceedings concerning assets located in the territory of the court. Hence the Italian system qualifies as decentralized one.

Obviously, this does not help the creditor, especially with respect to attachment of credits: for this reason law no. 162 of 2014 provided that the competent court in these cases should locate in the debtor's domicile, instead of the debtor's debtor's one, derogating to the general rule referred to the location of the asset involved; in fact, the new rule allows the creditor to attach several debtor's credits in the same enforcement proceedings, even if the debtor's debtors are located far away.

This solution, however, relies on dematerialization of money credits: whenever movable or immovable assets are involved, location of the asset is still dispositive.

6 Authorities/bodies and agents

The Tribunal's enforcement division is the court of enforcement proceedings: the number of judges assigned to the division depends on the court's workload. The judge, however, is entrusted mainly with supervision of the proceedings and resolution of satellite disputes: several tasks (such as the research of movable property available for attachment) are performed by lower officers of the court (ufficiali giudiziari), and other ones (such as the sales of assets) may be delegated to notaries, lawyers, or accountants.

7 Enforcement titles

An enforcement title allows a credit to be autonomously enforceable: as already seen above, bank checks, promissory notes, and also private documents, insofar as a public officer certified the authenticity of their signatures, may be enforcement titles, alongside judgments. Moreover, judicial titles may comprise not only judgments on the merits following a full-fledged trial, but also many so-called "anticipatory" orders following a summary fact-findig (provided that the law expressly gives them this effect: the most important one in the practice is the decreto ingiuntivo, that is an ex parte order granted, e.g., when there is documentary evidence of the credit, regulated by Artt. 633-656 of the Code of Civil Procedure). Note, however, that provisional measures, albeit included in the definition of "judgment" by Art. 2 of EU Regulation 1215/2012, are not proper enforcement titles according to Italian procedural law: their enforcement, hence, is subject to special rules (pursuant to Art. 669 duodecies of the Code of Civil Procedure).

It is worth noting that only judicial titles allow direct enforcement of specific performance obligations other than delivery of movable assets or release of immovable ones.

In the perspective of transnational litigation, however, the most important topic is the status of foreign enforcement titles. Judgments, court settlements, and authentic instruments within the meaning of Art. 2 of EU Regulation no. 1215/2015, are enforcement titles as such, provided they are certified, according to the provisions of the same, by the competent authority of court of the Member State of origin, and the same holds for ex parte orders to pay uncontested credits pursuant to EU Regulation no. 805/2004. Judgments and authentic instruments coming from other States, by contrast, as well as arbitral awards, are still subject to exequatur procedures.

8 Means of enforcement

Enforcement through attachment of assets, sale thereof, and distribution of revenues among the creditors (the first one and the intervening ones) is the general and residual means of enforcement: in fact, whenever a debtor does not comply to an injunctive remedy, and does not even pay the consequent sanctions, the creditor can only revert to generic enforcement of that money credit.

Attachment of movable property is performed by an officer of the court through its material apprehension, while attachment of immovable property is performed through inscription in public registries, and attachment of credits through legal notice to the debtor and the debtor's debtor. Recent legislation allows the officer and the creditor to access public databases for the research of attachable property.

In all these cases, pursuant to Art. 492 of the Code of Civil Procedure, there must be a legal proof (that is, a documentary certification by a competent public officer) that the debtor received a written prohibition (ingiunzione) to dispose of the asset in prejudice of

the creditor (attached assets may still be validly transferred, but remain nonetheless subject to judicial sale), alongside various warnings concerning the subsequent procedural steps. Italian courts adopt a very strictly formalistic approach to this issue: whenever any part of the magic spell is missing, the enforcement procedure is incurably null and void ([4]).

Procedures for specific enforcement of obligations to release immovable assets are especially cumbersome for the creditor, especially when the immovable is located in a city: the public officer must previously notify to the debtor a warning grossly corresponding to the ingiunzione, and only after ten days may enter the premise and give the keys to the creditor, but very often the help of a blacksmith, or even of the police, is necessary, and there may be a long queue to obtain it.

Moreover, direct enforcement of specific performance (other than delivery of movable assets or release of immovable ones) requires the creditor to file a motion for a summary proceeding in the enforcement division of the Tribunal, aimed at determining how the credit may be satisfied without the active cooperation of the debtor.

In the long run, hence, indirect enforcement through Art. 614 bis of the Code will probably often take the place of direct specific enforcement (unless the debtor appears devoid of any prospect of future earnings).

9 Order of proceedings

Pursuant to Art. 479 of the Code of Civil Procedure, a creditor must notify to the debtor the enforcement title, together with a warning (precetto) that judicial enforcement will start if the obligation is not complied within ten days: only if the debtor does not pay within this deadline the ingiunzione may be notified. However, the enforcement division of the Tribunal may discretionally accord immediate enforcement pursuant to art. 482 of the Code, upon an ex parte motion from the creditor.

A hearing with the participation of the debtor is also required to provide for the sale of assets, for the assignment of credits, and for the direct enforcement of specific performance other than delivery of movable assets or release of immovable ones (as seen above).

Other hearings may be required by the debtor, generally in order to ask a stay of the proceedings whenever the existence of the credit is denied, or the enforcement proceedings are affected by a nullity that the enforcement division did not declare sua sponte. These complaints, however, are decided in a full trial: the judge entrusted with the supervision of the proceedings may grant a stay only as an interim measure subject to appeal to a panel of the same enforcement division (without the participation of the judge entrusted with the proceedings), pursuant to Art. 624 of the Code: complaints alleging nullity of the proceedings are decided by a different judge of the same enforcement

division, while complaints alleging that there is no credit are decided by the court competent for the merits.

Enforcement may also be stayed by the judge supervising the proceedings when a third party claims property over an attached asset, pursuant to Art. 619 of the Code, and when litigation ensues between participants to the distribution of revenues from the sale of assets, pursuant to Art. 512 of the Code. Pursuant to Art. 623 of the Code, apart from these cases, stay of enforcement may be granted only by special statutory provisions (e.g. in case of a public calamity), or by a judge entrusted with a challenge of the enforcement title (such as an appeal against the judgment, an opposition to the decreto ingiuntivo, a nullity action of the arbitral award, etc.). When enforcement titles coming from EU Member States are challenged in the State of origin, the enforcement court may also grant a stay pursuant to Art. 51 of EU Regulation 1215/2012, and to Art. 23 of EU Regulation 805/2004.

10 Division between enforcement and security measures

As seen above, enforcement of provisional measures is so much sui generis that it does not even qualify as enforcement stricto sensu: rather than an "esecuzione" is an "attuazione". Art. 669 duodecies of the Code, in fact, provides that no preliminary warning (precetto) is required, and distinguishes between three categories of cases: seizures, money orders, and other remedies.

Enforcement of seizures aimed at protecting effectiveness of general enforcement are performed like attachments: the sale, or the assignment of credit, is set only after the formation of a proper enforcement title. Seizures concerning evidence, or movable or immovable property to deliver or release, are performed like corresponding specific performance proceedings, but a guardian chosen by the court is entrusted with their custody.

Provisional measures ordering to pay money are enforced like enforcement titles: the creditor must ask the officer of the court attachment of assets, ask a hearing from the competent enforcement division to set their sale, and share the revenues with concurring creditors.

Other provisional remedies, by contrast, are enforced under the supervision of the same judge that issued them, and not of the enforcement division of the court. Decisions concerning satellite litigation over enforcement of these remedies may be appealed to a panel, always of the same division (and not of the enforcement division), without the participation of the judge that issued the remedy.

Obviously, this does not apply to provisional measures coming from a different EU Member State: these "judgments" are treated like proper judgments whenever they were previously notified to the debtor (insofar as the court that issued them had also jurisdiction

on the merits of the claim, pursuant to the new provisions of art. 2 of EU Regulation no. 1215/2015).

Moreover, since sanctions provided by Art. 614 bis of the Code may also apply to violation of interim injunctions, in the actual practice direct general enforcement of the corresponding money debt will probably take the place of their "attuazione" by the judge that issued the remedy.

11 Comments and critical approach

For several decades of the past century scholars advocated reforms of enforcement proceedings to foster effectiveness of judicial protection of rights, especially with respect to specific performance, but also with respect to generic enforcement, lamenting an excess of procedural guarantees for the debtor and for the creditors without enforcement titles ([5]). These ideas were supported by prolonged dissatisfying experiences with the traditional rules and principles.

In the current century the government took the charge perhaps even too much seriously, providing not only for the reforms advocated by procedural law scholars, but also for the introduction of online enforcement proceedings, and for further reductions of the enforcement courts' workload (allowing most satellite litigation to be decided with interim orders). Hence, an evaluation of the actual effectiveness of enforcement proceedings in Italy is now impossible, because practice on the applicable rules is mostly missing.

Many scholars are now asking the legislator to stay this apparently endless stream of reforms, and allow courts and lawyers to learn to cope with the new system emerging thereof ([6]).

Notes

[1] See, e.g., D'Alessandro, "L'espropriazione presso terzi", in (Luiso, 2014: 58); Tedoldi, 2014: 390; Bove, 2015: 4).
[2] See, e.g., art. 72 *bis* of legislative decree n. 602 of 29 September 1973, governing attachment of credits for the enforcement of tax credits.
[3] Compare note 2.
[4] See, e.g., the judgment of the Italian Court of Cassation no. 2473 of 30 January 2009, and its order no. 8408 of 12 April 2011.
[5] Compare, e.g., the essays collected in (Associazione italiana fra gli studiosi del processo civile, 1992; Centro nazionale di prevenzione e difesa sociale, 1993; Associazione italiana fra gli studiosi del processo civile (Milano: Giuffrè, 2001; Associazione italiana fra gli studiosi del processo civile, 2005).
[6] See esp. (Associazione italiana fra gli studiosi del processo civile, 2015: 743).

References

Associazione italiana fra gli studiosi del processo civile (ed.) (1992) *L'effettività della tutela del creditore nell'espropriazione forzata* (Milano: Giuffrè).

Associazione italiana fra gli studiosi del processo civile (ed.) (2001) *Tecniche di attuazione dei provvedimenti del giudice* (Milano: Giuffrè).

Associazione italiana fra gli studiosi del processo civile (2015) Il documento dell'Associazione italiana fra gli studiosi del processo civile sul disegno di legge delega per la riforma del c.p.c., *Rivista trimestrale di diritto e procedura civile*, 69(2), pp. 747-748.

Bove M. (2015) La nuova disciplina in materia di espropriazione del credito, Le nuove leggi civili commentate, 1, CEDAM, p. 1.

Centro nazionale di prevenzione e difesa sociale (ed.) (1993) *La legge di riforma del codice di procedura civile e la tutela del credito* (Milano: Giuffrè).

Luiso F.P. (ed.) (2014) Processo civile efficiente e riduzione arretrato. Commento al d.l. n. 132/2014, convertito in l. n. 162/2014 (Torino: Giappichelli).

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Legal Aspects of Servitization

JANJA HOJNIK

Abstract The objective of the article is to demonstrate the many dimensions of servitization and its impact on future development of EU law. Servitization is one of the economic megatrends in modern society, a process creating value by adding services to products, ranging from renting and maintaining expensive capital goods and sharing economy to producing smart objects and rapid prototyping. Considering its multifaceted character, servitization inherently touches upon the full spectrum of legal fields. The article first makes an overview of the legal challenges of servitization from the competition and consumer law perspective, corresponding to the two main motives behind the servitization strategy, i.e. locking out competitors and locking in consumers. It then considers servitization in cross-border trade, highlighting the tight connection between servitization and globalisation. Finally, some other important legal aspects of servitization are considered in a nutshell – such as implications for B2B and B2G contracts, environmental and intellectual property law and fundamental rights concerns. It may be observed that law on the one hand promotes the positive aspects of servitization, while simultaneously restraining its negative implications for the European economy and society.

Keywords: • servitization • internet of things • digitising industry • sharing economy • big data • cloud manufacturing • 3D printing • EU law • competition • bundling • consumer protection

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Pravni vidiki servitizacije

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Povzetek Namen članka je prikazati mnoge dimenzije servitizacije in njen vpliv na nadaljnji razvoj prava EU. Servitizacija je eden od velikih trendov moderne družbe, proces ustvarjanja vrednosti z dodajanjem storitev izdelkom, ki zajemajo vse od najema in vzdrževanja dragih kapitalskih dobrin, deljenja produktov, do izdelovanja pametnih stvari in hitrih prototipov. Upoštevajoč njen večplasten značaj, se servitizacija dotika vseh pravnih področij. Članek najprej predstavi pravne probleme servitizacije z vidika konkurenčnega in potrošniškega prava, ki ustrezajo dvema glavnima motivoma za strategijo servitizacije, tj. izključitev konkurentov in zadrževanje potrošnikov. V nadaljevanju se opredeli do servitizacije v čezmejnem trgovanju, s poudarkom na tesni povezavi med servitizacijo in globalizacijo. Nazadnje so na kratko predstavljeni še nekateri drugi pomembni pravni vidiki servitizacije – kot so vplivi na B2B in B2G pogodbe, okoljsko pravo, pravo intelektualne lastnine in temeljne pravice. Opaziti je mogoče, da pravo na eni strani spodbuja pozitivne vidike servitizacije, hkrati pa omejuje njene negativne vplive na evropsko gospodarstvo in družbo.

Ključne besede: • servitizacija • internet stvari • digitalna industrija • model poslovanja z deljenjem • veliko podatkovje • proizvodnja v oblaku • 3D tiskanje • EU pravo • konkurenca • vezana prodaja • varstvo potrošnikov

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1 Uvod – servitizacijsko orientirana industrijska renesansa v Evropi

Skoraj nesporno je, da je proizvodnja v razvitih gospodarstvih pod ogromnim pritiskom (Neely, 2007; Johansson, 2010). Zgodba deindustrializacije razvitih gospodarstev se je pričela v letu 1950 in dodana vrednost proizvodnje je trenutno pod 15 odstotki BDP v večini OECD držav (Crozet; Kemekliene, Connolly, Keune, & Watt; Schettkat & Yocarini, 2006). Ne glede na to pa je finančna kriza iz leta 2008 in sledeča recesija številne posameznike in podjetja spodbudila k iskanju alternativnih virov prihodka ter v razvitih gospodarstvih privedla do spoznanja nevarnosti pretiranega zanašanja na finančne storitve. Poleg tega se je gospodarsko okrevanje izkazalo za težavnejše v državah s šibkim industrijskim sektorjem. Dejstvo je, da Evropa potrebuje »ponovno vzpostavitev ravnotežja« v svojem gospodarstvu, s posebnim poudarkom na proizvodnji (Brennan et al., 2015; Howard Lightfoot, Tim Baines, & Palie Smart, 2013; Livesey, 2012; Tether & Bascavusoglu-Moreau, 2012).[1] Verjetno je, da lahko »industrijska renesansa« ali »reindustrializacija« prinese zaposlitvene možnosti in rast nazaj v Evropo (Elżbieta Bieńkowska, 2015; Karl Aiginger, 2016). Kljub temu pa za to, da bodo razvita gospodarstva preživela, zgolj zagotavljanje proizvodov ne bo zadostovalo. Prav zato se predlaga, da se morajo proizvodna podjetja vzpeti po vrednostni lestvici z inovacijami in ustvarjanjem še bolj prefinjenih proizvodov in storitev, da ne bodo tekmovala zgolj na podlagi cene (Neely, 2009; Porter & Ketels, 2003). Navkljub tradicionalnemu ločevanju proizvodnje in storitev je vedno bolj realistično, da proizvajalci ponujajo tudi storitve; pravzaprav postopoma gradijo svojo celotno konkurenčno strategijo na inovaciji storitev (T. Baines, 2015). Poleg tega s tem, ko kompleksnost in raznovrstnost gospodarskih dejavnosti naraščata in s tem, ko se širi tudi digitalizacija, meje med storitvami in proizvodnjo postajajo vse bolj nedoločljive (Crozet, 2015; Goldhar, & Berg, 2010). Zaradi potrebe po opisu teh postopkov se je pojavil pojem »servitizacije,« ki dokazuje, da smo sredi novega opredeljevanja koncepta proizvodnje.

Gospodarske raziskave[2] kažejo, da je servitizacija skupaj z globalizacijo ena od velikanskih trendov v gospodarstvu moderne družbe ter zajema širok spekter poslovnih modelov, ki so trenutno na trgu. Poleg tega je kompleksen interdisciplinaren koncept, ki je vse bolj popularen med priznanimi strokovnjaki z različnimi perspektivami (Chesbrough & Spohrer, 2006; Howard Lightfoot et al., 2013). To dejstvo skupaj s hitrim razvojem informacijske in komunikacijske tehnologije (IKT), ki imata pomemben vpliv na servitizacijo (Kryvinska, Kaczor, Strauss, & Greguš, 2014), pomeni, da je ukvarjanje s to tematiko posebej problematično za pravne raziskovalce in ustvarjalce prava. Vseeno pa se morajo, upoštevajoč naraščajočo pomembnost, pravni strokovnjaki in uporabniki odzvati na servitizacijo s preučitvijo pravnih problemov, ki so z njo povezani. Pravni postopki evropskih razsežnosti zoper Uberja, ki so nedavno rezultirali tudi v dveh zadevah za predhodno odločanje pred Sodiščem Evropske Unije (v nadaljevanju: Sodišče EU),[3] so dokaz, da to drži. Poleg tega pa se tudi več drugih institucij EU, sredi tega večdimenzionalnega odziva na trend servitizacije, ukvarja z množico vidikov, kot so infrastrukturni, vodstveni, spretnostni, pa tudi upravljavski.

2 Servitizacija – »nova paradigma poslovnih operacij« (Toffel, 2008)

Pojem sta prvič leta 1988 uporabila Vandermerwe in Rada, dva strokovnjaka s področja managementa, ki sta pisala o »naraščajoči ponudbi bolj izpopolnjenih tržnih paketov ali »paketov« kombinacij proizvodov, storitev, podpore, samostoritev in znanja, osredotočenih na potrošnika, z namenom, da bi dodale vrednost ključnim gospodarskim ponudbam.« (Vandermerwe & Rada, 1988)[4] Poznejše definicije servitizacije slednjo pojasnjujejo kot »pojav na produktu zasnovanih storitev, ki zabrišejo tradicionalno razliko med proizvodnjo in tradicionalno storitvijo« (White, Stoughton & Feng, 1999), kot tudi »trend, pri katerem proizvodna podjetja posvajajo vse več storitvenih komponent v svojih ponudbah« (Looy, Gemmel, & Dierdonck, 2003; tudi Ren & Gregory, 2007). Dandanes je servitizacija široko prepoznana kot proces ustvarjanja vrednosti z dodajanjem storitev produktom (Baines, Lightfoot, Benedettini, & Kay, 2009; Oliva & Kallenberg, 2003) in se smatra za vseprisotno v proizvodnih družbah in razvitih gospodarstvih (Opresnik & Taisch, 2015: 174). Skladno s tem je večina pogosto zagotovljenih storitev v praksi še vedno dostava izdelkov, ki ji sledi zagotovitev rezervnih delov in potrošnega materiala ter pomoč uporabnikom s tako imenovanimi info kotički (Tether & Bascavusoglu-Moreau, 2012; 17). Nadalje lahko s servitizacijo povezane transakcije vključujejo tudi izposojo avtomobilov namesto njihovega nakupa, pogodbene storitve namakanja namesto pridobitve namakalnih sistemov, ali pa zagotovitev kapacitete strežnikov namesto naročanja računalnikov.[5] Eden najbolj zgodovinskih primerov uspešnega fiksiranja dobave dobrin in storitev je Rolls-Roycev model izposoje letal (imenovan Power-by-the-Hour). Z uporabo senzorjev, ki lahko neprestano nadzorujejo stanje letalskega motorja (TotalCare Programme), je Rolls-Royce občutno poenostavil postopek vzdrževanja (Ardolino, Saccani, & Perona, 2015). Podobno je tudi Xerox razvil model cene na natisnjeno stran za svoje fotokopirne naprave (T. Baines, 2015: 9). Tudi Volvo, ki je v bistvu avtomobilski proizvajalec, je dandanes vključen v širok spekter aktivnosti, povezanih z avtomobilskim prevozom, kot so zavarovanje, bencinske črpalke in avtomobilska asistenca, trenutno pa celo razvija vozilo, ki bi preko pametnega telefona opozorilo mobilnega dobavitelja goriva, o tem, da naj dotoči gorivo medtem ko je avto parkiran in je voznik odsoten (Steiner, 2015; Vandermerwe & Rada, 1988: 318). Vse te družbe so tako uspele s preobrazbo iz navadnih proizvajalcev v ponudnike celovitih rešitev (Brady, Davies, & Gann, 2005; Windahl & Lakemond, 2010).

3 Servitizacija v digitalni dobi: digitaliziranje industrije

Pomik proti servitizaciji sovpada z naraščajočim trendom digitalizacije (Lerch & Gotsch, 2015), zaradi česar se trdi da sta »revolucija storitev in informatike dve plati istega kovanca« (Rust, 2004: 24), ter da »informatizacija« postaja nujna komponenta servitizacije (Opresnik, Hirsch, Zanetti, & Taisch, 2013). Pojav hitre in zmogljive informacijske in komunikacijske tehnologije (v nadaljevanju: IKT) kot je Internet, predstavlja vodilno vlogo pri izboljševanju obstoječih poslovnih modelov (Kalakota & Robinson, 2001; Lightfoot, Baines, & Smart, 2012: 211–226) in se smatra za pomemben pogoj, ki omogoča (inovativno) servitizacijo (Ardolino et al., 2015; Kowalkowski, Kindström & Gebauer, 2013, p. 3; Kryvinska et al., 2014: 3; Penttinen & Palmer, 2007)

V tem obziru sta Lerch in Gotsch razvila model štirih generičninih faz, v katerih proizvajalci vključujejo IKT rešitve v svoje določbe o storitvah - (Lerch & Gotsch, 2015: 47). V tem smislu je Internet stvari (IS) že sprejet kot eden izmed najbolj pomembnih sredstev, ki bo omogočal servitizacijo v prihodnosti. Orodja za podatkovne komunikacijske storitve z vgrajevanjem senzorjev, ki podpirajo brezžično komunikacijo z Internetom, spreminjajo »označene stvari« v »pametne stvari.«[6] IS na primer pomaga proizvajalcem večjih dobrin, da hkrati s ponudbo pogodb o vzdrževanju nudijo še opremo za oddaljeno nadziranje stanja opreme in si prizadevajo za razvoj indikatorjev, ki bi nakazovali na možnost nastanka okvare izven običajnih okvirov (npr. tresljaji, temperatura in pritisk). To pomeni, da lahko proizvajalec opravi manj obiskov namenjenih pregledu in s tem zmanjša svoje stroške, hkrati pa kupcu zagotovi manj motenj in s tem večje zadovoljstvo.[7]

IKT je prav tako podlaga za vse večjo uporabo oblakov in proizvodnje, pri kateri so podatki posredovani tretjim osebam (ponudnikom oblakov) in do katerih je mogoč oddaljen dostop preko Interneta (Mell & Grance, 2009) Glej tudi (Wen & Zhou, 2014; Xu, 2012; Zhang et al., 2014). Posledično računalništvo v oblaku predstavlja servitizacijo na področju informacijske tehnologije (Sultan, 2014). Poleg tega IKT omogoča tudi t.i. deljenje oz. model poslovanja s sodelovanjem, ki ga podpirata Uber in Airbnb in pri katerem aplikacije pametnih telefonov omogočajo dostop do platform, ki povezujejo kupce s prodajalci (Felländer, Ingram, & Teigland, 2015). Nazadnje pa se odvija še revolucija v bolj običajnih aplikacijah za 3D tiskanje (imenovano tudi dodatno proizvajanje ali hitro izdelovanje protitipov) – tehnologija, ki ustvarja fizične objekte neposredno preko računalniško podprtega načrtovanja in plast za plastjo dodaja različne materiale s pomočjo 3D tiskalnika. Ta nova tehnologija ima nepredstavljiv potencial za revolucionaliziranje neštetih panog kot so medicina, farmacija in arhitektura.

Hiter razvoj IKT torej predstavlja poseben izziv za proizvajalce in njihove poskuse pridobivanja konkurenčne prednosti preko storitev. V Nemčiji so tovrstno proizvodnjo, pri kateri proizvajalci opremljajo svoje izdelke in stroje s pametno tehnologijo, poimenovali »Industrie 4.0« (Baines & Lightfoot, 2014: 0; Bauernhansl, 2013; Blanchet, Rinn, Thaden, & Thieulloy, 2014; Lerch & Gotsch, 2015; Dujin, Geissler, & Horstkötter, 2014: 0; Ferber, 2012: 0; Wahlster, 2012). Francoski izraz za isti pojav je »Industrie du Futur«, na Nizozemskem strategi govorijo o »Smart Industry«, v Španiji o »Industria Conectada 4.0«, v Italiji o »Fabbrica Intelligente«, Evropska Komisija (v nadaljevanju: Komisija) pa je nedavno prevzela izraz »digitalizirana industrija«.[8] Vsi ti koncepti se osredotočajo na ustvarjanje pametnih produktov v pametnih tovarnah, ki bi morale v bližnji prihodnosti voditi v četrto industrijsko revolucijo (Abramovici, Göbel, & Neges, 2015) Glej tudi (H. Kagermann, Helbig, Hellinger, & Wahlster, 2013). Z digitalno proizvodnjo, ki proizvajalcem omogoča, da nudijo pozamezni produkt po ceni masovne proizvodnje, bi si po besedah predsednika nemške inženirske zveze (VDMA), Reinholda Festega, lahko »nazaj izborili proizvodnjo, ki jo je Evropa zgubila zaradi Azije pred mnogimi leti« (Reinhold Festge, 2015) See also (P. D. H. Kagermann, 2015). Komisarka Elżbieta Bieńkowska pa poudarja, da »digitalne tehnologije nudijo ključ za zavarovanje robustne industrijske baze za Evropo tudi v prihodnosti« (Bieńkowska, 2015). Po drugi

strani pa je model deljenja kritiziran, ker zagovarja manjšo potrošnjo in zato potencialno ogroža gospodarstvo (Felländer et al., 2015: 12). Navkljub mnogim zgodbam uspeha se torej servitizacija še vedno ne more smatrati za rešitev vseh težav EU.

4 Pravni izzivi servitizacije – EU vidik

Upoštevajoč gospodarsko rast in potencial za ustvarjanje novih delovnih mest,[9] je Komisija popolnoma sprejela proces servitizacije, zatrjujoč da sta »proizvodnja in storitve dve plati istega kovanca« ter da »v sodobni ekonomiji ne moreš izbirati med eno in drugo (...). Imeti moraš obe« (Bieńkowska, 2015). Vseeno pa mora modernemu poslovanju in tehnološkemu razvoju slediti primerna ureditev, ki bo kontrolirala s tem povezane nevarnosti in omgočila razcvet industrije. Glede na to, da tako industrija kot tudi potrošniki postajajo pametnejši, morajo temu slediti tudi pametne regulatorne rešitve (Oettinger, 2015), ki bodo ustvarile ravnotežje med varnostjo, odgovornostjo in konkurenco na eni strani ter inovativnost in prilagodljivost na drugi. Potrebe po regulaciji bodo po eni strani omejile servitizacijo, kot na primer pravila o bančništvu v senci, ki omejujejo aktivnost leasinga pri avtomobilskih prodajalcih,[10] po drugi strani pa jo bodo spodbudile, s tem ko bo, na primer servitizacija postala odziv na okoljsko ali potrošniško ureditev. Čeprav bo ureditev na nivoju EU na večini nivojev ključna za preprečevanje mnogih različnih pristopov držav članic, ki ustvarjajo kaos in patriotstvo na notranjem trgu, se bodo pristojni organi na nacionalnem in lokalnem nivoju morali vključiti skladno z načeloma subsidiarnosti in proporcionalnosti. Poleg tega pa bodo v regulatornem procesu morale biti spoštovane tudi druge ustavne in institucionalne ureditve, vključno z industrijskim sodelovanjem in samoregulacijo v skladu z »novim pristopom«, tako da bo trg sam določal tehnične rešitve, medtem ko bo javna oblast postavljala zgolj splošne regulatorne zahteve.[11]

Servitizacija se s svojim večplastnim značajem dotika vseh pravnih področij. Sledeče poglavje predstavlja pravne probleme servitizacije z vidikov konkurenčnega in potrošniškega prava, ki ustrezajo dvema glavnima motivoma za strategijo servitizacije, tj. izključitev konkurentov in zadrževanje potrošnikov. Tretja sekcija se opredeli do servitizacije v čezmejnem trgovanju, s poudarkom na tesni povezavi med servitizacijo in globalizacijo. Nazadnje so na kratko predstavljeni še nekateri drugi pomembni pravni vidiki servitizacije – kot so javna naročila, okoljsko pravo ter pravo intelektualne lastnine. Poleg tega pomembni vidiki servitizacije zadevajo tudi delovno[12] in kazensko pravo (Bräutigam & Klindt, 2015: 187–195), forenzične postopke (Hegarty, Lamb, & Attwood, 2014), pa tudi telekomunikacije (Bräutigam & Klindt, 2015: 179–186), medicinsko pravo (Bräutigam & Klindt, 2015: 196–214) in še mnoga druga pravna področja, vendar pa ti zaradi prostorske omejitve članka niso predstavljeni.

5 Servitizacija kot strategija za izključevanje konkurentov

Kar zadeva strateške motive servitizacije, se zatrjuje, da lahko proizvodna podjetja, ki razširjajo svojo proizvodnjo tudi v zagotavljanje storitev, obučtno izboljšajo svoj strateški položaj, pridobijo konkurenčno prednost in postavijo ovire svojim konkurentom

(Bustinza, Bigdeli, Baines, & Elliot, 2015; Bustinza et al., 2015; Mathieu, 2001), s čimer upoštevajo dejstvo, da je pakete izdelkov in storitev načeloma težje imitirati kot gole izdelk (Gebauer & Friedli, 2005; Oliva & Kallenberg, 2003). Servitizacija zatorej omogoča »izključitev« konkurentov, tj. preprečuje ali zavira konkurente pri povečevanju njihovega tržnega deleža na podlagi razvoja novih izdelkov, saj so potrošniki povezani s svojimi dobavitelji zaradi pogodb o storitvah. Medtem ko konkurenčno pravo prepoveduje določene servitizacijske modele, slednji hkrati nalagajo nove izzive konkurenčnemu pravu.[13]

Primarno servitizacija kot strategija, ki podpira združevanje produktov in storitev, zelo očitno in direktno sovpada s konkurenčnimi pravili, ki smatrajo prakso združene prodaje dveh ali več izdelkov in/ali storitev (tj. vezana prodaja in združevanje) za nasprotujočo pravilom konkurenčnega prava.[14] Za tako prakso gre na primer takrat, ko proizvajalec večjih naprav, ki ima na trgu prevladujoči položaj, svojim strankam, ki od njega kupujejo stroje, vsili še najem svojih storitev vzdrževanja in popravil, namesto da bi strankam omogočil izbiro cenejšega, neodvisnega ponudnika storitev. Med mnogimi razlogi za nudenje združenih produktov in storitev je cenovna diskriminacija, odvračanje od vstopa na trg in prihranek stroškov (Salinger, 1995). Obratna servitizacija Xeroxa se je zgodila prav zaradi družbine kršitve konkurenčnih pravil ZDA, s tem ko je združevala leasing fotokopirnih naprav, visokocenovne tonerje (ki so se takrat imenovali »črno zlato«) in storitve vzdrževanja (Blackstone, 1972; Finne, Brax, & Holmström, 2013) Glej tudi (Kearns, Mauler, & Kleinfield, 1992: 64–65). Konkurenčno pravo pa še zdaleč ne prepoveduje vsakršnega združevanja produktov in storitev (Whish & Bailey, 2015: 730). Carlton in Waldman pojasnjujeta, da je »ključni vidik vezane prodaje s perspektive konkurenčnega prava ta, da je na resničnem trgu veliko vezane prodaje, ki deluje na podlagi učinkovitosti« (Carlton & Waldman, 2008: 1859). Zagovorniki vezane prodaje trdijo, da podjetja in družba na splošno pogosto žanjejo koristi takega združevanja. Očitna razlaga za veliko število vezanih prodaj je, da lahko družbe bolje vključujejo svoje izdelke, kot bi to lahko storili kupci (Nalebuff, 2004). Poleg tega se vezana prodaja lahko uporabi tudi za ohranjanje učinkovitosti vezanega produkta ali vodi do nižjih cen (Evans & Salinger, 2005; Peitz, 2008: 41–42; Rennhoff & Serfes, 2009: 547; Whish & Bailey, 2015: 730–731). Pretirano stroga zakonodaja na tem področju bi zato lahko preprečila učinkovito vključevanje produktov (Faull & Nikpay, 2014: 457; See also Weinstein, 2002).

Še en vidik konkurenčnega prava, ki se tesno povezuje s servitizacijo, zadeva podatke. Zbiranje in analiza podatkov je bila do sedaj v domeni podjetij s programsko opremo. To področje pa se vse bolj širi tudi na proizvodna podjetja, ki so pričela izkoriščati možnosti, ki jih ponujajo zbiranje in uporaba potencialnih podatkov, zato da bi ustvarili večjo vrednost (Bessis & Dobre, 2014; Opresnik et al., 2013; Opresnik & Taisch, 2015). V tem smislu so podatki postali proizvodna surovina (Polonetsky & Tene, 2012: 63; Opresnik & Taisch, 2015: 175). Informacije, ki se pridobijo od kupcev, se lahko uporabijo za razvoj novih sistemov, ki izboljšujejo delovanje produkta in s tem položaj podjetja v vrednostni verigi, hkrati pa tudi zvišujejo njegove inovacijske zmožnosti (Sundin, 2009; Tukker & Tischner, 2006).

Tovrstni podatki ustvarjajo konkurenčno prednost napram manjšim ali novim konkurentom, ki si ne morejo privoščiti takšnih informacijskih sistemov. To je še posebej poudarjeno v situacijah ko servitizacijo omogoča IKT, pri katerih senzorji na produktih avtomatsko zbirajo podatke. Z ozirom na avtomatsko zbiranje podatkov se je razvil koncept »Veliko podatkovje«, nanaša pa se na zbirko podatkov, ki je tako velika ali kompleksna, da so tradicionalne aplikacije za obdelavo podatkov nezadostne (Bessis & Dobre, 2014; Kagermann et al., 2013; Miller, 2015: 37; Opresnik & Taisch, 2015; Shah, 2015). IS skupaj s tehnologijo Velikega podatkovja ponuja proizvajalcem priložnost preobrazbe svojih ponudb v storitve, kar za stranke pomeni dodano vrednost. V tem smislu postaja Veliko podatkovje »velik« problem za konkurenčno pravo EU. Problemi lahko nastanejo v situacijah, ko Veliko podatkovje predstavlja veliko in dolgotrajno oviro za vstop na trg. Zaradi tega se smatra, da bi morala velika podjetja sprejeti odgovornost, kadar zavračajo nudenje podatkov uporabnikov, s katerimi razpolagajo, svojim konkurentom ali za zbiranje dodatnih podatkov s širitvijo v nove proizvodnje linije. Kljub odločnim nasprotnikom tovrstnega izvrševanja konkurenčnega prava, ki trdijo, da ima Veliko podatkovje redko opraviti z definicijo trga ali konkurenčnimi učinki (Tucker & Wellford, 2014), podporniki zatrjujejo, da upoštevaje pomembnost podatkov v digitalizirani industriji, kot tudi težnjo h konentraciji podatkov, konkurenčno pravo ne sme ignorirati s tem povezanih problemov (Bräutigam & Klindt, 2015: 169).

6 Sodelovalna ekonomija kot grožnja pošteni konkurenci

Pravna analiza servitizacije se ne more izogniti izzivom, ki jih prinaša model poslovanja z deljenjem. Z vidika konkurenčnega prava je model deljenja lahko v prid konkurenci, spodbuja rast, olajšuje učinkovitejšo rabo virov, ustvarja nova delovna mesta in znižuje stroške potrošnikov. Ne glede na to pa so arhetipi modela deljenja, kot sta Uber in Airbnb pod nadzorom zaradi učinkov, ki jih ima njihovo poslovanje na določene konkurente, ki jih obtožujejo nepoštene konkurence (Malhotra & Van Alstyne, 2014). V taki situaciji se na konkurenčno pravo sklicujejo tako ponudniki storitev, ki delujejo s pomočjo digitalne platforme, tako kot Uber in Airbnb, kot tudi tradicionalni ponudniki storitev. Prvi zatrjujejo, da obstoječa ureditev ovira učinkovito konkurenco, slednji pa, da je taka konkurenca nepoštena, saj novi modeli poslovanja niso podvrženi istim pravilom, v skladu s katerimi morajo biti tradicionalne storitve. Kot kaže, pa je z obeh gledišč problematična prav »ureditev« (Laschena, 2015; See also Posen, 2015).

Tradicionalni ponudniki storitev trdijo, da se Uber in Airbnb izogibata določenim davkom, strokovnim in varnostnim predpisom ter da prelagata breme tveganja s trgovca na potrošnika (Rogers, 2015). Hotelske verige in vlade po vsem svetu obsojajo do Aribnb, ker se je izogibal turističnim taksam, ki so običajno vključene v strošek najema sobe v hotelu, in lokalnim varnostnim predpisom (Baker, 2014). V zvezi z Uberjem velja omeniti, da je svoje storitve najprej nudil voznikom taksijev izven njihovega delovnega časa, ki so imeli dovoljenje za opravljanje storitev v zvezi s taksi prevozi, preden je ponudbo razširil na posameznike, ki niso imeli v lasti dovoljenja za taksiste, so pa imeli v lasti avtomobil. To je Uberju pomagalo pri cenovni diskriminaciji. Običajni vozniki

taksijev so sedaj protestno glavni nasprotniki Uberjevega organiziranja upora po Evropi (Arthur, 2015; eub2, 2015; Stan Schroeder, 2015). Odzivi držav članic se v tej zadevi razlikujejo. V Franciji so UberPop prepovedali julija 2017, čemur so sledili protesti francoskih taksistov. Francoski Conseil constitutionnel je septembra 2015 potrdil odločitev, da je treba UperPop prepovedati na podlagi francoskega prava, ki prepoveduje storitve, ki izkoriščajo lastnike avtomobilov brez uradnega dovoljenja ali urjenja.[15] Nemčija, Španija in Belgija zastopajo podobno stališče, medtem ko se Uber pritožuje pred Komisijo, zatrjujoč da zastarela nacionalna pravila kršijo pravo EU (Fairless, 2015).

Uber se zanaša na koncept, po katerem se razširjen »ridesharing« model tako razlikuje od običajnih taksi storitev, da so postali predpisi, ki urejajo taksi storitve, neuporabni. Uber sebe zatorej dojema bolj kot tehnološko podjetje kot pa prevozno podjetje, saj temelji na »enostavnem« vmesniku in naprednem internetnem sistemu, ki anlizira podatke Velikega podatkovja (Felländer et al., 2015: 23). Uberjevo pojasnilo je bilo nedavno podprto s strani High Court of Justice v Londonu, ki je razsodilo, da voznikov pametni telefon z aplikacijo za voznika ni naprava za računanje voznin, zaradi česar se predpisi za taksije ne morejo uporabiti.[16] Poleg tega sta se tudi dve nacionalni sodišči obrnili na Sodišče EU z vprašanji za predhodno odločanje, ki bosta pomembno vplivali na odločitev o tem, ali je Uber prevozno podjetje ali ponudnik digitalnih storitev.[17]

Glede na to, da je Sodišče EU v preteklosti pokazalo svojo podporo možnosti potrošnikov, da se ti lahko sami odločijo ali želijo koristiti določeno storitev, v kolikor je seveda zagotovljena njihova varnost, bi lahko Sodišče EU podprlo rešitev, ki Uberja ne bi prisilila v spoštovanje zastarelih predpisov. V povezavi s tem bi bilo koristno, da bi se Sodišče EU poučilo o rezultatih nedavnega javnega posvetovanja, ki ga je izvedla Komisija. Z njim je je bilo ugotoljeno, da večina potrošnikov zastopa stališče, da »model poslovanja s sodelovanjem nudi zadostno obveščenost o ponudnikih storitev, pravicah potrošnikov, značaju in oblikah ponudbe in pravicah« (European Commission, 2016). V skladu s temi ugotovitvami, se lahko nedavni izjavi Komisije, da je treba »novim poslovnim modelom dati možnost« ter da Evropa postaja »edini kontinent, ki zavrača nove poslovne modele«, [18] razumeta kot znamenje, da Evropska izvršilna veja nudi večjo podporo poslovnemu modelu deljenja kot vlade držav članic. Poleg tega tudi komisarka za industrijo, Elżbieta Bieńkowska, podpira blag ureditveni pristop, ter zagovarja »jasne smernice, povezane z obstoječimi predpisi«, s čimer izloča konkretno zakonodajo EU na področju poslovanja z deljenjem (Valero, 2016).

Dokler bo trend servitizacije prinašal na trg nove modele poslovanja, ima konkurenčno pravo pomembno vlogo pri varovanju poštenih odnosov med velikimi in majhnimi udeleženci na trgu ter med uveljavljenimi podjetji in novinci. Navkljub mnogim izzivom servitizacije v digitalni dobi je mogoče priti do zaključka, da je trenutno konkurenčno pravo dovolj fleksibilno, da lahko zajame večino izzivov, ki jih prinaša nova tehnologija izdelkov in storitev. Vseeno se morajo tudi konkurenčni organi ter sodišča zavedati nevarnosti, ki jo predstavljajo argumenti o neuravnoteženosti in ekonometrične analize, hkrati pa ohraniti možnost za vpeljavo novih sredstev dokazovanja konkurenčne škode

(Au, 2012: 228). »Pameten« odziv je zatorej primerna uravnoteženost nasprotujočih si interesov.

7 Servitizacija kot strategija za zadrževanje kupcev

Poleg izključevanja konkurentov pri proizvajanju izdelkov in storitev, lahko proizvodna podjetja pričakujejo tudi dodatno tržno prednost, saj servitizacija omogoča »zadrževanje« kupcev. Z vključevanjem različnih storitev, ki sledijo nakupu, bodo potrošniki postali zvestejši kot če bi lahko zgolj kupili neko dobrino, istočasno pa proizvajalcu to omogoča vpogled v potrebe potrošnikov (Aurich, Mannweiler, & Schweitzer, 2010; Baines et al., 2009, p. 558; Vandermerwe & Rada, 1988). Servitizacija tako pomaga graditi dolgotrajnejša razmerja s strankami, kar lahko privede celo do točke, ko postanejo potrošniki odvisni od svojega dobavitelja (Baines et al., 2009; Manzini, Vezzoli, & Clark, 2001). Posledično je potrošniško pravo naslednje področje prava, ki je tesno povezano s servitizacijo.

Večplasten značaj servitizacije primarno prinaša izzive na področje regulacije odgovornosti v sistemih združevanja produktov in storitev. V tej zvezi je sprejem direktive o odgovornosti ponudnikov storitev, kot je že bila predlagana s strani Komisije leta 1990, ponovno potrebna presoje. Čeprav je bil predlagan osnutek iz 1990 utemeljen na krivdni odgovornosti (namesto na objektivni odgovornosti), v tistem času ni bilo nobenega političnega interesa za sprejem te ureditve.[19] Vseeno pa bo prenovljen pogled EU in držav članic na proizvodnjo in servitizacijo mogoče vodil do novega zagona v tem pogledu. Nasprotno je bil evropski zakonodajni postopek bolj uspešen z Direktivo o odgovornosti za proizvode,[20] ki pa se ne nanaša na neopredmetene dobrine – pomanjkljive storitve, malomarni nasveti, napačna diagnostika ter napačne informacije zato niso vključene v to direktivo. Vseeno pa je pomembno omeniti, da bo, kadar se škoda povzroči s proizvodom z napako, uporabljenim med storitvijo, to škodo mogoče povrniti na podlagi Direktive o odgovornosti za proizvode (Grubb & Howells, 2007: 292–297).[21] Veliko servitizacijskih poslov zato spada v okvir te Direktive, vključno s programsko opremo z napako, 3D natisnjenih predmetov z napako in skupni prevoz s pokvarjenim avtomobilom.[22] To pomeni, da lahko potrošnik, čigar avto povzroči nesrečo zaradi nepravilnega delovanja programske opreme, ali potrošnik ki kupi hišo, natisnjeno s 3D tehnologijo, ki se kasneje podre, poda zahtevek na podlagi Direktive o odgovornosti za proizvode (Wuyts, 2014: 5). V primerih, ko programsko opremo zagotavlja Internet (t.i. nevgrajena programska oprema) ali ko so datoteke za digitalni načrt za 3D natisnjene predmete prodani kupcem, ki nato te predmete natisnejo sami, potencialne napake ne spadajo v okvir te direktive.

Situacija na področju varnostnih predpisov je primerljiva s situacijo na področju odgovornosti za proizvode. Čeprav člen 2(1) Direktive 2001/95 o splošni varnosti proizvodov[23] določa, da varnostni režim proizvodov zajema katerikoli proizvod, ki je namenjen potrošniški rabi oz. ga bodo potrošniki verjetno uporabljali, četudi jim ni namenjen, »vključno v okviru zagotavljanja storitev«, pa ni nobene primerljive ureditve na področju varnosti storitev (Weatherill, 2013: 282). Države članice bi morale zato same

sprejeti zakonodajo, ki bo zastavila varnostne standarde za storitve, kar pa ni najboljša rešitev v času rasti servitizacije (ki jo omogoča IKT), ki zahteva trg brez meja.

Posebne težave za pravila v zvezi z odgovornostjo in varnostjo izvirajo iz dejstva, da lahko servitizacija spremeni vloge v proizvodnem ciklu. Tradicionalna proizvodna zakonodaja domneva, da so dobrine izdelane in sestavljene v proizvodnem obratu, dane na trg in prodane distributorjem in potrošnikom. Razvoj v proizvodni tehnologiji bo imel potencial spremeniti to sliko v bližnji prihodnosti. Z združevanjem digitalnih storitev, kot so spletne oblikovalne storitve z napredno proizvodnjo kot je 3D tiskanje, bo možen velik preobrat z masovne v popolnoma prilagojeno produkcijo.[24] Pri 3D tiskanju je meja med proizvodnjo in storitvijo zabrisana zaradi negotovosti glede tega, koga je treba smatrati za proizvajalca proizvoda, še posebej kadar je 3D tiskalnik uporabljen nekje v vrednostni verigi (Kommerskollegium, 2015: 23). Zaradi široke dostopnosti 3D tiskalnikov je posamezniki (predvsem ljubiteljskim izumiteljem) precej lažje postanejo proizvajalci.[25] Ker slednji niso seznanjeni s pravili o odgovornosti za proizvode, bo pravni okvir odgovornosti za proizvode morda prisiljen v to da se spremeni, da se prilagodi takšni novi tehnologiji (Berkowitz, 2014; Engstrom, 2013). Brez te spremembe ureditve se bodo proizvajalci verjetno skušali izogniti odgovornosti z zatrjevanjem, da so zgolj »ponudniki storitev« (Nielson, 2015: 616), ki oddajajo 3D tiskalnike v najem strankam med postopkom tiskanja (tiskalnik pa medtem ostane v prostorih proizvajalca) in prodajajo surovine strankam vnaprej, s čemer se rešijo odgovornosti za proizvod.

8 Pogodbe za prodajo sistemov proizvod-storitev potrošnikom

Z vidika razmerja podjetij do potrošnikov so servitizacijski modeli lahko razvrščeni v dve skupini. Prvo sestavljajo servitizacijske transakcije, kjer je lastništvo na proizvodu preneseno na potrošnika (tj. proizvod je prodan) z nekaj dodanimi storitvami, ki povečujejo vrednost proizvoda. Te storitve so lahko tradicionalne (kot sta vzdrževanje in popravilo) ali pa digitalne, vgrajene v pametne proizvode, ki so povezani z Internetom (tj. pametne naprave, ki proizvajalcu omogočajo oddaljen dostop). Nasprotno pa drugo skupino servitizacijskih modelov sestavljajo transakcije, kjer lastništvo na proizvodu ostaja pri prodajalcu, na kupca pa je prenesena zgolj storitev (kadar je na primer naprava oddana, avto izposojen ali si ga deli več uporabnikov itd.).

Uvrščanje te klasifikacije servitizacijskih transakcij pod pogodbene obrazce, ki jih zagotavlja Direktiva o pravicah potrošnikov, vodi do zaključka, da prva skupina transakcij spada med prodajne pogodbe.[26] Glede na definicijo iz člena 2(5) te Direktive je kriterij za uvrstitev pogodbe med prodajne pogodbe prenos lastništva nad blagom na potrošnika proti plačilu cene blaga. Zadnji del definicije is istega člena, pa dodaja, da prodajna pogodba vključuje tudi »kakršno koli pogodbo, katere predmet so blago ali storitve.« Če je glavni namen prenos lastništva določenega blaga, bi posledično pogodba morala biti uvrščena med prodajne pogodbe, četudi zajema pripadajoče storitve, ki jih zagotavlja prodajalec, kot so instalacija, vzdrževanje ali kaj drugega, ne glede na relativno vrednost blaga in storitev. [27] S tega vidika je moč pričakovati, da bo proizvodnja edinstvenega izdelka skladno s potrošnikovimi izrecnimi zahtevami – četudi je tak

proizvod izdelan s pomočjo pametnih naprav kot standardiziran proizvod (proizvod v veliki proizvodnji) – prav tako spadala pod prodajno pogodbo, navkljub dejstvu, da ne gre za čisto prodajno transakcijo, temveč za kombinacijo slednje z določbami o storitvah, podobno kot v primeru izdelovanja oblačil po meri (Bräutigam & Klindt, 2015: 148).[28] Prodajna pogodba se bo lahko uporabila tudi v primeru transakcij kot jo je razvil Volvo, ki ponuja dolivanje bencina v odsotnosti voznika. Ta oblika pogodbe izrecno velja tudi za digitalne vsebine, dobavljene na oprijemljivem mediju.[29] Če pa je posebna pogodba sklenjena za storitve, ki so del paketa proizvoda in storitev (na primer pogodba za popravilo), pa mora biti zaradi svojega glavnega namena uvrščena med pogodbe o storitvah.[30] Pogodbe o storitvah so definirane kot tiste, na podlagi katere trgovec opravi storitev za potrošnika ali se temu zaveže, potrošnik pa za to plača (člen 2(6)). Iz tega sledi, da druga skupina servitizacijskih transakcij spada pod pogodbe o storitvah, saj lastništvo izdelkov ostane trgovcu, prenesena pa je zgolj njihova raba.

9 Zaključek: človeški delež pri servitizaciji

Čeprav je svet morda nov, servitizacija in z njo povezani koncepti, ki podpirajo idejo, da ni treba kupovati proizvodov, zato da bi uživali koristi, niso novi. Wilson podaja primer ananasov, ki so bili prvič v Evropo pripeljani v 17. stoletju in so bili tako dragi, da so jih revnejše, srednjerazredne družine občasno najele, ko so ob posebnih priložnostih gostile družbo, ki so jo želele navdušiti, hkrati pa upale, da jih nihče ne bo dejansko poskusil razrezati (Wilson, 2005).

Od takrat je Evropa prehodila že dolgo pot. Skupina na visoki ravni za poslovne storitve je pojasnila, da servitizacija »ponuja priložnosti za revolucijo proizvodnega sektorja,«[31] medtem ko iz SPREE projekta, financiranega s strani EU, izhaja zaključek, da ima servitizacija »potencial brez primere radikalno spremeniti proizvodnjo in potrošniške vzorce in doseči ločevanje gospodarstva, ekologije in družbenih sprememb« (“SPREE Project,” n.d.). Komisija se je na ta poslovni trend večdimenzionalno odzvala s sprejemom ali objavo o sprejemu vrste akcijskih načrtov, smernic ali zakonodajnih predlogov povezanih s servitizacijo.[32] Nekateri komentatorji trdijo, da zato, ker še ni znano kako točno se bo servitizacija razvijala, EU še ne bo kmalu sprejela zakonodaje, ki zadeva digitaliziranje industrije, drugi opozarjajo na potrebo po nemudnem odzivu, da se prepreči zakonodajna aktivnost držav članic, ki bi EU postavila v slabši položaj nasproti ostalim globalnim velesilam kot sta ZDA in Kitajska, ki sta prav tako razvili svoje proizvodne strategije. V mnogih pogledih je servitizacija smiselna in zato je smiselno tudi, da se ji posveti regulatorna podpora, ki jo potrebuje, da postane redna oblika poslovanja. To pa vseeno ne pomeni, da mora biti nova ureditev sprejeta v naglici, sploh ker bi zadostovala že sprememba obstoječe zakonodaje (WDMA European Office, 2016: 10; See also Braucher, 2002). Mnoga obstoječa pravila v zvezi z blagom so povsem uporabna tudi za pametno blago in veliko obstoječih pravil v zvezi s storitvami je uporabnih tudi za servitizacijske transakcije. Poleg tega je treba priznati da zakonodaja ne more zajeti vseh možnih problemov, ki se lahko pojavijo v praksi – osrednja regulatorna vloga bo zato na plečih sodišč, ki bo moralo biti dovolj fleksibilno, da bo prepoznalo potrebo po ravnotežju med različnimi interesi.

Industrija in tehnologija se očitno naglo spreminjata; tudi zakoni se lahko temu razvoju hitro prilagodijo. Vendar pa se bodo vsi vpleteni morali globoko zamisliti, ali se temu lahko enako hitro prilagodi tudi družba[33] – ali se bodo ljudje lahko naučili potrebnih veščin; ali bomo v tem »tehnološkem tsunamiju« varni? [34] Ob primerih kot je Uber se postavljajo vprašanja o uporabnosti delovne zakonodaje v situacijah, kjer je meja med delavcem in samostojnim izvajalcem nejasna. [35] S širšo uporabo avtomatiziranih sistemov (robotov) v delovnem procesu bodo morala biti popravljena tudi pravila o varnosti pri delu. Seveda digitalizirana industrija ne bo nadomestila ljudi v proizvodnji, bo pa dovoljevala drugačno delitev dela med ljudmi in napravami, kjer bodo rutinske fizične in mentalne naloge v vse več primerih zamenjane s koordinacijo in kontrolnimi nalogami (van Est et al., 2015; WDMA European Office, 2016, p. 4). Komisija je že izrazila potrebo po digitalnih veščinah in novem izobraževanju delovne sile kot enega glavnih izzivov digitaliziranja industrije v EU, ob čemer zatrjuje, da se »bodo vse službe spremenile in mnoge izginile.« [36] Servitizacija bo zato imela neposredni učinek ne le na evropska podjetja in Evropejce kot potrošnike, temveč tudi na večji del evropskih študentov in delavcev.

Zaključiti je mogoče, da smo se znašli v sredi »servitizacijsko-digitalizacijsko-globalizacijskega« hurikana. Čeprav se ga nekateri bojijo in ga skušajo ustaviti, pa je malo verjetno da bi taki poskusi vodili do vidnih rezultatov. Zato se zdi mnogo bolj kontruktivno preprosto poskusiti in to karseda izkoristiti ter sprejeti razvoj, ki deluje nam v prid. Premišljen regulatorni odziv, ki bi zajemal vse vpletene, bi lahko v tem oziru ponudil ključni prispevek k omejevanju negativnih vplivov novega industrijskega vala na evropsko gospodarstvo in družbo.

Notes

[1] Glej tudi Komisija, Towards Knowledge Driven Reindustrialisation, Poročilo Evropske Komisije 2013, SWD (2013) 347 končno: 3k
[2] Npr. (Parametric Technology Corporation (PTC), 2013)
[3] Zadeva C-434/15, Asociación Profesional Élite Taxi proti Uber Systems Spain, S.L., vloženo dne 7. avgusta 2015 in zadeva C-526/15, Uber Belgium BVBA proti Taxi Radio Bruxellois NV, vloženo dne 5. oktobra 2015.
[4] V zadnjih letih se ta pojem hitro širi iz angleškega v druge jezike, tako da je mogoče najti izraze 'la servitization' v italijanščini in francoščini, 'Servitization' v nemščini 'serwicyzacja' v poljščini itd.
[5] Sporočilo Komisije (Commission Communication, n.d.)
[6] Najprej predmeti, opremljeni z RFID (Radio Frequency Identification) tehnologijo (elektronska ID oznaka) – Več o tem (Chabanne, Urien, & Susini, 2013; Gubbi, Buyya, Marusic & Palaniswami, 2013; Ngai, Moon, Riggins, & Yi, 2008; Weber, 2009)
[7] 'State of the Internet of Things Market Report 2015' (*Verizon Enterprise Solutions*) 13. Glej tudi (Saara A. Brax & Katrin Jonsson, 2009; Tonci Grubic & Joe Peppard, 2016)
[8] Glej Komisija, DG Connect, An Action Plan for Digitising European Industry, Osnutek, 23. december 2015. Glej tudi (UK Government, 2013).
[9] Crozet in Milet, ki sta raziskovala servitizacijo v francoskih podjetjih, sta ugotovila, da so v primerjavi z ostalimi podjetji ki proizvajajo zgolj blago, podjetja, ki so pričela s prodajo storitev,

povečala svoj profit za 3,7 do 5,3 odstotkov, povečala število zaposlenih za 30 odstotkov in izboljšala prodajo svojega blaga za 3,6 odstotke - (Crozet & Milet, 2015: 25)

[10] Glej sporočilo Komisije, Bančni sistem v senci – obravnavanje novih virov tveganja v finančnem sektorju, COM (2013) 614 final, tudi Zelena knjiga – Bančni sistem v senci, COM(2012) 102 final in odziv Leaseurope, Komentarji na Zeleno knjigo o bančnem sistemu v senci, Bruselj, dostopno na: http://www.leaseurope.org/. Več o bančnem sistemu v senci (Garcia, 2012; Greene & Broomfield, 2013)

[11] Glej sporočilo Komisije, Vizija za notranji trg z industrijskimi proizvodi, COM (2014) 25 final: 5. Glej tudi Klindt v (Bräutigam & Klindt, 2015: 100–106; Weber & Weber, 2010: 23)

[12] Glej npr. (Rogers, 2015)

[13] Več o industrijski politiki v konkurenčnem pravu Gifford & Kudrle, 2015; Sokol, 2015.

[14] Za razliko med vezano prodajo in združevanjem glej npr. (Rousseva, 2010: 219; Diaz & Garcia, 2007; Hylton & Salinger, 2001; Jones & Sufrin, 2014: 485)

[15] Conseil constitutionnel, Société UBER France SAS et autre, Décision n° 2015-484 QPC du 22 septembre 2015. Glej tudi (Jacquin, 2015)

[16] Transport for London proti Uber London Ltd, št. zadeve: CO/1449/2015, sodba z dne 16. oktober 2015, [2015] EWHC 2918 (Admin), para 17.

[17] Zadeva C-434/15, Asociación Profesional Élite Taxi proti Uber Systems Spain, S.L., in zadeva C-526/15, Uber Belgium BVBA proti Taxi Radio Bruxellois NV, obe v teku.

[18] ("Brussels wants to share," 2015, "Europe should embrace sharing economy, says EU," 2015)

[19] Predlog Direktive o odgovornosti ponudnikov storitev, COM (90) 482 final, 20. december 1990. Več o tem (Weatherill, 2013: 186–187)

[20] Direktiva Sveta o približevanju zakonov in drugih predpisov držav članic v zvezi z odgovornostjo za proizvode z napako, UL L 210, 7.8.1985: 29-33.

[21] Glej zadevo C-203/99, Veedfald proti Arhus Amtskommune, EU:C:2001:258 in zadevo C-495/10, Dutrueux, EU:C:2011:869.

[22] Pisno vprašanje št. 706/88 s strani Gijs de Vries Komisiji: Product liability for computer programs, UL C 114, 8.5.1989, 42.

[23] UL L 11, 15.1.2002: 4-17.

[24] Komisija, Business Innovation Observatory – Design for Innovation, 'Web-based design services as a new business model in the design world', 2014.

[25] Uredba (ES) št. 765/2008 o določitvi zahtev za akreditacijo in nadzor trga v zvezi s trženjem proizvodov, UL L 218, 13.8.2008: 30-47.

[26] Direktiva 2011/83/EU o pravicah potrošnikov, UL L 304, 22.11.2011: 64-88.

[27] GD za pravosodje, Usmeritveni dokument glede Direktive o pravicah potrošnikov, junij 2014: 6.

[28] Cf Burrer se sprašuje, ali bi to situacijo lahko zajela prodajna pogodba, pogodba o storitvah ali kakšna nova, netipična oblika pogodbe.

[29] Direktiva o varstvu potrošnikov, recital 19.

[30] Prav tam, recital 26.

[31] High-Level Group on Business Services, Final Report, april 2014: 28.

[32] Npr. DSM strategija je bila sprožena maja 2015, Smernice o modelu deljenja v poslovanju bi morale biti objavljene do marca 2016, akcijski načrt za digitaliziranje industrije do aprila 2016, načrt za IS do poletja 2016, zakonodaja o povezanih avtomobilih do 2018, itd.

[33] Glej npr. Indeks digitalnega gospodarstva in družbe (DESI), ki nadzira digitalni razvoj evropske družbe.

[34] C.F. (Chappell, 2016)

[35] Glej npr. (Musil, 2015)

[36] Glej Komisija, DG Connect, Akcijski načrt za digitalizacijo evropske industrije, Osnutek, 23. december 2015: 11. Ustrezno, 90 odstotkov služb v digitalizirani industriji zahteva določeno stopnjo digitalnih veščin, 40 odstotkov podjetij, ki skušajo zaposliti IKT strokovnjake ima s tem

težave. Ocenjuje se, da bo do leta 2020 v EU 800.000 delovnih mest za IKT strokovnjake. Glej tudi Skupina na visoki ravni za poslovne storitve, končno poročilo, april 2014: 63-75.

Refernces

Abramovici, M., Göbel, J. C. & Neges, M. (2015) Smart Engineering as Enabler for the 4th Industrial Revolution, In: Fathi, M. (Ed.) Integrated Systems: Innovations and Applications, pp. 163–170 (Springer International Publishing), available at: http://link.springer.com/chapter/10.1007/978-3-319-15898-3_10 (July 18, 2016). Aiginger, K. (2016, January 26). The high road: Europe must seize the potential of advanced manufacturing [Text], available at: http://www.euractiv.com/sections/innovation-industry/high-road-europe-must-seize-potential-advanced-manufacturing-321309 (July 18, 2016).

Ardolino, M., Saccani, N. & Perona, M. (2015) The Impact of Digital Technologies and Ecosystems on the Servitization of Companies: A Preliminary Analysis, pp. 51–58. Presented at the Spring Servitization Conference, Aston Business School, available at: http://www.researchgate.net/profile/Marco_Ardolino/publication/277017752_NS_Ardolino_et_al_SSC2015_review/links/555f23eb08ae6f4dcc8ff52b.pdf (July 18, 2016).

Arthur, C. (2015, June 26) Uber backlash: taxi drivers' protests in Paris part of global revolt, The Guardian, available at: http://www.theguardian.com/technology/2015/jun/26/uber-backlash-taxi-drivers-protests-paris-global-revolt (July 18, 2016).

Au, T. H. (2012) Anticompetitive Tying and Bundling Arrangements in the Smartphone Industry, Stanford Technology Law Review, pp. 188–228.

Aurich, J. C., Mannweiler, C. & Schweitzer, E. (2010). How to design and offer services successfully, CIRP Journal of Manufacturing Science and Technology, 2(3), pp. 136–143, doi: 10.1016/j.cirpj.2010.03.002.

Baines, T. (2015) Exploring Service Innovation and the Servitization of the Manufacturing Firm, Research Technology Management, 58(5), pp. 9–11, doi: 10.5437/08956308X5805002.

Baines, T. S., Lightfoot, H. W., Benedettini, O. & Kay, J. M. (2009) The servitization of manufacturing: A review of literature and reflection on future challenges, Journal of Manufacturing Technology Management, 20(5), pp. 547–567, doi: 10.1108/17410380910960984.

Baines, T. & Lightfoot, H. (2014) Servitization in the Aircraft Industry: Understanding Advanced Services and the Implications of Their Delivery, In: Lay, G. (ed.) Servitization in Industry, pp. 45–54 (Springer International Publishing), available at: http://link.springer.com/chapter/10.1007/978-3-319-06935-7_3 (July 18, 2016).

Baker, D. (2014, May 27) Don't buy the "sharing economy" hype: Airbnb and Uber are facilitating rip-offs, The Guardian, available at: http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation (July 18, 2016).

Bauernhansl, T. (2013) Industry 4.0: Challenges and limitations in the production. Keynote. ATKearney, Factory of the Year.

Berkowitz, N. D. (2014) Strict Liability for Individuals - The Impact of 3-D Printing on Products Liability Law [notes], Washington University Law Review, (4), pp. 1019.

Bessis, N. & Dobre, C. (2014) Big Data and Internet of Things: A Roadmap for Smart Environments (Springer).

Bieńkowska, E. (2015) Reindustrialisation of Europe: Industry 4.0 - Innovation, growth and jobs, Speech, In: European Commission, available at: https://ec.europa.eu/commission/2014-2019/bienkowska/announcements/reindustrialisation-europe-industry-40-innovation-growth-and-jobs-forum-europe-conference_en (July 18, 2016).

Blackstone, E. A. (1972) Copying-Machine Industry: Innovations, Patents, and Pricing, Antitrust Law & Economics Review, 6, pp. 105.

Blanchet, M., Rinn, T., Thaden, G. & Thieulloy, G. (2014) Industry 4.0: The new industrial revolution-How Europe will succeed. Hg. v. Roland Berger Strategy Consultants GmbH. München, available at: http://www.Rolandberger.com/media/pdf/Roland_Berger_TAB_Industry_4_0_2014 0403.Pdf (July 18, 2016).

Brady, T., Davies, A. & Gann, D. M. (2005) Creating value by delivering integrated solutions, International Journal of Project Management, 23(5), pp. 360–365.

Braucher, J. (2002) When Your Refrigerator Orders Groceries Online and Your Car Dials 911 after an Accident: Do We Really Need New Law for the World of Smart Goods?, Washington University Journal of Law & Policy, 8(241), pp. 241–259.

Bräutigam, P. & Klindt, T (2015) Digitalisierte Wirtschaft/Industrie 4.0.

Brax, S. A. & Jonsson, K. (2009) Developing integrated solution offerings for remote diagnostics: A comparative case study of two manufacturers, International Journal of Operations & Production Management, 29(5), pp. 539–560, doi: 10.1108/01443570910953621

Brennan, L., Ferdows, K., Godsell, J., Golini, R., Keegan, R., Kinkel, S., … Taylor, M. (2015) Manufacturing in the world: where next?, International Journal of Operations & Production Management, 35(9), 1253, doi: 10.1108/IJOPM-03-2015-0135.

Brussels wants to share (2015, November 2), available at: http://brand-e.biz/european-commission-looks-to-bolster-the-sharing-economy_36359.html (July 18, 2016).

Bustinza, O. F., Bigdeli, A. Z., Baines, T. & Elliot, C. (2015) Servitization and competitive advantage: the importance of organizational structure and value chain position, Research-Technology Management, 58(5), 53–60, doi:10.5437/08956308X5805354.

Carlton, D. W. & Waldman, M. (2008) Tying (SSRN Scholarly Paper No. ID 1529843) Rochester, NY: Social Science Research Network, available at: http://papers.ssrn.com/abstract=1529843 (July 18, 2016).

Chabanne, H., Urien, P. & Susini, J.-F. (2013) RFID and the Internet of Things (John Wiley & Sons).

Chappell, S. (2016, January 20) Tech transformation – 4th Industrial Revolution "tsunami" warning in Davos, Euronews, available at: http://'www.euronews.com/2016/01/20/fourth-industrial-revolution-tsunami-warning-in-davos/ (July 18, 2016).

Chesbrough, H. & Spohrer, J. (2006) A Research Manifesto for Services Science, Communications of the ACM, 49(7), pp. 35–40, doi: 10.1145/1139922.1139945.

Commission Communication. (n.d.) Innovation for a sustainable Future - The Eco-innovation Action Plan (Eco-AP) COM (2011) 899 final, available at: http://ec.europa.eu/environment/ecoap/about-eco-innovation/good-practices/project-proposes-policy-packages-servitisation_en (July 18, 2016). Crozet, M. & Milet, E. (2015) Should everybody be in services? The effect of servitization on manufacturing firm performance (No. CEPII Working Paper 2015/19), available at: http://www.cepii.fr/PDF_PUB/wp/2015/wp2015-19.pdf (July 18, 2016).

Crozet, M. & Millet E. (2014) The servitization of French manufacturing firms, CEPII Working Paper, (10), available at: http://www.cepii.fr/PDF_PUB/wp/2014/wp2014-10.pdf (July 18, 2016).

Diaz, F. E. G. & Garcia, A. L. (2007) Tying and Bundling under EU Competition Law: Future Prospects, Competition Law International, (1), pp. 13.

Dujin, A., Geissler, C. & Horstkötter, D. (2014) INDUSTRy 4.0: The new industrial revolution (Munich: Roland Berger Strategy Consultants).

Engstrom, N. F. (2013) 3-D Printing and Product Liability: Identifying the Obstacles, University of Pennsylvania Law Review Online, 162(35), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347757 (July 18, 2016).

eub2 (2015, September 16) European taxi drivers block Brussels over Uber, EuBusiness.com, available at: http://www.eubusiness.com/news-eu/belgium-transport.14c9/ (July 18, 2016).

Europe should embrace sharing economy, says EU (2015, October 28), available at: http://www.irishtimes.com/business/economy/europe-should-embrace-sharing-economy-says-eu-1.2408872 (July 18, 2016).

European Commission (2016, January 29) First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, available at: https://ec.europa.eu/digital-agenda/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries (July 18, 2016).

Evans, D. S. & Salinger, M. (2005) Why do firms bundle and tie? Evidence from competitive markets and implications for tying law, Yale Journal on Regulation, 22(1), pp. 37-89.

Fairless, T. (2015, April 1) Uber Files Complaints Against European Governments Over Bans. Wall Street Journal, available at: http://www.wsj.com/articles/uber-files-complaints-against-european-governments-over-bans-1427885946 (July 18, 2016).

Faull, J. & Nikpay, A. (2014) Faull and Nikpay: The EU Law of Competition (Oxford: OUP Oxford).

Felländer, A., Ingram, C. & Teigland, R. (2015) Sharing Economy–Embracing Change with Caution. In Näringspolitiskt Forum rapport.

Ferber, S. (2012) Industry 4.0–Germany takes first steps toward the next industrial revolution, available at: http://blog.bosch-si.com/categories/manufacturing/2012/10/industry-4-0-germany-takes-first-steps-toward-the-next-industrial-revolution/ (July 18, 2016).

Festge, R. (2015, April 7) "Industry 4.0": How European companies can really benefit, EurActiv, available at: http://www.euractiv.com/sections/innovation-industry/industrie-40-how-european-companies-can-really-benefit-313385 (July 18, 2016).

Finne, M., Brax, S. & Holmström, J. (2013) Reversed servitization paths: a case analysis of two manufacturers, Service Business, 7(4), pp. 513–537, doi: 10.1007/s11628-013-0182-1.

Garcia, J. A. (2012) Who's Afraid of the Shadows?–EU Moves to Curb Emerging Threats from Shadow Banking, EU Moves to Curb Emerging Threats from Shadow Banking (June 14, 2012), Financial Regulation International, Forthcoming, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080116 (July 18, 2016).

Gebauer, H. & Friedli, T. (2005) Behavioral implications of the transition process from products to services, Journal of Business & Industrial Marketing, 20(2), pp. 70–78, doi: 10.1108/08858620510583669.

Gifford, D. J. & Kudrle, R. T. (2015) The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy (University of Chicago Press).

Goldhar, J. & Berg, D. (2010) Blurring the boundary: convergence of factory and service processes, Journal of Manufacturing Technology Management, 21(3), 341–354, doi: 10.1108/17410381011024322.

Greene, E. F. & Broomfield, E. L. (2013) Promoting risk mitigation, not migration: a comparative analysis of shadow banking reforms by the FSB, USA and EU, Capital Markets Law Journal, 8(1), 6–53.

Grubb, A. & Howells, G. G. (2007) The Law of Product Liability (Butterworths).

Grubic, T. & Peppard, J. (2016) Servitized manufacturing firms competing through remote monitoring technology: an exploratory research, Journal of Manufacturing Technology Management, 27(2), pp. 154-184, doi: 10.1108/JMTM-05-2014-0061.

Gubbi, J., Buyya, R., Marusic, S. & Palaniswami, M. (2013) Internet of Things (IoT): A vision, architectural elements, and future directions, Future Generation Computer Systems, 29(7), 1645–1660, doi: 10.1016/j.future.2013.01.010.

Günther Oettinger. (2015, April 15) Europe's future is digital, Speech at Hannover Messe. Speech 15-4772, available at: http://europa.eu/rapid/press-release_SPEECH-15-4772_en.htm (July 18, 2016).

Hegarty, R. C., Lamb, D. J. & Attwood, A. (2014) Digital Evidence Challenges in the Internet of Things, In: Proceedings of the Tenth International Network Conference (INC 2014), p. 163, Lulu. com, available at: https://www.google.com/books?hl=sl&lr=&id=Tl7qBgAAQBAJ&oi=fnd&pg=PA163&dq=hegarty+lamb+digital+evidence&ots=LyUIpBXu1i&sig=t5enwpS78bQH95kpAV6KG3nDL4Q (July 18, 2016).

Hylton, K. N. & Salinger, M. A. (2001) Tying Law and Policy: A Decision Theoretic Approach (SSRN Scholarly Paper No. ID 267170) (Rochester, NY: Social Science Research Network), available at: http://papers.ssrn.com/abstract=267170 (July 18, 2016).

Jacquin, J.-B. (2015, September 22) Le Conseil constitutionnel confirme l'illégalité du service Uberpop en France, Le Monde.fr, available at: http://www.lemonde.fr/economie/article/2015/09/22/web-eco-uberpop-decision-conseil-constitutionnel_4767302_3234.html (July 18, 2016).

Johansson, L. (2010) Servicification of Swedish manufacturing, pp. 33 (Stockholm, Sweden: The National Board of Trade, Stockholm), available at: http://www.kommers.se/Documents/dokumentarkiv/publikationer/2010/skriftserien/report-2010-1-servicification-of-swedish-manufacturing.pdf (July 18, 2016).

Jones, A. & Sufrin, B. (2014) EU Competition Law: Text, Cases, and Materials (Oxford: Oxford University Press).

Kagermann, H., Helbig, J., Hellinger, A. & Wahlster, W. (2013) Recommendations for Implementing the Strategic Initiative INDUSTRIE 4.0: Securing the Future of German Manufacturing Industry; Final Report of the Industrie 4.0 Working Group (Forschungsunion).

Kagermann, P. D. H. (2015) Change Through Digitization—Value Creation in the Age of Industry 4.0, In: Albach, H. Meffert, H., Pinkwart, A. & Reichwald, R. (eds.) Management of Permanent Change, pp. 23–45 (Springer Fachmedien Wiesbaden), available at: http://link.springer.com/chapter/10.1007/978-3-658-05014-6_2 (July 18, 2016).

Kalakota, R. & Robinson, M. (2001) E-business 2.0: Roadmap for Success (Addison-Wesley Professional).

Kearns, D. T., Mauler, D. & Kleinfield, S. (1992) Xerox-Prophets in the Dark: How Xerox Reinvented Itself and Beat Back the Japanese (Harper Business), available at: http://dl.acm.org/citation.cfm?id=573594 (July 18, 2016).

Kemekliene, G., Connolly, H., Keune, M. & Watt, A. (2007) Services employment in Europe, Now and in the Future, In: ETUI-REHS, Background Paper for UNI-Europa Conference, available at: https://www.etui.org/content/download/2540/27784/file/07+Service+employment+in+Europe+EN+R104.pdf (July 18, 2016).

Kommerskollegium. (2015) Servicification on the Internal Market – a regulatory perspective: The case of customisation by 3D printing, pp. 28 (Stockholm, Sweden: National Board of Trade, Stockholm), available at: http://www.kommers.se/Documents/In_English/Report-Servicification%20on%20the%20Internal%20Market%20%E2%80%93%20a%20regulatory%20perspective.pdf (July 18, 2016).

Kowalkowski, C., Kindström, D. & Gebauer, H. (2013) ICT as a catalyst for service business orientation, Journal of Business & Industrial Marketing, 28(6), pp. 506–513, doi: 10.1108/JBIM-04-2013-0096.

Kryvinska, N., Kaczor, S., Strauss, C. & Greguš, M. (2014) Servitization - Its Raise through Information and Communication Technologies, In: Snene, M. & Leonard, M. (eds.), Exploring Services Science, pp. 72–81 (Springer International Publishing), available at: http://link.springer.com/chapter/10.1007/978-3-319-04810-9_6 (July 18, 2016).

Laschena, A. (2015, November 16) Competition and the sharing economy: the challenges of a new business model, available at: http://www.kreab.com/brussels/2015/11/16/competition-and-the-sharing-economy-the-challenges-of-a-new-business-model/ (July 18, 2016).

Lerch, C. & Gotsch, M. (2015) Digitalized Product-Service Systems in Manufacturing Firms. Research Technology Management, 58(5), pp. 45-52, doi: 10.5437/08956308X5805357

Lerch, C. & Gotsch, M. (2015) How Digitalisation can Accelerate the Transformation Process from the Manufacturer to Service Provider (Vol. 2015) Presented at the Servitization: the theory and impact, Spring Servitization Conference, Aston Business School.

Lightfoot, H. W., Baines, T. S. & Smart, P. (2012) Emerging Technology and the Service Delivery Supply Chain, In: Chan, H. K., Lettice, F. & Durowoju, O. A. (eds.) Decision-Making for Supply Chain Integration, pp. 211–226 (London: Springer), available at: http://link.springer.com/chapter/10.1007/978-1-4471-4033-7_11 (July 18, 2016).

Lightfoot, H., Baines, T. & Smart, P. (2013) The servitization of manufacturing: A systematic literature review of interdependent trends, International Journal of Operations & Production Management, 33(11/12), 1408–1434, doi: 10.1108/IJOPM-07-2010-0196.

Livesey, F. (2012) The Need for a New Understanding of Manufacturing and Industrial Policy in Leading Economies, Innovations (15582477), 7(3), pp. 193-202, doi:10.1162/INOV_a_00146.

Looy, B. van, Gemmel, P. & Dierdonck, R. (2003) Services Management: An Integrated Approach (Pearson Education).

Malhotra, A. & Van Alstyne, M. (2014) The Dark Side of the Sharing Economy ... and How to Lighten It, Communications of the ACM, 57(11), pp. 24–27.

Manzini, E., Vezzoli, C. & Clark, G. (2001) Product-Service Systems. Using an Existing Concept as a New Approach to Sustainability, Journal of Design Research, 1(2), doi: 10.1504/JDR.2001.009811.

Mathieu, V. (2001) Product services: from a service supporting the product to a service supporting the client, Journal of Business & Industrial Marketing, 16(1), pp. 39–61, doi: 10.1108/08858620110364873.

Mell, P. & Grance, T. (2009) Perspectives on cloud computing and standards. USA, NIST, available at: http://www.bhcloudcomputing.org/down/whitepaper/%E4%BA%91%E8%AE%A1%E7%AE%97%E6%84%BF%E6%99%AF%E4%B8%8E%E6%A0%87%E5%87%86.pdf (July 18, 2016).

Miller, M. (2015) The Internet of Things: How Smart TVs, Smart Cars, Smart Homes, and Smart Cities are Changing the World. Que.

Musil, S. (2015, July 13) Hillary Clinton takes aim at Uber during speech on “gig economy”, CNET, available at: http://www.cnet.com/news/hillary-clinton-takes-aim-at-uber-during-speech-gig-economy/ (July 18, 2016).

Nalebuff, B. (2004) Bundling as an Entry Barrier, Quarterly Journal of Economics, 119(1), pp. 159–187, doi: 10.1162/003355304772839551.

Neely, A. (2007) The Servitization of Manufacturing: An Analysis of Global Trends (Vol. 2007, p. 10) Presented at the 14th European Operations Management Association Conference, Ankara, Turkey: 14th European Operations Management Association Conference, available at: http://202.120.224.199/picture/article/110/00e3fddc-df0b-4e8b-96b6-89db9d41a29d/8eb0e8f8-9868-479d-a425-cde8d5ca218d.pdf (July 18, 2016).

Neely, A. (2009) Exploring the financial consequences of the servitization of manufacturing, Operations Management Research, 1(2), pp. 103–118, doi: 10.1007/s12063-009-0015-5.

Ngai, E. W. T., Moon, K. K. L., Riggins, F. J. & Yi, C. Y. (2008) RFID research: An academic literature review (1995–2005) and future research directions, International Journal of Production Economics, 112(2), pp. 510–520, doi: 10.1016/j.ijpe.2007.05.004

Nielson, H. (2015) Manufacturing Consumer Protection for 3-D Printed Products. Arizona Law Review, 57(2), pp. 609–622.

Oliva, R. & Kallenberg, R. (2003) Managing the transition from products to service. International Journal of Service Industry Management, 14(2), pp. 160–172, doi: 10.1108/09564230310474138.

Opresnik, D. & Taisch, M. (2015) The value of Big Data in servitization, International Journal of Production Economics, 165, pp. 174–184, doi: 10.1016/j.ijpe.2014.12.036

Opresnik, D., Hirsch, M., Zanetti, C. & Taisch, M. (2013) Information – The Hidden Value of Servitization, In: Prabhu, V., Taisch, M. & Kiritsis, D. (eds.) Advances in Production Management Systems. Sustainable Production and Service Supply Chains, pp. 49–56 (Berlin, Heidelberg: Springer), available at: http://link.springer.com/chapter/10.1007/978-3-642-41263-9_7 (July 18, 2016).

Parametric Technology Corporation (PTC) (2013) Manufacturing Transformation, Achieving competitive advantage in a changing global marketplace (J2171-Oxford_Economics_ebook-EN-0513) (Oxford, United Kingdom: Oxford Economics).

Peitz, M. (2008) Bundling may blockade entry, International Journal of Industrial Organization, 26, pp. 41–58, doi: 10.1016/j.ijindorg.2006.09.005.

Penttinen, E. & Palmer, J. (2007) Improving firm positioning through enhanced offerings and buyer–seller relationships, Industrial Marketing Management, 36(5), pp. 552–564.

Polonetsky, J. & Tene, O. (2012) Privacy in the Age of Big Data: A Time for Big Decisions, Stanford Law Review Online, 64, pp. 63.

Porter, M. E. & Ketels, C. H. M. (2003) UK Competitiveness: Moving to the Next Stage (DTI Economics Paper, May 2003) (Harvard Business School), available at: http://www.hbs.edu/faculty/Pages/item.aspx?num=15397 (July 18, 2016).

Posen, H. A. (2015) Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber. Iowa Law Review, 101, pp. 405-433.

Ren, G. & Gregory, M. J. (2007) Servitization in manufacturing companies: a conceptualization, critical review, and research agenda, In: Frontiers in Service Conference, San Francisco (San Francisco, CA, US).

Rennhoff, A. D. & Serfes, K. (2009) The Role of Upstream-Downstream Competition on Bundling Decisions: Should Regulators Force Firms to Unbundle?, Journal of Economics & Management Strategy, 18(2), pp. 547–588, doi: 10.1111/j.1530-9134.2009.00222.x.

Rogers, B. (2015) Social Costs of Uber, University of Chicago Law Review Dialogue, 82, pp. 85–102.

Rousseva, E. (2010) Rethinking exclusionary abuses in EU competition law (Hart Publishing), available at: http://cadmus.eui.eu/handle/1814/13498 (July 18, 2016).

Rust, R. T. (2004) If everything is service, why is this happening now, and what difference does it make, Journal of Marketing, 68(1), pp. 23–24.

Salinger, M. A. (1995) A Graphical Analysis of Bundling. The Journal of Business, 68(1), pp. 85–98.

Schettkat, R. & Yocarini, L. (2006) The shift to services employment: A review of the literature. Structural Change and Economic Dynamics, 17(2), pp. 127–147, doi: 10.1016/j.strueco.2005.04.002.

Schroeder, S. (2015, October 22) Uber arrives in Croatia despite taxi drivers' vow to revolt, available at http://mashable.com/2015/10/22/uber-arrives-in-croatia/ (January 21, 2016).

Shah, M. (2015) Big Data and the Internet of Things, arXiv Preprint arXiv:1503.07092, available at: http://arxiv.org/abs/1503.07092 (July 18, 2016).

Sokol, D. D. (2015) Tensions Between Antitrust and Industrial Policy, George Mason Law Review, 22(5), pp. 1247–1268.

SPREE Project. (n.d.), available at: http://www.spreeproject.com/ (July 18, 2016).

State of the Internet of Things Market Report 2015 (n.d.), available at: http://www.verizonenterprise.com/state-of-the-market-internet-of-things/ (July 18, 2016).

Steiner, R. (2015, February 1) Self-filling cars that never run out of fuel, Daily Mail, available at: http://www.dailymail.co.uk/sciencetech/article-2935700/Self-filling-cars-never-run-fuel-Volvo-develops-vehicle-alert-mobile-suppliers-tank-car-parked-driver-elsewhere.html (July 18, 2016).

Sultan, N. (2014) Servitization of the IT Industry: The Cloud Phenomenon, Strategic Change, 23(5-6), pp. 375–388, doi: 10.1002/jsc.1983.

Sundin, E. (2009) Life-Cycle Perspectives of Product/Service-Systems: In Design Theory, In: Sakao, T. & Lindahl, M. (eds.) Introduction to Product/Service-System Design, pp. 31–49 (London: Springer), available at: http://link.springer.com/chapter/10.1007/978-1-84882-909-1_2 (July 18, 2016).

Tether, B. & Bascavusoglu-Moreau, E. (2012) Servitization: The Extent and Motivations for Service Provision amongst UK Manufacturers. Presented at the DRUID 2012, CBS, Copenhagen, Denmark, available at: http://druid8.sit.aau.dk/druid/acc_papers/f3ybhree2dhmgsgldxgfg4t028bs.pdf (July 18, 2016).

Toffel, M. W. (2008) Contracting for Servicizing, Harvard Business School Technology & Operations Mgt. Unit Research Paper, 08-063, available at: http://papers.ssrn.com/abstract=1090237 (July 18, 2016).

Tucker, D. S. & Wellford, H. B. (2014) Big Mistakes Regarding Big Data, Antitrust Source, 14(2), pp. 1.

Tukker, A. & Tischner, U. (eds.) (2006) New Business for Old Europe: Product-Service Development, Competitiveness and Sustainability (Sheffield: Greenleaf).

UK Government (2013, October 30) Future of manufacturing: a new era of opportunity and challenge for the UK, available at: https://www.gov.uk/government/publications/future-of-manufacturing/future-of-manufacturing-a-new-era-of-opportunity-and-challenge-for-the-uk-summary-report (July 18, 2016).

Valero, J. (2016, January 28) Brussels to issue sharing economy "guidelines" in March, EurActiv, available at: http://www.euractiv.com/sections/digital/brussels-issue-new-guidelines-sharing-economy-321368 (July 18, 2016).

van Est, R., Kool, L., Timmer, J., Pel, B., Brom, F., van Keulen, I., . others. (2015) Working on the robot society: visions and insights from science concerning the relationship between technology and employment (The Hague: Rathenau Instituut), available at: https://pure.knaw.nl/ws/files/1584863/RATH_Working_on_the_Robot_Society_DEF_WEB.pdf (July 18, 2016).

Vandermerwe, S. & Rada, J. (1988) Servitization of Business: Adding Value by Adding Services, European Management Journal, 6(4), pp. 314–324, doi: 10.1016/0263-2373(88)90033-3

Wahlster, W. (2012) From Industry 1.0 to Industry 4.0: Towards the 4th Industrial Revolution. In: Forum Business meets Research.

WDMA European Office (2016) "Industrie 4.0: Mastering the Transition", 10 Key Recommendations for a European Framework for the Successful Digital Transition in Industry (Brussels).

Weatherill, S. (2013) EU Consumer Law and Policy (Edward Elgar Publishing).

Weber, R. H. (2009) Internet of things – Need for a new legal environment?, Computer Law & Security Review, 25(6), pp. 522–527, doi: 10.1016/j.clsr.2009.09.002

Weber, R. H. & Weber, R. (2010) Internet of Things: Legal Perspectives (Springer Science & Business Media).

Weinstein, S. N. (2002) Bundles of trouble: the possibilities for a new separate-product test in technology tying case, California Law Review, pp. 903–957.

Wen, X. & Zhou, X. (2014) Servitization of manufacturing industries based on cloud-based business model and the down-to-earth implementary path, The International Journal of Advanced Manufacturing Technology, pp. 1–18, doi: 10.1007/s00170-014-6348-8

Whish, R. & Bailey, D. (2015) Competition Law. (Oxford: Oxford University Press).

White, A. L. Stoughton, M. & Feng, L. (1999) Servicizing: The Quiet Transition to Extended Product Responsibilit (Boston: Tellus Institute), available at: http://www.tellus.org/tellus/publication/servicizing-the-quiet-transition-to-extended-product-responsibility#sthash.h8BRbwl6.dpuf (July 18, 2016).

Wilson, B. (2005) Canned truth, Times Literary Supplement, TLS, 5357, pp. 36.

Windahl, C. & Lakemond, N. (2010) Integrated solutions from a service-centered perspective: Applicability and limitations in the capital goods industry, Industrial Marketing Management, 39(8), pp. 1278–1290.

Wuyts, D. (2014) The Product Liability Directive – More than two Decades of Defective Products in Europe, Journal of European Tort Law, 5(1), pp. 1–34, doi: 10.1515/jetl-2014-0001.

Xu, X. (2012) From cloud computing to cloud manufacturing, Robotics and Computer-Integrated Manufacturing, 28(1), pp. 75–86, doi: 10.1016/j.rcim.2011.07.002.

Zhang, L., Luo, Y., Tao, F., Li, B. H., Ren, L., Zhang, X., … Liu, Y. (2014) Cloud manufacturing: a new manufacturing paradigm, Enterprise Information Systems, 8(2), pp. 167–187, doi: 10.1080/17517575.2012.683812.

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Removal of Exequatur in England and Wales

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Abstract The law relating to the enforcement of judgments in England and Wales is complex: a complexity deriving from the lack of any overall supervision of the procedure. Enforcement tasks are divided between solicitors, judges and other court officers, and independent enforcement agents, and are moreover allocated to two different court systems: the High Court and the County Court. For the creditor who is not experienced in English enforcement law, it may be difficult to know where to get good advice. In addition, information about debtors' assets is not easy to obtain. In the light of these considerations, the amendments to English law that have been introduced to implement the Brussels I Regulation (recast) – removing the previously centralised procedure for registration of foreign judgments and directing creditors to choose among these diffuse enforcement procedures – do not seem to be an unalloyed improvement in the system of cross-border enforcement.

Keywords: • cross-border enforcement • enforcement agents • access to information • choice of procedures • protective measures

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1 The system for enforcement: what authority or authorities are competent in relation to enforcement in England and Wales?

The three basic types of system to be found in Europe are administrative (e.g. Sweden, Finland), independent liberal professional (e.g. France), and court-based (e.g. Germany, Spain, Italy). These are not neat categories, however. Systems that are primarily court-based may employ independent or semi-independent agents to undertake tasks that involve activities outside the court – such as visits to the premises of the debtor for service of documents or seizure of assets. The English system is just such a hybrid. Enforcement of judgments is in principle through the court and its officers, but many of the relevant officers of the court are independent professionals such as solicitors and High Court Enforcement Officers (HCEOs). Much of the practice of enforcement is undertaken by HCEOs who, in addition to their licensed activities as court officers, offer a range of services related to debt collection and so share some characteristics with the liberal professional enforcement agent ('huissier de justice') found in a number of European jurisdictions.

The law on enforcement is complicated by the existence of two court systems: the High Court and the County Court. The High Court is one of the Senior Courts of England and Wales.[1] It deals at first instance with all high value and high importance cases.[2] Although its central office is in London, almost any High Court case can be commenced in a District Registry – which is usually to be found in the same building as the local County Court centre. In enforcement matters, the High Court has sole responsibility for enforcing judgments for more than £5000 (including interest).

The County Court is the successor to county courts that were established by statute in 1846, replacing the earlier heterogeneous and ineffective local court structures. It is now a single, centrally organised and administered court system, sitting in County Court centres. The County Court deals with civil cases where the amount in dispute is relatively small, as well as having various special competencies. It has the exclusive responsibility for enforcement of claims arising under a regulated consumer credit agreement, and is also the only court in which an application for an attachment of earnings order (AEO) can be made.[3]

In minor civil and commercial disputes, the County Court is solely responsible for enforcing judgments for less than £600 (including interest). Judgments for amounts falling £600 and £5000 may be enforced in the High Court or the County Court. These thresholds are currently subject to review. HCEOs are arguing for competence in relation to the enforcement of debts of any size.

In principle the Civil Procedure Rules apply in both the High Court and the County Court – but specific provisions may be limited to one court or the other, as in the case of AEOs. In cross-border cases, applications are most likely to be made to the High Court because the amounts involved are likely to be above the High Court threshold. Applications to the High Court are also the default position in relation to applications for a refusal of

recognition or enforcement, or for applications for relief against enforcement. Thus for example CPR rule 74.7A(1)(b) states that an application under article 45 or 46 of Brussels I (recast) must be made "to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court."

In addition to deciding which court to approach, the onus is on the creditor to decide which method of enforcement to pursue from those available, as is commonly the case in court-centred enforcement systems. These methods include:

i) execution against goods (seizure and sale of movable property)
ii) charging orders (registration of a security right against immovable property)
iii) attachment of earnings
iv) third party debt order (seizure of a debt – typically money standing to the judgment debtor's credit in a bank)

In high value cases the appointment of a receiver by way of equitable execution may be an enforcement option, and an application for insolvency, or the threat thereof, is also a common tool for dealing with commercial debtors and acquiring access to information. The lack of an obvious point of entry to the system makes it immediately somewhat opaque for those seeking to access it from a different jurisdiction. Legal advice may be sought, but the majority of solicitors do very little enforcement work and so are likely to be inefficient and expensive. Finding appropriate legal advice is the first challenge!

2 Getting advice: the choice of solicitor and/or enforcement agent

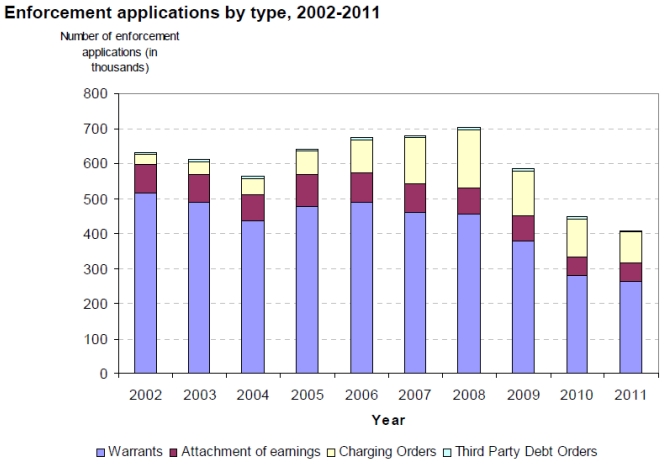
For those without good prior information and advice, a disincentive to enforcement is the expense of enforcement proceedings. Since the system is not transparent a creditor may need, or want, to employ a lawyer to advise them. A number of debt recovery solicitors advertise fees of about £400 for any application for a method of enforcement. Court fees are in addition to this: for example, the fee for applying for a third party debt order or an attachment of earnings order is currently £100. While additional fees and charges may be paid out of any proceeds of enforcement, these initial fees may prove irrecoverable. Applications that arise in relation to enforcement, such as an application by the judgment debtor for refusal of recognition or enforcement, will proceed under the standard application procedure in CPR 23. The standard fee for an application on notice is £255 - in addition to the fees of any legal representative. For work going beyond standard applications, solicitors will normally charge an hourly rate – but some firms offer no win no fee enforcement of judgments, on the basis that they will retain a high proportion of any money collected.[4]

However, unless creditors are aware of details about the debtor that make a specific method of enforcement attractive, the default position is to apply for execution against goods via a writ or warrant of control: a writ in the High Court, a warrant in the County

Court. And a specialised service provider – with varying levels of professionalism – has evolved to perform this function: the bailiff, or enforcement agent. Historically they have had a variety of origins and titles, and have been responsible for the enforcement of different types of judgments and other debts, but recent legislation, in the form of the Tribunals, Courts and Enforcement Act 2007, has led to greater standardisation and integration within the industry.[5] In relation to the enforcement of civil judgments, two types of agents can be identified: High Court Enforcement Officers (HCEOs) and County Court bailiffs.[6]

The predecessors of HCEOs were sheriff's officers – a title with a long history, since sheriffs were bearers of judicial power in England before the Norman conquest in 1066. High Sheriff is now a largely titular and ceremonial role since the law and order functions of the sheriff have long been delegated to others. Until recently, civil enforcement functions in the form of the execution of High Court writs were delegated to an Under Sheriff, usually a solicitor, and performed in practice by sheriff's officers. Like the High Sheriff, their jurisdiction was limited to a single county. The Courts Act 2003 short-circuited this complex process of delegation by recreating sheriff's officers as HCEOs and giving them direct authority to enforce writs (in the context of seizure of goods).[7] It also allowed HCEOs to be appointed to more than one district,[8] so that many now in effect have nationwide jurisdiction. In practice, this has led to new businesses being established which group together several HCEOs who work together.[9] New qualifications and training have been brought in to improve training and professionalism. County Court bailiffs are employees of the court service and trained within that service. As well as service of documents, seizure of goods and evictions, they deal with the committal to prison of those in contempt of court and transport from prison to court. Views differ as to whether they are effective. HCEOs have campaigned vigorously for the power to enforce all County Court judgments, and encourage judgment creditors to transfer judgment debts over £600, and repossession orders,[10] up to the High Court for enforcement.

A very large proportion of enforcement proceedings involve writs and warrants of control, rather than the wider range of enforcement measures which often prove most useful in other jurisdictions. The table below shows the comparative use of various methods of enforcement in the County Court in the period 2002-2011 by way of indication of this,[11] and more recent statistics show warrants of control in the County Court continuing to be issued at nearly double the rate of other the other methods of enforcement added together. The contrast between methods of enforcement is much more marked in the High Court. In 2014, the latest date for which data is available, 41,267 writs of fieri facias (now writs of control) were issued, but only 445 charging orders were granted, and 201 third party debt orders.[12] Attractions for the judgment creditor are the lower costs of initiating these proceedings directly with an HCEO, and the fact that it is this method of enforcement that is likely to lead quickly to direct contact with the judgment debtor and the pressure to achieve a payment arrangement.



3 Problems of access to information

Lack of information about the debtor's assets is an obstacle to enforcement in England and Wales. It is notable that the trend elsewhere in Europe is towards ensuring that enforcement agents have access to information about the debtor from e.g. tax, social security and/or local authority records. Banks may also be required to provide information. Granting access to information is perceived as problematic in the UK for a number of reasons. In part there is a cultural concern for privacy and resistance to authority. But more specifically, there is a considerable distrust of enforcement agents.

In some Member States enforcement is undertaken by an administrative agency who can access other administrative records. Alternatively access to information may be within the control of the enforcement court. In a number of EU Member States competence to enforce judgments has been granted to independent enforcement agents who claim, or aspire to, a high level of professional training and regulation. In these states it is felt that there are sufficient guarantees for the protection of the debtor, that access to information about debtor assets is justified. In England and Wales, however, despite several reviews, the law has proved resistant to change, and in particular there is a reluctance to identify enforcement agents as professionals and to give them significant powers.[13] A combination of unclear legal rules and the privatisation of many enforcement operations without the proper training and regulation of the agents involved has historically led to abuses, which have been vigorously condemned by a strong debt advice community. The adversarial relationship between these two sides of the industry has damaged the prospects for the emergence of a trusted profession. The most serious problems exist in relation to the collection of public debts by certificated enforcement agents, but all enforcement agents are affected by the resulting public perceptions.

Nevertheless, the new framework created by the Tribunals, Courts and Enforcement Act 2007, the Taking Control of Goods Regulations 2013[14] and the Taking Control of Goods (Fees) Regulations 2014[15] clarifies the rights and obligations of enforcement agents, simplifying the law and trying to make it fairer, while improving the incentives for enforcement agents to act correctly and charge the appropriate fees. Early indications are that this new framework is making a difference. The Ministry of Justice is currently in the process of review of its operation, and certainly there has been a reduction in the number of complaints. But whether this is the first stage on a journey to a professional status is doubtful. The view within the industry and outside is that high levels of education are not required for the work – but rather it is about personal skills, in terms of e.g. organisational, negotiating and conflict-resolution abilities and commercial sense. In discussions concerning a regulator for enforcement agents in the lead up to the 2007 Act, the expectation was that the Security Industry Authority – which deals with security guards and surveillance - would be given this responsibility. This has not happened, and so enforcement of regulation remains diffused between local authority complaints procedures, the Local Government Ombudsman and weak professional associations, with the removal of the agent's certificate by the County Court as an ultimate sanction.

Lawyers who specialise in debt collection may nevertheless maintain close links with particular enforcement agents, and the possibility of multidisciplinary practices licensed as Alternative Business Structures has led to the creation of at least one such practice in the debt enforcement field,[16] bringing together solicitors and HCEOs and allowing an integrated approach to enforcement that puts them in a comparable position to the French huissier de justice in terms of their range of competencies[17] (but not their independence of the court).

The new regulations, and market adaptations, may in time change attitudes towards access to information from tax and other authorities for the purposes of enforcement, but this does not seem imminent.[18] In the absence of such access to third party information, the current procedure for obtaining information is via an Order to Obtain Information. The debtor is required to attend court, bringing relevant financial documents, so that they can be questioned as to their assets. Applications in the High Court for debtors to attend for questioning have ranged between about 50 and 100 per annum over the last five years, but in the County Court, the annual number ranges from about 20-30,000 per annum – still a small number compared to applications for warrants. The procedure is seen as potentially helpful for the pressure that it places on the judgment debtor to provide the desired information, since the sanction for non-attendance is imprisonment for contempt of court, but the time involved and doubts as to whether the information given by the judgment debtor will be complete and accurate are disincentives to its use, particularly since the courts are reluctant to order imprisonment except in egregious cases.

Like their domestic counterparts, therefore, a judgment creditor from another EU Member State must rely to a large extent on the information they have already gleaned about the judgment debtor from their business dealings with them. Information can nevertheless be obtained more readily in the commercial sector. For example, an HCEO

can force entry to commercial premises without notice, and is therefore in a position to access financial records and glean further information.

At an initial stage, therefore, a judgment creditor has a number of hurdles to overcome in terms of obtaining good legal advice and assistance, choosing whether to seek High Court or County Court enforcement, and – in particular in non-commercial cases – making sure they are in possession of adequate information about the judgment debtor to avoid costly errors devising an enforcement strategy.

4 Against this background, how does the removal of exequatur work?

Under the Brussels I Regulation as originally formulated, an application for a declaration of enforceability is directed to the High Court in London. As a result of the procedure the foreign judgment is registered and thereafter treated as a judgment of the English Court. This channelling of applications through the High Court has the great merit of concentration of expertise.

Amendments to the CPR to implement Brussels I Regulation (recast) were effected in November 2014 by the Civil Procedure (Amendment No.7) Rules 2014.[19] CPR 74, entitled Enforcement of Judgments in Different Jurisdictions, is the principal provision affected by these changes. The rules as amended omit any reference to registration of a judgment enforceable under Brussels I (recast), and previous reference to 'registration' are altered to read 'enforcement'. Thus CPR rule 74.4A states that "a person seeking the enforcement of a judgment which is enforceable under the [Brussels I] Regulation [(recast)] must, except in a case falling within article 43(3) of the Regulation (protective measures), provide the documents required by article 42 of the Regulation".

The effect of this seems to be that a judgment creditor should provide the documents required by article 42 of the Regulation on each occasion that an enforcement measure is sought.

The removal of any requirement of registration is particularly noteworthy when it remains the case that the enforcement of judgments from Scotland or Northern Ireland involves a process of registration,[20] but Franzina, Kramer and Fitchen take the view that it is necessitated by the removal of exequatur:

"Recital (8) of that Regulation [European Enforcement Order] records that in relation to this principle of equality, arrangements for the enforcement of judgments should continue to be governed by national law. It provides the example of the legal systems of the UK, where the judgment rendered in another Member State should follow the same rules as the registration of a judgment from another part of the UK. This example, however, appears misplaced, as the applicable UK legislation imposes additional requirements of certification and registration for judgments from other UK legal systems, which do not apply to judgments delivered in the UK legal system in which enforcement is sought. This is out of line with the principle of equality and, whatever interpretation of the

European Enforcement Order Regulation may be supportable by reference to its Recital (8), cannot be extended to the Recast Regulation."[21]
But it is possible to challenge this view. In my opinion it does insufficient justice to the role of the court as the enforcement authority. Just as with a huissier de justice, or with an administrative authority such as the Swedish kronofogdemyndighet the judgment to be enforced needs to be submitted to the legal institution and recorded or registered in some way to facilitate effective processing by the enforcement authority. There needs to be a central point of reference to ensure that any measures adopted, or disputes or problems relating to enforcement can be filed in one place. In relation to judgments from other parts of the UK, Sch.6[22] of the Civil Jurisdiction and Judgments Act 1982 states:

A certificate registered under this Schedule shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered.

Domestic judgments are recorded on the Register of Judgments, Orders and Fines maintained by Registry Trust Ltd,[23] which also maintains records for judgments in Scotland, Northern Ireland and other jurisdictions in the British Isles. In the light of the limited information available to creditors about debtors' assets, it seems inappropriate if the latter's liabilities arising as a result of the judgment of another Member State become less transparent following the amendment of the Brussels I Regulation.

There has also been an amendment to the law in relation to challenges to the recognition and enforcement of judgments under the Judgments Regulation. Part 23 of the CPR permits a great variety of procedural applications to be made, and is identified as the provision under which applications to refuse recognition or enforcement are to be made. The same provision is also to be used in the case of applications for suspension of proceedings under article 38 of the Regulation, and in the case of applications for an adaptation order pursuant to article 54 of the Regulation (or challenges to such an order). In so far as national grounds for refusal of enforcement are relevant to a judgment from another Member State,[24] these will also be raised in a Part 23 application. Franzina, Kramer and Fitchen note that:

Domestic enforcement rules relating to, for example, lapse of time, disproportionality of enforcement means, abuse of rights, prohibitions to seize certain (primary) goods, set-off, or other specific procedural or material (temporary) obstacles to enforcement may be invoked in relation to a judgment originating from another Member State—as they may in relation to a domestic judgment. If, on the other hand, such grounds would, for example, run counter to or overlap with Art 45(1)(b) on default of appearance and defective service or with Art 45(1)(c) and (d) on irreconcilability with another judgment, or involve an assessment of the jurisdiction of the court of the Member State of origin other than on the basis set out in Art 45(1)(e) and (2), they are not permitted to be applied under the Regulation, even if available for an equivalent domestic judgment.

Part 23 applications can be made in the High Court or the County Court. According to CPR rule 74.7A, an application under article 45 or 46 of the Judgments Regulation that the court should refuse to recognise or enforce a judgment must be made "to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court." The court may require the judgment creditor to disclose to the judgment debtor the court or courts in which any proceedings relating to enforcement of the judgment are pending in England and Wales (CPR rule 74.7A(5)).

5 The availability of provisional enforcement

Article 40 of the Brussels I Regulation (recast) states: "An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed".

The role of protective measures in the enforcement process is one that may vary considerably from one Member State to another, and an appreciation of the differences in approach to enforcement between Member States may promote reflection on whether and how the law of the State addressed may need to be adapted to take account of these differences.

A judgment may become final as soon as it has been handed down. This is essentially the position in England and Wales. CPR 40.7(1) states that "[a] judgment or order takes effect from the day when it is given or made, or such later date as the court may specify" – although under CPR 40.11 a judgment debtor has 14 days within which to comply with a money judgment before enforcement becomes due. There is no 'ordinary appeal' against the judgment of a County Court or the High Court. On the rare occasions when an appeal is lodged, or an application is made to set aside a default judgment, a stay of enforcement can be sought.[25] The way that enforcement of judgments is conceptualised in other European jurisdictions is different. Since appeals from a first instance judgment are much more common than in England and Wales, such judgments enjoy only 'provisional' enforceability. They do not become final until the time has elapsed for lodging an appeal, or, if an appeal is lodged, until the appeal has been decided. Nevertheless, the meaning of provisional enforcement, and the conditions under which it may be permitted, vary significantly between jurisdictions.[26]

In some Member States, the practical situation result is not dissimilar to the position in England and Wales – provisional execution is the norm, and there is no need for the judgment creditor to provide security against the risk of the judgment being overturned on appeal.[27] In others, provisional execution may be dependent on the provision of security.[28] In yet others,[29] provisional enforcement of a judgment means only that protective measures can be adopted to secure the debtor's assets against future execution. Moreover, in the latter case, in principle it has to be plausibly demonstrated to the enforcement court that without such measures there is a risk that enforcement will be unsuccessful or significantly more difficult, although there are a number of exceptions to

this principle.[30] If an appeal is lodged, in any of these cases, the law of the relevant Member State may allow a stay of enforcement or a rescission of the order for provisional enforcement.

As a result of these differences, lawyers and enforcement agents in other Member States may be more familiar than those in England with the idea that a particular measure – such as a seizure of goods, or of a bank account – may have a purely protective purposes in some contexts, while being a step in the process of execution of a judgment in others. This has consequences for the form of any application for such measures, and the institution to which they should be addressed. Rather than seeking a protective order from a court, it may be possible to approach an enforcement agent directly with a request for provisional measures. In France, for example, a titre exécutoire creates an automatic right to protective measures (saisies conservatoires), entitling the holder of the title to approach a huissier de justice, and the latter to undertake such measures without the intervention of a court. But judgments that are not yet enforceable, accepted bills of exchange, and an unpaid cheque or rental payment also provide grounds for a creditor to approach a huissier de justice directly. And, as a matter purely of French law, a judgment of a foreign court is a 'décision de justice' for the purposes of Article L511-2 of the Code des procédures civiles d'exécution, with the result that it provides grounds for a huissier to proceed to protective measures.[31]

This potential for enforcement measures to have a function which is both protective and also a preliminary to execution is less apparent in England and Wales. An application for a protective measure is more readily envisaged as a pre-judgment action, to obtain the grant of an asset freezing injunction, or a mandatory or prohibitory injunction relating to the potential infringement of a substantive right (CPR Part 20). The well-known asset-freezing orders issued by English courts (formerly Mareva injunctions) – which can be obtained pre-or post-judgment – are flexible and effective, but also expensive to obtain.

The existence of a two stage process for enforcement measures – one which freezes the assets in question, and a second that realises those assets – is as much a feature of English law as it is of the law in other European jurisdictions: goods are made subject to control by an enforcement agent before they are removed and sold; a bank account may be frozen as part of the procedure for a third party debt order before notice of the procedure is served on the judgment debtor (CPR Part 72.3); a charge may be granted over immovable property rights before notice is given to the debtor (CPR Part 73.3 and 4). An application for the appointment of a receiver can also be made without notice to the debtor (CPR Part 69.3). A question for the English courts to address is therefore whether these measures are 'protective' measures within article 40 of the Judgments Regulation (recast), which can be used by the judgment creditor where appropriate, or whether an interim measure within the meaning of CPR Part 20 must be sought. If the latter is the case, there is certainly a difference in treatment of judgments between England and Wales and other jurisdictions with a broader view of the operation of protective measures.

6 Conclusion

The provisions implementing the Brussels I Regulation (recast) into English law are few in number and leave significant issues unregulated. It is to be expected that further legislation will be introduced in due course to clarify some of the areas of uncertainty. Be that as it may, the new procedure leads to a much more diffuse approach to cross-border enforcement that will be less accessible to creditors who are not repeat players. When compared with the original Brussels I Regulation (recast) it does not appear to be an improvement in the procedures for enforcement.

Notes

[1] Together with the Court of Appeal and the Crown Court.
[2] It also has a supervisory jurisdiction over all subordinate courts and tribunals, with a few statutory exceptions.
[3] There is a centralised procedure for attachment of earnings that operates from Northampton Business Centre (NBC). NBC has streamlined, secure computer systems used for various centralised procedures, and notably debt claims.
[4] E.g. Helpland Ltd (www.helpland.co.uk) offer this service on the basis that they retain 60% of any money collected.
[5] Note that industry, rather than profession, is the term typically used.
[6] A further type of bailiff involved mainly in the collection of public debts has become regulated under the title of certificated enforcement agents: see the Tribunals, Courts and Enforcement Act 2007, ss.63 and 64.
[7] Courts Act 2003, Sch.7(4).
[8] Schedule 7(2).
[9] The nationwide jurisdiction that HCEOs now enjoy has led to the merger or takeover of firms of HCEOs and other parties involved in the debt collection process, so that an integrated service can be offered.
[10] The majority of repossession claims have to be brought in the County Court under s.8 or s.21 of the Housing Act 1988 or the Rent Act 1977 (tenants), or CPR Part 55 (trespassers).
[11] Taken from the Ministry of Justice, Judicial and Court Statistics 2011 – full report (June 2012), available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf> accessed 4 June 2016.
[12] In fact the numbers of charging orders and third party debt orders are quite high compared with previous years: see Ministry of Justice, Civil justice statistics quarterly: January to March 2015 and the Appellate Courts 2014 (June 2015), Appellate Court Tables: 2014, available at <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2015> accessed 4 June 2016.
[13] Similar resistance to change can be seen in other jurisdictions where enforcement is court supervised and limited functions are given to the enforcement agents responsible for service of documents and seizure of goods, such as Germany and Spain.
[14] S.I. 2013/1894.
[15] S.I. 2014/1
[16] Burlingtons, which is regulated by the Solicitors' Regulation Authority, the Financial Conduct Authority and the Ministry of Justice.
[17] Seizure of goods, other methods of enforcement, pre-litigation debt collection, and also summary court procedures for debt collection cf. injonction de payer.

[18] Part 4 of the Tribunals, Courts and Enforcement Act 2007 provides for the making of regulations to allow specified information to be obtained from Government Departments or other sources, but no implementing regulations have been adopted.
[19] SI 2014/2948
[20] Civil Jurisdiction and Judgments Act 1982, s.18 and Sch.6 and 7.
[21] In Ch. 13 "The Recognition and Enforcement of Member State Judgments" of (Dickinson and Lein, 2015: 419), and see Civil Jurisdiction and Judgments Act 1982, s 18 and Sch 6–7 for the UK legislation governing registration of a judgment from another part of the UK.
[22] Schedule 6 relates to money judgments. Schedule 7, which relates to non-money judgments, is in very similar terms.
[23] Under contract with the Ministry of Justice (http://registry-trust.org.uk/). Judgments from other parts of the UK should also be recorded with judgments from England and Wales after they have been registered with the High Court under Sched.6 or 7 to the Civil Jurisdiction and Judgments Act 1982.
[24] Brussels I Regulation recast, 420
[25] CPR 40.8A and 83.7 set out the range of grounds on which a stay may be sought.
[26] Further variations between states exist in relation to the types of enforceable instruments (titres exécutoires) that exist – some recognise a much wider range than others – and the availability of summary procedures for debt collection in relation to which an application to set aside a payment order may be the appropriate remedy for the debtor.
[27] E.g. the Netherlands: see arts 233-235 Rv. Provisional execution is nearly always ordered and without security. Security may be required in the case of summary judgments seeking provisional payment [kort geding], where it is more likely that the original decision will be overturned).
[28] This is, for example, the situation in Germany. A judgment debtor can prevent execution of a judgment by providing security (e.g. §§ 711-12 ZPO)
[29] Including Austria and Slovenia.
[30] See for Austria those in §§ 371, 371a EO.
[31] Société Same Deutz-Farh, Civ 2e 12 October 2006, no.04-29.062, Bull.civ. II no.270. See (Cuniberti, Cornette and Normand, 2011: 306-307).

Reference

Cuniberti, G., Cornette, F. & Normand, C. (2011) D*roit international de l'exécution : recouvrement des créances civiles et commerciales,* (Collection droit des affaires), (Paris: L.G.D.J. Lextenso éditions).

Dickinson, A. & Lein, E. (2015) The *Brussels I Regulation recast* (Oxford: Oxford University Press).

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Cross Border Service of Documents – Partical Aspects and Case Law

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Abstract General globalization is necessary followed by the court proceedings. Number of disputes with an international element are increasing, which also affects the need for cross-border service of documents in those cases. Consequently, this paper discusses various systems in place for cross-border service. It also attempts to identify the problems which may arise in cross-border service and analyze relevant case law of the Court of Justice of the European Comunities. It also highlights the importance of rules of national law in the interpretation of the legal consequences of service and highlights areas that should be harmonized in the Union law de lege ferenda.

Keywords: • service of documents • cross-border service • systems of service • language clause in cross-border service • unknown address • methods of service • electronic service • direct service • service by post • personal and substituted service

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1 Introduction

The general globalization has undoubtedly affected the litigation, because the number of disputes with cross-border element are rising every year. Therefore in this context, it is necessary to highlight some practical aspects of service of documents abroad.

According to Slovenian Civil Procedure Act (hereinafter: CPA)[1], in following cases the rules of cross-border service of documents come into consideration:

- Upon the first service of process to the defendant abroad (par. 2 article 146 CPA).
- If process is to be served on a person or institution based in a foreign state or on foreign citizen enjoying immunity, the service shall be effected through diplomatic channels, unless otherwise provided by an international agreement or the present Act (par. 1 article 135 CPA).[2]
- If process is to be served on a citizen of the Republic of Slovenia residing in a foreign state, the service shall be effected through intermediary of a consular or diplomatic representative of the Republic of Slovenia dealing with consular matters in the concerned foreign state. Such service shall be valid only if the person to be served is willing to accept the process thus served. Otherwise the rules of international conventions regarding legal aid (assistance) will be applied.

The common denominator of service abroad is that the addressee is located abroad. The fact that the addressee is located abroad brings new dimension of problems regarding service of documents. In cross-border service of documents contact between different legal regimes occurs, which could mean language problems (affecting the need for translation), sometimes it requires the use of special methods of service, but undoubtedly such service also arises the question of the time and cost components.[3]

Regarding service of documents, parties usually have different expectations. Plaintiff expect quick and efficient service on one hand. On the other hand, the defendant needs adequate information about what kind of procedure is pending against him in some foreign country (abroad). But this can only be ensured if he understands the documents that are served. That obviously rise the question of the translation of the documents that are being served. The defendant also needs an appropriate time to decide whether to engage in a procedure (e.g. respond to the claim) or not.[4]

It should also be noted, that regulation of service of documents reflects the national sovereignty of States. Therefore there are always some conceptual differencies.

Given the particular importance of service in cross-border disputes, service of documents is always dealt in context of judicial cooperation.

Considering this theoretical background we will discuss some aspects of different systems that can be used in cross-border service.

2 Different systems of cross-border service

When we think about cross-border service it is essential to use the correct system of service to ensure effective service. In the case of cross-border service to an even greater extent there are differences between continental and Anglo-Saxon (Common law) legal system. In countries with a continental legal system, service is the act of state authorities, as well as an expression of state sovereignty (Galič, 2010: 51). Therefore, service is acta iure imperii and the principle of state sovereignty forbids that service is performed on the territory of a foreign country (Sladič, 2005: 1131).

As the oldest method of cross-border service service thrue diplomatic chanell should be mentioned. But in this case we are dealing with very complex system of service.
In order to simplify service in cross-border disputes various multilateral and bilateral agreements were adopted.

A significant shift towards the simplification of cross-border service represents the adoption of the Hague Convention of 15 November 1965 on the service Abroad of Judicial and Extrajudicial documents in civil or commercial matters.[5]

The regulation of The Hague Convention still applies if the documents are served in a State which is not a member of the European Union.

An updated list of Contracting States to Hague Convention is available on the website of The Hague Conference on Private International Law.[6]

For the EU Member States (except Denmark), the Hague Convention was replaced by Regulation (EC) No 1348/2000[7] of 29 May 2000 on the service of judicial and extrajudicial documents in civil or commercial matters in the Member States, which was later repealed by Regulation (EC) 1393/2007[8] on the service of judicial and extrajudicial documents in civil and commercial matters in the Member States (hereinafter: EU Service Regulation). Service Regulation apllies also for the Denmark, which has acceded to the Sevice Regulation by special parallel agreement with the European Community.

EU Service Regulation applies to all EU member states, in accordance with point 23 of the Preamble to the Regulation. However, EU Service Regulation does not prevent Member States to maintain existing agreements or conclude new agreements to expedite or simplify the service of documents, in so far as they are compatible with the EU Sevice Regulation.[9]

Therefore, there are still various bilateral agreements existing between Member States and non-EU countries.[10]

It should also be mentioned that EU Service Regulation does not affect the application of Article 23 of the Convention on Civil Procedure of 17 July 1905, Article 24 of the Convention on civil procedure of 1 March 1954 or Article 13 of the Convention on International Access to Justice of 25 October 1980 between the Member States which are contracting parties to these conventions (Article 21 of the EU Service Regulation).[11]

3 Issues with cross-border service of documents

Without a doubt the EU Service Regulation has to some extent, speed up the cross-border service of documents. In comparison with the previous regulation (no. 1348/2000), it has particularly highlighted demand that the service is carried out as soon as possible and in any event within one month of receipt. This rule applies only in the case when the service should be carried out by the transmitting and /or receiving agency (2nd para. article 7 of the EU Service Regulation). On the other hand, for another method of service (direct service, by post or by diplomatic and consular channels) deadline for the service is not provided.

In terms of speed of delivery, in our opinion, the greatest potential for optimization presents in particular introduction of electronic service.

Under EU Service Regulation cross-border service is no longer "act of sovereignty" but "an act of information" because it follows the fundamental objective to provide adversarial proceedings (Hess, 2010: 448; Galič, 2010: 52).

Nevertheless, it is necessary to highlight some of the issues that are either not regulated or not regulated effectively by the EU Service Regulation.

3.1 Use of the language clause

EU Service Regulation expressly provides, that the language of the document, that needs to be served, could be reason for refusal to accept such document (article 8). The addressee may refuse to accept the document if it is not written in the official language of the place where service is to be effected or in a language which the addressee understands.

In relation to the translation of documents the case Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin[12] should be mentioned. The Court of Justice of the European Union (CJEU) ruled that the right to refuse to accept a document under par. 1 article 8 of the EU Service Regulation is to be interpreted as meaning that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential

function and is not necessary for understanding the subject-matter of the claim and the cause of action.

It is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated.

While in relation to language clause the rule under par. 1 article 8 of the EU Service Regulation should be interpreted as the meaning that the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission.

Therefore the addressee of a document served may not in any event rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands where the addressee concluded a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of transmission and the annexes concern that correspondence and are written in the agreed language.

3.2 Service of documents to the addresse abroad with unknown address

In accordance with the provision of paragraph 2. Article 1 of the EU Service Regulation the regulation does not apply where the address of the person to be served with the document is not known.

In this regard, the EU Service Regulation fails to have an instrument that would provide an investigation of the address for service abroad. In practice, the EU Regulation No. 1206/2001[13] on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, should be used, which further complicates the matter, because for one service two different instruments are used.

That this is an important issue is seen also from BU-I Regulation[14] and EU Regulation (EC) No. 2201/2003[15] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. In both cases, it is envisaged that the proceedings should be suspended for as long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defense, or that have been taken all the necessary steps in this direction (BU-26 Article I and Article 18 of Regulation no. 2201/2003).

In this context, the CJEU in Case Hypoteční banka a.s. v Udo Mike Lindner[16] ruled that BU-I Regulation must be interpreted as a meaning that in a situation in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union.

The BU-I Regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.

Even in the case of G v Cornelius de Visser[17] CJEU pointed out that the European Union law must be interpreted as meaning that it does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.

In this cases the CJEU also ruled, that the European Union law must be interpreted as precluding certification as a European Enforcement Order, within the meaning of Regulation (EC) No 805/2004[18] of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, of a judgment by default issued against a defendant whose address is unknown.

Considering this decisions it is unclear what steps must be taken by court or other competent authority, that a party whose address is unknown, could actually be found.

So it would make sense for the EU Service Regulation to anticipate a procedure for central authorities in such cases (where the parties address is unknown or known, but it is incorrect (even in this case it is not possible to carry out effective service).

3.3 Electronic service

Within the national legislation, the EU Member States usually regulates the new method of serving documents (so-called electronic service). EU Service Regulation does not expressly regulate electronic service. On the other hand, the individual Member States govern the electronic service in different ways (usually via special system for electronic

delivery). The national legal systems as a rule opt for a closed system of electronic service (to use it, it is necessary to execute a special registration procedure). This rises the question whether the foreigners (especially e.g. Legal entities) could registered in this system and whether this means that such registration bypasses the use of the EU Service regulation, because within this system they are served under rules of national procedural law.

Notwithstanding the foregoing, at least Slovenia has an open systems for electronic service that without no major technical requirements enables secure electronic service.[19]

At EU level, there are currently conducted several pilot projects dealing with the issue of electronic service. Nevertheless, the EU Service Regulation in that regard has not yet been amended.

3.4 Direct service by postal services – issues with personal and substituted service

Among the methods of direct service the EU Service Regulation in article 14 governs the service by postal services. From the wording of the cited article follows that each Member State has the option to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

Taking a narrow interpretation of that provision we can come to the conclusion that the parties (when they are themselves responsible for service) may not used this method of service.

Some Member States follows this narrow interpretation and interprete this provision literally (eg. France[20]). So it is to revise the text of the regulation regarding this issue and eliminate ambiguities in the interpretation.[21]

Another problem with the service by postal services represent the rules about to whom the documents could be served. Some Member States are in fact familiar with substitute service (eg. Slovenia), but the procedural law of another Member State may not permitted it and the document must be served personally. That means that we can come to a situation where the service was effected by substituted service under the law of the requesting Member State but the service is in fact not consistent with the methods of service permitted by the law of the requested Member State.

In this context the decision of the CJEU in case Scania Finance France SA v Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co.[22] should be mentioned. The court ruled that Article 27(2) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Accession Conventions of 1978, 1982, 1989 and 1996, and the first paragraph of Article IV of the Protocol annexed to that convention, must be interpreted as meaning that, where

a relevant international convention, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers, where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol.

The two methods of transmitting documents provided for by Article IV of the Protocol annexed to the Convention are exhaustive, in the sense that it is solely where neither of those two options is usable that transmission may be effected in accordance with the law applicable in the court in the State in which the judgment was given.

Regarding service by postal services it should be highlighted that Post (public or private) effect the service by its own rules.[23] Each Member State regulate postal service autonomously. However, in practice all Posts effect the service in accordance with the rules of the Universal Postal Union.

In the Report[24] EC recognizes a practical problem with acknowledgments of receipt which are filled in improperly or incompletely, because they are not able to provide appropriate evidence on the relevant facts of the performed or attempted service.[25] Courts in the requesting Member States often are unable to determine from the return receipt to whom the delivery was performed or when.

Therefore EC is considering the introduction of a standard international acknowledgments of receipt that would be used by all postal operators.

3.5 Relationship between the EU Service Regulation and other EU Regulations

We have already pointed out that the EU Service Regulation was an important step towards the simplification of cross-border service. Notwithstanding this, other EU regulations (particularly EU Brussels-Ia Regulation, EC Regulation creating a European Enforcement Order for uncontested claims) governs service of documents as well.

The abolition of exequatur raises the question on the need of a higher degree of harmonisation concerning national civil procedural rules, in general, and concerning rules on service of documents, in particular. Regarding service of documents the rules of the Member States differ substantially on fundamental questions such as[26]

- Which documents are served on the parties in legal proceedings?
(While documents introducing proceedings are generally served in all Member States, there is wide variation on the service of judgments, convocations for hearings, etc. Judgments, for instance, are served in some Member States, sometimes even as a condition for enforceability of the judgment in the forum State, while in other Member

States judgments are not generally served but are to be picked up from the court by the parties themselves.),

- In which circumstances documents are served?
(in some Member States judgments are not served when the parties were present or represented in the proceedings, while in other Member States the judgment is mandatorily served),

- By whom documents are served?
(In some Member States, service is generally the responsibility of the parties, while in other Member States the court takes care of the service of documents. In several Member States, the responsibilities vary depending on which type of document needs to be served (document introducing proceedings, convocation for hearings, judgment, etc.),

- Who are subjects of service?
(Eg. in some Member States documents are served on the parties themselves (mandatory personal service) while in other Member States documents or certain types of documents may or even must be served on their legal representative in the forum State. While the delimitiation whether documents should be served according to national rules or rules for cross-border service is assessed under national law of each Member State – lex fori rule applies (Hess, 2010: 459).

- Legal consequences of service
(There are differences between Member States, concerning for example starting the running of time limits for appeal, the calculation of interest, etc.). Also, Member States are not uniform on the consequences of lack of service (eg. opening the recourse to special remedies).

As a result of these disparities, it is uncertain currently in which circumstances the protection ensured by the EU Service Regulation actually applies (eg. rules on the right to refuse to accept a document, the date of service, and the rights of the defence in the event of default.

EC is therefore considering the need to address this legal uncertainty, in particular by way of common minimum standards on which documents should be served on foreign parties, on whom such service may take place, and at which moment in time service should take place. In this way, a more uniform protection of defendants across the Union would be ensured and would without any doubt enhance legal certainty and the protection of the rights of the defence.[27]

On the other hand, has EC Regulation on European enforcement order (hereinafter: EEO Regulation) and EC Regulation on European order for payment procedure (hereinafter: EOP Regulation) established minimum procedural standards for service of documents. Further more, the EC Regulation on Small Claims Procedure (hereinafter: SCP Regulation) directly governs service of documents to be used in proceedings under this

Regulation (Article 13). The issues regarding service by fiction, which is usually rejected as insufficient, should also be mentioned. Regulations does not foresee, that individual Member State should change its national regulation on service of documents. The only sanction for non-compliance with the prescribed service by Regulation therefore is its inefficiency.[28]

EU Service Regulation is in relation to the EEO Regulation and EOP Regulation somewhat less stringent, because the two regulations (EEO and EOP) requires that the debtor actually learns about documents that are being served. This can result in judgment by default by the application of the EU Service Regulation (2nd para. article 19 of the Eu Service Regulation), even if the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal. Considering the EEO Regulation such a default judgment can not be certified as European enforcement order (Rauscher, 2004: 152).

4. Conclusion

It should be highlighted that EU Service Regulation actually governs only a small part of cross-border service. With specific scope (Article 1), the Eu Service Regulation is limited to the service of judicial and extrajudicial documents in civil and commercial matters from one Member State to another. That can only means that the EU Service Regulation may require clarification regarding the scope of the instrument at Union level. In addition, the legal uncertainty resulting from the disparities in national procedural laws may need to be addressed.

EU Service Regulation does not affect the national legislation of the Member States (eg. The question of the place and time of service, address for service, etc.). Even convalescence of errors in service are determined under the law of the Member States. EU Service Regulation also does not regulate the time limits that apply to the service of documents. Even the question when the rules for cross-border service applies are assessed under national law.

Highlighted questions regarding service of documents under EU Service Regulation should be assessed under lex fori.[29] In this context, it should be clarified that the national procedural law is applied whenever the EU Service Regulation does not have special provisions on service of documents.

Notes

[1] Civil procedure Act (Uradni list RS, 26/99 and changes).
[2] In such case, as a rule, service of documents is effected trough the diplomatic channel, unles a treaty or CPA provide otherwise.
[3] See (Geimer, 1999: 5).
[4] See case *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, C-14/07 (ECLI:EU:C:2008:264).

[5] Uradni list RS - MP, št. 19/2000.
[6] https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 (last accessed 9.6.2016). Hague Convention has been signed by 71 contracting states.
[7] OJ L 160, 30.6.2000.
[8] OJ L 324/79, 10.12.2007.
[9] In accordance with article 20 of the EU Service Regulation all Member States must send to to the Commission a copy of the agreements or arrangements concluded between the Member States as well as drafts of such agreements or arrangements which they intend to adopt and any denunciation of, or amendments to, these agreements or arrangements.
[10] For example, bilateral agreements concluded by the Republic of Slovenia or its legal predecessor former Socialist Republic of Yugoslavia are published on the website of the Ministry of Justice: http://www.mp.gov.si/si/zakonodaja_in_dokumenti/mednarodne_pogodbe_s_podrocja_pravosodja/bilateralni_sporazumi/(last accessed 9.6.2016).
[11] This is the so-called legal assistance.
[12] C-14/07.
[13] OJ L 174, 27. 6. 2001.
[14] OJ L 12, 16. 1. 2001.
[15] OJ L 338, 23. 12. 2003.
[16] C-327/10 (ECLI:EU:C:2011:745), judgement from 17. 11. 2011.
[17] C-292/10 (ECLI:EU:C:2012:142), judgement from 15. 3. 2012.
[18] OJ L 143, 30. 4. 2004.
[19] Eg. Post of Slovenia has developed system PoštAR - https://www.postar.eu/si/Home/Index (last access 9.6.2016).
[20] Eg. This follows from the circular of the Minister of Justice No. 11-08 D3 of November 10 2008 („Bulletin officiel du Ministère de la Justice“, No. 2009-01 from 28. February 2009). Text available at: http://www.textes.justice.gouv.fr/art_pix/1_boj_20090001_0000_p000.pdf (last accessed 9. 6. 2016).
[21] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the application of Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), COM(2013) 858 final, 13.
[22] C-522/03 (ECLI:EU:C:2005:606), judgement from 13. 10. 2005.
[23] Majority have certain terms and conditions. But for cross-border service, as a rule, the rules of the Universal Postal Union applies.
[24] Report, 13-14.
[25] EC in the evaluation study finds, the most common problems are that the acknowledgement of receipt is not completely filled (41,1%) or not returned (40,6%) or the signature cannot be read (34%). - MainStrat, Study on the application on the application of Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters, final report July 2012, 182.
[26] Report, 6.
[27] Report, 5-7.
[28] Heiderhoff in (Rauscher, 2015: 770).
[29] Geimer in (Geimer, Greger, and Zöller, 2007: 698); Heiderhoff in (Rauscher, ???: 773).

Reference

Galič, A. (2010) Vročanje sodnih pisanj v tujino v civilnih in gospodarskih zadevah, In: *Pravni letopis,* pp. 51-72 (Ljubljana: GV Založba, Ljubljana). 51-72.

Geimer, G. (1999) *Neuordnung des internationalen Zustellungsrechts. Vorschläge für eine neue Zustellungskonvention*. (Schriften zum Prozessrecht; PR 145) (Duncker & Humblot GmbH).

Geimer, R., Greger, R. & Zöller, R. (2007) *Zivilprozessordnung mit Gerichtverfassungsgesetz und den Einführungsgesetzen, mit Internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen, Kommentar*, 26. ed. (Köln: Verlag Dr. Otto Schmidt).

Hess, B. (2010) *Europäisches Zivilprozessrecht, Ius Communitatis* (Heidelberg: C.F. Müller Verlag, Heidelberg).

MainStrat, Study on the application on the application of Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters, final report July 2012.

Rauscher, T. (2004) *Der Europäische Vollstreckungstitel für unbestrittene Forderungen*, (München; Sellier;, Heidelberg: European Law Publisher, München, Verlag Recht und Wirtschaft, Heidelberg).

Rauscher, T. (2015) *Europäisches Zivillprozess- und Kollisionsrecht, Kommentar, vol. 2*, 4. ed.Edition (Köln: Verlag Dr. Otto Schmidt, Köln).

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the application of Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), COM(2013) 858 final.

Sladič, J. (2005) Vročanje v civilnih in gospodarskih zadevah, *Podjetje in delo*, 6-7, pp. 1131-1159.

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Disputes over the Use of Distributable Profit and Provision of a Minimum Dividend and On-balance –Accounting Aspects of Repealed Decisions of the General Meeting in Public Limited Company (d.d.)

MARIJAN KOCBEK & SAŠA PRELIČ

Abstract Article deals with one of the most important shareholder's rights, right to dividend. Authors present this shareholder's right from the theoretical view, elaborate its origins and possibilities for impugnment of the shareholders resolution not to distribute at least minimal dividend to shareholders. Article deals also with typical dilemmas with respect to deciding on the distribution of profits at the shareholders meeting.

Keywords: • profit • shareholders resolution on distribution of profit • impugnment of the shareholders resolution on distribution of profit • minimal dividend

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Spori glede uporabe bilančnega dobička in zagotavljanja minimalne dividende ter bilančno-računovodski vidiki razveljavljenih skupščinskih sklepov v d.d..

MARIJAN KOCBEK & SAŠA PRELIČ

Povzetek V članku je obravnavana ena izmed najpomembnejših premoženjskih pravic delničarja, to je pravica do dela dobička. Avtorja jo obravnavata s pravno-dogmatičnega stališča, opredeljujeta predpostavke za njen nastanek, vključno z možnostjo izpodbijanja sklepa skupščine, če ne odloči o delitvi vsaj minimalne dividende ter opozarjata na najbolj tipične praktične dileme pri odločanju o uporabi bilančnega dobička.

Ključne besede: • bilančni dobiček • sklep o uporabi bilančnega dobička • izpodbijanje sklepa o uporabi bilančnega dobička • minimalna dividend

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1 Udeležba v dobičku kot temeljna članska premoženjska pravica iz delnice

Pravica do dela dobička je temeljna premoženjska pravica, ki pripada imetniku deleža v gospodarski družbi, ne glede na njeno pravno organizacijsko obliko. Zato pripada ta pravica tudi delničarjem delniških družb.

Pravico do udeležbe na dobičku imajo delničarji ne glede na vrsto delnic, ki jim pravno pripadajo. Zagotavljajo jo tako navadne delnice kot tudi prednostne delnice. Naše delniško pravo ne dopušča delnic, ki bi izključevale pravico do udeležbe v dobičku, tako kot je na primer mogoče izključiti glasovalno pravico (314. člen Zakona o gospodarskih družbah – ZGD-11).

Ko razpravljamo o fenomenu udeležbe v dobičku, moramo razlikovati dve vrsti upravičenj, in sicer:

pravico do dela dobička (dividende), kot eno izmed abstraktnih premoženjskih upravičenj iz skupka siceršnjih delničarjevih korporacijskih pravic, in
pravico do izplačila dividende, ki jo je določila skupščina s sklepom o uporabi bilančnega dobička (peti odstavek 230. člena ZGD-1).

Pravica do dela dobička (dividende) ne predstavlja obligacijskopravnega upravičenja, ampak le korporacijskopravno upravičenje iz siceršnjega skupka (premoženjskih) pravic delničarja. Zgolj na podlagi statusa delničarstva delničar še nima nikakršnega obligacijskopravnega zahtevka do družbe, da mu izplača dobiček (dividendo), četudi družba v poslovnem letu izkaže čisti dobiček. Podlaga za nastanek take obligacijske pravice – terjatve delničarja je šele sklep skupščine o uporabi bilančnega dobička. S sprejemom tega sklepa, pod pogojem, da je z njim odločeno o delitvi, se namreč iz korporacijskopravnega upravičenja do dela dobička izloči samostojna obligacijska premoženjska pravica, to je terjatev delničarja do izplačila dobička – dividende. Ta se lahko, kot vsaka obligacijskopravna pravica, tudi sodno uveljavlja in je predmet samostojnih pravnih razpolag.2

Skupščina lahko s sklepom o uporabi bilančnega dobička tega uporabi tudi za druge namene, na primer za oblikovanje rezerv in drugo, lahko pa pusti bilančni dobiček tudi nerazporejen, kot preneseni dobiček. Delničar nima obligacijskopravnega zahtevka za izplačilo dividende, če skupščina ni odločila o uporabi bilančnega dobička za namen izplačila v obliki dividende. Lahko pa delničarji uveljavljajo izpodbijanje sklepa skupščine o uporabi bilančnega dobička, če se ne deli minimalna skupna zakonsko določena dividenda v višini 4. odstotkov osnovnega kapitala (prvi odstavek 399. člena ZGD-1).

Šele pravica do izplačila dividende, ki jo je določila skupščina s sklepom o uporabi bilančnega dobička, je torej obligacijska terjatev delničarja, ki tudi zastara, tako kot zastarajo ostale terjatve.

2 Sklep o uporabi bilančnega dobička

Sklep o uporabi bilančnega dobička je eden izmed najpomembnejših sklepov skupščine delniške družbe,[3] zaradi česar zakon poleg splošnega, določa še specialni izpodbojni razlog (399. člen ZGD-1).

Skupščina ne odloča o delitvi dobička, ampak o uporabi bilančnega dobička (druga alineja prvega odstavka 293. člena ZGD-1). Odločitev se sprejema s sklepom. ZGD-1 posebej opredeljuje vsebino sklepa o uporabi bilančnega dobička (četrti odstavek 293. člena ZGD-1). O tem odloča skupščina vsako leto, najkasneje do konca meseca avgusta, v tistih družbah, kjer je poslovno leto enako koledarskemu letu, sicer pa do konca osmega meseca po koncu poslovnega leta (tretji odstavek 294. člena ZGD-1). Na skupščini se obravnavajo rezultati poslovanja na podlagi poslovnega poročila, ki sta ga sprejela uprava in nadzorni svet oziroma upravni odbor; hkrati se odloča o uporabi bilančnega dobička ter o podelitvi razrešnice organom vodenja in nadzora (prvi odstavek 294. člena ZGD-1). Predlog o uporabi bilančnega dobička podajo organi vodenja ali nadzora, to je uprava in nadzorni svet ali upravni odbor (prvi stavek četrtega odstavka 293. člena ZGD-1). Skupščina pri odločanju o uporabi bilančnega dobička ni vezana na predlog organov vodenja ali nadzora. Skupščina lahko odloči drugače, kot sta predlagala uprava in nadzorni svet oziroma kot je predlagal upravni odbor.[4] Če skupščina odloči drugače, kot so predlagali organi vodenja ali nadzora, to ne predstavlja niti ničnostnega niti izpodbojnega razloga pri letnem poročilu in sklepu o uporabi letnega dobička. V družbah z dvotirnim sistemom upravljanja naj bi predlog sklepa o uporabi bilančnega dobička podala uprava in nadzorni svet skupaj, vendar ni nujno, da bosta pri tem enotna in da bosta podala enak predlog. Po navadi bosta v primeru neenotnosti tudi sicer neenotna pri sprejemu letnega poročila, kar pomeni, da bo skupščina odločala sama, in sicer ne le o uporabi bilančnega dobička, temveč tudi o sprejemu letnega poročila. Če nadzorni svet potrdi letno poročilo, nato pa ni enotnega predloga z upravo glede uporabe bilančnega dobička, to skupščini ne onemogoča, da bi odločila o uporabi bilančnega dobička. Predlog lahko dá vsak delničar. Takšen predlog se ne šteje za predlog o uvrstitvi točke dnevnega reda na zasedanje skupščine, ampak le za predlog delničarja o tem, kako naj se bilančni dobiček, ki je ugotovljen v letnem poročilu, uporabi. Morebitna pasivnost nadzornega sveta kot sopredlagatelja predloga sklepa o uporabi bilančnega dobička ni procesna predpostavka, ki bi bila nujna za sprejem skupščinskega sklepa. Sklep skupščine ne bi bil niti ničen niti izpodbojen zgolj zaradi razloga, ker nadzorni svet ni podal predloga o uporabi bilančnega dobička. Enako velja glede predloga uprave.

Skupščina ni vezana na predlog organov vodenja ali nadzora, vezana pa je na sprejeto letno poročilo, ki ga sprejmeta uprava in nadzorni svet oziroma v enotirnem sistemu

upravljanja upravni odbor, ali pa skupščina sama, če je za to pristojna. Skupščina ne more razdeliti med delničarje več letnega čistega dobička, kot ga prikazuje kategorija bilančnega dobička, ugotovljena v sprejetem letnem poročilu.[5] Hkrati ne more spremeniti letnega poročila, tako da bi ugotovila večji letni čisti dobiček, ga prerazporedila v kategorijo bilančnega dobička in nato odločala o razdelitvi med delničarje. Prav tako skupščina ne more posegati v posamezne kategorije kapitala in v druge rezerve iz dobička ter jih prerazporediti v kategorijo bilančnega dobička, ki ga bi nato razdelila med delničarje. O vseh teh vprašanjih se že predhodno odloča pri sprejemu letnega poročila. Skupščina lahko odloča o teh zadevah le, ko sama sprejema letno poročilo, če tega dela niso opravili organi vodenja ali nadzora. Skupščina pri tem ni nadrejen organ upravi in nadzornemu svetu ali upravnemu odboru in ne more spremeniti odločitve teh organov. Mogoča pa je obratna situacija, da namreč organi vodenja ali nadzora odločitev o tem prepustijo skupščini.

3 Obvezna (relativno) minimalna 4-odstotna dividenda

Praviloma je treba pri uporabi bilančnega dobička del tega dobička uporabiti tudi za razdelitev med delničarje, in sicer najmanj v višini 4. odstotkov osnovnega kapitala.[6] Skupščina lahko pri sklepanju o uporabi bilančnega dobička odloči, da se dobiček ne razdeli med delničarje kot dividenda, temveč da se ves bilančni dobiček prerazporedi v druge rezerve iz dobička. V praksi utegne nastati položaj, da se celotni letni čisti dobiček razporedi v druge rezerve iz dobička, če organi vodenja ali nadzora pri sestavi letnega poročila oblikujejo druge rezerve iz dobička v višini 50 odstotkov letnega čistega dobička, preostalo polovico pa odvede v druge rezerve iz dobička skupščina. Takšna odločitev skupščine pomeni, da nadaljnja usoda tega bilančnega dobička, ki pridobi status drugih rezerv iz dobička, ni več odvisna od njene odločitve. O drugih rezervah iz dobička se namreč odloča pri sestavi letnega poročila. Druge rezerve iz dobička se lahko uporabijo za katerikoli namen (deveti odstavek 64. člena ZGD-1). Od uprave in nadzornega sveta oziroma upravnega odbora je odvisno, ali bodo v naslednjih letih druge rezerve iz dobička morebiti ponovno uporabili za oblikovanje bilančnega dobička, o katerem bo odločala skupščina. Pri dodatnem odvajanju bilančnega dobička v druge rezerve iz dobička skupščina ni zakonsko omejena, niti ne more biti statutarno omejena. V druge rezerve iz dobička lahko odvede tudi ves bilančni dobiček, pri čemer je treba upoštevati zakonske določbe o možnostih izpodbijanja sklepa o uporabi bilančnega dobička s strani manjšine delničarjev (399. člen ZGD-1).[7] Sklepa o uporabi bilančnega dobička, s katerim se dividende najmanj v višini minimalne zakonske dividende delničarjem ne delijo, ni mogoče izpodbijati, če je bilo to po presoji dobrega gospodarstvenika nujno, glede na okoliščine, v katerih družba posluje.[8] Pri tem ne gre za diskrecijsko odločanje o možnosti delitve bilančnega dobička za dividende v takšni višini niti za vprašanje gospodarske primernosti politike dividend oziroma uporabe bilančnega dobička, temveč za vprašanje nujnosti drugačne uporabe bilančnega dobička, upoštevajoč okoliščine, v katerih družba posluje, s presojo dobrega gospodarstvenika. To predstavlja pravni standard, ki se rešuje kot pravno vprašanje.

Če družba razdeli dividende delničarjem najmanj v višini 4. odstotkov osnovnega kapitala, potem ni druge možnosti izpodbijanja sklepa o uporabi bilančnega dobička (razen zaradi formalnih napak pri delu skupščine), čeprav se ves preostanek razporedi v druge rezerve ali pa uporabi za druge zakonsko dovoljene namene.[9]

4 Uporaba bilančnega dobička za delavce in druge namene

Na podlagi zakona in skupščinskega sklepa je mogoče bilančni dobiček uporabiti le za dva namena, za razdelitev med delničarje in za oblikovanje drugih rezerv iz dobička. Na podlagi posebne statutarne ureditve se lahko bilančni dobiček poleg zakonsko določenih namenov uporabi tudi za druge namene, na primer za izplačila delavcem in poslovodstvu, kar primeroma opredeljuje tudi zakonska določba (šesti odstavek 230. člena ZGD-1). Po uveljavitvi novele ZGD-1C (2009) člani nadzornega sveta ne morejo biti več udeleženi pri dobičku. Drugi takšni nameni so lahko uporaba bilančnega dobička za podeljene delniške opcije, za donacije tretjim osebam in podobno. Drugi nameni so v celoti prepuščeni statutarni ureditvi. Statut je lahko splošen, lahko pa natančno določi in kvantificira, koliko bilančnega dobička bodisi v odstotku bodisi v absolutnem znesku ter pod kakšnimi drugimi pogoji je mogoče uporabiti za druge namene. Pri udeležbi delavcev in članov organov vodenja ali nadzora v dobičku ni predpogoj, da se odstotek dobička v statutu natančno opredeli. V statutu se lahko določi le zgornja meja dobička, ki se lahko razdeli, in drugi pogoji. Zadostuje zgolj splošna opredelitev namena uporabe dobička.

ZGD-1 torej dopušča, da so pri udeležbi v dobičku delniške družbe udeleženi tudi delavci. Delovnopravnih vidikov takšne udeležbe ne opredeljuje, saj jo opredeljujejo delovnopravni predpisi.[10] ZGD-1 obravnava statusne vidike, pri čemer je v ospredju vprašanje odločanja o uporabi dobička, opredeljevanje načina razdelitve dobička v statutu ter možnost povečanja osnovnega kapitala delniške družbe v okviru instituta pogojnega povečanja osnovnega kapitala. Ta se realizira s pretvorbo terjatev delavcev, ki jih imajo na podlagi udeležbe v dobičku, ki jim jo družba zagotavlja.[11] Podrobneje ureja udeležbo delavcev v dobičku specialni zakon,[12] pri čemer so še posebej pomembni davčni vidiki, ki naj bi to udeležbo spodbujali.

Družba lahko zagotovi delavcem udeležbo v dobičku, kar ne pomeni plačila dela, torej plače, ampak neposredno udeležbo v dobičku. Takšna odločitev mora biti sprejeta na skupščini delniške družbe, za kar pa mora obstajati podlaga bodisi v zakonu bodisi v statutu. Trenutno ni v Sloveniji nobene druge neposredne zakonske podlage za takšno odločitev skupščine, zato je potrebna statutarna opredelitev. Statutarna opredelitev mora biti dovolj konkretizirana, na primer z merili ali pogoji izplačila, ni pa nujno, da je v statutu natančno določena višina izplačila dobička med delavce. Na isti skupščini je možno s spremembo statuta določiti udeležbo delavcev v dobičku in že takoj pri naslednji točki dnevnega reda odločiti tudi o konkretni udeležbi.[13]

Tudi pri uporabi dobička za te druge namene je treba upoštevati osnovno izhodišče prvenstvene delitve dobička med delničarje vsaj v višini 4. odstotkov osnovnega kapitala. Sicer je treba dokazati nujnost drugačne delitve z vidika dobrega gospodarstvenika, ob upoštevanju okoliščin, v katerih družba posluje.

5 Bilančni vidiki neuporabe oziroma prenosa bilančnega dobička

Skupščina lahko s sklepom o uporabi bilančnega dobička tega uporabi bodisi za delitev med delničarje bodisi za oblikovanje drugih rezerv iz dobička bodisi za druge namene. Skupščina ima tudi možnost odločiti, da se del ali celotni bilančni dobiček ne uporabi za nobenega od omenjenih namenov in tudi ne za razdelitev med delničarje, temveč da se bilančni dobiček opredeli kot preneseni dobiček. Takšna opredelitev bilančnega dobička v preneseni dobiček pa pomeni, da se bo pri odločanju o bilančnem dobičku naslednje leto ponovno odločalo o tem delu bilančnega dobička. Preneseni dobiček se avtomatično v celoti izkaže v bilančnem dobičku. O njem ne morejo odločati organi vodenja ali nadzora pri sestavi letnega poročila. Vendar ni nujno, da se bo naslednje leto v bilančnem dobičku prikazal kot bilančni dobiček v enaki višini, kot bi ustrezala prenesenemu dobičku, če se pri oblikovanju bilančnega dobička pojavijo tudi kategorije, ki njegovo višino zmanjšujejo, in sicer nepokrita izguba, v konkretnem primeru nepokrita izguba tekočega leta. V bilančni dobiček se po določbi petega odstavka 66. člena ZGD-1 odvedeta tako poslovni izid poslovnega leta kot tudi preneseni dobiček. Če je poslovni izid poslovnega leta negativen, torej je ustvarjena izguba, se bo preneseni dobiček v celoti uporabil za »pokritje« te izgube. Višina bilančnega dobička se zmanjša za čisto izgubo poslovnega leta. O tem se posebej ne odloča, temveč gre samo za računski prikaz bilančnega dobička v letnem poročilu (peti, šesti in sedmi odstavek 66. člena ZGD-1).
Na prvi pogled ni bistvene razlike, če skupščina s sklepom o uporabi bilančnega dobička tega v celoti ali v delu odvede v druge rezerve iz dobička ali če odloči, da se bilančni dobiček ne razdeli med delničarje in se oblikuje kategorija prenesenega dobička. V obeh primerih je konkreten rezultat ta, da se dividenda delničarjem ne deli, pa tudi dobiček se ne uporabi za druge namene. V obeh primerih je mogoče ta del bilančnega dobička razdeliti med delničarje v prihodnosti. Vendar obstajajo razlike glede možnosti takšnih postopkov, predvsem pa glede pristojnosti. Če skupščina odloči, da se bilančni dobiček uporabi za dodatno odvajanje v druge rezerve iz dobička, to pomeni, da bo odločanje o njihovi nadaljnji usodi prvenstveno v pristojnosti uprave in nadzornega sveta oziroma upravnega odbora pri sestavi naslednjih letnih poročil. Takrat lahko organi vodenja ali nadzora v bilančni dobiček odvedejo tudi del sredstev iz teh drugih rezerv iz dobička. Druge rezerve iz dobička lahko uporabijo za druge namene, bodisi za oblikovanje rezerv za lastne delnice bodisi za pokrivanje izgube in druge namene. Pri oblikovanju prenesenega dobička pa skupščina ne prenese pristojnosti o odločanju glede tega dobička na organe vodenja ali nadzora, temveč gre le za odloženo odločanje o dobičku. Skupščina bo o tem prenesenem dobičku ponovno odločala že naslednje leto, ker se bo preneseni dobiček praviloma prikazal v bilanci kot bilančni dobiček,[14] razen v izjemnem primeru,

če bi družba poslovala z izgubo, ko preneseni dobiček avtomatično zmanjša sicer potencialni bilančni dobiček.

6 Izpodbojnost sklepa o uporabi bilančnega dobička

Specialni izpodbojni razlog glede sklepa o uporabi bilančnega dobička, ki ga določa ZGD-1 v 399. členu, je sestavljen iz dveh delov. Sklep je izpodbojen:

- če je v nasprotju z zakonom ali statutom, ali
- če je skupščina odločila, da se delničarjem dobiček ne deli najmanj v višini 4. odstotkov osnovnega kapitala, če to po presoji dobrega gospodarstvenika ni bilo nujno glede na okoliščine, v katerih družba posluje.[15]

Iz tako opredeljenega izpodbojnega razloga izhaja dolžnost družbe, da načeloma deli tako imenovano skupno[16] dividendo v višini 4. odstotkov osnovnega kapitala.[17] Pri tem obveznosti delitve tega odstotka ne gre zamenjevati niti z odstotkom donosa na tržno ali knjigovodsko vrednost delnice, niti z odstotkom od ustvarjenega čistega dobička oziroma ugotovljenega bilančnega dobička. Če družba ustvari dobiček in se ugotovi bilančni dobiček, se mora za razdelitev med delničarje uporabiti toliko bilančnega dobička, da skupna dividenda delničarjev znaša 4 odstotke od osnovnega kapitala.[18] Če družba izplača 4-odstotno dividendo, sklepa o uporabi bilančnega dobička ni dopustno izpodbijati, če je sprejet v skladu z zakonom in statutom.[19] Pri tem je treba opozoriti na določbe ZGD-1 glede uporabe čistega in bilančnega dobička, kjer se natančno določa vrstni red delitve, ter predvsem dolžnost oblikovanja najrazličnejših kategorij rezerv. Če predpisana dividenda ni izplačana, izpodbijanje ni utemeljeno, če je bilo neizplačilo dividende nujno glede na okoliščine, v katerih družba posluje.[20] To je pravno vprašanje, ki ga sodišče rešuje sámo (po načelu iura novit curia), ne pa dejansko vprašanje, ki bi se morebiti razčiščevalo s finančnimi izvedenci. Ne gre za presojo, koliko dividende bi bilo dobro oziroma primerno, da bi jo družba delila, temveč gre za pravno vprašanje[21], ali družba ni mogla deliti dividende v višini 4. odstotkov osnovnega kapitala glede na to, da je morala oblikovati ustrezne rezerve, pokriti izgubo in drugo. [22]

Tožbo za izpodbijanje sklepov skupščine o uporabi bilančnega dobička lahko vložijo le manjšinski delničarji, in sicer delničarji, katerih skupni deleži dosegajo dvajsetino osnovnega kapitala ali katerih skupni najmanjši emisijski znesek dosega 400.000 evrov.[23] Na zahtevo delničarjev lahko sodišče spremeni sklep skupščine o uporabi bilančnega dobička, če ugotovi obstoj okoliščin, ki upravičujejo delitev bilančnega dobička (drugi odstavek 399. člena ZGD-1).

Dosedanja sodna praksa je bila sicer neenotna glede vprašanja, kakšen zahtevek lahko stranka postavi, če na temelju 399. člena ZGD-1 izpodbija sklep skupščine delniške družbe. Nekatere odločbe menijo, da lahko stranka na temelju 399. člena ZGD-1 zahteva le spremembo skupščinskega sklepa.[24] Druge odločbe[25] pa ne vidijo nič napačnega v tem,

če delničar zahteva razveljavitev sklepa in postavi še dajatveni zahtevek na plačilo dividende [26]

7 Spori glede uporabe bilančnega dobička – aktualne dileme

V poslovni praksi prihaja v zadnjem času do porasta števila sporov[27] v zvezi z uporabo bilančnega dobička. [28]

Kompleksnost vprašanj, ki se pri tem pojavljajo, ilustrirajmo na primeru neke delniške družbe, ki je v poslovnem letu 2008 izkazala bilančni dobiček v določeni višini. Na skupščini so delničarji sprejeli sklep, da se ta dobiček razdeli med delničarje, ti pa ga takoj vrnejo družbi tako, da ga ta razporedi v kapital oziroma v njegovo zvišanje. Manjšinski delničar se je zoper ta sklep skupščine pritožil, sodišče pa je (sicer šele leta 2013) dokončno odločilo, da pripada delničarjem bilančni dobiček v višini najmanj 4 odstotke osnovnega kapitala. Manjšinski delničar je z izvršbo dosegel plačilo pripadajočega mu deleža dobička, drugi delničarji pa pripadajočega deleža niso dobili izplačanega.

Tak položaj je izpostavil številne pravne dileme, kot na primer:

1. ali je sklep skupščine od trenutka vložitve izpodbojne tožbe dalje »viseč« in se njegovi učinki ne smejo odražati v izkazih, ali pa ima od trenutka sprejetja na skupščini, ne glede na morebitne izpodbojne tožbe, popolno veljavo ter mora uprava (vsaj v računovodskem pomenu) upoštevati takšne sklepe do trenutka, ko sodišče pravnomočno (ali dokončno) odloči v sporu?

2. v času od vložitve izpodbojne tožbe do odločitve sodišča je družba izkazala izgubo in ne sme izplačati dobička, dokler je ne pokrije. Kako je treba upoštevati dejstvo, da je v času od trenutka sprejetja izpodbitega sklepa do pravnomočnosti sodbe bilančni dobiček, ki ga je potrebno po 399. členu ZGD-1 izplačati, nižji? Ali je treba najprej pokrivati izgubo in šele nato izplačati dobiček? Kakšno bi bilo pravilno postopanje, če bi bila izguba tako velika, da zahtevanega dobička po pravnomočnosti ne bi bilo mogoče izplačati (izguba presega bilančni dobiček iz leta 2008)? Ali imajo tudi v tem primeru delničarji zahtevek zoper družbo na podlagi ugotovljenega dobička le za leto 2008 (ki pa ga dejansko ni več)?

3. v času od sprejema sklepa za poslovno leto 2008 je družba sprejemala več (istih) sklepov o delitvi ter reinvestiranju dobička v osnovni kapital. Vsi izkazi so vsebovali tudi ugotovljen (bilančni) dobiček za leto 2008 (ugotovljen in še nerazdeljen) ter del tekočega dobička poslovnega leta. Kakšna je pravilna obravnava bilančnega dobička ter določbe 399. člena ZGD-1? Ali se z izplačilom 4. odstotkov na podlagi sodbe participacija na bilančnem dobičku, ugotovljenem v letu 2008, izčrpa, ali pa je (obvezna) participacija tudi na bilančnem dobičku v naslednjem letu, kot na primer:

- v letu 2008 je bil bilančni dobiček 2.000.000 €; na podlagi 399. člena ZGD-1 je bila delničarjem izplačana dividenda v višini 300.000 €, ostanek bilančnega dobička znaša 1,700.000 €. Ker je družba v poslovnem letu 2009 poslovala brez dobička, izkazuje za to poslovno leto bilančni dobiček v višini 1.700.000 €. Ali delničarjem tudi v tem primeru »pripada« dividenda po 399. členu ZGD-1 (ob predpostavki, da je uprava »previdna« in dividend noče izplačati)?

4. Nadalje pa je po sprejemu sklepa o uporabi bilančnega dobička, izkazanega za poslovno leto 2008, ki ga je eden od delničarjev izpodbijal, družba sprejemala vsako leto praktično identične sklepe o delitvi in reinvestiranju dobička, ki pa jih je manjšinski delničar izpodbijal. Na podlagi sklepa skupščine je bilo predlagano, da sodišče v registrskem postopku vpiše spremembo osnovnega kapitala družbe. Sodišče je spremembo vpisalo, potem pa je pritožbeno sodišče sklep o povečanju osnovnega kapitala po pritožbi manjšinskega delničarja razveljavilo, pri čemer ni presojalo sklepa skupščine, pač pa je razveljavitev obrazložilo s pomanjkanjem revizorjevih pojasnil. To pa odpre vprašanje učinkovanja sklepa skupščine in posledic na izkaze, v smislu ali so sklepi skupščine za upravo relevantni ter s tem, ne glede na izpodbijanje, podlaga za knjiženje, ali pa je to v primeru izpodbijanja dopustno izvršiti šele po pravnomočnosti odločbe sodišča?

Pri iskanju odgovorov na te praktične dileme je treba izhajati iz zgoraj opredeljenih teoretičnih izhodišč.

7.1 Pravna narava sklepa

Sklep skupščine delniške družbe, s katerim je ta v okviru svojih pristojnosti odločila o uporabi bilančnega dobička (sklep o uporabi bilančnega dobička, peti odstavek 230. člena ZGD-1), je tudi v primeru izpodbojne tožbe, ki bi jo kateri od upravičencev vložil zoper ta sklep in s katero bi uveljavljal njegovo neveljavnost, treba računovodsko obravnavati enako kot v primerih, če tožba sploh ne bi bila vložena. (Zgolj) Vložena tožba torej na obravnavo (oziroma pravno usodo) sklepa ne vpliva. Na podlagi sklepa skupščine o uporabi bilančnega dobička, s katerim skupščina odloči o delitvi bilančnega dobička v obliki dividend, pridobijo delničarji namreč terjatev (obligacijski zahtevek) za izplačilo njim pripadajočega dela bilančnega dobička, družba pa to hkrati izkaže kot svojo obveznost (v dolgovanem kapitalu). [29]

Drugače pa je v nasprotnem položaju: če skupščina s sklepom o uporabi bilančnega dobička odloči, da se bilančni dobiček ne uporabi (za izplačilo dividend), delničarji seveda ne pridobijo terjatve, niti za družbo ne nastane obveznost, da karkoli izplača. Neuporabljeni bilančni dobiček je treba v računovodskem izkazu – bilanci stanja (za naslednje leto) – izkazati kot posebno kategorijo, namreč kot »preneseni dobiček«.
Takšna obravnava v računovodskih izkazih traja ves čas trajanja sodnega postopka, v katerem sodišče odloča o (ne)veljavnosti sklepa o uporabi bilančnega dobička, traja torej

do pravnomočnega zaključka pravde. Šele z dnem pravnomočnosti sodbe, s katero je sodišče ugodilo oziroma zavrnilo zahtevek (in torej potrdilo oziroma razveljavilo sklep o uporabi bilančnega dobička), je treba pravnomočno odločitev ustrezno poočititi tudi v računovodskih izkazih družbe. To pomeni, da za računovodsko obravnavo ni merodajno dejstvo (časovna točka) vložitve izpodbojne tožbe, temveč je merodajno dejstvo, da je bilo o zahtevku pravnomočno odločeno in je bila torej sporna pravdna zadeva pravnomočno zaključena.

Vendar pa se niti s pravnomočno sodno odločbo, s katero sodišče morebiti razveljavi sklep o uporabi bilančnega dobička oziroma družbi naloži izplačilo 4-odstotne dividende, še manj pa z vloženo izpodbojno tožbo zoper sklep o uporabi bilančnega dobička, letno poročilo ne spremeni (peti odstavek 293. člena ZGD-1). Ne spremeni se niti za leto, v katerem je bil ugotovljen bilančni dobiček, niti za leto, v katerem se odloča o njegovi uporabi. Bistveno torej je, da se v tej zvezi letno poročilo ne spreminja oziroma se ne popravlja za nazaj, tudi če je sodišče sklep o uporabi bilančnega dobička razveljavilo. To bi namreč terjalo spremembe v vseh letih do dneva pravnomočnosti sodbe. Ker se letno poročilo za nazaj ne spreminja, se končni rezultat (morebitne ugodilne pravnomočne) sodbe izkaže v letnem poročilu in v računovodskih izkazih šele glede na datum pravnomočnosti sodbe; v konkretnem primeru torej šele v letnem poročilu v letu 2015. V časovni točki pravnomočnosti sodbe se torej šele vzpostavi obveznost za izplačilo dividende, hkrati pa se v tej višini zmanjšajo razpoložljive proste sestavine lastnega kapitala, ki ga v konkretnem primeru predstavlja preneseni dobiček.

Peti odstavek 293. člena ZGD-1 namreč izrecno določa, da se s sklepom o uporabi bilančnega dobička sprejeto letno poročilo ne spremeni. Bilančni dobiček je torej kategorija letnega poročila in se izkaže v ustreznem računovodskem izkazu. Letno poročilo sprejmejo pristojni organi, na način in pod predpisanimi pogoji. Sklep o uporabi bilančnega dobička, kot je ta ugotovljen v sprejetem letnem poročilu (in kot »sledi iz letnega poročila«), pa se sprejema po posebnem postopku (peti do sedmi odstavek 230. člena ZGD-1). ZGD-1 natančno določa tudi vse njegove obligatorne sestavine (četrti odstavek 293. člena ZGD-1). Zakonska opredelitev pokaže, da ni podlag za odločanje o uporabi bilančnega dobička za povečanje osnovnega kapitala, ampak zgolj za uporabo za zakonsko dopustne namene, med katere pa povečanje osnovnega kapitala ne sodi. O povečanju osnovnega kapitala odloča skupščina posebej, s posebnim sklepom o povečanju osnovnega kapitala, nikakor pa ne v povezavi z odločanjem o uporabi bilančnega dobička.

S sklepom o uporabi bilančnega dobička se letno poročilo torej ne spremeni. Rezultat tega sklepa se izkaže v naslednjem letnem poročilu, ki ima presečni datum naslednjega poslovnega leta. Seveda se tudi v primeru, če sodišče razveljavi sklep o uporabi bilančnega dobička, po enakem sklepanju ne spremeni letno poročilo. Če se s sklepom o uporabi bilančnega dobička torej letno poročilo ne spremeni, to seveda hkrati pomeni, da sklep o uporabi bilančnega dobička ne vpliva na letno poročilo, ki torej ostane táko, kot

je bilo sprejeto s strani organov, pristojnih za njegovo sprejemanje. Enako pa na letno poročilo tudi ne učinkuje dejstvo morebitne razveljavitve sklepa o uporabi bilančnega dobička s strani sodišča. Zato tudi v takem primeru (torej v primeru sodne odločbe, s katero je sodišče ugodilo zahtevku na razveljavitev sklepa) letno poročilo ostane nespremenjeno, kar pomeni, da ga ni dopustno popravljati oziroma spreminjati, kar velja tako za tekoče letno poročilo, kot tudi za pretekla letna poročila in njihove računovodske izkaze.

Te položaje lahko ilustriramo s hipotetičnim primerom, ko bi se naknadno ugotovila neka obveznost družbe, ki je sporna in o kateri je tekla pravda, v kateri se s pravnomočno sodbo taka obveznost ugotovi šele čez nekaj obdobij, čeprav po temelju izvira iz nekega spornega pravnega posla iz preteklosti. Družba – dolžnica mora v takem primeru pripoznati obveznost v računovodskem izkazu in v letnem poročilu seveda šele na podlagi pravnomočne sodbe. Družba tudi v tem primeru seveda ne popravlja letnega poročila za nazaj, denimo na datum sklenitve (spornega) pravnega posla, niti posledično z nekakšnim »domino efektom« ne popravlja oziroma prilagaja vseh ostalih letnih poročil iz naknadnih poslovnih let. V računovodstvu namreč veljajo pravila, da se letna poročila, ki so sprejeta, nikoli ne spreminjajo, niti se ne popravljajo. Edina izjema od tega pravila je v primeru odpravljanja tako imenovanih računovodskih napak, kar pa je seveda drugo vprašanje in se nanaša zgolj na tehnične popravke v letnem poročilu.

7.2 Kasnejša izguba

Tudi kasnejše izgube ne vplivajo na obveznosti družbe do izplačila dividende, nastale na podlagi sklepa o uporabi bilančnega dobička iz preteklosti ali sodbe, ki se nanaša na obveznost uporabe bilančnega dobička iz preteklosti za delitev dividend.

Tudi odgovor na to vprašanje je najbolje razumljiv, če ga ilustriramo s primerom: če je skupščina v letu 2009 sprejela sklep o uporabi bilančnega dobička in odločila o uporabi le-tega za dividende, v tem trenutku nastane obveznost (dolg) družbe, da dividende izplača, kar na strani delničarjev pomeni, da so pridobili terjatev, da se jim dividenda tudi izplača. Sklep o uporabi bilančnega dobička, s katerim skupščina odloči o delitvi le-tega za dividende, je torej pravno relevantno dejstvo, na podlagi katerega nastane: obveznost (dolg) družbe dividendo izplačati in terjatev (obligacijski zahtevek) delničarjev za izplačilo njim pripadajočega zneska dividende. Nastane torej obligacijsko razmerje z delničarjem kot upnikom (terjatev) in družbo kot dolžnico (obveznost, dolg).

Obveznosti iz tega naslova mora družba v prihodnje izpolniti, ne glede na dejstvo, ali kasneje, v prihodnjih letih, pri poslovanju ustvari izgubo, saj je to njena obveznost, kot vsaka druga. To velja tudi v primeru, če ustvari tekočo izgubo, na primer v letu 2009. Delničarji, ki so pridobili terjatev za izplačilo dividende na podlagi letnega poročila 2008, imajo iz tega naslova namreč položaj upnika, enako kot ostali upniki družbe, ki pridobijo terjatev na pravno poslovni podlagi. Zato je te obligacijske vidike treba razlikovati od

korporacijskih. Če pa je družba v letnem poročilu 2008 ugotovila bilančni dobiček, ga pa po sklepu skupščine o uporabi bilančnega dobička v letu 2009 ni (raz)delila, ampak ga je opredelila kot nerazporejen dobiček ali ga morebiti razporedila v druge rezerve iz dobička, tedaj seveda v letnem poročilu 2009 ni nastala obveznost družbe za delitev dividende, niti delničarji niso pridobili terjatve za izplačilo dividende.

Zato je treba razlikovati različno »usodo« bilančnega dobička glede na sprejeto odločitev v sklepu o uporabi bilančnega dobička. Če se je kasneje, morebiti tudi čez več let, v sodnem sporu dokončno ugotovilo, da je bil sklep o uporabi bilančnega dobička nepravilen in ga je sodišče razveljavilo ter družbi naložilo (dosodilo) obveznost izplačila dividende, je treba v letnem poročilu družbe za to leto – torej za leto dokončnega oziroma pravnomočnega zaključka spora – opredeliti obveznost družbe za izplačilo dividende. Hkrati pa je treba za to takoj porabiti potrebni vir, to pa je preneseni dobiček ali pa druge rezerve iz dobička, če jih družba ima. Ta »poračun« pa se opravi zgolj v bilanci stanja. Tako »poračunavanje« torej ne učinkuje na izkaz poslovnega izida, ker se pravna razmerja v družbi med delničarji, kot lastniki, poračunavajo zgolj po kapitalu, torej v bilanci stanja, ne pa v izkazu poslovnega izida. Kolikor pa je družba ta preneseni dobiček oziroma druge rezerve iz dobička v preteklih letih že »porabila« za pokrivanje morebitne izgubo in v letu pravnomočnosti sodbe teh kategorij ni več, obveznost za izplačilo dividende delničarjem vseeno obstaja. Odrazi se v tem primeru in v tem trenutku seveda kot nepokrita izguba družbe.[30]

7.3 Učinki sodbe

Na podlagi pravnomočne sodbe se obveznost izplačila 4-odstotne minimalne dividende nanaša zgolj na tisto leto, na katerega letno poročilo se nanaša in na katerega sklep o uporabi bilančnega dobička se nanaša. [31]To avtomatično ne učinkuje na bilančni dobiček v naslednjem letu in na uporabo bilančnega dobička v naslednjem letu.

V zvezi s primerom za leto 2008 glede bilančnega dobička 2008 torej velja: za leto 2008 bi v primeru pravnomočne ugodilne sodbe, upoštevaje ureditev v ZGD-1, delničarjem bilo treba izplačati 4-odstotno dividendo. Obveznost izplačati 4-odstotno dividendo pa ne pomeni obveznost izplačila 4. odstotkov od zneska ugotovljenega bilančnega dobička, temveč predpostavlja uporabo tolikega dela bilančnega dobička, da bo izplačani znesek predstavljal 4-odstotno dividendo, torej 4 odstotke od osnovnega kapitala, oziroma 4 odstotni donos na delnico. [32]

Če je v konkretnem primeru to znesek 300.000 €, je preostanek bilančnega dobička v višini 1.700.000 € kategorija, ki jo je v naslednjem letnem poročilu treba izkazati kot preneseni dobiček. Ta preneseni dobiček pa se lahko prihodnje leto sprosti v novi bilančni dobiček tega poslovnega leta. Če torej predpostavimo, da znaša bilančni dobiček v naslednjem letu 1.700.000 €, to avtomatično ne pomeni, da delničarjem pripada zgolj zaradi pravnomočne sodbe (ki se sicer nanaša le na bilančni dobiček za leto 2008) za

prejšnje leto kakršnakoli dividenda. Načeloma res velja, da naj bi se med delničarje delila 4-odstotna dividenda, seveda pa navedeno velja le, če so za to podani zakonski pogoji. Ta delitev ni absolutno nujna, ker se lahko družba te obveznosti oprosti, če dokaže, da to po presoji dobrega gospodarstvenika ni bilo nujno glede na okoliščine, v katerih družba posluje (prvi odstavek 399. člena ZGD-1). Če družba teh razlogov, ki upravičujejo nedelitev vsaj minimalne dividende, nima, potem mora seveda spoštovati zakonske določbe glede odločanja pri sklepanju o uporabi bilančnega dobička.

7.4 Povečanje osnovnega kapitala

ZGD-1 med ukrepi za povečanje osnovnega kapitala ne pozna povečanja osnovnega kapitala na način, da bi se kot vir povečanja uporabil bilančni dobiček, glede katerega je bilo odločeno, da se uporabi za izplačilo delničarjem v obliki dividend.

Med ukrepi za povečanje osnovnega kapitala razlikuje ZGD-1 namreč:

- realno (= efektivno) povečanje, ki ga imenuje redno povečanje osnovnega kapitala oziroma povečanje z novimi vložki (to pa ima še nekakšne podvrste v obliki odobrenega kapitala in tudi pogojnega povečanja), ter
- poenostavljeno (= nominalno) povečanje osnovnega kapitala iz sredstev družbe.

Glede osnovnega kapitala veljajo stroga formalna načela, zlasti načelo konstitutivnosti vpisa v sodni register. Osnovni kapital je pri rednem povečanju povečan šele, ko je povečanje (ki implicira vpis in vplačilo novih delnic) vpisano v sodni register (340. člen ZGD-1), oziroma pri nominalnem povečanju tedaj, ko je v sodni register vpisan sklep o povečanju (362. člen ZGD-1). Predpostavka pri tem seveda je, da so sklepi, na podlagi katerih je registrsko sodišče opravilo vpise, pravnomočni, kar posledično pomeni, da kolikor pride (v pravdnem postopku) do ugotovitve neveljavnosti sklepov (njihove razveljavitve), osnovni kapital konstitutivno ni mogel biti povečan.

Osnovni kapital torej v primeru poenostavljenega povečanja osnovnega kapitala zgolj na podlagi sklepa skupščine (o povečanju osnovnega kapitala iz sredstev družbe, na način in pod pogoji iz 358.-370. člena ZGD-1) še ni povečan, ker je povečan šele z vpisom sklepa v sodni register (362. člen ZGD-1). Povsem jasno tudi je, da bi mogel biti osnovni kapital še toliko manj povečan na podlagi sklepa skupščine v primeru nezakonitega sklepa, če naj bi se osnovni kapital povečeval s terjatvami iz naslova dividende, torej po postopku rednega povečanja, saj je pri tej obliki povečanja konstitutivno šele dejstvo vpisa povečanja. Upoštevati je torej treba nekakšno »dvofaznost« registrskega postopka, ki predpostavlja najprej ustrezen sklep skupščine o povečanju osnovnega kapitala, na temelju katerega sledi nato še sama izvedba povečanja. V tem primeru bi morali torej vsi delničarji individualno še sodelovati v povečanju osnovnega kapitala, vsak s svojim vložkom, ki ga predstavlja terjatev, ki bi jo bilo treba na družbo prenesti s cesijo kot

prenosnim poslom v postopku rednega povečanja osnovnega kapitala, kar pa ni bilo opravljeno.

Po drugi strani pa je uprava seveda odgovorna, da sklepe skupščine uresniči (tretja alineja 267. člena ZGD-1). To bi torej pomenilo, da mora uprava sklep skupščine o povečanju osnovnega kapitala priglasiti za vpis v sodni register. Vendar pa bi morala, če oceni, da bi bili sklepi nezakoniti, že v proceduri njihovega sprejemanja na to okoliščino skupščino določno opozoriti. Še posebej pa je jasno, da osnovni kapital ni povečan, če upravi v registrskem postopku sklepov sploh ne uspe registrirati.

To pa pokaže, da se tudi računovodsko obravnavanje obravnava le v skladu z zakonskimi pogoji in da je torej tudi računovodsko izkazovanje lahko posledica zgolj veljavnega materialnega pravno relevantnega dejstva (in ne obratno). Če se na primer osnovni kapital poveča nominalno, torej iz sredstev družbe, s pretvorbo oziroma uporabo kategorij lastnega kapitala, ki jih je dopustno uporabiti za to obliko povečanja osnovnega kapitala, se povečanje seveda ne izkaže že na dan sklepa skupščine, ampak šele z dnem pravnomočnosti vpisa sklepa v sodni register, ker je to tisto pravno relevantno dejstvo, na uresničitev katerega zakon veže posledico povečanja. Pri tem pa je treba opozoriti, da pri povečanju osnovnega kapitala iz sredstev družbe nikoli ne gre za to, da se bilančni dobiček uporabi za povečanje osnovnega kapitala, ampak da se kot vir za povečanje osnovnega kapitala smejo uporabiti le tiste posamezne kategorije dobičkov, pri katerih je to izrecno dopustno: torej kategorije, ki so v bilanci stanja. Bilančni dobiček pa je zgolj kategorija, ki je končna rezultanta skupka določenih kategorij (virov) iz bilance stanja in tudi drugih kategorij (virov) in pogojev. Viri lastnega kapitala, ki so potencialno lahko uporabljeni za povečanje osnovnega kapitala iz sredstev družbe, pa se pretvorijo v osnovni kapital šele z dnem pravnomočnosti sklepa sodišča o povečanju osnovnega kapitala, ki je bilo izvedeno na podlagi priglašenega sklepa o povečanju. Šele, če bi kasneje prišlo do razveljavitve tega sklepa na podlagi izrednih pravnih sredstev, pa bi se seveda »kolo zgodovine« smelo zavrteti nazaj, kar bi pomenilo ponovno vzpostavitev tistih kategorij lastnega kapitala, ki so bile uporabljene kot vir za povečanje osnovnega kapitala.

Notes

[1]Zakon o gospodarskih družbah (ZGD-1); Ur. l. RS, št. 42/06, s kasnejšimi spremembami in dopolnitvami.
[2]Podrobneje Kocbek, v (Kocbek, 2014: 664).
[3]Enako pa velja tudi v pravu družb z omejeno odgovornostjo.
[4]Če je na primer uprava predlagala nadaljnje odvajanje čistega dobička v druge rezerve iz dobička,lahko skupščina odloči o delitvi dividend in obratno.
[5]Bilančni dobiček, ki se prikaže v letnem poročilu, se sicer »izračuna«, vendar predstavlja kombinacijo zakonsko določenih postopkov uporabe posameznih virov in avtonomnega odvajanja (dotiranja) v rezerve na eni strani ter sproščanja posameznih rezerv na drugi strani. V nemškem zakonu o delnicah (AktG) je ugotovitev bilančnega dobička podobno kogentno določena in sicer v

prvem odstavku § 158.
[6]Smisel tega pravila je v varstvu manjšinskih delničarjev pred politiko »izstradanja« s strani večine (Aushungerungspolitik); podrobneje Hüffer, v (Hüffer, 2016: 1729).
[7]399. člen ZGD-1 po zgledu § 254 AktG.
[8]V nemškem pravu je posebej določena še ničnost sklepa o uporabi bilančnega dobička zaradi ničnega letnega poročila (§ 253 AktG), česar ZGD-1 posebej ne opredeljuje. Prvi odstavek § 253 AktG določa:
»Nichtigkeit des Beschlusses über die Verwendung des Bilanzgewinns
Der Beschluß über die Verwendung des Bilanzgewinns ist außer in den Fällen des § 173 Abs. 3, des § 217 Abs. 2 und des § 241 nur dann nichtig, wenn die Feststellung des Jahresabschlusses, auf dem er beruht, nichtig ist. Die Nichtigkeit des Beschlusses aus diesem Grunde kann nicht mehr geltend gemacht werden, wenn die Nichtigkeit der Feststellung des Jahresabschlusses nicht mehr geltend gemacht werden kann.«.
[9]V ureditvi pred novelo ZGD-F (2001) določba o 4-odstotni dividendi ni bila vključena med izpodbojne razloge, ampak le dejstvo, »če se dobiček ne deli«, kar je v praksi povzročalo precej nejasnosti in sodnih sporov; podrobneje o tem (Kocbek, 1996: 332–337).
[10]Zakon o delovnih razmerjih (ZDR-1); Ur. l. RS, št. 21/13, posebej pa tudi kolektivne pogodbe in pogodbe o zaposlitvi.
[11]Skupščina ne more sama svobodno odločiti, da se dobiček ne deli med delničarje oziroma da se dobiček deli za druge namene. Takšna odločitev je mogoča, če je dana izrecna podlaga v zakonu ali v statutu. V sodnem sporu je sodišče pravno utemeljilo, da je za takšen sklep skupščine o delitvi dobička delavcem, če ni statutarne opredelitve, lahko pravno relevantna podlaga le tisti zakon, ki določa obveznost udeležbe zaposlenih v dobičku, ne pa tisti zakon, ki daje le možnost takšne udeležbe, zaradi česar je sklep skupščine zaradi pomanjkljive statutarne ureditve izpodbojen (sodba Okrožnega sodišča v Ljubljani, opr. št. VIII Pg 416/95).
[12] Zakon o udeležbi delavcev pri dobičku (ZUDDob); Ur. l. RS, št. 25/08.
[13]Sodba Vrhovnega sodišča Republike Slovenije, opr. št. III Ips 43/2001.
[14]Prenos dobička (Gewinnvortrag) se tudi v nemškem pravu avtomatično vključi v bilančni dobiček (Bilanzgewinn, § 158 AktG); gre zgolj za izračun; podrobneje (Hüffer, 2014: 1080 in naslednje).
[15]Primerjaj prvi odstavek § 254. AktG: »Der Beschluß über die Verwendung des Bilanzgewinns kann außer nach § 243 auch angefochten werden, wenn die Hauptversammlung aus dem Bilanzgewinn Beträge in Gewinnrücklagen einstellt oder als Gewinn vorträgt, die nicht nach Gesetz oder Satzung von der Verteilung unter die Aktionäre ausgeschlossen sind, obwohl die Einstellung oder der Gewinnvortrag bei vernünftiger kaufmännischer Beurteilung nicht notwendig ist, um die Lebens- und Widerstandsfähigkeit der Gesellschaft für einen hinsichtlich der wirtschaftlichen und finanziellen Notwendigkeiten übersehbaren Zeitraum zu sichern und dadurch unter die Aktionäre kein Gewinn in Höhe von mindestens vier vom Hundert des Grundkapitals abzüglich von noch nicht eingeforderten Einlagen verteilt werden kann«
[16]V nemški literaturi je sporno ali gre za skupno ali za individualno minimalno dividendo tudi v primeru prednostnih delnic; podrobneje Ehmann, v (Grigoleit, 2013: 1761).
[17]Varujejo se manjšinski delničarji, kadar eden ali več večinskih delničarjev dajo prednost zadrževanju dobička (»Thesaurierung des Gewinns«) tudi tedaj, kadar zaradi položaja družbe in njenega podjetja glede na okoliščine, v katerih družba posluje, to ni upravičeno, donosnim interesom (»Renditeinteresse«) manjšinskih delničarjev pa ni zadoščeno niti s kakšnim drugim kapitalskim ukrepom (»Kapitalmaßnahme«); podrobneje Hüffer, v (Goette, Habersack & Kalss, 2016: 1679).
[18]Sklep o uporabi bilančnega dobička po AktG ni izpodbojen, čeprav minimalno izplačilo zaradi oblikovanja rezerv ali prenosa dobička ne bo dosegalo 4. odstotkov osnovnega kapitala, če so bili

zneski bilančnega dobička do razdelitve med delničarje izključeni po zakonu ali statutu, podrobneje Hüffer, v (Goette, Habersack & Kalss, 2016: 1682).

[19]To velja tudi, če družba sploh nima dovolj bilančnega dobička; tako v sodbi Višjega sodišča v Ljubljani, opr. št. I Cpg 311/2014: »Ker je med delničarje dovoljeno deliti le bilančni dobiček, ga v primeru, ko ta ne dosega višine 4 % osnovnega kapitala, ni mogoče izplačati v vsaj taki višini, temveč le v delu, ki ga je mogoče deliti med delničarje, torej v višini bilančnega dobička samega.«.

[20]Novejša judikatura v tej zvezi poudarja: »Zgolj z naštevanjem stroškov in načrtovanih investicij v prihodnosti tožena stranka ni izkazala, da za družbo potrebnih ciljev kot dober gospodarstvenik ne bi mogla doseči na noben drug način, kot s posegom v zakonsko določen najmanjši delež na dobičku.«; sodba Višjega sodišča v Ljubljani, opr. št. I Cpg 129/2014.

[21]Koch, v (Goette, Habersack & Kalss, 2016: 1746); zadržanje dobička mora ščititi nadaljnji obstoj ter delovanje družbe (»Lebens- und Wiederstandfähigkeit der Gesellschaft«). Enako tudi Schmidt, v (Hopt & Wiedemann, 1996: komentar § 254, stran 253).

[22]Tako tudi sodba Vrhovnega sodišča Republike Slovenije, opr. št. III Ips 14/2009: »Nujnost (po presoji dobrega gospodarstvenika nujno glede na okoliščine, v katerih družba posluje) je nedoločen pravni pojem. Kdaj je nek ukrep nujen – v tolikšni meri, da opravičuje poseg v pravico do deleža na dobičku – je stvar materialnopravne presoje sodišča. Ne zadošča, da bo zadržani dobiček uporabljen za ukrepe, ki so po presoji skrbnega gospodarstvenika nujni. Tudi nujni ukrepi se načelno lahko opravijo brez posega v pravico do delitve (dela) dobička. Nujen mora biti torej poseg v pravico do udeležbe na dobičku.«.

[23]ZGD-1 v drugem odstavku 399. člena določa le natančne pogoje, pod katerimi lahko delničarji izpodbijajo sklep o uporabi bilančnega dobička, pri čemer ne oži kroga aktivno legitimiranih upravičencev za izpodbijanje sklepa po drugi in tretji alineji sedmega odstavka 395. člena ZGD-1.

[24]Odločbi Višjega sodišča v Ljubljani, opr. št. I Cpg 656/2010 in I Cpg 1207/2010; glejte tudi odločbo Višjega sodišča v Kopru, opr. št. Cpg 39/2013; v tej zadevi je bil postavljen le zahtevek na spremembo.

[25]Odločbe Višjega sodišča v Ljubljani, opr. št. I Cpg 1083/2012, ter Višjega sodišča v Kopru, opr. št. Cpg 121/2011 in Cpg 34/2010.

[26]Povzeto iz relevantne sodbe Višjega sodišča v Ljubljani, opr. št. I Cpg 1129/2012: »Glede na besedilo 2. stavka 2. odstavka 399. člena ZGD-1 lahko delničar zahteva le spremembo izpodbijanega sklepa. Glede vsega preostalega veljajo določbe o izpodbijanju sklepov skupščine delniške družbe.«.

[27]V pravni literaturi na primer (Strojin Štampar in Vahčič, 2003: 8-9) ter (Novak-Krajšek, 2005: 704).

[28]Na to kaže tudi podatek, da je na spletnih straneh PISRS v zvezi s 399. členom ZGD-1 objavljenih kar 18 sodb Vrhovnega oziroma višjih sodišč, medtem ko je vseh sodb o izpodbijanju nasploh (splošno po 395. členu ZGD-1) le 43. Od novejših sodb na primer sodba Višjega sodišča v Kopru, opr. št. Cpg 414/2014: »Možnost izpodbijanja sklepa skupščine, ker za dividende ni bil uporabljen bilančni dobiček v višini najmanj 4 % osnovnega kapitala, spada med tako imenovane manjšinske pravice. Pravica do udeležbe v dobičku je namreč temeljna premoženjska pravica, ki jo ima delničar in tudi najpomembnejši razlog, da delničar sploh je delničar. Zakon je zato določil minimalni znesek, ki ga skupščina praviloma mora uporabiti za dividende. Če ta višina ni dosežena, lahko delničarji izpodbijajo sklep skupščine, družba pa se lahko brani, da po presoji dobrega gospodarstvenika okoliščine ne omogočajo delitve dobička med delničarje. V predmetni zadevi ne gre za tak primer. Tožeča stranka (uprava družbe) želi doseči ravno nasprotno od upravičenja, ki ga daje 399. člen ZGD-1 (želi, da se med delničarje dobiček sploh ne deli), zato zahtevka na izpodbijanje sklepa skupščine, s katerim je bil v okviru zakona in statuta bilančni dobiček

uporabljen za dividende, iz razloga, ker konkretne okoliščine delitve dobička med delničarje ne omogočajo, po določbi 339. člena ZGD-1 nima.«.

[29] S sprejetjem skupščinskega sklepa, katerega vsebina je v nasprotju z zakonom ali statutom delniške družbe, nastane konkretno upravičenje delničarja, da začne postopek izpodbijanja sklepa skupščine; Plavšak, v (Kocbek, 2007: 106- 107).

[30]Le v enem, »mejnem« in izjemnem primeru, bi bil položaj lahko specifičen, in sicer, če bi ta isti preneseni dobiček družba uporabila v prejšnjih letih za izplačilo dividende delničarjem. To bi pa v končni posledici lahko pomenilo, da bi delničarji prejeli izplačane dividende dvakrat. Enkrat na podlagi izkazanega bilančnega dobička v prejšnjih letih, enkrat pa na podlagi pravnomočne sodne odločbe. Tedaj pa bi moralo poslovodstvo družbe opozoriti delničarje na morebitno njihovo odgovornost po vračilu dividende, če bi bilo mogoče ugotoviti njihovo nedobrovernost (če bi se torej zavedali tveganja dvakratne delitve dividende, da torej ni pravilen izračun bilančnega dobička, ob predpostavki, če bi šlo za iste delničarje kot prejemnike dividend).

[31]O učinkih sodbe tudi Višje sodišče v Ljubljani, v sodbi in sklepu I Cpg 778/2013: »Sodba o razveljavitvi sklepa skupščine učinkuje proti vsem delničarjem ter članom organov vodenja ali nadzora (398. člen ZGD-1), kar v konkretnem primeru pravnomočne sodbe o razveljavitvi sklepa o uporabi bilančnega dobička pomeni, da bo morala skupščina ponovno odločati o uporabi bilančnega dobička. Ker je sodišče prve stopnje sicer pravilno ugotovilo, da obstajajo okoliščine, ki upravičujejo delitev bilančnega dobička, vendar je skupščinski sklep pravilno razveljavilo, ker je tudi v nasprotju z zakonom, bi moralo posledično zavreči tožbo v delu, v katerem tožeča stranka zahteva odločitev, da se nameni del bilančnega dobička za izplačilo dividend delničarjem in o izplačilu dividend.«.

[32]Na primer sodba Višjega sodišča v Kopru, opr. št. Cpg 34/2010: »Sodišče ne more s spremembo skupščinskega sklepa odločiti o delitvi več kot 4% skupne dividende (drugi odstavek 399. člena ZGD-1).«.

Reference

Goette, W., Habersack, M. & Kalss, S. (2016) Münchener Kommentar zum Aktiengesetz; 4. knjiga, 4. ed., (München: Beck, Vahlen).

Grigoleit, H. C (ed.) (2013) Aktiengesetz: Kommentar (München: Beck).

Hopt, K. J. & Wiedemann H. (eds.) (1996) AktG: Grosskomentar (Berlin, New York: de Gruyter).

Hüffer, U. (2016) Aktiengesetz (Beck'sche Kurz-Kommentare, Band 53), 12. Aufl. (München: Beck).

Kocbek, M. (1996) Odločanje o rezervah in dobičku delniške družbe in možnosti izpodbijanja sklepov skupščine; Podjetje in delo, 22(3), pp. 332–337.

Kocbek, M. (red.) (2007) Veliki komentar Zakona o gospodarskih družbah (Ljubljana: GV Založba).

Kocbek, M. (red.) (2014) Veliki komentar Zakona o gospodarskih družbah, 1. knjiga (Ljubljana: IUS Software, GV Založba).

Novak Krajšek, D. (2005) Pravica do 4-odstotne dividende in načini realizacije članske pravice do deleža bilančnega dobička; Podjetje in delo, 31(5), 704-716.

Strojin Štampar, A., Vahčič, A. (2003) Izpodbijanje skupščinskega sklepa o uporabi bilančnega dobička, Pravna praksa, 22(41), pp. 8-9.

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Obligations of Contracting Authorities to Manufacturers Under Directive 2014/24/EU and ZJN-3

VESNA KRANJC

Abstract Slovenia is one of the few countries that under rules on obligations provide the right of a subcontractor to claim payment directly from the investor. For many years, the provision of Article 631 of OZ (the content is the same as the provision of Article 612 of ZOR) never raised issues in case law and business practice, because subcontractors had not actually exercised the right to direct payment. Because of the economic crisis and late payments, the provision became popular. ZJN-2 attempted to provide additional protection of subcontractors in transactions with public law entities. Its provisions are unclear, they raise a number of questions in theory and business practice to which the case law has not yet offered conclusive answers. Reform of public procurement in the EU and in Slovenia also affected the status of subcontractors. In this context, the main purpose of Directive 2014/24/EU is to provide conditions in which small and medium-sized enterprises can compete with larger companies in obtaining public contracts, and also that in cases where they act as subcontractors, their claims against main contractors are secured. ZJN-3 partially follows the provisions of Directive 2014/24/EU and at the same time brings changes to the currently valid contracting authorities to subcontractors. The author presents the regulation, provides arguments against opposing views and offers her opinion on the obligations of contracting authorities to subcontractors under ZJN-2 and ZJN-3.

Keywords: • public procurement • work contract • building contract • subcontractor • subcontractor's direct claim against contracting authority • obligation to pay the subcontractor • subcontractor's capabilities

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Obveznosti naročnikov do podizvajalcev po direktivi 2014/24/EU in ZJN-3

VESNA KRANJC

Povzetek Slovenija je med redkimi državami, ki v obligacijskih pravilih zagotavljajo pravico podizvajalca do uveljavitve plačila neposredno od investitorja, je tudi Slovenija. Vrsto let določba 631. člena OZ (vsebinsko enaka kot določba 612. člena ZOR) ni odpirala vprašanj v sodni in poslovni praksi, saj podizvajalci dejansko niso uveljavljali pravice do neposrednega plačila. Zaradi gospodarske krize in plačilne nedisciplине je določba postala aktualna. Dodatno varstvo podizvajalcev v poslih z osebami javnega prava je poskušal zagotoviti ZJN-2. Njegove določbe so nejasne, v teoriji in poslovni praksi odpirajo vrsto vprašanj, na katere v sodni praksi še niso oblikovani ustaljeni odgovori. Reforma javnega naročanja na ravni EU in v Sloveniji je posegla tudi v položaj podizvajalcev. V tej zvezi je poglavitni namen Direktive 2014/24/EU zagotoviti malim in srednje velikim podjetjem pogoje, da lahko konkurirajo večjim gospodarskim družbam pri pridobivanju javnih naročil, ob tem pa tudi, da so v primerih, ko nastopajo kot podizvajalci, zavarovane njihove terjatve do glavnih izvajalcev. ZJN-3 delno sledi pravilom Direktive 2014/24/EU, obenem pa spreminja do sedaj veljavne obveznosti naročnikov do podizvajalcev. Avtorica predstavi ureditev, polemizira z nasprotnimi stališči in podaja svoja stališča o obveznostih naročnikov do podizvajalcev po ZJN-2 in ZJN-3.

Ključne besede: • javno naročilo • pogodba o delu • gradbena pogodba • podizvajalec • neposredni zahtevek podizvajalca do naročnika • obveznost plačila podizvajalcu • sposobnost podizvajalca

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1 Odprta vprašanja OZ in ZJN-2 o plačilih podizvajalcem

Pravila javnega naročanja določajo postopek in pogoje za izbiro pogodbenih strank naročnikov. Po sklenitvi pogodbe o javnem naročilu pa je le-ta, vsaj načelno, podrejena obligacijskim pravilom, v Sloveniji Obligacijskemu zakoniku (OZ).[1] Načeloma zato, ker vse določbe OZ ne veljajo za pogodbe o javnem naročanju, na primer pravila OZ o spremembi sklenjene pogodbe.

Pravila OZ določajo pogoje za neposredna plačila podizvajalcem v 631. členu.[2] Po 631. členu OZ morajo biti kumulativno izpolnjeni naslednji pogoji za nastanek naročnikove obveznosti, da plača podizvajalcu:

- pripoznanje izvajalca o obstoju podizvajalčeve terjatve do izvajalca,
- podizvajalčeva terjatev do izvajalca mora biti dospela,
- izvajalčeva terjatev do naročnika mora biti dospela,
- obe terjatvi se morata nanašati na ista dela (morata biti koneksni),
- podizvajalec mora zahtevati plačilo od naročnika.

Glede vsakega od pogojev se postavljajo vprašanja, odgovori nanje niso vedno enotni. Vrsta odprtih vprašanj se nanaša na pripoznanje izvajalca o obstoju podizvajalčeve terjatve in zahtevo podizvajalca za plačilo od naročnika, predvsem zato, ker je izpolnjevanje obeh pogojev v praksi povezano z uporabo dokumentov, ki po svoji osnovni naravi služijo drugačnemu namenu.

Kadar izvajalec izjavi, da priznava obstoj terjatve v določenem znesku in navede posel iz katerega ta terjatev izvira, je takšna izjava nesporno pripoznanje podizvajalčeve terjatve po 631. členu OZ.[3] Tudi izjave, ki sicer ne navajajo, da so dane v zvezi s 631. členom OZ, ampak so dane v zvezi z izpolnjevanjem drugačnih pravic in obveznosti, lahko pomenijo pripoznanje po 631. členu OZ, a ne vedno (Vukmir, 2009: 96).

Pri izvajanju gradbenih del in tudi del, ki nimajo narave gradbe, izstavljajo izvajalci situacije. V poslovni praksi so običajni dogovori, da se plačilo ne izvede šele po dokončanju pogodbenih del, ampak se izvedena dela plačujejo sproti, včasih celo vnaprej. Če je dogovorjeno, da se izvedena dela plačujejo sproti, izstavlja izvajalec po določenih časovnih obdobjih (mesečno, kvartalno, polletno) začasne situacije. V začasni situaciji izvajalec navede, katera dela, v kakšni količini in vrednosti je izvedel v določenem obdobju. Izvajalčev obračun izvedenih del iz začasne situacije potrdi nadzorni inženir. Nadzorni inženir je oseba, ki na strani naročnika nadzira izvajanje del. Če ni posebej določeno drugače, nadzorni inženir ni pooblaščenec naročnika. Kljub temu, da nadzorni inženir potrdi izvajalčevo začasno situacijo, lahko naročnik ugovarja plačilu začasne situacije. Če naročnik ne ugovarja začasni situaciji in plača v situaciji obračunana dela, to ne pomeni, da je potrdil kakovost izvedenih del. Tudi iz Posebnih gradbenih uzanc[4] je razvidna razlaga, da je namen začasnih situacij le ta, da se evidentirajo in obračunajo izvedene vrste del in njihove količine (61. do 65. uzanca). Namen končne situacije je

enak, le da se izstavi po dokončanju del. Izstavi jo izvajalec, potrdi pa nadzorni inženir. Po dokončanju del sestavita naročnik in izvajalec dokončni obračun.

V Sloveniji se gradbene pogodbe vedno pogosteje sklepajo po pravilih FIDIC,[5] med drugim po Rdeči knjigi FIDIC.[6] Prednost pravil je, da podrobneje kot zakonska pravila urejajo pravice in obveznosti strank gradbene pogodbe. Po Rdeči knjigi FIDIC izvajalec nadzornemu inženirju predloži vsak mesec podroben obračun del (situacijo, člen 14.3), po pregledu obračuna inženir izda potrdilo o vmesnem plačilu (14.6) in le tega dostavi naročniku. Rdeča knjiga FIDIC izrecno pojasnjuje, da inženirjeva izdaja potrdila o vmesnem plačilu ne pomeni tudi sprejema, odobritve, privolitve ali zadovoljstva inženirja (četrti odstavek člena 14.6). Naročnik mora znesek iz inženirjevega potrdila o vmesnem plačilu plačati v roku iz člena 14.7. Rdeča knjiga FIDIC določa, da po dokončanju del (po prejetju potrdila o izvedbi) predloži izvajalec inženirju osnutek končnega obračuna, katerega inženir preveri, nakar izda izvajalec končni obračun (v primeru spora med izvajalcem in inženirjem je treba ravnati po tretjem odstavku člena 14.11). Izvajalec posreduje inženirju končni obračun in posebno izjavo o tem, da končni obračun predstavlja popoln in končni obračun vseh denarnih obveznosti, ki jih po pogodbi naročnik dolguje izvajalcu.[7] Na tej podlagi izstavi inženir naročniku potrdilo o končnem plačilu, ki določa končni dolgovani znesek. Izvajalec lahko uveljavlja le plačilo zneska, ki je naveden v potrdilu o končnem plačilu, kakršnakoli dodatna plačila pa le izjemoma (člen 14.14 v povezavi s členom 14.10). Znesek iz potrdila o končnem plačilu zavezuje naročnika k plačilu (člen 14.7).[8] Seveda pa so lahko v pogodbi določeni posebni pogoji za naročnikovo obveznost plačila tega zneska, na primer predložitev določenega zavarovanja s strani izvajalca (bančne garancije za odpravo napak). V takem primeru nastane izvajalčeva terjatev do naročnika šele po izpolnitvi pogoja.

Poudariti želim, da je tako po OZ in Posebnih gradbenih uzancah kot tudi po Rdeči knjigi FIDIC vloga situacij, začasnih obračunov, končnih obračunov in izdaja potrdil povezana s posebno naravo gradbenih pogodb in posebnim načinom določitve končnega plačila. V gradbenih poslih je običajno (v primeru dogovora cena po enoti mere), da končno plačilo ni enako pogodbeno dogovorjenem znesku, ampak je odvisno od vrste in količine dejansko izvedenih del. Zato je potrebno izvedena dela kontrolirati in meriti. Situacije in obračuni ugotavljajo, katere vrste del oziroma enote so bile dejansko izvedeno. To ugotavljata izvajalec in nadzorni inženir, saj naročnik običajno za takšen nadzor nima ustreznega strokovnega znanja. Namen situacij in obračunov ni identificirati terjatev izvajalca do naročnika.[9] Njihov namen je le določiti znesek glede na izvedena dela in določbe o ceni v pogodbi. Ta znesek je seveda bistven za konkretizacijo terjatve izvajalca do naročnika, a ni njen edini pogoj.

Če je torej naročniku predložena situacija ali potrdilo o plačilu, oba dokumenta izda izvajalec in potrdi inženir (velja tudi za končno situacijo in potrdilo o končnem plačilu), sama po sebi ne izkazujeta pripoznanja izvajalca o obstoju podizvajalčeve terjatve do izvajalca. Mišljen je primer, ko bi glavni izvajalec v situacijo ali potrdilo o plačilu vključil tudi dela, ki jih je izvedel podizvajalec.[10] Tudi v primeru, da bi izvajalec naročniku izstavil situacijo in tej situaciji priložil situacijo svojega podizvajalca, ni mogoče sklepati,

da je pripoznal terjatev podizvajalca po 631. členu OZ. Ker predstavljajo neposredna plačila podizvajalcem po 631. členu OZ izjemo, morajo biti pogoji, ki so določeni za realizacijo te izjeme, nesporno izpolnjeni. Zato mora biti volja izvajalca za pripoznanje podizvajalčeve terjatve nesporno izkazana, domnevana volja za pripoznanje po moji oceni ne zadošča. Volja izvajalca za pripoznanje je nesporno izkazana, če izvajalec svoji situaciji ali svojemu potrdilu o plačilu doda izjavo, da pripoznava terjatev podizvajalca v enakem ali nižjem znesku. Enako je volja izvajalca za pripoznanje nesporno izkazana, če podizvajalčevi situaciji ali podizvajalčevemu računu naslovljenemu nanj in katero posreduje naročniku doda izjavo, da pripoznava to terjatev podizvajalca.

Vprašanje pripoznanja podizvajalčeve terjatve po 631. členu OZ se postavlja tudi v zvezi z IOP obrazcem (obrazec o izpisku odprtih postavk) in sicer v primeru, ko podizvajalec posreduje obrazec izvajalcu ter mu ga le-ta podpisanega vrne. Z IOP obrazcem se evidentira odprta postavka za posamezno stranko (terjatev izdajatelja obrazca do te stranke) in se nato posreduje tej stranki v podpis. Če stranka (zakoniti zastopnik ali pooblaščena oseba) podpiše obrazec, s tem potrdi ali se strinja z odprto postavko. Strinjanje z odprto postavko oziroma podpis IOP obrazca s strani pooblaščene osebe dolžnika ima naravo pripoznave dolga po 364. členu OZ. Po pripoznavi dolga po 364. členu OZ se zastaranje pretrga in začne teči znova. Pripoznava dolga po 364. členu OZ je akcesorne narave. Čeprav dolžnik podpiše IOP obrazec, lahko kasneje ugovarja obstoj ali višino dolga. Potrditve IOP obrazca s strani izvajalca, ki ga je izvajalcu posredoval podizvajalec, ni mogoče šteti za pripoznanje terjatve po 631. členu OZ.

Obe terjatvi (terjatev podizvajalca do izvajalca in terjatev izvajalca do naročnika) morata biti dospeli. Če rok za plačilo podizvajalčeve terjatve še ni potekel, pogoji niso izpolnjeni. Tudi če je naročnik že plačal izvajalcu, izvajalec pa obveznosti do podizvajalca še ni poravnal, pogoji niso izpolnjeni, saj je terjatev izvajalca do naročnika prenehala.

Obe terjatvi se morata nanašati na ista dela. Če izvajalec dolguje podizvajalcu plačilo za dela, katera je naročnik njemu (izvajalcu) že plačal, a ima sam terjatev do naročnika za druga dela, terjatvi nista koneksni. Četudi izvajalec terja plačilo od naročnika za večji obseg del in se terjatev podizvajalca nanaša le na del te storitve, je koneksnost podana. Vprašanje je, kako obravnavati terjatvi, pri katerih identiteta del ni omogočena.
Iz podizvajalčeve izjave naslovljene naročniku mora biti razvidno, da terja plačilo od njega – naročnika. Izjava podizvajalca naročniku, da izvajalec še ni plačal ali da zamuja s plačilom, sama po sebi ni zahtevek za plačilo.

Potem ko podizvajalec poda naročniku zahtevek za plačilo in so izpolnjeni pogoji iz 631. člena OZ, mora naročnik plačati podizvajalcu, ne pa svoji pogodbeni stranki, sicer glavnemu izvajalcu. Podizvajalec pa ima pravico terjati plačilo od izvajalca (svoje pogodbene stranke) ali od naročnika. Izvajalec neupravičeno odkloni plačilo, če podizvajalca napoti, da naj zahteva plačilo od naročnika.

Obveznost naročnika, da ob izpolnjevanju posebnih pogojev plača pogodbeni stranki svojega izvajalca, je v OZ določena le za podjemno pogodbo in pogodbene tipe, pri katerih se ureditev sklicuje na podjemno pogodbo (na primer za gradbeno pogodbo). Tudi za vrsto drugih pogodb je lahko v praksi značilno, da pogodbena stranka v izvedbo posla vključuje tretje osebe, a OZ tretjim ne priznava enakih pravic.

Pravila OZ, ki le do določene mere varujejo interese podizvajalcev, veljajo tudi za pogodbe o javnem naročanju. Zaradi številnih primerov iz prakse, ko podizvajalci niso prejeli plačila, tudi podizvajalci iz pogodb o javnem naročanju, je ZJN-2 poskušal podizvajalce iz pogodb o javnem naročanju zaščititi bolj kot OZ.

Od sprejema ZJN-2 leta 2006 so se spreminjale določbe o plačilih podizvajalcem. V ta pravila je najbolj korenito posegla novela ZJN-2B iz leta 2010.[11] Po uveljavitvi novele ZJN-2B so morali naročniki že tekom postopka oddaje javnega naročila, predvsem pa ob sklenitvi pogodbe o javnem naročilu, izpolniti vrsto obveznosti, ki bi naj zagotovile plačilo podizvajalcem (71. člen ZJN-2). Določbe ZJN-2 o obveznostih do podizvajalcev so nejasne in nomotehnično pomanjkljive. Največji problem je ta, da je nejasno ali mora naročnik (potem, ko sta naročnik in izbrani ponudnik izpolnila obveznosti iz ZJN-2) plačati podizvajalcu ali pa mora plačati svoji pogodbeni stranki, to je izbranemu ponudniku. V praksi so naročniki pri pogodbah o javnem naročanju gradenj večinoma plačevali neposredno podizvajalcem, pri pogodbah o javnem naročanju storitev in blaga pa so se temu izogibali.

Avtorica sem zagovarjala stališče, da zgolj na podlagi določb 71. člena ZJN-2 ne izhaja naročnikova obveznost plačila neposredno podizvajalcem. Stališče teorije o tem vprašanju ni enotno.[12] Del sodne prakse je tem stališčem pritrdil,[13, 14] del stališča zanika in razlaga, da že izpolnitev pogojev iz ZJN-2 ustvarja obveznost neposrednih plačil,[15] a vrsta zahtevkov še čaka na odločitev sodišč.[16]

Na podlagi ZJN-2 iz 2006 je bil sprejet izvedbeni predpis o neposrednih plačilih podizvajalcem – Uredba o neposrednih plačilih podizvajalcu pri nastopanju ponudnika s podizvajalcem pri javnem naročanju,[17] ki pa je le odpirala nova vprašanja. Z uveljavitvijo novele ZJN-2B iz 2010 je uredba prenehala veljati, a se je uporabljala še naprej. Uporabljala bi se naj do izdaje novega izvedbenega predpisa, a ta ni bil sprejet.

2 Pravila EU o podizvajalcih

V primerjavi s ponudniki so podizvajalci običajno manjše gospodarske družbe. Mala in srednja podjetja nastopajo kot podizvajalci, saj ne izpolnjujejo vseh naročnikovih pogojev ali enostavno niso sposobna prevzeti vseh obveznosti iz kompleksnih javnih naročil. Sodelovanje teh družb kot podizvajalcev (ali celo članov skupine) Direktiva 2014/24/EU[18] spodbuja tako, da omogoča, da se določene okoliščine na strani podizvajalcev štejejo kot da pogoj izpolnjuje ponudnik (63. člen). Manjše družbe so zaščitene tudi s pravili o oblikovanju sklopov (46. člen Direktive 2014/24/EU).

Direktiva 2014/24/EU zahteva, da so določeni osebni pogoji izpolnjeni tudi na strani podizvajalcev (prvi odstavek 71. člena).

Direktiva 2004/18/ES ni imela določb o neposrednih plačilih podizvajalcem. Toda Sodišče je v zadevi C-47/07 na podlagi načel, ki so skupna vsem pravnim redom držav članic, odločalo o zahtevku podizvajalca, a mu ni ugodilo.[19] Tudi zato je Direktiva 2014/24/EU posegla v ta vprašanja, a z neobvezujočimi pravili.

Določitev neposrednih plačil podizvajalcem Direktiva 2014/24/EU prepušča nacionalnim ureditvam. Države lahko določijo, da morajo ponudniki navesti dele naročil, ki jih bodo oddali podizvajalcem (drugi odstavek 71. člena) in lahko določijo, da morajo naročniki na zahtevo podizvajalca plačati neposredno podizvajalcu (tretji odstavek 71. člena).

Razumeti je, da že določbe 631. člena OZ o neposrednih plačilih podizvajalcev izpolnjujejo cilj iz tretjega odstavka 71. člena Direktive 2014/24/EU. Večina držav članic EU v svojih obligacijskih predpisih nima določbe, ki na enak način kot OZ zagotavlja neposredna plačila podizvajalcem.[20]

3 Obveznosti naročnikov do podizvajalcev po ZJN-3

3.1 Podizvajalci pri javnih naročilih blaga, storitev in gradenj

Opredelitev podizvajalca podaja prvi odstavek 94. člena Zakona o javnem naročanju (ZJN-3).[21] Pojem podizvajalca je vsebinsko enak kot po ZJN-2. Obligacijska pravila za isto osebo uporabljajo izraz sodelavec, podjemnikov sodelavec, spolnitveni pomočnik. V pravni teoriji in praksi pa se tudi za vprašanja povezana z obligacijskimi pravili uporablja izraz podizvajalec.

Po ZJN-3 je lahko podizvajalec vsaka fizična ali pravna oseba, ki dobavlja blago, izvaja storitve ali gradnje (Po OZ veljajo pravila o podizvajalcih le za storitve in gradnje). Vsakdo, ki je s ponudnikom v pogodbenem razmerju še ni podizvajalec po ZJN-3. Na primer računovodski servis izbranega ponudnika ni podizvajalec, prav tako ne njegov dobavitelj elektrike. Po ZJN-3 je podizvajalec vsakdo, ki je stopil v pogodbeno razmerje z izbranim ponudnikom zaradi izvedbe konkretnega javnega naročila. Zato je v prvem odstavku 94. člena ZJN-3 navedeno, da mora biti podizvajalec neposredno povezan z javnim naročilom. Izvajalec elektroinštalacijskih del, ki je z izbranim ponudnikom sklenil pogodbo za izvajanja del na določenem objektu, je neposredno povezan z javnim naročilom. Tudi če podizvajalec ne ve, da je vključen v neposredno izvedbo naročila (če torej ne ve, da je posel namenjen naročniku po ZJN-3), je podizvajalec po ZJN-3.

ZJN-2 (15. a točka prvega odstavka 2. člena) ni razlikoval med podizvajalci pri javnem naročanju blaga, storitev ali gradenj. ZJN-3 naročnikom določa obveznosti glede podizvajalcev le pri javnem naročanju gradenj in storitev (drugi odstavek 94. člena ZJN-

3). Dodaja pa, da lahko naročniki ravnajo na enak način tudi pri javnem naročanju blaga (prva alineja osmega odstavka 94. člena ZJN-3).

Podizvajalci so osebe, ki na strani ponudnika sodelujejo pri izvedbi javnega naročila. To pomeni, da so podizvajalci v pogodbenem razmerju s ponudnikom (ZJN-3 v 94. členu uporablja za ponudnika tudi izraz glavni izvajalec). Učinki podizvajalčevega dela pa se kažejo pri izvajanju javnega naročila, torej pogodbe, ki je sklenjena med naročnikom in izbranim ponudnikom. K izvedbi javnega naročila lahko pripevajo poleg ponudnika in njegovih podizvajalcev tudi osebe, ki sodelujejo s podizvajalcem. Teorija in tudi ZJN-3 jih imenuje podizvajalci podizvajalcev ali podizvajalska veriga. Že po ZJN-2 se je postavljalo vprašanje, ali je treba zavarovati tudi podizvajalce podizvajalcev. Enako varstvo podizvajalčevih podizvajalcev bi terjalo od naročnika, da plačuje vsem, ki so prispevali k izvedbi javnega naročila. OZ v 631. členu ne daje enakega varstva podizvajalčevim podizvajalcem. V obligacijskem pravu velja načelo relativnosti. Pogodba ustvarja pravice in obveznosti med strankama pogodbe. Cigoj pojasnjuje, da je za tretje osebe tuje obligacijsko razmerje (pogodba med dvema strankama) le neko pravno dejstvo, v katerega pa nimajo pravice posegati (Cigoj, 1976: 5). Že 631. člen OZ je izjema od načelne ureditve. Poleg tega zagotavljanje enakega varstva celotne podizvajalske verige otežuje poslovanje naročnikov in tudi neposrednih podizvajalcev. ZJN-3 v drugi alineji osmega odstavka 94. člena pojasnjuje, da lahko naročniki zagotavljajo enako varstvo celotni podizvajalski verigi in ne le neposrednim podizvajalcem, a morajo to predvideti v razpisni dokumentaciji.

Tudi povezana družba ponudnika je lahko podizvajalec. Povezane družbe so formalno pravno samostojne osebe, ekonomsko pa niso samostojne. Ob ureditvi varstva podizvajalcev po ZJN-2 je zakonodajalec ocenil, da bi se lahko ponudniki preko svoji povezanih oseb izognili obveznostim iz ZJN-2 do dejanskih podizvajalcev, saj ZJN-2 ni zagotavljal varstva podizvajalski verigi. Zato je šesti odstavek 71. člena ZJN-2 določal, da se za podizvajalca po ZJN-2 ne šteje povezana družba ponudnika (četudi je podizvajalec z njo sklenil pogodbo), ampak podizvajalec povezane družbe. ZJN-3 nima enake določbe. Torej veljajo obveznosti naročnikov iz ZJN-3 tudi za podizvajalce, ki so sicer povezane osebe ponudnika, in ne za podizvajalce povezanih oseb.

3.2 Pogoji na strani podizvajalcev

Čeprav podizvajalec ni pogodbena stranka naročnika, morajo biti tudi na strani podizvajalcev izpolnjeni določeni osebni pogoji.

Vsak podizvajalec mora izpolnjevati pogoje iz prvega, drugega in četrtega odstavka 75. člena ZJN-3 (četrti odstavek 94. člena ZJN-3). To pomeni, da mora izpolnjevati izključitvene pogoje o nekaznovanosti za določena kazniva dejanja, o izpolnjevanju obveznosti za poravnavanje davčnih in drugih obveznosti do države, da ni uvrščen v evidenco z negativnimi referencami (110. člen ZJN-3) in da mu ni bila izrečena globa zaradi prekrška v zvezi s plačilom za delo. Podizvajalci morajo izpolnjevati pogoje iz prvega, drugega in četrtega odstavka 75. člena ZJN-3 že na podlagi ZJN-3, tudi če

naročnik v razpisni dokumentaciji teh pogojev izrecno ne navede. Tudi za podizvajalce je enako kot za ponudnike možen spregled glede izpolnjevanja obveznih pogojev, če je izkazan javni interes, da se vključi določenega podizvajalca (četrti odstavek 94. člena v povezavi s tretjim odstavkom 75. člena ZJN-3).

V četrtem odstavku 94. člena ZJN-3 je navedeno, da naročnik lahko zavrne podizvajalca, če le-ta ne izpolnjuje izključitvenih pogojev iz šestega odstavka 75. člena ZJN-3 (kršitev konkurenčnih pravil, nasprotje interesov, zavajajoče informacije, neupravičeno pridobivanje prednosti). Tudi če teh pogojev naročnik ni opredelil v razpisni dokumentaciji, je na podlagi ZJN-3 upravičen, da zavrne podizvajalca.

Poleg tega lahko naročnik določi druge pogoje za podizvajalce. Pogoje za podizvajalce mora določiti vnaprej v razpisni dokumentaciji. Tudi če ne določi posebnih pogojev za podizvajalce, se v določenih posebnih okoliščinah domneva, da mora podizvajalec izpolnjevati posebne pogoje. Na primer, takrat, kadar razpisna dokumentacija določa pogoje za tistega, ki določena dela dejansko izvaja in je iz ponudbe razvidno, da bo določena dela dejansko izvajal ponudnikov podizvajalec. Če naročnik vnaprej določi pogoje za podizvajalce, jih podizvajalci morajo izpolnjevati.

Če ponudnik že v ponudbi navede, da bo dela izvajal s podizvajalci in tudi navede s katerimi podizvajalci, naročnik preveri izpolnjevanje pogojev na strani podizvajalcev takrat, ko preverja izpolnjevanje pogojev na strani izbranega ponudnika. Ponudniki lahko podizvajalce določijo pozneje, na primer po oddaji ponudbe in tudi po sklenitvi pogodbe o javnem naročilu. Če naročnik ob izbiri ali sklenitvi pogodbe še ni obveščen, da bo na strani ponudnika sodeloval podizvajalec, pogoje preveri takrat, ko ga izbrani ponudnik obvesti o podizvajalcu.

Če ponudnik obvesti naročnika, da bo javno naročilo izvajal s podizvajalcem in naročnik ugotovi, da podizvajalec ne izpolnjuje pogojev (obveznih ali pogojev, ki jih je naročnik določil v razpisni dokumentaciji) naročnik zavrne takšnega podizvajalca. V četrtem odstavku 94. člena ZJN-3 je izrecno navedeno, da naročnik zavrne podizvajalca. To pomeni, da naročnik ne zavrne ponudnika in njegove ponudbe, kot to velja za neizpolnjevanje ostalih pogojev. Ponudnik lahko podizvajalca, ki ne izpolnjuje pogojev, nadomesti z novim podizvajalcem. ZJN-3 v četrtem odstavku 94. člena določa, da mora naročnik o zavrnitvi podizvajalca obvestiti ponudnika (glavnega izvajalca) v desetih dneh od prejema predloga.

V četrtem odstavku 94. člena ZJN-3 je navedeno, da lahko naročnik zavrne ponudnikov predlog o podizvajalcu tudi, če bi to lahko vplivalo na nemoteno izvajanje ali dokončanje del. Razumeti je, da lahko zavrne ponudnikov predlog o podizvajalcu tudi takrat, ko podizvajalec izpolnjuje obvezne zakonske pogoje in pogoje, ki jih je določil naročnik. Čeprav je v pogodbah izven javnega naročanja pogosto določeno, da mora izvajalec pridobiti soglasje investitorja, če bo dela namesto izbranega izvajalca izvajal

podizvajalec, odpira določba vrsto vprašanj. Na njeni podlagi lahko pride tudi do neupravičene diskriminacije ponudnikov.

3.3 Obveščanje naročnika o podizvajalcih

Ponudnik lahko že ob oddaji ponudbe navede podizvajalce. ZJN-3 od ponudnikov ne zahteva, da podizvajalce navedejo že v ponudbi. So primeri, ko ob oddaji ponudbe ponudniki še ne vedo ali bodo javno naročilo izvedli sami ali pa bodo v izvedbo vključili podizvajalce. Tudi če vedo, da bodo pritegnili podizvajalce, ob oddaji ponudbe vedno ne vedo, kdo so konkretni podizvajalci.

V posameznih primerih ponudniki izkazujejo izpolnjevanje pogojev in meril s skupnimi ponudbami ali pa z okoliščinami na strani podizvajalcev (10. člen, 81. člen ZJN-3). V takšnih primerih že v ponudbi navedejo konkretne podizvajalce.

Če ponudnik ne navede podizvajalcev v ponudbi, jih lahko naročniku sporoči pozneje. Izbrani ponudnik mora o vsaki spremembi podizvajalca (spremembi glede na navedbe iz ponudbe) ali o novih podizvajalcih obvestiti naročnika v 5 dneh po spremembi (tretji odstavek 94. člena ZJN-3). Razumeti je, da sprememba pomeni sklenitev pogodbe z novim podizvajalcem. Takrat mora naročniku tudi posredovati podatke in dokumente o podizvajalcih.

V ponudbi ali po sklenitvi pogodbe s podizvajalcem mora ponudnik posredovati naročniku (drugi odstavek 94. člena ZJN-3):

- kontaktne podatke o podizvajalcu (vsaj firmo in naslov) in njegovem zakonitem zastopniku,
- opis dela javnega naročila, ki ga bo izvajal določeni podizvajalec,
- enotni evropski dokument v zvezi z oddajo javnega naročila (ESPD) iz 79. člena ZJN-3 za podizvajalca,
- zahtevo podizvajalca za neposredno plačilo, a le, če podizvajalec to zahteva (glejte 6. točko komentarja tega člena).

V kolikor ponudnik (glavni izvajalec) krši obveznost obveščanja o podizvajalcih ali katero od ostalih obveznosti iz 94. člena ZJN-3 mora naročnik podati predlog za uvedbo postopka o prekršku (sedmi odstavek 94. člena ZJN-3).

3.4 Obveznost naročnika, da plača podizvajalcu

V prvem poglavju prispevka je navedeno, da so v teoriji podani različni odgovori na vprašanje ali je ZJN-2 določil takšne obveznosti naročnikov in ponudnikov, da ob izpolnitvi teh obveznosti nastopi naročnikova obveznost neposrednih plačil podizvajalcem. Po ZJN-2 je bilo torej odprto vprašanje ali mora naročnik namesto izbranemu ponudniku, plačati podizvajalcu.

V primerjavi z ZJN-2 je ZJN-3 v 94. členu spremenil ureditev o neposrednih plačilih podizvajalcem pri pogodbah o javnem naročanju. Nesporno je, da ZJN-3 ne vzpostavlja sistema, po katerem bi v pogodbah o javnem naročanju avtomatično veljalo, da naročniki plačujejo podizvajalcem, namesto svojim pogodbenim strankam – izbranim ponudnikom. V drugem in petem odstavku 94. člena ZJN-3 je določeno, da mora naročnik plačati podizvajalcu le, če podizvajalec to zahteva in če podizvajalec to zahteva na način iz ZJN-3. V zakonodajnem gradivu za sprejem ZJN-3 je glede podizvajalcev navedeno, da zakon zagotavlja večjo transparentnost v podizvajalski verigi, obveščanje o tem, kdo je na gradbišču in odgovornost glavnega izvajalca za posredovanje informacij.[22]

Podizvajalec, tudi podizvajalec iz pogodb o javnem naročanju, lahko zahteva neposredno plačilo od glavnega izvajalca (izbranega ponudnika po pravilih javnega naročanja) tudi po pogojih iz 631. člen OZ. Če podizvajalec zahteva plačilo od naročnika, če je podizvajalčeva terjatev do glavnega izvajalca/ponudnika dospela, če je terjatev glavnega izvajalca/ponudnika do naročnika dospela, če se obe terjatvi nanašata na ista dela in če je podizvajalčeva terjatev do glavnega izvajalca/ponudnika s strani le-tega pripoznana, naročnik mora plačati podizvajalcu in ne svoji pogodbeni stranki – glavnemu izvajalcu/ponudniku.

Po spremenjenih pravilih o plačilih podizvajalcem iz ZJN-3 mora podizvajalec zahtevati neposredno plačilo. Po 631. členu OZ zahteva plačilo od naročnika, ZJN-3 pa ne pojasni od koga zahteva podizvajalec plačilo. Razumeti je, da bi naj ponudnik svojega morebitnega podizvajalca vprašal, ali bo zahteval neposredno plačilo od naročnika po ZJN-3. Če podizvajalec to zanika, ponudnik nima obveznosti iz petega odstavka 94. člena ZJN-3. Ponudnik obvesti naročnika, da del naročila izvaja s podizvajalcem, navede le kontaktne podatke o podizvajalcu in pošlje obrazec ESPD za podizvajalca. Podizvajalec bo lahko kasneje zahteval neposredno plačilo od naročnika po pogojih 631. člena OZ. Predvidevati je mogoče, da se bodo v vrsti primerov ponudniki raje odločali za podizvajalce, ki ne bodo zahtevali od ponudnikov, da le-ti izpolnijo obveznosti iz ZJN-3 glede plačil podizvajalcem.

V petem odstavku 94. člena ZJN-3 je določeno, da posebne obveznosti naročnika in glavnega izvajalca (ponudnika) nastopijo le, če podizvajalec zahteva plačilo v skladu in na način, določen v drugem in tretjem odstavku 94. člena ZJN-3. Drugi in tretji odstavek 94. člena ZJN-3 o tem ne govorita (o načinu, kako bi naj podizvajalec zahteval neposredno plačilo).

Razumeti je, da bi naj podizvajalec najprej izjavil ponudniku (glavnemu izvajalcu), da bo zahteval neposredna plačila od naročnika. V takšnem primeru mora ponudnik (glavni izvajalec) zagotoviti sledeče:

1. Ponudnik/glavni izvajalec mora v pogodbi o javnem naročilu pooblastiti naročnika, da na podlagi potrjenega računa oziroma situacije (potrjenega s strani ponudnika) neposredno plačuje podizvajalcu.

2. Podizvajalčevo soglasje, da naročnik namesto ponudnika/glavnega izvajalca plača podizvajalcu.

3. Ponudnik/glavni izvajalec mora svojemu računu ali situaciji priložiti račun ali situacijo podizvajalca, ki ga je predhodno potrdil.

Prvo in drugo obveznost lahko ponudnik zagotovi ob sklenitvi pogodbe o javnem naročilu, seveda le, če takrat že ima podizvajalca, ki zahteva plačilo od naročnika. Svojemu računu bo ponudnik priložil potrjen račun podizvajalca tekom izvajanja pogodbe o javnem naročilu. Račun podizvajalca bi naj potrdil, če bo zahtevek podizvajalca iz računa utemeljen, torej če bo podizvajalec pravilno izpolnil svojo obveznost.

ZJN-3 ne določa plačilnih rokov, kar pomeni, da so lahko plačilni roki za terjatve podizvajalca daljši kot plačilni roki za terjatve ponudnika. Prav tako ne predvideva primerov, ko naročnik ne potrdi računa podizvajalca. Zavrnitev je lahko utemeljena ali neutemeljena. Vse opisane okoliščine so za zagotovitev neposrednih plačil podizvajalcem pomembne.

Vse tri ponudnikove obveznosti iz ZJN-3 so enake, kot so bile določene v ZJN-2 (ZJN-2 ni določal, da se podizvajalec izreče ali zahteva neposredno plačilo). Vprašanje ostaja zato enako: ali mora naročnik po izpolnitvi vseh treh pogojev plačati neposredno podizvajalcu?

Tisti, ki zagovarjajo stališče, da mora naročnik po izpolnitvi vseh treh pogojev plačati neposredno podizvajalcu, obveznost argumentirajo s pravili o asignaciji (Hrastnik, 2011: 1142 in 1143). Gospodarski pomen asignacije je ta, da se s plačilom enega dolga poplačata dva dolga. Pri asignaciji dolžnik (asignant) pooblasti svojega upnika (asignata), da le-ta namesto njemu, izpolni določeni tretji osebi (asignatarju). Ta tretja oseba je s strani asignanta izbrana zato, ker je asignantov upnik oziroma bi naj bila asignantov upnik. Enake ekonomske cilje kot asignacija (z enim poslom doseči prenehanje več obveznosti) zagotavljajo tudi drugi pravni posli (cesija, odpust dolga, prevzem izpolnitve). Pravni učinki so seveda različni. Potem, ko so vzpostavljene pravice in obveznosti iz asignacije, pridobi asignatar direktni zahtevek do asignata (asignantov upnik pridobi zahtevek do asignantovega dolžnika). V primerjavi z ostalimi posli je asignatarjev položaj ugodnejši zato, ker je njegova terjatev abstraktna glede na temeljni posel med asignantom in asignatom. Četudi asignat ne bi dolgoval asignantu ali asignat ne bi dolgoval asignantu zneska v določeni višini, lahko asignatar od asignata terja znesek iz asignacije in mu ga je asignat dolžan plačati. Abstraktna narava asignatove obveznosti je torej poglavitna prednost asignacije za upnika – asignatarja.

Za nastanek pravic in obveznosti iz asignacije (za terjatev asignatarja do asignata) morajo torej biti izpolnjeni pogoji iz 1035. in 1036. člena OZ:

- ena oseba (asignant) mora pooblastiti drugo osebo (asignata), da naj na njen račun plača določeni tretji osebi (asignatarju),
- asignatar mora biti s strani asignanta pooblaščen za sprejem te izpolnitve,
- asignat mora asignatarju izjaviti, da sprejema asignacijo.

Izpolnjene obveznosti po ZJN-3 ne izpolnjujejo pogojev iz 1035. do 1049. člena OZ o asignaciji (nakazilu).[23] Ni izpolnjen pogoj o dvojni pooblastitvi iz 1035. člena OZ, prav tako z izpolnitvijo teh obveznosti še ni podana asignatova izjava o sprejemu nakazila iz 1036. člen OZ. Predvsem pa je morebitna vzpostavitev pravnih razmerij iz asignacije neprimerna. Če bi bila vzpostavljena razmerja iz asignacije, bi to med drugim pomenilo, da bi moral naročnik plačati podizvajalce, morebitnih napak ali drugačnih kršitev pogodbe pa od podizvajalcev ne bi mogel uveljavljati. Podizvajalce bi moral plačati, četudi bi ob dospelosti te obveznosti bilo nesporno, da je bila pogodba o javnem naročilu kršena.

ZJN-3 v prehodnih in končnih določbah, v 116. členu, določa izvedbene predpise ZJN-2, ki prenehajo veljati z uveljavitvijo ZJN-3. Uredbe o neposrednih plačilih podizvajalcu pri nastopanju ponudnika s podizvajalcem pri javnem naročanju iz leta 2007 (ko še ni veljala ureditev, ki je delno povzeta v ZJN-3 in je bila podlaga za sprejem uredbe bistveno drugačna) ne navaja. Uredba je prenehala veljati že 2010 z uveljavitvijo novele ZJN-2B, a se je uporabljala še naprej. ZJN-3 tudi ne določa, da bi naj bil sprejet poseben izvedbeni predpis glede neposrednih plačili podizvajalcem.

4 Izjava ponudnika o poravnavi obveznosti do podizvajalcev

Šesti odstavek 94. člena ZJN-3 nalaga obveznosti ponudnikom po izvedbi javnega naročila. Navedeno je, da obveznosti veljajo le za primer, ko ne velja neposredno plačilo podizvajalcem po 94. členu ZJN-3. V 60 dneh po prejemu plačila (torej končnega plačila) mora ponudnik/glavni izvajalec javnega naročila poslati naročniku izjavo, da je plačal podizvajalce. Tej izjavi mora priložiti izjavo podizvajalca oziroma podizvajalcev, da so prejeli plačilo za njihovo del izvedbe javnega naročila. Obveznost je sankcionirana v kazenskih določbah ZJN-3 (112. člen).

5 Sklep

Pogodbe o javnem naročanju imajo, skorajda brez izjeme, civilnopravno naravo. Naročnikom omogočajo pridobivanje blaga, storitev in oddajo gradenj, torej vsega kar potrebujejo za izvajanje oblastnih in drugih javnih funkcij. Naročniki izvajajo dejavnosti v javnem interesu. Posamezni nakupi blaga, oddaje storitev in gradenj pa naj ne bi izkazovali javnega interesa naročnikov. Pravila o javnem naročanju naj bi zagotovila, da naročniki pri oddaji javnih naročil uveljavljajo enake interese oziroma izbirajo svoje pogodbene stranke po enakih merilih kot gospodarski subjekti.

Zadnja reforma javnega naročanja na ravni EU v primerjavi s starejšimi stališči omogoča tudi v javnem naročanju uveljavljanje javnih interesov, seveda pod omejenimi pogoji (Arrowsmith, 2014: 631). S tega vidika so spremenjena pravila o dovoljenih pogojih in merilih za izbiro pogodbenih stran naročnikov, saj izrecno dovoljujejo tudi tako imenovane socialne in okoljske pogoje oziroma merila. Tudi zaščita malih in srednjih podjetij ter podizvajalcev je pogojena z uveljavitvijo javnega interesa. V tej zvezi so smiselne zahteve po ureditvi, ki bi onemogočala konkuriranje za javna naročila tistim gospodarskim subjektom, ki ne izpolnjujejo svojih pogodbenih obveznosti, torej obveznosti do naročnikov in tudi do svojih pogodbenih strank oziroma podizvajalcev. Zavezati osebe javnega prava oziroma naročnike k obveznostim, ki so tuje splošnim pravilom pogodbenega prava, pa ima lahko vrsto negativnih posledic, tudi takšnih, ki izničijo svoj namen. To velja tudi za obveznosti naročnikov do podizvajalcev.[24]

Notes

[1] Obligacijski zakonik, OZ, Uradni list RS, št. 83/2001, 28/2006 – odl. US, 32/2004, 40/2007.
[2] Določbe 631. člena OZ o neposrednih plačilih podizvajalcem so po vsebini enake kot prej veljavne določbe 612. člena Zakona o obligacijskih razmerjih, ZOR, Uradni list SFRJ, št. 29/1978, 39/1985 in 57/1989.
[3] Višje sodišče v Ljubljani, I Cpg 1261/2015, z dne 9. 2. 2016, je pojasnilo, da se za izjavo o pripoznanju zahteva strožja, to je pisna oblika.
[4] Posebne gradbene uzance, Uradni list SFRJ, št. 18/1977.
[5] FIDIC – kratica za Fédération Internationale des Ingénieurs-Conseils oziroma Mednarodno zvezo svetovalnih inženirjev, s sedežem v Lozani, Švica.
[6] Rdeča knjiga FIDIC (po barvi platnic tiskane izdaje) je skrajšano ime za Pogoji gradbenih pogodb za gradbena in inženirska dela, ki jih načrtuje naročnik (Conditions of Contract for Construction. For Building and Engineering Works designed by the Employer. CONS).
[7] Rdeča knjiga FIDIC v členu 14.12 določa: When submitting the Final Statement, the Contractor shall submit a written discharge which confirms that the total of the Final statement represents full anf final settlement of all moneys due to the Contractor under or in connection with the Contract.
[8] Enako o plačilih Bunni, 2013: 547.
[9] Po Rdeči knjigi FIDIC se potrdilo o končnem plačilu izda po zaključku del, po OZ in Posebnih gradbenih uzancah se končna situacija izda ob izpolnitvi pogodbe.
[10] Tako je odločilo tudi hrvaško sodišče na podlagi enakega pravila, kot je 631. člen OZ. Navedlo je, da ni mogoče domnevati konkludentnega pripoznanja s tem, ko naročnik izstavi situacijo in v tej situaciji obračuna tudi dela, ki jih je izvedel podizvajalec. Pojasnilo je, da mora biti pripoznanje v zvezi z neposrednimi zahtevki podizvajalcev do naročnikov nedvomno in nesporno. VSRH Rev 1362/1996-2, 21. 2. 2011.
[11] Zakon o spremembah in dopolnitvah Zakona o javnem naročanju, ZJN-2B, Uradni list RS, št. 19/2010.
[12] Podrobno o pravilih ZJN-2 (ZJN-2, noveli ZJN-2B) o plačilih podizvajalcem, tudi o različnih stališčih v pravni teoriji (Kranjc, 2014: 95-).
[13] Višje sodišče v Celju, Cpg 150/2014, z dne 8. oktobra 2014.
[14] Višje sodišče v Ljubljani, I Cpg 509/2015, z dne 2. 12. 2015, je pojasnilo, da mora biti razlaga, ali je asignat nakazilo sprejel, stroga in restriktivna.
[15] Višje sodišče v Ljubljani, II Cp 2304/2014, z dne 11. 2. 2015, Višje sodišče v Kopru, I Pg 1752/2013, z dne 2. 12. 2015.

[16] Glede vprašanja o obveznosti neposrednih plačil po ZJN-2 je bila s sklepom Vrhovnega sodišča dopuščena revizija, VSRS sklep III DoR 10/2015, z dne 5.5.2015.
[17] Uradni list RS, št. 66/2007.
[18] Direktiva 2014/24/EU Evropskega parlamenta in Sveta z dne 26. februarja 2014 o javnem naročanju in razveljavitvi Direktive 2004/18/ES, UL L št. 94 z dne 28. 3. 2014, str. 65.
[19] Sodba Sodišča (veliki senat), C-47/07 P, Masdar (UK) Ltd proti Komisiji Evropskih skupnosti, z dne 16. decembra 2008. Naročnik storitev je bila Evropska komisija, podizvajalec pa družba Masdar, katera ni dobila plačila od glavnega izvajalca oziroma pogodbene stranke naročnika. Sodišče je pri odločanju uporabilo pravila oziroma načela, ki so skupna vsem pravnim redom držav članic. Sodišče ni odločalo na podlagi pravila, kot je 631. člena OZ, ki podizvajalcu ob izpolnjevanju določenih pogojev priznava pravico zahtevati plačilo neposredno od naročnika. Sodišče je odločilo, da v primeru, ko pogodbena stranka oziroma izvajalec ne plača podizvajalcu, le-ta nima zahtevka do naročnika. Tega zahtevka nima na podlagi instituta neupravičene obogatitve, saj niso izpolnjeni pogoji (ni izpolnjen pogoj o neobstoju pogodbenega temelja). Zahtevek podizvajalca je zavrnilo tudi na podlagi načela varstva legitimnega interesa.
Podrobneje o odločitvi (Williams, 2010: 555-; Prostor, 2011: 823-).
[20] Podrobno o primerjalno pravni ureditvi neposrednih plačil podizvajalcem (Hrastnik, 2014).
[21] Zakon o javnem naročanju, ZJN-3, Uradni list RS, št. 91/2015.
[22] EVA: 2015-3130-0001, predlog Zakona o javnem naročanju, točka 2.2. Socialni vidiki novih pravil.
[23] Podrobno o asignaciji Vrenčur v (Juhart & Plavšak, 2004: 1077-).
[24] UNCITRAL Legal Guide on Drawing Up International Contracts fort he Construction of Industrial Works, 1988, stran 138 opozarja, sicer v zvezi s pogodbenimi dogovori o neposrednih plačilih podizvajalcem, da lahko imajo takšna razmerja negativen vpliv tako na razmerje med naročnikom in izvajalcem kot tudi na razmerje med izvajalcem in podizvajalcem.

Reference

Arrowsmith, S. (2014) The Law of Public and Utilities Procurement: Regulation in the EU and UK (London: Sweet & Maxwell, Thomson Reuters).
Bunni, N. G. (2013) The FIDIC Forms of Contract, 3rd ed. (Oxford: Blackwell Publishing).
Cigoj S (1976) Obligacije, sistem splošnega obligacijskega prava v teoriji, sodstvu in primerjalnem pravu (Ljubljana: Časopisni zavod Uradni list SR Slovenije).
Hrastnik, B. (2011) Ureditev neposrednih plačil podizvajalcem, Podjetje in delo, 37(6/7), 2011, pp. 1135-1145. Dnevi slovenskih pravnikov 2011 od 13. do 15. oktobra, Portorož
Hrastnik, B. (2014) Neposredni zahtevki podizvajalcev ob stečaju glavnega izvajalca, doktorska disertacija (Ljubljana: Pravna fakulteta Ljubljana).
Juhart, M. & Plavšak, N. (2004) Obligacijski zakonik s komentarjem, posebni del, 4. knjiga (ur), (Ljubljana: GV Založba).
Kranjc, V. (2014) Neposredna zahteva podizvajalcev do naročnika pri razmerjih, ki izhajajo iz javnih naročil, Pravosodni bilten, 35(1), pp. 95-118.
Prostor, J. (2011) Zahtevek podizvajalca do naročnika posla, Podjetje in delo, 37(5), pp- 823-835.
Vukmir, R. (2009) Ugovori o građenju i uslugama savjetodavnih inženjera (Zagreb: RRiF-plus)
Williams, R. (2010) Case C-47/07, Masdar (UK) Ltd v. Commission, Judgement of the Grand Chamber of 16 Decembe 2008, and Case C-446/04, Test Claimants in the FII Group Litigation v. Commissiomers of Inland Revenue, Judgement of the Grand Chamber of 12 December 2006, Common Market Law Review, 47(2), pp. 555-573.
UNCITRAL Legal Guide on Drawing Up International Contracts fort he Construction of Industrial Works, (1988), (New York: United Nations.

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Certan Open Issues Regarding the Refusal of Enforcement Under the Brussels I Regulation in Slovenia

JERCA KRAMBERGER ŠKERL

Abstract The article focuses on some of the open issues that come to light when combining the Slovenian national law and the recast Brussels I Regulation, especially regarding the first instance procedure for deciding on an application for refusal of enforcement under Article 46 of the Regulation, and the manner of adapting a measure or an order that is not known in the law of the Member State addressed under Article 54 of the Regulation.The author draws attention to the inappropriate notifications of the Slovenian authorities regarding the jurisdiction of the national courts concerning different stages of procedure for refusal of enforcement under the recast Regulation. On the basis of the comparison with other EU Member States, she proposes that Slovenia modifies these notifications, so as to determine the jurisdiction of the district court to deal with the application for refusal of enforcement, and the jurisdiction of appellate courts and the Supreme Court for further appeals. The author further suggests the omission of the second appeal, which is not obligatory under the Regulation, and the jurisdiction of the Supreme Court for the (first) appeal, so as to preserve the coherence of the Slovenian system of recognition and enforcement of foreign judgments.Regarding the adaptation of foreign measures, the author proposes that a specialized national authority be entrusted with this task, so as to ensure uniform solutions and facilitate the work of the enforcement authorities. The procedure of adaptation should be commenced by the enforcement authority dealing with enforcement in the case at hand, as it would be too big of a burden for the creditors to realize that adaptation is needed, to demand it and maybe even propose the appropriate way of adapting the foreign measure. The Slovenian legislator will have to define the place of the adaptation proceedings within the enforcement proceedings and determine whether an appeal is possible only when adaptation was carried out or also when it was refused.

Keywords: • exequatur • enforcement of judgments • adaptation of measures • Brussels I regulation • recast Brussels I regulation • Brussels I bis regulation • abolition of exequatur • refusal of enforcement • application for refusal of enforcement • Slovenia

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1 Introduction

In December 2012 the legislatures of the European Union (hereinafter: the EU) adopted the recast Brussels I Regulation.[1] The main reason for the recast of the Regulation was the wish to abolish the obstacles to the "free circulation of judgments"[2] between the Member States, which had been articulated many times since the end of the 1990s in the gatherings of the highest political representatives of the EU.

At the time of the recasting of the Brussels I Regulation, several regulations (the co-called "second generation regulations")[3] were already in force in the EU that abolished the verifications of judgments from other Member States and provided for the equal treatment of such judgments and domestic judgments (except in the case of irreconcilable judgments). The leap to the abolition of exequatur in all civil and commercial matters was therefore not self-evident, but was expected (at some time in the future).

In 2010, only eight years after the entry into force of the Brussels I Regulation of 2000,[4] the Commission presented the proposal for the recast of the Regulation[5], in which a similar system of the cross-border effect of judgments was foreseen as in the aforementioned Regulations, complemented by the limited possibility of asserting the most serious procedural infringements also in the state of enforcement. However, the consultation process on the basis of the mentioned proposal showed that the Commission acted (at least) too quickly. The stakeholders deemed that it was not (yet) time for such a radical step and that the state of enforcement should maintain a broader possibility of control of the possible grounds for refusal of recognition or enforcement.

We could say that the text that was finally adopted in 2012 is a compromise between the political wishes (the Commission's proposal) and the legal reality, or, with the words of Marta Requejo Isidro, it is "somewhere between renewal and continuity" (Requejo Isidro, 2014: 2). And, as often happens, the compromises, especially in the procedural field, which demands a great degree of precision and a coherent system, open new questions and new problems, despite numerous positive novelties. Above all, the Brussels I Recast, although being a regulation and thus directly applicable, it often cannot be applied in practice without the implementing provisions of the national law that it requires either expressly or indirectly (i.e. by not regulating a certain issue).[6] Combining the Regulation with 28 national legal systems will sometimes be hard work; it will inevitably require modifications and amendments of the national legislations, and, most probably, some unacceptable differences in application will occur that will have to be remedied by the Court of Justice of the European Union (hereinafter the CJEU).

This article focuses on some of the open issues that come to light when we try to combine the Slovenian national law and the recast Regulation, especially regarding the first instance procedure for deciding on an application for refusal of enforcement under Article 46 of the Regulation, and the manner of adapting a measure or an order that is not known in the law of the Member State addressed (i.e. the state of enforcement) under Article 54 of the Regulation. Hopefully, the Slovenian legislature will soon devote more attention

to these (and other open) issues, since it is clear that much larger implementation in the national law will be necessary than that which Slovenia undertook regarding the Regulation of 2000.

At time of writing of this article (June 2016), Slovenia notified the Commission with the jurisdiction of courts regarding the remedies under the recast Regulation. However, no adaptations of the Slovenian legislation have yet been made. It is true that the new provisions on the recognition and enforcement of judgments did not start to apply at the very moment of the entry into application of the recast Regulation on 10 January 2015, since they only apply to judgments issued in proceedings started after that date (it does not suffice for the judgment to be issued after that date) (Article 66),[7] but there is no more time for hesitation.

2 Procedure for deciding on an application for refusal of enforcement

2.1 The original manner of abolishing exequatur in the Brussels I Recast

The crucial changes in the recast Regulation can be found regarding the enforcement of judgments from other Member States. Under the Regulation of 2000, the creditor had to start a special procedure at the district court (Sl. okrožno sodišče) in view of obtaining a declaration of the enforceability of the judgment (exequatur), which was a prerequisite for the enforcement of such judgment (Article 38/1). This procedure was unilateral (ex parte) (Article 41) and the defendant was only notified of its result (i.e. the granting of exequatur) (Article 42). The defendant then could file an appeal (Sl. ugovor)[8] against the declaration of enforceability, which was again decided upon by the district court (Article 43) and discussed inter partes. Another appeal (Sl. pritožba)[9] was possible against such decision of the district court and could be filed at the Supreme Court of the Republic of Slovenia (hereinafter: the Supreme Court) (Article 44). An application for the enforcement of the judgment (Sl. predlog za izvršbo)[10] could only be filed once the decision in the described proceedings became final (Article 38).

The recast Regulation abolished the declaration of enforceability. However, exequatur was not abolished in the same way as in the so-called "second generation" regulations (e.g. in the European Enforcement Order Regulation). Contrary to those regulations, which determine (almost) all possibilities for objecting to the cross-border enforceability of the judgment in the state of origin of the judgment, under the Brussels I Recast the debtor can assert grounds for the refusal of enforcement in the state of enforcement (Article 45 and 46).[11] It is thus of utmost importance to distinguish between the "abolition of exequatur" in the "second generation" regulations and the "abolition of exequatur" under the Brussels I Recast. We could say that under the latter, exequatur was abolished in the narrow sense of the word, i.e. only the granting of the declaration of enforceability[12] was abolished. The possibility of verification of the grounds for refusal of enforcement in the state of enforcement remains, however, under different procedural rules.

Under the recast Regulation, the debtor can assert, in the state of enforcement, all grounds for refusal of enforcement (or recognition) that could be asserted under the Regulation of 2000, with one additional ground being a violation of the protective jurisdiction in employment matters. These grounds are: a manifest contradiction with the substantive and procedural public policy[13] of the state of enforcement, inadequate service of the introductory document in the proceedings, the irreconcilability of judgments, and a violation of the most important rules on the regulation of international jurisdiction (i.e. exclusive jurisdictions and protective jurisdictions when the defendant is the weaker party) (Article 45).

2.2 Verification of the grounds for refusal of enforcement in separate proceedings or (also) together with the grounds for refusal of enforcement under national legislation?

Under Recital 30 of the Regulation, the debtor "should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law". The national grounds for refusal of enforcement should thus be available to the debtor at the stage where he/she will be able to assert grounds from the Regulation.[14] It seems that a special procedure for invoking the grounds from the Regulation should be necessary,[15] but it should be possible to invoke the grounds for refusal under national legislation (also) in that procedure. An important argument for the requirement of a special procedure is also that the same procedure should be available regarding an application for refusal of recognition (Article 45/4).[16]

The recital is, however, not a binding provision of the Regulation. Thus, Gascón-Inchausti deems that, under Article 47/2, three options are open for Member States as to the manner in which the courts verify the existence of grounds for refusal under the Regulation: first, as a so-called incidental question in the enforcement proceedings, second, as a question decided on together with the objections to enforcement under national law, or third, as a separate procedure independent of the enforcement procedure (Gascón-Inchausti, 2014: 243, also 223). In Mankowski's opinion it would be contrary to procedural economy if the debtor were forced to start two proceedings if he/she wanted to assert grounds for refusal of different origin, i.e. from the Regulation and from the national law.[17] The same author argues that the fact that the court cannot verify the existence of grounds for refusal on its own motion does not exclude the possibility of Member States regulating the procedure for the refusal of enforcement as preliminary verification in enforcement proceedings and that no obligation ensues from the Regulation for States to create a specific remedy only for the refusal of enforcement.[18]
Slovenia determined that the district courts have jurisdiction for deciding on an application for refusal of enforcement under the Regulation, whereas the local courts (Sl. okrajna sodišča) have jurisdiction as to enforcement stricto sensu. Thus, the grounds for refusal of enforcement from the recast Regulation cannot be asserted otherwise than in a separate procedure, independently from the grounds for refusal of enforcement under the national law. This solution seems reasonable, since enforcement proceedings, as currently

regulated in the Slovenian legislation, are not appropriate for resolving the complex legal issues common in the verification of foreign judgments,[19] even though, contrary to the majority of EU Member States, enforcement is entrusted to courts and not to non-judicial authorities.[20] This is also consistent with the Slovenian legal tradition of district courts having competence to deal with foreign judgments. Unified case law can also probably be better ensured by the 11 Slovenian district courts with, in principle, more experienced judges than by the 22 local courts.[21]

Furthermore, the procedure for deciding on an application for refusal of enforcement under the Regulation has a non-suspensive nature, i.e. the enforcement proceedings should, in principle, be conducted without regard to the filing of an application for refusal under the Regulation. This ensues[22] from Recital 31 and from Article 44, which provides that the court may, when an application for refusal of enforcement is filed, limit enforcement to protective measures; it may condition the enforcement by the payment of a security, or fully or partially suspend the enforcement. The debtor thus may demand any of these measures; however, the court is not obliged to follow such requests and can pursue enforcement despite the parallel procedure regarding the application for refusal of enforcement. Hovaguimian warns of the possibility that the (non)suspensive nature of the application and appeals will be regulated very differently by the Member States so that in some States the creditor will be satisfied within "mere days after the service of the certificate […] and only at the end of a third-instance appeal in others." (Hovaguimian, 2015: 236). In our opinion, the wording of the regulation prevents the Member States from excluding the possibility of suspension, as well as from providing for automatic suspension triggered by the procedure for the refusal of enforcement under the Regulation; however, within these limits, different regulations are obviously possible.

As to the possibility of raising the refusal of enforcement as an incidental question in enforcement proceedings, contrary to recognition (Article 36/3), no binding article of the Regulation speaks of such a possibility. Furthermore, if a negative conclusion to proceedings for the refusal of enforcement is not a prerequisite for enforcement (given the abolition of exequatur and the non-suspensive nature of the procedure for the refusal of enforcement), we can hardly speak of an incidental question, i.e. a question upon which the decision of the court in the principal matter depends. Recognition as an incidental question in enforcement proceedings is currently possible under the Slovenian national legislation (the PILPA),[23] since no enforcement is possible without a decision on recognition. Therefore, this solution cannot be transferred to verification of the grounds for refusal under the recast Regulation. It is interesting to note that even under the Regulation of 2000, the verification of the grounds for refusal of enforcement as an incidental question in enforcement proceedings was not possible,[24] even though enforcement was not possible without a declaration of enforceability.

2.3 Procedure for deciding on an application for refusal of enforcement: ex parte (unilateral) or inter partes (adversarial)?

The recast Regulation does not provide an answer to the question of whether procedure for deciding on an application for refusal of enforcement is a unilateral (ex parte) procedure or an adversarial procedure, i.e. to the question of whether the opposing party, the creditor, can participate at that stage of the proceedings. Under Article 47/3, the court can, in certain cases, require the other party to provide a copy of the judgment and, where necessary, a translation or transliteration thereof. This could indicate the participation of the creditor at this stage of the proceedings. However, under Article 49, both parties can file an appeal against the decision on the application for refusal of recognition and, according to the notifications Slovenia made to the Commission, district courts have jurisdiction for such appeal. The same court thus has jurisdiction to decide first on an application for refusal of jurisdiction, and second, on an appeal against the decision on the application for refusal of jurisdiction. Further appeal under Article 50 can be filed in Slovenia at the Supreme Court. Thus it seems the intention was to preserve the system with a first ex parte stage, a second adversarial stage before the same court, and a third (adversarial) stage at the Supreme Court, first adopted in the Slovenian PILPA and then mirrored in the Brussels I Regulation of 2000.

Such solution was appropriate under the Regulation of 2000, where the first stage of the proceedings for the declaration of enforceability was unilateral and where the court verified the existence of the grounds for refusal only in the second stage of the proceedings (when deciding on the debtor's appeal). In the first stage, the court only controlled some formal requirements and the participation of the debtor was not necessary. In the second stage, when the court would verify the grounds for refusal asserted by the debtor, both parties participated, so the court could decide on the basis of the allegations and proofs provided by both of them.

However, under the recast Regulation, wherein the first stage under the Regulation of 2000 is abolished, the proceedings actually start at the former second stage (the second stage under the Regulation of 2000 became, to a substantial degree, the first stage under the recast Regulation). Contrary to the Regulation of 2000, procedure possibly leading to the refusal of enforcement is started by the debtor (by an application for refusal) and no longer by the creditor. The court will thus right away, on the basis of the debtor's application, verify the existence of the grounds for refusal. It does not seem sensible from the point of view of either time or costs (not to mention the burdening of the courts) that the same court does so first only with the participation of the debtor, and later once more with the participation of both parties. The only advantage we can see in such a system would be the possibility of the court rejecting the manifestly ill-founded applications without the participation of the creditor; however, the debtor can also file an appeal, so even such advantage is questionable. On the other hand, it seems equally not sensible (this would also be quite strange to the Slovenian procedural system) if the same court decided twice in adversarial proceedings in two stages of proceedings on the same subject matter.

According to the information on the E-Justice Portal of the EU,[25] only Lithuania, the United Kingdom (with the exception of Gibraltar), and Slovenia determined that the same court decides on the application for refusal and on the (first) appeal. The vast majority of the Member States notified the Commission of the jurisdiction of first instance national courts for the application for refusal, the jurisdiction of the second instance national courts for the first appeal, and the jurisdiction of the third instance court for the second appeal, if provided. These States most probably all provided for an adversarial procedure from the first stage onwards.[26] Briggs wrote that "the first occasion on which the grounds [for refusal] […] are debated is the inter partes application by the judgment debtor for a refusal of enforcement" and that "Regulation 1215/2012 provides more opportunities for genuine inter partes argument about the recognition or enforcement of the judgment than the Regulation 44/2001 did, which is perhaps surprising."[27]

2.4 Possible solutions de lege ferenda

The current Slovenian determination of jurisdiction for the different stages of the proceedings under the recast Regulation seems inappropriate. It would be better to follow the example of the vast majority of Member States and notify the Commission of the jurisdiction of the district courts for the (adversarial) proceedings for deciding on an application for refusal of enforcement, and the jurisdiction of the courts of higher instances for the appeals.

Regarding the appeals, the best solution, in our view, would be to leave the appellate courts out of the procedure, as this is the case in the recognition procedure under the Slovenian PILPA and in the procedure for the declaration of enforceability under the Regulation of 2000, and just provide one appeal (Sl. pritožba) before the Supreme Court (Sl. Vrhovno sodišče). Namely, the recast Regulation in fact provides for one extra appeal in comparison with the previous version of the Regulation. The previous procedure, which was actually a two-stage procedure, with the first stage divided in two, is now a three-stage procedure, and this is probably the reason why the states must not necessarily provide a second appeal (Article 50). Being that this verification happens at the stage where the judgment is enforceable (and mostly final) in the Member State of origin, it is difficult to find reasons for such extensive possibility of review in the state of enforcement. This is especially true since the court deciding on the second appeal will also be able to suspend or limit the enforcement (Article 51) and thus delay the satisfaction of the creditor until the end of such three-stage proceedings (whereas the Regulation does not set any time limits for the appellate stages to be finished and only states that the first stage must be conducted without delay (Article 48)).[28]

The jurisdiction of the Supreme Court for deciding on the appeal under Article 49 and the renouncing of the second appeal also brings together the advantages of a shorter procedure (only one appeal) and of the unification of the case law through the highest court in the country.[29]

3 The adaptation of a measure or order unknown in the state of enforcement

3.1 The first instance proceedings regarding adaptation

Article 54/1 provides that "if a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests."[30] Recital 28 to the Regulation provides: "[w]here a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State."[31] Article 54/1 also provides that the adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin. The doctrine speaks of the requirement of a "functional equivalence" (Requejo Isidro, 2014: 9).

First, the doctrine emphasises that if the States are free to regulate the manner of adapting foreign measures, they cannot simply refuse to proceed to carry out such adaptation if necessary (and possible).[32] Various authors are especially worried about the very loose regulation of such adaptation in the Regulation.[33] The adaptation of a foreign measure to one existing in the national legal order can namely be a very complex legal question demanding a good knowledge of comparative law and often of a foreign language.

Being that neither the Regulation nor the Slovenian national legislation provide for a different option, the courts with jurisdiction for enforcement proceedings, i.e. the local courts, will, for the time being, have to carry out this task.[34] Timmer mentions the option of establishing a special authority charged with adaptation when needed, which would facilitate the work of the enforcement courts (Timmer, 2013: 138). On the other hand, such a solution could, in the view of that author, put the creditor in the awkward position of having to assess him/herself whether the foreign measure needs adaptation in the state of enforcement and thus the specialised authority should be seised of the matter first (Timmer, 2013: 138). Gascón-Inchausti even argues that the party demanding the enforcement, should, in principle, propose the adaptation; furthermore, such party should also, if necessary, provide the expertise regarding the substance and the effects of the foreign measure in order to justify the proposed adaptation (Gascón-Inchausti, 2014: 229).

We would suggest the adoption in Slovenia of the idea of a specialised authority (e.g. one of the district courts) for two reasons: first, this would facilitate the work of the enforcement courts, which would not have to deal with the adaptation, and second, this would ensure unified case law, which is of crucial importance, as it would be

unacceptable for different courts to transform the same foreign measure into different measures under Slovenian law.

We fully agree with Timmer that it could be very difficult for the creditor to recognise whether adaptation is needed or not. This could, however, be solved in that it would be the enforcing court that would have to start adaptation proceedings before the specialised organ in the event it realised the need for adaptation (without the creditor necessarily losing the possibility of requesting the adaptation him/herself).[35] For example, in England and Wales, Civil Procedure Rule No. 74.11A provides that "[t]he court may make an adaptation order on its own initiative or on an application by any party." The case law of such an adaptation authority would subsequently, naturally, be followed by the enforcement courts, without further referring the same foreign measures to such authority.

Not only the initiative for adaptation, but also the finding of a corresponding national measure should, in our view, be in the hands of the competent national authorities.[36] The idea of the creditor proposing the solution and justifying it seems too harsh on the creditor, but also not in line with the goal of a uniform case law on adaptation of foreign measures and of the reducing of obstacles to the free circulation of judgments in the EU.

3.2 Appeals against a decision on adaptation

Article 54/2 further provides that any party may challenge the adaptation of the measure or order before a court. The doctrine mentions the need for a reasoned decision on adaptation, in order to make the appeal under Article 54/2 possible and efficient.[37] The same as for the commonly accepted rule on the impossibility of the exequatur of a decision on (the refusal of) exequatur,[38] a decision on the adaptation of a foreign measure should not be considered to be a decision capable of producing cross-border effects under the Regulation.[39]

The provision of Article 54/2 on appeals against a decision on adaptation is also very general and Member States will have to not only designate the competent court (at this point, the authority in question must necessarily be a court), but also the scope of such appeal and the procedure for such appeal. Since the question of adaptation is a question of law, the parties will probably be able to assert the erroneous application of substantive law and, naturally, procedural violations at the first instance proceedings on adaptation. The erroneous application of substantive law will consist of either an erroneous understanding of the effects, aims, and interests of the foreign measure or order, or in an erroneous choice of the national measure to replace the foreign one. The national law will also have to determine who is "any party" who can appeal and within what time limits.[40] Fitchen points out that the Regulation is silent on the question of whether an appeal must be possible only in the event a positive decision on adaptation has been taken, or also in cases where adaptation was refused; various authors suggest that a wider interpretation

would be better,[41] and we agree. National law will also have to regulate the interplay between the adaptation proceedings and the enforcement proceedings.[42]

3.3 The need for regulation in national law

The cases where adaption will be needed are not very common, but they will be complicated. It is clear that adaptation proceedings will have to be regulated in the Slovenian national legislation. Although it could be argued that systems where courts are entrusted with the enforcement of civil judgments and the enforcement is divided into the "permission of enforcement" and "actual enforcement"[43] are more suited to incorporating the adaptation into the "permission stage" of the enforcement proceedings,[44] the current organisation and division of tasks at the local courts, as well as the normal course of enforcement proceedings are not suited to coping with such questions. For the time being, there are also no provisions on the jurisdiction for appellate proceedings regarding adaptation, on the time limits for the appeal, or on certain other procedural issues.

Given that the provision of Article 54 allows so much free room for the interpretation of the Member States, there is a great possibility that the CJEU will be called on to set limits to the differences among the national legislations, so as to ensure that the goals of the Regulation are still attained.

4 Conclusion

The recast of the Brussels I Regulation started with great ambition. From the preparatory process, it is evident that the main goal was the abolition of exequatur. The legal doctrine and legal practitioners have, on the whole, doubted the need for such reform, since the system under the Regulation of 2000, even though it was not ideal, worked well and was improving through the case law of the national courts and the CJEU. Since the adoption of the recast Regulation, the legal profession has been unanimous in the opinion that the reform opens at least as many questions as it solves, and that the compromise between the political endeavour of ensuring the "free circulation of judgments" and the protection of fundamental rights in the cross-border movement of judgments in the EU did not fully succeed.[45]

Domestic judgment and judgments from other Member States are still not treated equally. Nevertheless, these differences will, in most cases, not come to light, since the debtor will not always apply for refusal of enforcement (according to the data gathered under the old Regulation, the debtor will do so in a very small percentage of cases).[46] In such cases, the parties will save time and money that otherwise had to be invested in the procedure for the declaration of enforceability under the old version of the Regulation.

Another difference between the old Regulation and the recast Regulation seems important to emphasise: somewhat contradictorily, the recast version leaves national legislatures more free space than the old version, at least regarding the procedure for refusal of enforcement, even though it should be a new step towards the cohesion and unification

of EU private international law. The delegation of the regulation of important procedural questions to national laws could mean a step back from the mentioned goals, since states will inevitably regulate such questions differently.[47] Additionally, this limits the possibility of intervention by the CJEU. Procedural rules must be clear and unequivocal, as well as very precise, and we could question whether the determination of such rules via directive-like provisions in the recast Regulation is the best possibility. We can only agree with the warning of Gascón-Inchausti that, being that so much freedom is given to the national legislatures, these have to be very careful to make sure that the "implementation" of the Regulation into the national legislation ensures and supports the progress towards easier cross-border enforcement (Gascón-Inchausti , 2014: 248).

In any case, it is high time for appropriate intervention by the Slovenian legislature, since the provisions of the Regulation on recognition and enforcement are starting to apply. Due to the application of the Regulation only to proceedings started after 10 January 2015, there was some additional time to adapt the national legislations to the Regulation in the field of recognition and enforcement, but also that additional time is running out and the courts and parties need clear procedural solutions.

Notes

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 of 20 December 2012.
[2] Recital 27 of the Recast Regulation.
[3] For example, the European Enforcement Order Regulation (Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 of 30 April 2004).
[4] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001.
[5] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 16 December 2010, COM (2010) 748 final.
[6] The phenomenon of regulations demanding implementation is not new to EU law: see, e.g., (Craig & De Burca, 2008: 278), and the CJEU judgment, C-403/98, Azienda Agricola Monte Arcosu, 11 January 2001.
[7] Gascón-Inchausti deems that since the court of the state of origin of the judgment will issue the certificate from the Annex I, such court will apply its national law regarding the determination of the starting point of the proceedings: (Gascón-Inchausti, 2014: 215). For the application of the national law of the state of origin of the judgment already for the determination of the time of the starting of the procedure under the Regulation of 2000, see (Kramberger Škerl, 2014).
[8] See, e.g., judgment of the Supreme Court of the Republic of Slovenia, No. Cpg 8/2015 of 28 October 2015.
[9] Ibid.
[10] Article 40 of Zakon o izvršbi in zavarovanju [Claim Enforcement and Security Act], Official Gazette of the Republic of Slovenia, No. 3/2007 (consolidated version), with subsequent amendments.

[11] E.g., the certification as a European Enforcement Order requires the court in the state of origin of the judgment to verify a number of conditions (Article 6 of the EEO Regulation), however, further control in the state of enforcement is not possible. On the other hand, the certificate of Annex I to the Brussels I Recast is issued without verifications as to the jurisdiction of the court of origin or the minimal procedural guarantees; the debtor has the possibility to invoke the grounds for refusal of enforcement in the state of enforcement. Cf. (Gascón-Inchausti, 2014: 214).
[12] I.e. the first (ex parte) stage of exequatur proceedings under the Regulation of 2000.
[13] CJEU, Krombach v. Bamberski, C-7/98 of 28 March 2000, and, e.g., (Kramberger Škerl, 2011: 469-472).
[14] Cf. (Domej, 2014: 515).
[15] See e.g. Francq in (Magnus & Mankowski, 2016: 953): "A new procedure is established by the Regulation. It is not mandatory, but conditional upon an application of the person against who enforcement is sought."
[16] Cf. (Requejo Isidro, 2014: 8).
[17] Mankowski in (Rauscher, 2016: 1119).
[18] Mankowski in (Rauscher, 2016: 1117).
[19] It must be noted that in cases where no application for refusal of enforcement is filed, the enforcement court will have to determine if the judgment falls within the scope of the Regulation, which can already be a difficult issue to solve. The majority of the doctrine is namely of the opinion that the fact that the certificate from Annex I was issued in the Member State of origin does not bind the Member State of enforcement regarding the applicability of the Regulation: (Hovaguimian, 2015: 224-226).
[20] Cf. (Hovaguimian, 2015: 221).
[21] Cf. (Kramberger Škerl, 2012).
[22] For such interpretation, see also Mankowski in (Rauscher, 2016: 1117).
[23] Zakon o mednarodnem zasebnem pravu in postopku [Private International Law and Procedure Act], Official Gazette of the Republic of Slovenia, Nos. 56/1999, 45/2008.
[24] See Article 38/1 of the Regulation of 2000 and, a contrario, Article 33/3 on the automatic recognition of judgments.
[25] The information on the courts that have jurisdiction to decide on an application for refusal of enforcement and the legal remedies against the decision on such application are accessible on the European E-Justice Portal: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do?clang=en (accessed on 31 May 2016).
[26] For Germany, see Mankowski in (Rauscher, 2016: 1127) (the author cites Begründung der Bundesregierung zum Entwurf eines Gesetzes zur Durchführung der Verordnung (EU) Nr 1215/2012 sowie zur Änderung sonstiger Vorschriften, BT-Drs 18/823, 22 Zu § 1115 ZPO-E). The obligation to hear the party opposing the application for refusal is regulated in Article 1115/4 (3rd sentence) of the German ZPO. See also (Domej, 2014: 513).
[27] (Briggs, 2015: 687). See also (Hovaguimian, 2015: 238), who speaks about the possibility of limitations of enforcement until the end of the second appellate proceedings, "a limitation that may even stretch for the length of three contradictory proceedings."
[28] Cf. (Hovaguimian, 2015: 217).
[29] Cf. (Domej, 2014: 513, 514).
[30] Gascón-Inchausti argues that Article 54/1 probably originates in the CJEU judgment DHL Express France v. Chronopost SA, C-235/09, 12 April 2011, on the recognition and enforcement of coercive measures (Fr. astreinte) under the Regulation No. 40/1994 (Gascón-Inchausti, 2014: 229). Cf. Kramer in Magnus, Mankowski, p. 970.
[31] As examples where adaptation would be necessary, Hovaguimian cites specific search orders and measures to gather evidence for expert reports: Hovaguimian, p. 230. Gascón-Inchausti mentions the coercive measures (Fr. astreinte) which do not exist in all legal systems or have

different effects in other legal systems and the orders in personam from the British and Irish legal systems: (Gascón-Inchausti, 2014: 229).
[32] Fitchen in (Dickinson & Lein, 2015: 506).
[33] See, e.g., (Timmer, 2013: 137-139); Fitchen in (Dickinson & Lein, 2015: 506).
[34] Cf. Fitchen in (Dickinson & Lein, 2015: 507), Kramer in (Magnus & Mankowski, 2016: 973, 974).
[35] Cf. Fitchen in (Dickinson & Lein, 2015: 507).
[36] Cf. Kramer in (Magnus & Mankowski, 2016: 972).
[37] Fitchen in (Dickinson & Lein, 2015: 507).
[38] Mankowski suggests that the finding of other grounds for refusal except public policy (which can be interpreted differently in each Member State) should actually be recognised in other Member States, so as to ensure that they are interpreted in the same way throughout the EU: Mankowski in (Rauscher, 2016: 1122).
[39] Cf. Fitchen in (Dickinson & Lein, 2015: 508). Mankowski in (Rauscher, 2016: 1120).
[40] Cf. Fitchen in (Dickinson & Lein, 2015: 510).
[41] Authors cited by Fitchen in (Dickinson & Lein, 2015: 510).
[42] Ibid.
[43] E.g. those of Slovenia and Austria. In Germany, on the other hand, the court simply issues an "enforceable judgment", i.e. a copy of the judgment followed by a declaration of enforceability (Vollstreckungsklausel) (Article 724 of the German Zivilprozessordnung [Civil Procedure Act]). The enforcement can be opposed to by an autonomous legal remedy called "opposition to enforcement" (Vollstreckungsgegenklage).
[44] On (the difficulties in) combining the national rules on enforcement and the ones from the Brussels I Regulation, see, e.g., (Ekart & Rijavec, 2010: 142-146). Hovaguimian, on the other hand, argues that also non-judicial authorities entrusted with enforcement are, in most Member States (with the notable exception of Germany) highly qualified lawyers who can also deal with such adaptation, if necessary: (Hovaguimian, 2015: 231).
[45] For more on the non-existence of the relevant arguments for the reform and on the downsides of the new regulation, see, e.g., (Timmer, 2013: 129-147).
[46] Heidelberg Report, No. 52. The study showed that an appeal is lodged in only 1–5% of procedures for the declaration of enforceability.
[47] Hess speaks about a "renationalisation" of the verification of the judgment: (Hess, 2011: 129). Cf. also Mankowski in (Rauscher, 2016: 1125; Hovaguimian, 2015: 242); Cuniberti, Rueda in (Magnus & Mankowski, 2016: 955).

References

Briggs, A. (2015) *Civil Jurisdiction and Judgments*, 6th ed. (Abingdon (Oxon), New York (NY): Informa law from Routledge).
Craig, P. P. & De Búrca, G. (2008) *EU Law, Text, Cases and Materials*, 4th ed. (Oxford: Oxford University Press).
Dickinson, A. & Lein, E. (eds.) (2015) *The Brussels I Regulation Recast*, (Oxford: Oxford University Press).
Domej, T. (2014) Die Neufassung der EuGVVO, Quantensprünge im europäischen Zivilprozessrecht, *Rabels Zeitschrift für auslaendisches und internationales Privatrecht*, 78(3), pp. 508-550, doi: 10.1628/003372514X682685.
Ekart, A. & Rijavec, V. (2010) *Čezmejna izvršba v EU, osrednja tema evropskega civilnega procesnega prava*, (Ljubljana: GV Založba).

Gascón-Inchausti, F. (2014) La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis, In: Guinchard, E. (ed.) *Le nouveau règlement Bruxelles I bis,* pp. 205-248 (Bruylant).

Hess, B. (2011) Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts, *IPrax*, 31(2), pp. 125-130.

Hovaguimian, P. (2015) The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns, *Journal of Private International Law*, 11(2), pp. 212-251, doi: 10.1080/17441048.2015.1068001.

Jenard, P., *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, OJ EC No. C-59/79.

Kramberger Škerl, J. (2011) European public policy (with an emphasis on exequatur proceedings), *Journal of Private International Law*, 7(3), pp. 461-490, doi: 10.5235/jpil.v7n3.461 .

Kramberger Škerl, J. (2012) The Abolition of Exequatur in the Proposal for the Review of Brussels I Regulation, In: Rijavec, V. & Ivanc, T. (eds.). *Cross-border civil proceedings in the EU: (conference papers)*, pp. 127-151 (Maribor: Faculty of Law).

Kramberger Škerl, J. (2014) Uporaba uredbe Bruselj I ratione temporis, *Podjetje in delo*, 40(3/4), pp. 528-543.

Magnus, U. & Mankowski, P. (2016) *Brussels Ibis Regulation, Commentary* (European Commentaries on Private International Law) (Köln: Sellier, Verlag Dr. Otto Schmidt)

Rauscher, T. (ed.) (2016) *EuZPR – EuIPR, Europäisches Zivilprozess- und Kollisionsrecht, Kommentar, Brüssel Ia-VO*, 4th ed. (Köln: Sellier, Verlag Dr. Otto Schmidt).

Requejo Isidro, M. (2014) *Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast): The Abolition of Exequatur*, available at: http://www.ejtn.eu/PageFiles/6333/Requejo_Doc.pdf (June 5, 2016).

Hess, B., Pfeiffer, T & Schlosser, P. (2007) *Report on the Application of the Brussels I Regulation in the Member States ("The Heidelberg Report"): study JLS/C4/2005/03* (Ruprecht-Karls Universität Heidelberg, Institut für ausländisches und internationales Privat- und Wirtschaftsrecht), available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (May 31, 2016).

Timmer, L. J. E. (2013) Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature?, *Journal of Private International Law*, 9(1), pp. 129-147, doi: 10.5235/17441048.9.1.129.

Overview of the Croatian enforcement system with focus on the remedies

IVANA KUNDA

Abstract This chapter is intended to serve as a summary of the most important features related to remedies available in the course of enforcement proceedings before Croatian authorities. It should provide basis for the purpose of comparative study of different EU systems. Main characteristics and legal sources of Croatian enforcement law are identified in the initial section, while the central sections deal with various remedies available throughout the enforcement proceedings.

Keywords: • Croatian law • means of enforcement • remedies against enforcement • territorial jurisdiction • enforcement title • competent bodies • executory debenture • enforceability certification

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1 Outline of the Croatian enforcement system

1.1 Legal sources

The sedes materiae of the Croatian enforcement law is the Enforcement Act (hereinafter: the EA).[1] It is regularly amended, the most recent amendment being currently at the stage of the public consultations on the Draft Proposal.[2] This Act is complemented by several other acts, including the Conducting Enforcement over the Pecuniary Means Act[3] as well as for specific domains the Family Act,[4] the Maritime Code[5] and the Tax General Act[6] which subsidiary refer to the EA as lex generalis. The EA is also subsidiary relying on the rules established in the Civil Procedure Act (hereinafter: the CPA).[7] The rules essentially govern procedural issues related to organisation and structure, competence and functional aspects, as well as substantive issues such as the existence of the claim, the object of enforcement, effects of enforcement of the rights of third parties, priority etc. (Dika, 2007: 6-7). The proceedings for securing claims are also regulated under the EA, but they do not fall within the scope of this chapter.

1.2 Essential features of the system

Civil enforcement is understood as the proceedings in which the coercion, ordered by the Court or the Public Notary, is used against the respondent for the purpose of realisation of the applicant's right.[8] Thus, the sovereignty element in the exercise of the enforcement seems to dominate the conceptual basis of the system. If one were to qualify the Croatian enforcement system under the categories proposed by Hess,[9] it would fall under the broader category of the court-oriented systems, often called by the name of the famous Austrian jurist – the Franz Klein systems. It is also traditionally a centralised system. However, a past decade is witnessing a slight shift away from the strict court-orientation and centralised structure. The three stages were the introduction of the function of Public Notaries into the enforcement procedures in 2005, the introduction of the role of the Financial Agency (the Croatian acronym is FINA),[10] acting along with the Croatian National Bank and banks, in the enforcement of the pecuniary-claims, available since the beginning of 2011, and further advanced of the FINA's competences in the form of the direct collecting (izravna naplata) thought the FINA, without the need for the involvement of either the court of the Notary Public as of October 2012.

1.3 Means of enforcement and territorial jurisdiction

Under the principle nulla executio sine lege enshrined in the EA, the means of enforcement are enumerated in the closed list. As a rule, enforcement may be ordered and conducted by any means of enforcement using any object of enforcement for that purpose which is identified by the applicant, irrespective of the nature of the enforced claim.[11] Yet, owning to the nature of the claims, the law differentiates between means of enforcement measures to carry out the involuntary collection of the pecuniary claim and those available to coerce realisation of non-pecuniary claims. Examples of the former are: enforcement against an immoveable, enforcement against a moveable, enforcement against debtor's pecuniary receivables, enforcement against the debtor's claim to have an

immoveable or a moveable handed over, enforcement against the stocks or shares in the company, enforcement against other property such as patents, ususfructus etc.[12] Examples of the latter are: enforcement to hand over and deliver a moveable, enforcement to vacate and hand over an immoveable, enforcement to receive performance, endurance or omission, enforcement to return an employee back to work, enforcement to divide an immoveable or a moveable, enforcement to obtain a statement of will.[13]

Territorial jurisdiction of the courts and Public Notaries is established for each of the means of enforcement depending on the nature of such means. For instance, to decide and carry out enforcement against an immoveable, the immoveable has to be within the territorial scope of the enforcement court.[14] The same rule applied for enforcement against a moveable, and in case the moveable is of unknown location, competence leis with the court for the place of the respondent's domicile or seat.[15] In situations in which enforcement is against respondent's pecuniary receivables the competence belongs to the court for the place of the respondent's domicile/seat, in the absence of such domicile in Croatia, the respondent's residence, and in the absence of such residence in Croatia, the domicile/seat of the respondent's debtor, and in the absence of such domicile, the residence of the respondent's debtor.[16]

1.4 Enforcement titles and conditions for enforcement

Enforcement may be ordered on the basis of either of the two sorts of documents: 1) the enforcement tile document having the titulus executionis (ovršna isprava) such as an enforceable judgment, a court settlement, an arbitration award, or a document containing the clausula exequendi (a notarial deed), and 2) the authentic document (vjerodostojna isprava) which does not have the credibility of an enforcement tile document but merely indicates the existence of the claim, such as public document, invoice, excerpt from the company's financial books or bill of exchange accompanied with the protest. The difference between two categories of documents reflects in the (non-)conditionality of the enforcement ordered on the basis of each: While the enforcement of the former document category is ordered unconditionally, the enforcement of the latter is ordered under condition that the respondent does not object to the enforcement.

One peculiarity of the Croatian system is the executory debenture (zadužnica) introduced in 1996. Executory debenture serves the purpose of securing a claim. If confirmed by the Public Notary and entered into the Register of executory debentures and bianco executory debentures is enforced directly by the FINA as if this is enforceable enforcement decision. If merely confirmed by the Notary Public without being registered, the FINA will proceed as if this is a request for direct collecting.[17] As such, the executory debenture is "a Croatian product" (Vukmir, 2010: 5-7) and quite unknown in the comparative law.[18]

The enforcement court will proceed based on an enforcement title document provided it is enforceable, which is proven by the enforceability certification (potvrda ovršnosti).[19] Such certification (known as clause exécutoire or Vollstreckbarkeitsklausel) is issued by the court which rendered the decision whose enforceability is being confirmed.[20]

Actually, the original or the authenticated copy of the decision in question is often stamped, the stamp stating that the decision has acquired the enforceability character as of certain date. Alternatively, the court may issue such certification on a separate sheet. In addition to enforceability certification, the enforcement title document need to be suitable for enforcement. Suitability derives from the content of the document, essentially it has to be explicit enough to identify the creditor, the debtor, the type, extent and time for performance of the obligation. In case of decision which orders certain performance, it has to contain the period of time for voluntary performance; which if missing is provided by the enforcement court.[21]

It is important to note that Art. 19 of the EA particularly states that enforcement of the foreign court or administrative decision or decision of another foreign authority or enforcement of the foreign public instruments may be ordered and carried out in Croatia provided that such decision or instrument fulfils the enforcement requirements or if so prescribed by an act, international agreement or directly applicable EU legal instrument.

1.5 The role of the court and other competent bodies

Either the court of the Public Notary may order civil enforcement. The courts are competent to order enforcement based on the document bearing the titulus executionis, while the Public Notaries are competent to order enforcement based on trustworthy documents. Yet, the Public Notaries' authority is limited to situations where there is no objection by the defendant. In case of an objection raised against the enforcement decree, the courts resume the enforcement proceedings. The activities related to realisation of the enforcement ordered by the court (in cases concerned with the enforcement title documents) or the Notaries Public (in cases ssoncerned with thrustworthy documents) are carried out by the enforcement administrators[22] or the FINA, along with the Croatian National Bank and banks in general, as the case may be. Thus, as a rule where the basis for enforcement is the enforcement title document, the enforcement activities are carried out by the court – the judge and the court employees, and the progress of the enforcement proceedings is ultimately controlled by the court. In situation in which a basis for enforcement is a trustworthy document, the Public Notaries, as a profession of public credibility, are competent to act, so that ordering of the enforcement and carrying out of the activities related to enforcement lay within them. However, the situation in which an objection is raised by the respondent results in the competence being exercised by the courts again.[23] The situations falling within the FINA's competences are twofold: where FINA is acting merely as the one carrying out the enforcement against pecuniary means ordered in the enforcement proceedings by the court or the Notary Public, it is the FINA's responsibility to carry out the activities related to enforcement, such as keeping the records, blocking the accounts, transferring the monies. The proceedings remain under the ultimate control of the courts or the Notary Public as the case may be. However, a special feature of the Croatian enforcement system is the abovementioned direct collecting – a function of the FINA which enables creditors to obtain enforcement of certain pecuniary claims without the need to involve either the court or a Notary Public. This route is available for the certain subcategories of the enforcement title documents (enforceable court decisions and settlements, enforceable administrative and employer's

calculation of matured wage and other employment-related payments) which became enforceable as of 15 October 2012.[24]

2 Main remedies against enforcement decision

The most important legal remedies available against the decisions on the application for enforcement are appeal and objection depending on the type of document, which is the basis for rendering the challenged decision.

2.1 Appeal

2.1.1 Grounds and effects

Where the enforcement decision is rendered based on the enforcement title document, the remedy available to the respondent is the appeal. Ground for the appeal are enumerated in the closed list which should be interpreted restrictively (Mihelčić, 2015: 235): 1. lack of enforcement title; 2. lack of enforceability; 3. enforcement title document was repealed, annulled, altered or otherwise put out of force; 4. if the parties have agreed in an official document or a document legalised by a notary public that the creditor shall not seek enforcement; 5. if the period for enforcement has expired; 6. object exempted from enforcement, or on which enforcement is limited; 7. creditor is not authorised to seek enforcement on the basis of an enforcement title document or against the debtor; 8. condition in the enforcement title document is not fulfilled; 9. the claim has ceased; 10. the realisation of the claim is prevented due to the later fact; 11. the claim from the enforcement title document is time barred.[25] Deadline to appeal is 8 days from the day of delivery to the defendant. After the deadline for appeal has expired but not later than by the end of the enforcement proceedings, the reposndent's appeal is admissible based on grounds under 7, 9-11, provided that the ground could not have been justifiably raised within the deadline for appeal.[26] When deciding on the appeal the court's assessment ex officio involves the grounds under 1, 3, 5 and 6 (for res extra commercio and claims arising out of taxes and other levies), as well as erroneous application of substantive law and substantial violations of the enforcement procedure.[27]

The appeal is also available to the applicant where the court exceeded the claim stated in the application or because of the decision on the costs of the proceedings.[28] Unlike the applicant's appeal, the respondent's appeal in principle has no suspensive effect over the ordered enforcement.[29]

2.1.2 Deciding on the appeal

Two courts are involved in the adjudicating on the debtor's appeal: the first instance court which rendered the appealed enforcement decision and the second instance court. Where the first instance court holds the appeal founded, it may: 1) uphold the appeal and alter the decision fully or partially and reject the application for enforcement, or 2) repeal the enforcement decision and dismiss the application for enforcement, 3) or declare that it

has no subject-matter or territorial jurisdiction and assign the case to the competent court, within 30 days.[30] Where the respondent's appeal is based on grounds under 7 or 9-11, the first instance court has to service the appeal to the applicant, so that he could respond within 8 days, and then decide on it. If the creditor acknowledges the reasons for the appeal, the enforcement is terminated. If the applicant disputes the reasons or fails to respond, the first instance court will instruct the debtor to initiate, within 15 days, a litigation seeking a ruling that the enforcement is impermissible. If the respondent proves the appeal grounds by a public document or by the facts which are generally known or may be established by applying the rules on legal presumptions, the first instance court will uphold the appeal and terminate the enforcement. Where the first instance court holds the appeal is unfounded, it has to forward the case to the second instance court within 30 days.[31] Prior to making a decision on the appeal, the second instance awaits 8 days for the applicant to submit the response to the appeal and rules within further 60 days taking into account the situation at the time when the ruling is issued.[32]

2.2 Objection

2.2.1 Grounds and effects

Respondent may challenge the enforcement decision rendered on the basis of a trustworthy document by an objection. Legal grounds for an objection are explicitly provided in the closed list which is the same as in case of respondent's appeal if objection is raised only against the part ordering enforcement.[33] Where the deadline for an objection has expired, the objection is still available based on grounds under 7, 9-11 above, where the fact has occurred after the enforcement decision has been issued.[34] Deadline to submit an objection is 8 days (except for the enforcement based on a bill of exchange or a cheque, in which case the deadline is 3 days) and there is in principle no suspensive effect over enforcement. If the decision on enforcement based on a trustworthy document is challenged only in part regarding the coasts of the proceedings, instead of the rules on the objection, the rules on the appeal apply accordingly.[35]

There is no provision explicitly stating that the applicant has the right to submit an objection, but the scholarship believes this right should be derived by analogy to the applicant's right to appeal against the enforcement decision based on enforcement title document based on the same grounds (Mihelčić, 2015: 268).

2.2.2 Deciding on the objection

Given the fact that trustworthy documents do not have an enforcement title, the enforcement decision based on the trustworthy document has two main sections: the section in which the payment is ordered and the section in which the enforcement is ordered. An objection may concern either of the two section or the entire decision. Where the enforcement decision is objected to in its entirety or in part ordering the payment, the court will declare the enforcement to be out of force and the proceedings will continue as in case of an objection against the payment order under the CPA.[36] Where the objection concerns only the part of the enforcement decision in which the enforcement is ordered,

the proceedings will continue as in case of respondent's appeal against the enforcement decision based on enforcement title document explained above.[37] In situations where the objection concerns only a vertically divisible part of the payment order, the other part becomes final and the enforcement is carried out.[38]

In all these situation, the decision on the appeal is made by the court. The Notary Public who rendered the challenged enforcement decision is obliged to forwarded to the court the appeal along with the entire file for the purpose of deciding upon it (Mihelčić, 2015: 268).

2.3 Third party's objection

2.3.1 Grounds and effects

Third party's objection on impermissibility may be submitted against the enforcement decision rendered based on an enforcement title document or a trustworthy document. Legal ground for such an objection is that third party is an owner of a holder of a right regarding the object of enforcement, which right is an obstacle to enforcement on that object (exception is co-ownership over moveable).[39] Such objection has to be submitted before the enforcement has been completed. It has no suspensive effect.

2.3.2 Deciding on the objection

Third party's objection is delivered to applicant and responded who have 8 days to submit their responses. If the objection is proven by means of a final decision, a public document, or the facts which are generally known or may be established by applying the rules on legal presumptions, the first instance court decides on the objection in the enforcement proceedings.[40] If the applicant fails to respond or any party to the proceedings challenges the objection, the first instance court will instruct the third party to commence, within 15 days, litigation against the parties to the enforcement proceedings seeking declaration on impermissibility of enforcement. This will,. However, not happen where the objection is proven by means of a final decision, a public document, or the facts which are generally known or may be established by applying the rules on legal presumptions, as already explained above.[41]

3 Other remedies in the enforcement proceedings

3.1 Motion for suspension

3.1.1 Grounds

Motion for suspension of an enforcement decision is available irrespective of whether the decision is rendered based on an enforcement title document or a trustworthy document. Conditions for the respondent's motion for suspension are twofold: first set of conditions depend on the probability of certain undesirable factual effect (A) and the second is

related to legal situation related to the enforcement (B). One of each under A and B has to be cumulatively fulfilled in order for the enforcement to be suspended. There are two alternative conditions under A: 1. probability that enforcement would cause him irreparable damage or nearly irreparable damage or 2. probability that suspension of the enforcement is necessary to prevent violence. There are ten alternative conditions under B: 1. legal remedy is filed against the decision which is being enforced; 2. motion for restitutio in integrum or a motion for retrial concerning enforced decision is filed; 3. an action is filed to set aside an arbitration award which is being enforced; 4. an action is filed to repeal or annul a settlement or a notarial deed which is being enforced; 5. the debtor appealed against the enforcement decision or commenced the litigation; 6. the debtor appealed against a ruling confirming enforceability of the enforcement title document or filed a motion for retrial; 7. the debtor or a party in the proceedings seeks rectification of irregularities occurred in the course of enforcement; 8. enforcement, under the enforcement title document, depends on simultaneous fulfilment of an obligation by the applicant, and the respondent refuses to fulfil his or her obligation because the applicant has not fulfilled his or her obligation or shown any willingness to do so simultaneously with the respondent; 9. the Croatian Government declared a state of disaster and on that day the debtor was resident or seated on the respective territory; 10. there is ongoing ex officio criminal proceedings concerning the claim which is being enforced.[42]

Besides the respondent, the applicant also has the possibility to submit the motion for suspension. The applicant may do so only once and provided that the enforcement has not commenced. The duration of the suspension is ordered at the court's discretion.[43] Finally, the motion for suspension may be raised by a third party where that party sought declaration that enforcement on an object is impermissible. The court will grant that motion provided that the following three conditions are cumulatively met: 1. It is probable that the third party owns or holds a certain right; 2: should the enforcement be carried out, the third party would probably suffer irreparable or nearly irreparable harm, and 3. the third party commenced the proceedings for the purpose of declaring the enforcement impermissible against the object or enforcement.[44]

3.1.2 Deciding on the motion to suspend

In the process of deciding on the motion, the court has to determine the above conditions and either grant or dismiss the motion. The suspension sought by the respondent or a third party may be conditioned by providing security if so requested by the applicant.[45] The court shall dismiss the motion for suspension if the applicant, provides security for the damage which the respondent or the third party might suffer as a result of the enforcement.[46] If the applicant accepts suspension or both of the parties agree with a third party, the court orders suspension without deciding whether conditions are meet.[47]

3.2 Debtor's motion for counter-enforcement

3.2.1 Grounds

After the enforcement has been completed, the respondent may in the same enforcement proceedings request the court to order the applicant to return which the latter received as a result of the enforcement.[48] The court will order such return provided that any of the following conditions is met: 1. the enforcement title document is repealed, altered, annulled, set out of force or otherwise without effect; 2. the creditor's claim was settled by the debtor outside the court and during the enforcement proceedings, thus it was settled twice; 3. the enforcement decision was repealed and the application for enforcement is dismissed or rejected, or if the enforcement decision was altered by a final decision; 4. the enforcement against an object was declared impermissible.[49] Deadline for counter-enforcement is 3 months from the moment the respondent become aware of the respective fact, but not later than 1 year after completing the enforcement.[50]

3.2.2 Deciding on the counter-enforcement

The respondent's motion is delivered to the applicant who has 8 days to submit the response. If the applicant objects to the motion, the court hearing will be scheduled and decision made. If the applicant fails to respond, the court will decide whether to hold the hearing or render the decision without one. In the court decision upholding the motion, the court will order the return of the received within 15 days.[51] Such final and enforceable decision may be counter-enforced under the EA.[52]

4 Concluding remarks

The focus of this report being on the remedies, it is important to note that the Croatian enforcement system shows general similarities with some other continental European systems, primarily Germanic ones, as it is traditionally court-oriented. However, certain developments and specific socio-economic factors have resulted in new features muddling the clear water of the formerly very strictly court-oriented approach, including the involvement of Public Notaries and the FINA. Likewise, there is a special instrument, which seem not to have obvious counterparts in the comparative law, such as the executory debenture.

Respondent has several means to challenge the decision on enforcement. The nature of remedy (appeal and objection) depends on the nature of the enforcement decision, which in turn depends on the nature of the document that serves as basis for it (enforcement title document and trustworthy document). In all situations the grounds are numerus clausus and as a rule do not suspend enforcement.

Notes

[1] Ovršni zakon, Narodne novine 112/2012, 25/2013 and 93/2014.
[2] The public consultation on the Draft Proposal on Amendments to the Enforcement Act was opened on 25 May 2016 to be closed on 9 June 2016, while the report on the public consultation is expected on 16 June 2016. See https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=3365 (last visited on 31 May 2016).
[3] Zakon o provedbi ovrhe na novčanim sredstvima, Narodne novine 91/2010 and 112/2012.
[4] Obiteljski zakon, Narodne novine 103/2015.
[5] Pomorski zakonik, Narodne novine 181/2004, 76/2007, 146/2008, 61/2011, 56/2013 and 26/2015.
[6] Opći porezni zakon, Narodne novine 147/2008, 18/2011, 78/2012, 136/2012, 73/2013, 26/2015 and 44/2016.
[7] Zakon o parničnom postupku, Službeni list SFRJ 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991, Narodne novine 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013 and 89/2014.
[8] See generally (Dika, 2007: 1-5).
[9] Hess proposes four categories based on the enforcement organs: 1) bailiff-oriented systems (known also by the French terminology as huissier de justice), 2) court-oriented systems, 3) mixed systems, and 4) administrative systems (Hess, 2005: 33-36).
[10] The FINA was established by the Republic of Croatia by the Financial Agency Act. Zakon o Financijskoj agenciji, Narodne novine 117/2001, 60/2004 and 42/2005.
[11] There are only minor exceptions. See (Mihelčić, 2015: 31).
[12] See Arts. 74-245 of the EA.
[13] See Arts. 246-277 of the EA.
[14] Art. 79 of the EA.
[15] Arts. 133 and 134 of the EA.
[16] Art. 171 of the EA.
[17] Art. 208 of the EA.
[18] See further (Marković, Matić and Karačić, 2007; Šafranko, 2010).
[19] Art. 25 of the EA.
[20] Art. 36 para 2 of the EA.
[21] Art. 29 of the EA.
[22] The execution administrator is the employee of the court who directly undertakes actions in the enforcement proceedings (Art. 2, para. 10 of the EA).
[23] See infra section 2.2.
[24] Art. 209 of the EA.
[25] Art. 50, para 1 of the EA.
[26] Art. 53 of the EA.
[27] Art. 50, para. 5 of the EA.
[28] Art. 50, para. 6 of the EA.
[29] Art. 50, para 7 pf the EA.
[30] Art. 51, para. 2 of the EA.
[31] Art. 51, para. 4 of the EA.
[32] Art. 51, para. 7 of the EA.
[33] Art. 57, para. 2 of the EA.
[34] Art. 57, para. 3 of the EA.
[35] See Art. 57, para. 1 of the EA. (Mihelčić, 2015: 268).
[36] Art. 58, para. 3 of the EA.
[37] Art. 58, para. 4 of the EA.

[38] Art. 58, para. 6 of the EA.
[39] Art. 59 of the EA. Thre are certain exceptions where such objection is not permitted, such as in case o co-ownership. See Art. 61 of the EA.
[40] Art. 60, para2 of the EA.
[41] Art. 60, para. 1 of the EA.
[42] Art. 65, para 1 of the EA.
[43] Art. 66 of the EA.
[44] Art. 67 of the EA.
[45] Art. 65, para 3. and Art. 97, para. 2 of the EA.
[46] Art. 68 of the EA.
[47] Art. 69 of the EA.
[48] This remedy is not available where the enforcment was conducted ex officio.
[49] Art. 62, para. 1 of the EA.
[50] Art. 62, para. 5 of the EA.
[51] Art. 63 of the EA.
[52] Art. 64 of the EA.

References

Dika, M. (2007) *Građansko ovršno pravo, I. knjiga* (Zagreb: Narodne novine).
Hess, B. (2005) Comparative Analysis of National Reports, In: Andenas, M., Hess B. & Oberhammer, P. (eds.) *Enforcement Agency Practice in Europe - JAI/02/FPC/19/UK* (London: BIICL), available at http://www.biicl.org/files/5001_enforcement_agency_practice_in_europe.pdf (May 31, 2016).
Marković, B., Matić, B. & Karačić, D. (2007) Promissory note as payment security instrument in the Republic of Croatia, *MPRA Paper (Munich Personal RePEc Archive)* No. 6325, posted 6. February 2008 05:49 UTC, available at: http://mpra.ub.uni-muenchen.de/6325/ (July 14, 2016).
Mihelčić, G. (2015) *Komentar Ovršnog zakona* (Zagreb: Organizator).
Šafranko, Z. (2010) Zadužnica i njezino novo pravno uređenje, *Pravo u gospodarstvu*, 49(6), pp. 1487-1527.
Vukmir, B. (2010) Kritički osvrt na zadužnicu, *Pravo i porezi*, 4, pp. 5-7.

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Selected Issues of Recognition and Enforcement of Foreign Judgments from the Prespective of EU Member

JIŘI VALDHANS & TEREZA KYSELOVSKÁ

Abstract The issue of recognition and enforcement of foreign judgments is one of three key areas dealt with by private international law. Nevertheless, this issue falls not only within the scope of this legal discipline. For the actual enforcement of a foreign judgment, national procedural laws play an essential role. The interconnection between private international law and national procedural law makes this area of law very interesting issue for further legal research. In this article, we will outline the fundamental principles and concepts behind recognition and enforcement, historical development of national approaches to this issue, and the mechanism through which States take into account foreign judgments. Consequently, we will present, from the point of view of the EU Member States, sources of law for recognition and enforcement, including examples of relevant legal instruments; and resolution of possible conflicts between legal sources and their application.

Keywords: • recognition • enforcement • foreign • judgments • private international law • procedural law • national • European Union, Brussels Convention • Brussels I Regulation • Brussels Ibis Regulation • legal sources • decision • court • universalism • territoriality • state sovereignty • reciprocity • exequatur • lex fori • international convention • regulation

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1 Prologue

The issue of recognition and enforcement of foreign judgments is one of three key areas dealt with by private international law. Nevertheless, this issue falls not only within the scope of this legal discipline. For the actual enforcement of a foreign judgment, national procedural laws play an essential role. The interconnection between private international law and national procedural law makes this area of law very interesting issue for further legal research. This article, however, has no ambition to analyze in depth the interface between private international law and national procedural law. Such analysis is possible only on the background of a specific legal instrument governing recognition and enforcement of foreign judgments, which sets basic parameters of this connection. In this article, we will outline the fundamental principles and concepts behind recognition and enforcement, historical development of national approaches to this issue, and the mechanism through which States take into account foreign judgments. Consequently, we will present, from the point of view of the EU Member States, sources of law for recognition and enforcement, including examples of relevant legal instruments; and resolution of possible conflicts between legal sources and their application.

Recognition and enforcement of foreign judgments. Why are these two legal institutes so important, both for the theory of private international law and legal practice? The answer lies back in the theory of private international law. Decision of a court represents an act of official authority endowed by a state power which provides protection to rights and duties of subjects of law. It demonstrates the sovereignty of an issuing state and also represents the combination[1] of both substantive and procedural rules (Steiner, 1970: 244). As such, it can hold its effects only on the territory of an issuing state (Basedow, Hopt Zimmermann and Stier, 2012: 1424; Fawcett and Carruthers, 2008: 611; Steiner, 1970: 241; Heyer , 1963: 112) which means that it effects are territorially limited. In layman's terms - to obtain a favorable judgment is one thing. To be able to enforce it in place (country) where debtor´s assets are is a completely different issue.[2]

2 Historical Development

The approach to foreign judgments has changed and evolved during the history. Antique Rome held the idea of non-recognition and enforcement of judgment issued out of the Roman Empire (Michaels, 2009: 1). In the following period the concept of universalism developed mainly in the area of Italy and the Holy Roman Empire based on the idea of universal power of the pope and the emperor – “supremi principi qui simul omnia possunt”. Because of the idea of the universally effective Roman law the distinction between domestic and foreign judgment lost its meaning (Steiner, 1970: 24). Theory of universalism, which was in the history the most favorable towards foreign judgments, was overcome by completely opposite tendencies.

As a consequence of debilitating power of emperor in the 14th century and the emergence of independent states, the universal theory was replaced by the territorial concepts[3] built in the idea that law and all its manifestations have territorially limited effects only. Centre of these concepts were France (in 1629 by the Code Michaud the effects of foreign judgments were denied; other European states followed soon (Michaels, 2009: 2)) and the Netherlands (Steiner, 1970: 240). Further development is based on the conflict of these two concepts where territoriality is built mainly on the idea of state sovereignty and, on the other hand, universality built on the idea of the existence of rational rules common to all legal orders (Ibid, s. 241).[4] Despite various efforts it is the territorial approach which prevails. (Heyer , 1963: 112) Boundaries which prevented the handling of foreign judgments were built and the only way to get over them was to raise another additional theory(ies). It was the economic reality together with intensity of cross-border relations and the need to solve legal problems arising from it which was reflected in need to deal with foreign judgments even in the states holding the territorial theory. As aptly pointed by Cheshire, one the essential objects of private international law, which is the protection of rights acquired under a foreign law, would not be fully attained without permitting the enforcement of a foreign judgment. (Fawcett and Carruthers, 2008: 610-611) Therefore different ways how to deal with foreign judgments have been developed in different states.

Dutch theorists Paul and Johannes Voet and Ulrich Huber had seen the duty to grant foreign judgment with legal effects in other states as a matter of courtesy in cases of reciprocity (Basedow, Hopt Zimmermann and Stier, 2012: 1425). Every sovereign state should deal courteously with other states which also reflect in a duty to recognize judgments as a manifestation of such a state power. It means that a foreign judgment has to be taken into account as a general rule (Fawcett and Carruthers, 2008: 612). This concept had been adopted by Anglo-Saxon law by Joseph Story where it had been transformed to the form of the theory of vested rights (Steiner , 1970: 241) in the middle of the 19th century (Fawcett and Carruthers, 2008: 613). The difference between the theory of comity and theory of vested rights lies in the object which is to be dealt with. Theory of comity deals with foreign judgment. It is the judgment itself which is granted by effects in another state and this privilege is based on comity only. On the other hand, not the judgment but the vested rights created by the judgment are enforced under the theory of vested rights (Michaels, 2009: 2). Cheshire uses the term "doctrine of obligation" which is based on the idea of a debtor who, for procedural purposes, is regarded as having implicitly promised to pay a certain sum adjudicated by a court irrespective of the State where the court comes from (Fawcett and Carruthers, 2008: 613). Side effect is the elimination of the need of reciprocity which is necessary under the doctrine (theory) of comity.

The idea of requirement to deal with foreign judgment because of comity was overcome in continental Europe by Savigny´s concept of requirement based on the existence of international community. But the idea of necessity to deal with foreign judgment,

however, has not disappeared. State efforts to overcome the tendency of rejection of foreign judgment´s effects have led to conclusion of first bilateral legal aid agreements (Michaels, 2009: 2).

3 Methods of dealing with foreign judgments

Previous part introduced basic information about the historical background – doctrines or let´s say theories – how states can approach to foreign judgments. Even though the strict approaches dominate the theory of private international law both territorially and historically, different efforts to overcome this strictness are evident in most countries. However, methods how state can input more liberal elements to its approach differ.

Three methods can be distinguished: (Heyer , 1963: 112)

- Exequatur (state agrees with enforceability of foreign judgment on its territory under certain conditions);
- Registration (execution of foreign judgment is a correlative of registration again under certain conditions – this method is close to the previous one);
- Transformation (foreign judgment has to be transformed – incorporated – into the new domestic judgment. It is not the foreign judgment which is executed but the domestic judgment.

As seen from above mentioned, transformation is the least favorable method (except the strict rejection of foreign judgments at all), exequatur and registration are more favorable. Described methods correspond with theoretical approaches when states from continental Europe tended to use the concept of exequatur while Anglo-Saxon states with theories of comity/vested rights tended more to the concept of transformation. [5]

4 Theoretical background of “recognition” and “enforcement”

In previous parts of this contribution we dealt with more particular issues as historical development of national approaches and the mechanism through which States take into account foreign judgments. We would like to return back to the basic legal instruments we are dealing with – recognition and enforcement. These two instruments are often mixed together. At least, when the desired result of the whole process of dealing with the foreign judgment is taken into account, this simplification can be understood. Nevertheless, merging these two legal instruments, or legal procedures behind them, represents an error and misunderstanding. On the background of these two legal instruments we will also address briefly the law applicable and area of this law in particular.

Term "recognition" may be perceived in two senses. It can represent the process of recognition, i.e. legal procedure when usually court examines the conditions established by the lex fori which are necessary to grant foreign judgment legal effects in the state of recognition. The second meaning represents the result of the whole process, i.e. the situation when foreign judgment is granted by legal effects in the state of recognition and can be subject to enforcement. When taken into account the first meaning, i.e. the legal procedure, it is with no doubt covered by lex fori of the state of recognition[6], in particular by its private international law. In order to avoid any doubt what can be considered lex fori – not only the national laws but also international treaties both bilateral and multilateral and, from the perspective of EU countries, also EU law have to be taken into account. In general, all legal rules effective on the territory of the state of recognition. The issue of applicable legal rules, levels of their origin and solution of possible conflicts is addressed in next part of this contribution. For the moment we would like to emphasize only the logical divergence in the level of favorability in national law in comparison with international treaties and EU law. National laws are most strict (restrictive) while they display those territorial concepts addressed above. International treaties represent typical mean of cooperation between states and are used to establish a better regime of dealing with judgments issued by a court from another member state. Finally, European Union represents a closely co-operating entity with coercive powers towards the Member States and the possibility to adopt its own legal regulations. It is thus obvious that the Regulation could have been designed more flexibly, or in a way which allows for a stronger ingress into State sovereignty; for example automatic recognition which can be appealed only to the proposal of the debtor and from exhaustively defined and restrictively interpreted reasons.

Enforcement refers to the mechanism of execution in the state of recognition. By the mechanism of execution the authority(ies) providing execution, means of execution or objections against execution are meant. Recognition is "sine non qua" for enforcement. In different words – one cannot enforce something that does not exist. This statement can't be revoked by the fact that in certain legal regulations the recognition is automatic in the first stage, the judgment is pronounced enforceable and then the debtor may appeal against the enforceability of the judgment claiming the reasons against recognition.[7] As in the case of recognition the only possible law applicable to the enforcement is lex fori and its area of civil law procedure. Enforcement is not covered by private international law and it is not a subject to unification in any international treaty neither bilateral nor multilateral or EU regulations. Even today it is an issue regulated exclusively by national rules.

5 Recognition and Enforcement of Foreign Judgments in the European judicial area

As mentioned above, recognition and enforcement of foreign judgments is one of the most important matters in private international law. It is of immense importance

especially for the European Union. Creating area of free movement of decisions from one Member State to another Member State was and still is a core factor and prerequisite of maintaining and developing the area of freedom, security and justice, and for the proper functioning of the internal market (Recital 3 of the Brussels Ibis Regulation[8]).

5.1 Legal sources regulating recognition and enforcement of foreign judgments in the European judicial area

In general, there are three main groups of legal sources for recognition and enforcement of foreign judgments: 1) national law 2) international law (bilateral treaties and multilateral conventions). The European Union, as regional[9] integration entity sui generis, introduced another 3) group of instruments through its secondary legislation (regulations and directives).

This article deals primarily with the sources of law relevant for the EU Member States. It is not supposed to be an exhaustive and in depth analysis of the relevant sources of law, but mere an overview of legal norms, which shall be taken into account by the EU Member States.

5.2 National (domestic) law

Every state has usually its own rules for recognition and enforcement of foreign judgments. It stems from the principle of territoriality and sovereignty (Kučera, Pauknerová, Růžička, 2015: 357). Since the area of recognition and enforcement of foreign judgments is nowadays regulated by international conventions (bilateral or multilateral) and EU regulations, the national rules have to cede wherever international convention or EU regulation claims precedence.

Czech Private International Law Act

In the Czech Republic, the recognition and enforcement of foreign judgments is regulated by the Act No. 91/12 Coll., on private international law (PILA). Application of PILA is limited because of the EU legislation and international conventions, which take precedence over Czech law in relationships between EU Member States. The regulation of recognition and enforcement of foreign judgments in PILA is complex; it deals with all aspects of recognition and enforcement as well as with all types of decisions (judgments, arbitral awards, notarial deeds and public deeds) (Rozehnalová, Drličková et al., 2015: 68). The rules for recognition and enforcement of foreign judgments are in accordance with international and European standards. It is safe to say that the regulation in PILA is stricter, because is based, inter alia, on the principle of (material) reciprocity (Pauknerová, Rozehnalová, Zavadilová et. al., 2013: 113)[10]

5.3 International conventions

The recognition and enforcement of foreign judgments is regulated mainly by bilateral treaties (Kučera, Pauknerová, Růžička, 2015: 377). As mentioned above, private international law and the relationships between states are based on the principle of territoriality and sovereignty. The procedural laws and their application are the manifestation of state power (Rozehnalová, Drličková et al., 2015: 279). The mutual cooperation and judicial assistance in civil and commercial matters, especially in the field of movement of judgments between different states, is based on cooperation stemming from bilateral treaties and agreements. The bilateral treaties on mutual cooperation and judicial assistance are a traditional source for the idea and its execution that judgment from one state may have legal effects in another state. In the absence of commitments arising out of international treaty, states are under no obligation to recognize and enforce foreign judgments (Michaels, 2009).

There is no general international convention on this subject. Several specialized multilateral conventions govern recognition and enforcement in some particular areas. Here, we would like to list the relevant multilateral conventions that shall be taken into account by the EU Member States:

In the area of family law and protection of family and children, the Convention on the Recognition of Divorces and Legal Separations,[11] European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children[12], Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption[13] and Convention on the International Recovery of Child Support and Other Forms of Family Maintenance[14] are of relevance.

Lugano Convention from 2007[15] basically extends the "Brussels regime" to three non-Member States of the EU. The Lugano Convention applies to recognition and enforcement of judgments in civil and commercial matters between the EU Member States, Switzerland, Norway and Iceland.

In the area of international transportation, recognition and enforcement of foreign judgments is provided for in the CMR Convention[16] and COTIF Convention.[17]

One of the most successful conventions is the New York Convention, with 156 Member States.[18] It applies to recognition and enforcement of foreign arbitral awards. This convention was one of the reasons why arbitration was expressly excluded from Brussels I Regulation and Brussels Ibis Regulation (Magnus and Mankowski (ed.), 2012: 65).

Because of the potentially widespread and global damage caused by nuclear accidents, the recognition and enforcement of foreign judgments is also provided for in the Vienna Convention on Civil Liability for Nuclear Damage (1963); Protocol to amend the (1963) Vienna Convention on Civil Liability for Nuclear Damage;[19] and Convention on Supplementary Compensation for Nuclear Damage (1997).[20]

Orders for costs are enforceable under Convention on International Access to Justice.[21]
Hague Convention on Choice of Courts Agreements[22] is one of the "newest" conventions. It entered into force on 1 October 2015. The EU (all Member States except Denmark), Mexico and Singapore are parties to this convention.

The Czech Republic is Member State to all of the above mentioned multilateral conventions (Rozehnalová, Drličková et al., 2015: 63). As many other states, the Czech Republic is also bound by a numerous bilateral treaties and agreements which deal with recognition and enforcement of judgments in civil and commercial matters.

5.4 EU Regulations

The core EU instrument for recognition and enforcement of foreign judgments in civil and commercial matters is the Brussels Ibis Regulation. Its predecessor was Brussels Convention[23] that was created for the recognition and enforcement of judgments in civil and commercial matters between the then-Member States of the European Economic Community. Successor of the Brussels Convention was the Brussels I Regulation (44/2001)[24] which was on 10 January 2015 replaced by the Brussels Ibis Regulation.

5.4.1 Brussels Ibis Regulation

For application of the Brussels Ibis Regulation, several conditions shall be met. The Brussels Ibis Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015 (Art. 66 Para 1). For recognition and enforcement, both the initial proceedings shall be commenced and the subsequent judgment shall be rendered after this date (Rozehnalová, Vadhans, Drličková and Kyselovská, 2013: 315). Legal proceedings instituted, authentic instruments formally drawn up or registered and court settlements approved or concluded before 10 January 2015 fall within the scope of Brussels I Regulation (44/2011).

As to the material scope of the Brussels Ibis Regulation, it is applicable to civil and commercial matters whatever the nature of the court or tribunal. It shall not be extended to certain aspects of public law (in particular, revenue, customs or administrative matters) and acta iure imperii (Art. 1 Para 1). The concept of "civil and commercial matters" shall be interpreted autonomously (Rozehnalová, Vadhans, Drličková and Kyselovská, 2013:

213). The Brussels Ibis Regulation excludes from its scope certain areas of law, which are governed by national laws, resp. other EU regulations. The excluded matters are: the status or legal capacity of natural persons, rights in property arising out of matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration; maintenance obligations arising from a family relationship, parentage, marriage or affinity; will and successions, including maintenance obligations arising by reason of death (Art. 1 Para 2).

Brussels Ibis Regulation is directly applicable in EU Member States (including Denmark).

Personal scope, ie. domicile of the defendant according to Art. 4, is not relevant for the recognition and enforcement. The main rule is, that the judgment shall be rendered by a court or tribunal of the Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court (Art. 2 a)).

5.4.2 Other "specialized" EU Regulations

As mentioned above, the Brussels Ibis Regulation is the main legal source for the free movement of judgments in civil and commercial matters within the EU territory. Nevertheless, the EU legislator created other, more specialized regulations in certain areas within the civil and commercial matters.

The European Enforcement Order Regulation (EET Regulation)[25] was created to simplify recognition and enforcement of uncontested claims. The EET regulation created minimum standards for judgments. The judgment may be rendered in purely national proceedings, but its recognition and enforcement is sought in other Member State.

The European Payment Order Regulation (EPO Regulation)[26] shall be applied to uncontested pecuniary claims.

The main aim of the European Small Claims Regulation (ESC Regulation)[27] is to simplify and speed up proceedings in small (consumer) claims in cross-border cases.

All three above mentioned regulations abolished exequatur and introduced proceedings based on electronic forms.

The Brussels IIbis Regulation[28] provides for recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

The Maintenance Regulation[29] is EU instrument for recognition and enforcement of maintenance judgments.

The Succession Regulation[30] is the newest regulation for recognition and enforcement of judgments in the area of inheritance law.

5.5 Relationships between legal sources regulating recognition and enforcement of foreign judgments in the European judicial area

In general, the relationship between sources of law is due to their rather high amount one of the most difficult issues in private international law. The Brussels Ibis Regulation provides for express provisions how to solve possible conflicts of legal sources. It deals with its relationship to other legal instruments in Chapter VII (Art. 67 – 73).

The Brussels Ibis Regulation supersedes and replaces the Brussels Convention as between the Member States (Art. 68 Para 1). References in the case law or other EU instruments to the Brussels Convention or Brussels I Regulation (44/2001) shall be understood as reference to the Brussels Ibis Regulation (Art 68 Para 2).

Art. 67 establishes the principle lex specialis. This means, that the Brussels Ibis Regulation shall not prejudice application of provisions governing recognition and enforcement in specific matters which are contained in other EU instruments or in national legislation harmonized pursuant to such instruments. It is irrelevant if the concerned instruments became effective before or after the Brussels Ibis Regulation (Magnus and Mankowski (ed.), 2016: 1021).

Since the Brussels Ibis Regulation excludes from its scope maintenance obligations, succession and insolvency (Art. 1 Para 2 b), e), f)), the relevant instruments that shall be applicable to these area are the Maintenance Regulation, the Succession Regulation and the Insolvency Regulation.

Other relevant instruments are the EET Regulation, the EPO Regulation and the ESC Regulation. The scope of these regulations is the same as for the Brussels Ibis Regulation, all of them providing for recognition and enforcement of judgments in civil and commercial matters, the latter regulations in very specific areas. Nevertheless, because of the aim and purpose of these “special” regulations their position is an “alternative” instrument to the Brussels Ibis Regulation. Hence, it is up to the claimant which one of

them he will choose. These regulations have only an optional nature and the Brussels Ibis is not prejudiced (Magnus and Mankowski (ed.), 2016: 1023).

Member States of the EU are parties to numerous bilateral treaties (and in some cases multilateral conventions) dealing with the recognition and enforcement of judgments Art. 69 of the Brussels Ibis Regulation orders its precedence over bilateral treaties of recognition and enforcement of judgments concluded between Member States. Within its scope of application, the Brussels Ibis Regulation supersedes the bilateral treaties in total and in their entirety (they clearly remain in existence, but they have to cede wherever the Brussels Ibis Regulation claims precedence). List of all relevant bilateral treaties was established and complied by the Commission. The list of treaties is not exhaustive and constitutive, mere of a declaratory nature (Magnus and Mankowski (ed.), 2016: 1042), because of entries of potential new Member States to the EU (Magnus and Mankowski (ed.), 2016: 1030-1041).

Bilateral treaties between Member States and non-Member States remain generally unaffected (Art. 73 Para 3). (Magnus and Mankowski (ed.), 2016: 1029). There is a certain degree of "cooperation" between the Brussels Ibis Regulation and specialized conventions (Rozehnalová, Vadhans, Drličková and Kyselovská, 2013: 219).

The bilateral treaties of recognition and enforcement concluded between the Member States continue to have effect in relation to matters to which the Brussels Ibis Regulation does not apply (Art. 70 Paras 1 and 2); for instance in probate cases, arbitration or in wider understanding of "civil and commercial matters" than in the Regulation (Magnus and Mankowski (ed.), 2016: 1043).

Art. 71 states that the Regulation Brussels Ibis shall not affect any conventions, to which Member States are parties and which, in relation to particular matters, govern the recognition and enforcement of judgments; in other words, it deals with possible conflicts of law/making treaties (Magnus and Mankowski (ed.), 2016: 1047). Art 71 Paras 1 and 2 further contain rules on its application with a view to the necessity of uniform interpretation of the Brussels Ibis Regulation. Art. 71 shall be read in accordance with Recital 35 which asserts respect for international commitments entered into by the Member States. This provision in interesting in particular with respect to international conventions that the Member states have already ratified (especially in the area of international transportation, such as the CMR Convention, COTIF Convention) and the Hague Convention on Choice of Courts Agreements (2005).

According to Art 73 Para 1, the Brussels Ibis Regulation shall not affect the application of the Lugano Convention 2007. The latter is applicable in cases when recognition and enforcement of a judgment issued by a court of a Member State solely of the Lugano Convention 2007 is sought after in a Member State of the Brussels Ibis Regulation (Magnus and Mankowski (ed.), 2016: 1097).

Pursuant to Art. 73 Para 2, the Brussels Ibis Regulation shall not affect the application of the New York Convention 1958 (arbitration is expressly excluded from the scope in Art. 1 Para 2 d) and Recital 12).

Pursuant to Art. 73 Para 3, the Brussels Ibis Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of the Brussels I Regulation (44/2001) which concern matters governed by the Brussels Ibis Regulation.

5.6 Enforcement of foreign judgments

Brussels Ibis Regulation governs only the recognition of foreign judgments, resp. grounds for refusal of recognition or of enforcement. The enforcement itself is governed by national procedural laws. This is a core principle of procedural autonomy of EU Member States which is connected to the territoriality and sovereignty. Art. 41 Para 1 expressly states: "Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed." This rule is inspired by the principle of assimilation under which "a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed." (Magnus and Mankowski (ed.), 2016: 846). EU Member States thus apply their national rules of civil procedure and enforcement.

In the Czech Republic, enforcement of foreign judgments in civil and commercial matters is regulated by two legal sources, Civil Procedural Code and Execution Act.

6 Conclusion

Economic and legal reality shows the importance of taking into account foreign judgments. The position of states on this matter has changed throughout the history: from restrictive approach to universality in recognition and then back to restrictions, which are, nevertheless, nowadays more and more limited.

The mutual cooperation and judicial assistance between states in the area of recognition and enforcement used to be based on international conventions. And out of European Union still is. The need for cooperation and creation of area of (relative) free movement of judgments was essential for the development and economic integration within the European Communities, resp. the EU. The need for economic cooperation introduced subsequently many legal challenges and questions that should be dealt with.

The legal regulation of recognition and enforcement on the EU level is considered to be very favorable. The EU legislation interconnects private international law with national procedural laws. There is an obvious effort to create simple, predictable, yet certain legal rules. This development and future legislative steps in this area will be dealt with in our further research in this project.

Note

[1] For the decision to be issued many conditions has to be fulfilled which may differ in many ways from state to state.
[2] See also (Briggs and Rees, 2005: 1008).
[3] Which persist to the present days.
[4] Ibid, s. 241
[5] (Černohubý, 1967: 141); however, at the beginning of the first half of the 20th century also some of continental Europe states used this concept, e.g. the Netherlands, Nordic countries, some of Swiss cantons.
[6] The use of lex fori for procedural proposes represents one of the main doctrines of private international law. In case of procedural rules no question of the law applicable arises – see (Kučera, Pauknerová, Růžička et. al., 2015: 352).
[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in partially modified form also Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[8] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[9] In this text, we do not analyze other regional recognition and enforcement instruments, such as for instance in Latin America. On this subject, see (Michaels, 2009).
[10] For more information on recognition and enforcement of judgments in the Czech Republic, see (Rozehnalová, Drličková et al., 2015: 59 et seq)..
[11] Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Hague Conference on Private International Law (1970). Most of the Member States to this convention are EU Member States. Therefore, the EU law takes precedence over this convention. In: (Pauknerová, Rozehnalová, Zavadilová et. al., 2013: 349).
[12] European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, Council of Europe (1980).
[13] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law (1993).
[14] Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, Hague Conference on Private International Law (2007).
[15] Convention on Jurisdiction and the Recognition and Enforcemen of Judgments in Civil and Commercial Matters.
[16] Convention of 19 May 1956 on the Contracts for the International Carriage of Goods by Road, United Nations.
[17] Convention Concerning International Carriage by Rail.
[18] Convention on the Recognition and Enfrocement of Foreign Arbitral Awards, United Nations Commission on International Trade Law (New York 1958).

[19] Convention on Civil Liability for Nuclear Damage.
[20] Convention on Supplementary Compensation for Nuclear Damage
[21] Convention of 25 October 1980 on International Access to Justice, Hague Conference on Private International Law.
[22] Convention of 30 June 2005 on Choice of Courts Agreements, Hague Conference on Private International Law (2005).
[23] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[24] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[25] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.
[26] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.
[27] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.
[28] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
[29] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
[30] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

References

Basedow, J., Hopt, K. J., Zimmermann, R. & Stier, A. (2012) *Max Planck Encyclopedia of European Private Law* (Oxford: Oxford University Press).
Briggs, A. & Rees, P. (2005) *Civil jurisdisdiction and judgments*, 4th ed. (London: Norton Rose).
Černohubý, M. (1967) Uznání a výkon cizích rozhodnutí v ČSSR, *Socialistická zákonnost*, pp. 141
Fawcett, J. & Carruthers, J. (2008) *Cheshire, North & Fawcett*: *Private International Law*, 14th ed. (Oxford: Oxford University Press).
Heyer, J. (1963) *Výkon cizozemských rozsudků*, Zprávy advokacie, 112.
Kučera, Z., Pauknerová, M., Růžička, K. et. al. (2015) *Mezinárodní právo soukromé,* 8th ed. (Plzeň: Vydavatelství a nakladatelství Aleš Čeněk).
Magnus, U. & Mankowski P. (eds.) (2012) *Brussels I Regulation, European Commentaries on Private International Law* (Sellier).
Magnus, U. & Mankowski P. (eds.) (2016) *Brussels Ibis Regulation, European Commentaries on Private International Law* (Sellier).
Michaels, R. (2009) Recognition and Enforcement of Foreign Judgments, In: Wolfrum, R. (ed.) *Max Planck Encyclopaedia of Public International Law*, (Heidelberg: Max Planck Institute for Comparative Public Law and International Law & Oxford University Press).
Pauknerová, M., Rozehnalová, N., Zavadilová M. et. al. (2013) *Zákon o mezinárodním právu soukromém. Komentář* (Praha: Wolters Kluwer).
Rozehnalová, N., Drličková K. et. al. (2015) *Czech Private International Law*, (Publications of the Masaryk University, theoretical series, edition Scientia) (Brno: Masaryk University).

Rozehnalová, N., Vadhans, J., Drličková, K. & Kyselovská, T. (2013) *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)* (Praha: Wolters Kluwer ČR).

Steiner, V. (1970) Některé teoretické koncepce řešení otázky uznání a výkonu cizího rozhodnutí, *Časopis pro mezinárodní právo*, 13, pp. 239-247.

Vaške, V. (2007) *Uznání a výkon cizích rozhodnutí v České republice* (Praha: C. H. Beck).

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Regulation of Employment Relationships of Directors (Managers) in Companies

DARJA SENČUR PEČEK

Abstract The Companies Act regulates the position of directors only from the perspective of the functioning of a commercial company and not also from the perspective of the protection of their personal position. With reference to such, the Companies Act suggests that a contract be concluded between the commercial company and its director (a contract to perform the function of director). In practice, the aforementioned contract is as a general rule concluded as an employment contract and only rarely as a civil-law contact. The Employment Relations Act namely allows that a contractual relation between a company and a director be regulated as an employment relation and at the same time determines certain particularities of the labour-law position of directors, which the author discusses in the present article. As the most critical question the author stresses the termination of employment contract in the case of termination of the function of director.

Keywords: • director • manager • contract to perform the function of director • employment contract with a manager

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Urejanje delovnih razmerji direktorjev (poslovodnih oseb) gospodarskih družb

DARJA SENČUR PEČEK

Povzetek Zakon o gospodarskih družbah ureja položaj direktorja le z vidika funkcioniranja gospodarske družbe, ne pa z vidika varstva osebnega položaja direktorja. Glede tega nakazuje na sklenitev pogodbe med gospodarsko družb in direktorjem (t.i. pogodba o opravljanju funkcije direktorja). V praksi se navedena pogodba praviloma sklepa kot pogodba o zaposlitvi, in le redko kot pogodba civilnega prava. Zakon o delovnih razmerjih namreč dopušča, da se pogodbeno razmerje med družbo in direktorjem uredi kot delovno razmerje in hkrati določa nekaj posebnosti delovno-pravnega položaja direktorja, ki jih avtorica v prispevku obravnava. Pri tem kot najbolj problematično izpostavi vprašanje prenehanja pogodbe o zaposlitvi v primeru prenehanja funkcije direktorja.

Ključne besede: • direktor • poslovodna oseba • pogodba o opravljanju funkcije direktorja • pogodba o zaposlitvi s poslovodno osebo

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1 Uvod

Osebe, ki vodijo posle gospodarskega subjekta in ga zastopajo navzven, se v slovenski poslovni praksi tradicionalno imenujejo direktorji. Njihovo imenovanje, odpoklic, pristojnosti in odgovornosti urejajo statusno-pravni predpisi, predvsem Zakon o gospodarskih družbah (ZGD-1).[1] Glede varstva osebnega položaja direktorjev zakon napotuje na pogodbo, ki se sklene med gospodarsko družbo in direktorjem. Medtem ko je v drugih evropskih državah tovrstna pogodba praviloma pogodba civilnega prava, slovensko pravo dopušča, da se sklene kot pogodba o zaposlitvi.

Direktor, ki z družbo sklene pogodbo o zaposlitvi je hkrati član poslovodnega in zastopniškega organa gospodarske družbe in delavec te gospodarske družbe. Navedeno dejstvo terja določene posebnosti njegovega delovno-pravnega položaja. Veljavni Zakon o delovnih razmerjih (ZDR-1)[2] ureja nekaj tovrstnih posebnosti, hkrati pa dopušča da se s pogodbo o zaposlitvi pravice in obveznosti direktorja uredijo drugače kot jih določa zakon. Kljub temu dvojnost statusnega in delovnopravnega položaja direktorja (poslovodne osebe) sproža številna delovnopravna vprašanja, ki se odražajo v poslovni praksi.

2 Pojem direktorja in poslovodne osebe

Organ, ki v gospodarski družbi opravlja aktivnosti poslovodenja, se s skupnim (zbirnim) izrazom imenuje poslovodstvo (10. člen ZGD-1). Upoštevaje navedeno določbo se za poslovodstvo štejejo organi ali osebe, ki so po ZGD-1 ali po aktih družbe pooblaščeni, da vodijo njene posle. Že na podlagi navedene zakonske določbe je mogoče za poslovodstvo v delniški družbi in družbi z omejeno odgovornostjo (ki sta v poslovni praksi najpomembnejši gospodarski družbi) šteti člane uprave, člane upravnega odbora in poslovodje. S tem pa krog oseb, ki sodijo k poslovodstvu ni zaključen. Iz določb ZGD-1, ki se nanašajo na vodenje poslov in zastopanje pri delniški družbi z enotirnim sistemom upravljanja namreč izhaja, da so za vodenje poslov te družbe pooblaščene tudi druge osebe (ne le te, ki so izrecno navedene v 10. členu ZGD-1). Poslovodni, nadzorni in zastopniški organ v takšni družbi je upravni odbor. Glede na to, da upravni odbor združuje pristojnosti, ki jih imata v dvotirnem sistemu uprava in nadzorni svet, ni nujno, da vsi člani upravnega odbora vodijo (tekoče) posle družbe in zastopajo družbo. V primeru javne družbe (družbe, z vrednostnimi papirji katere se trguje na organiziranem trgu) je vodenje tekočih poslov in zastopanje že na podlagi zakona (praviloma) v pristojnosti enega ali več izvršnih direktorjev, ki jih upravni odbor mora imenovati. V nejavnih družbah pa upravni odbor lahko imenuje izvršne direktorje in nanje prenese vodenje tekočih poslov in druge pristojnosti. Če upravni odbor imenuje izvršne direktorje, ki so pristojni za vodenje tekočih poslov, le-ti nedvomno predstavljajo poslovodstvo delniške družbe, kljub temu, da jih ZGD-1 v 10. členu izrecno ne uvršča k poslovodstvu. Tudi z njimi se sklepa pogodba o opravljanju funkcije (tako tudi Bratina, Kocbek et al., 2014: 68).

V povezavi s poslovodstvom, oziroma osebami, ki sodijo k poslovodstvu se v ZGD-1 pojavlja tudi izraz direktor. ZGD-1 s tem ohranja v slovenskem pravu uveljavljeno poimenovanje oseb, ki vodijo posle gospodarskega subjekta in ga zastopajo. Tako poslovodjo družbe z omejeno odgovornostjo kot člane uprave delniške družbe (z dvotirnim sistemom upravljanja) ZGD-1 označuje tudi z izrazom direktor.[3] V delniški družbi z enotirnim sistemom upravljanja pa se za člane upravnega odbora ne uporablja izraz direktor,[4] ampak se z izrazom (izvršni) direktor označujejo osebe, imenovane s strani upravnega odbora, ki vodijo tekoče posle in zaradi tega sodijo k poslovodstvu. Izraz direktor se v slovenski statusni zakonodaji tako uporablja za osebe, ki v družbi dejansko opravljajo poslovodsko in zastopniško funkcijo - bodisi da so člani poslovodnega in zastopniškega organa (član uprave, poslovodja), ali jih je ta organ imenoval (izvršni direktor),[5] ne zajema pa niti članov upravnega odbora niti nadzornega sveta.

ZDR-1 pojma direktor ne uporablja, pač pa uporablja izraz poslovodne osebe in ureja posebnosti njihovega delovno-pravnega položaja. Pri tem ZDR-1 ne določa, kdo sodi v krog poslovodnih oseb. Glede na to, da ZDR-1 ureja le položaj oseb, ki imajo sklenjeno pogodbo o zaposlitvi, je treba k pojmu poslovodnih oseb v smislu ZDR-1 šteti osebe, ki sodijo k poslovodstvu družbe in imajo sklenjeno pogodbo o zaposlitvi. K poslovodnim osebam tako uvrščamo člane uprave, izvršne direktorje in poslovodje (se pravi direktorje), člane upravnega odbora pa le v primeru, ko imajo z družbo sklenjeno pogodbo o zaposlitvi (to pa bo le v primeru, ko upravni odbor ne imenuje izvršnih direktorjev, in člani upravnega odbora dejansko vodijo tudi tekoče posle in zastopajo družbo).[6] Pojem poslovodnih oseb se tako praviloma prekriva s pojmom direktorja.[7]

3 Pogodbeni položaj direktorja

Korporacijska zakonodaja določa, kako oseba postane in preneha biti direktor, ureja pristojnosti, obveznosti in odgovornosti osebe kot direktorja gospodarske družbe ter njegova razmerja do drugih organov družbe. Na podlagi te ureditve lahko oseba, ki je bila imenovana za direktorja deluje kot organ oziroma član organa gospodarske družbe, oziroma opravlja funkcijo direktorja. Glede ureditve pravic in obveznosti med gospodarsko družbo in direktorjem, ki presegajo ta korporacijski vidik, predvsem glede ureditve obveznosti družbe do direktorja pa ZGD-1 odkazuje na pogodbo med družbo in direktorjem.[8]

S pogodbo se direktor zaveže, da bo vodil posle družbe, zastopal družbo in opravljal vse druge naloge, ki sodijo k funkciji direktorja, družba pa se zaveže direktorju za to plačati. Gre za t. i. pogodbo o opravljanju funkcije direktorja,[9] v nemškem pravu poimenovano »namestitvena pogodba (Anstellungsvertrag)«.

Korporacijski položaj direktorja in pogodbeni položaj direktorja sta pravno ločena (Schmidt, 2002: 416; glej tudi Senčur Peček, 2007: 102, 103), hkrati pa obstajajo med obema položajem določene povezave in medsebojno učinkovanje. Le-to se kaže tako v zvezi z nastankom obeh pravnih razmerij,[10] njuno vsebino[11] in prenehanjem.[12]

Obseg varstva, ki se direktorju zagotavlja s pogodbo o opravljanju funkcije je v veliki meri odvisen od tega, ali je pogodbeno razmerje med družbo in direktorjem opredeljeno kot razmerje odvisnega opravljanja dela (in se direktorju prizna položaj delavca), ali kot razmerje dveh prirejenih subjektov (in ima direktor položaj neodvisnega pogodbenika). Navedena opredelitev ima daljnosežne posledice za položaj direktorja, predvsem z vidika veljavnosti delovno-pravne zaščitne zakonodaje in vključevanja direktorja v sisteme socialnih zavarovanj.

V nemškem in avstrijskem pravu se namestitvena pogodba šteje za civilno-pravno službeno pogodbo (Dienstvertrag), direktorjem pa se položaj delavca priznava le v omejenem obsegu (Senčur Peček 2007: 176 in naslednje).

V Republiki Sloveniji je vprašanje pravne narave pogodbenega razmerja med družbo in direktorjem postalo aktualno z uveljavitvijo ZGD[13] (1993), ki je v slovenski pravni red uvedel gospodarske družbe, urejene po vzoru drugih evropskih držav.[14]. V slovenski teoriji (Dobrin, 1995: 1120; 1121, Bohinc, 1999: 290-292; Klampfer, 2001: 333, 334; Senčur Peček, 2001: 298-300) so bili izraženi pomisleki v zvezi z delovnopravnim položajem direktorjev (poslovodnih oseb) oziroma stališča, da je delovno-pravni položaj zanje praviloma oziroma v določenih primerih neprimeren. Kljub temu je Zakon o delovnih razmerjih (ZDR),[15] ki je bil sprejet skoraj deset let za ZGD, s »salomonskim« 72. členom ohranil možnost, da poslovodna oseba (direktor) sklene pogodbo o zaposlitvi, hkrati pa dopustil tudi možnost, da poslovodna oseba z družbo sklene pogodbo, ki ni pogodba o zaposlitvi.[16] V praksi so se direktorji tudi po uveljavitvi ZDR večinoma odločali za delovno razmerje.

Čeprav se je v teoriji (Kresal, 2001: 325; Senčur Peček, 2010) ves čas problematizirala splošna možnost sklenitve pogodbe o zaposlitvi s poslovodnimi osebami (tudi ko v njihovem razmerju očitno ni elementov delovnega razmerja), tudi aktualni (leta 2013 uveljavljeni) ZDR-1 v prvem odstavku 73. člena ohranja dikcijo 72. člena ZDR, v drugem odstavku 73. člena pa izrecno dopušča delovnopravni položaj direktorjev-edinih družbenikov.[17] Gre za določbo, ki je v direktnem nasprotju z navedenimi stališči teorije, pa tudi z dotedanjo prakso Vrhovnega sodišča RS[18] in prakso Sodišča EU.[19] S to določbo se direktorjem enoosebnih družb izrecno priznava položaj delavca, ne glede na to, da je očitno, da elementov delovnega razmerja tu ni (predvsem ni mogoče najti elementa dela po navodilih in pod nadzorom delodajalca, saj je direktor hkrati predstavnik delodajalca in delavec). Ker direktor-edini družbenik (ustanovitelj) delovno-pravnega varstva (v razmerju do samega sebe) ne potrebuje, je namen te določbe očitno drugje.[20]

Hkrati je zakonodajalec s tem (hote ali nehote) status delavca izrecno priznal tudi drugim poslovodnim osebam. Če se status delavca (ne glede na elemente delovnega razmerja) priznava direktorju enoosebne družbe z omejeno odgovornostjo, to toliko bolj velja za direktorje v ostalih družbah z omejeno odgovornostjo, vprašanje pa je, ali tudi za vse poslovodne osebe v delniški družbi in za poslovodne osebe v drugih pravnih osebah.

Očitno je namen zakonodajalca, da se poslovodnim osebam omogoči sklenitev pogodbe o zaposlitvi, ne glede na to, ali v njihovem razmerju obstajajo elementi delovnega razmerja, se pravi, ali potrebujejo delovno-pravno varstvo ali ne. Če pravna oseba in poslovodna oseba svoje medsebojno razmerje uredita s pogodbo o zaposlitvi, je poslovodna oseba delavec, zato jo varuje delovno pravo.

V primeru, da pravna oseba in poslovodna oseba skleneta pogodbo o opravljanju funkcije kot pogodbo civilnega prava, se poslovodna oseba praviloma šteje za samozaposleno osebo in zanjo delovno pravo ne velja.[21]

4 Posebnosti delovnopravnega položaja direktorja (poslovodne osebe)

4.1 Splošno

Za direktorja, ki z družbo sklene pogodbo o zaposlitvi veljajo vse določbe delovne zakonodaje, razen tistih, iz veljavnosti katerih je izrecno izvzet oziroma glede vprašanj, ki so zanj posebej urejena. ZDR-1 posebnosti delovno-pravnega položaja poslovodne osebe ureja v tretjem in četrtem odstavku 20. člena (zastopnik delodajalca v razmerju do poslovodne osebe), 26. členu (izjema od objave prostega delovnega mesta), 54. členu in drugem odstavku 55. člena (dopustnost sklepanja pogodbe o zaposlitvi za določen čas, tudi v daljšem trajanju od splošne zakonske omejitve), tretjem odstavku 40. člena (dopustnost določitve konkurenčne klavzule tudi v primeru pogodbe o zaposlitvi za določen čas), četrtem odstavku 49. člena (mirovanje pogodbe o zaposlitvi za nedoločen čas v času mandata) in 157. členu (dopustnost drugačne ureditve delovnega časa). Poleg tega 73. člen ZDR-1, ki ureja pogodbo o zaposlitvi s poslovodnimi osebami izrecno določa, da lahko pogodbeni stranki pri ureditvi medsebojnih pravic, obveznosti in odgovornosti iz delovnega razmerja na nekaterih področjih odstopita od splošne zakonske ureditve.

4.2 Zastopnik družbe pri sklepanju pogodbe o zaposlitvi s poslovodno osebo

Glede na to, da praviloma poslovodne osebe kot zastopnik gospodarske družbe (delodajalca) sklepajo pogodbe o zaposlitvi z delavci, je v tretjem in četrtem odstavku 20. člena ZDR-1 posebej določeno, da v primeru, ko se pogodba o zaposlitvi sklepa s poslovodno osebo, v imenu delodajalca nastopa organ, ki je po zakonu oziroma aktih družbe (akt o ustanovitvi, družbena pogodba, statut) pristojen za zastopanje delodajalca proti poslovodnim osebam, če tega ni, pa lastnik (v času ustanavljanja pa ustanovitelj).

Upoštevaje določbe ZGD-1, je za nastopanje v imenu delodajalca v primeru sklenitve pogodbe o zaposlitvi s člani in predsednikom uprave delniške družbe pristojen nadzorni svet oziroma njegov predsednik, v primeru sklenitve pogodbe o zaposlitvi s poslovodjo družbe z omejeno odgovornostjo skupščina družbenikov (če ima družba nadzorni svet, pa le-ta, če družbena pogodba ne določa drugače), v primeru sklenitve pogodbe o zaposlitvi z izvršnim direktorjem nastopa v imenu delodajalca upravni odbor oziroma

njegov predsednik, v primeru sklenitve pogodbe o zaposlitvi s članom upravnega odbora pa skupščina.

Določbo tretjega odstavka ZDR-1, ki določa »kadar se sklepa pogodba o zaposlitvi s poslovodno osebo, nastopa v imenu delodajalca organ….« je treba razumeti tako, da splošno določa, kateri organ zastopa delodajalca-pravno osebo v razmerju do delavca-poslovodne osebe, v primeru, ko poslovodna oseba s pravno osebo, ki jo vodi sklene pogodbo o zaposlitvi. Ne gre torej za organ, ki nastopa v imenu delodajalca zgolj pri sklenitvi te pogodbe o zaposlitvi, ampak za organ, ki nastopa v imenu delodajalca v vseh vprašanjih, ki se tičejo pogodbe o zaposlitvi oziroma delovnega razmerja, vključno z odpovedjo te pogodbe o zaposlitvi.[22]

4.3 Izjema od objave

Upoštevaje 1. odstavek 26. člena ZDR-1 se lahko pogodba o zaposlitvi s poslovodno osebo sklene brez javne objave prostega delovnega mesta. Glede na to, da je pristojni organ gospodarske družbe pri imenovanju poslovodnih oseb praviloma prost in kandidatov ni dolžan iskati preko javnih razpisov, tudi javna objava delovnega mesta poslovodne osebe ne bi imela smisla. Pogodba o zaposlitvi se v tem primeru namreč sklene z osebo, ki je bila s strani pristojnega organa že imenovana na funkcijo direktorja (poslovodne osebe).

4.4 Konkurenčna klavzula

Konkurenčna klavzula, s katero se delavec zaveže, da določen čas po prenehanju pogodbe o zaposlitvi svojemu bivšemu delodajalcu ne bo konkuriral na nelojalen način (z uporabo znanj in zvez, ki jih je pri njem pridobil), lahko delavca zavezuje le v primerih, ko pogodba o zaposlitvi preneha na enega od načinov, ki so taksativno navedeni v drugem odstavku 40. člena ZDR-1. Med njimi ni prenehanja pogodbe o zaposlitvi za določen čas.

Upoštevaje tretji odstavek 40. člena ZDR-1 (po katerem se ZDR-1 loči od ZDR) se konkurenčna klavzula lahko dogovori tudi za primer izteka pogodbe o zaposlitvi za določen čas (v skladu s prvim odstavkom 79. člena ZDR-1), vendar le v primeru pogodb o zaposlitvi z določenimi kategorijam delavcev, med katerimi so tudi poslovodne osebe. Glede na to, da poslovodne osebe v času opravljanja svoje funkcije pridobijo za delodajalca pomembna znanja in zveze, je zakonska možnost vključitve konkurenčne klavzule v njihovo pogodbo o zaposlitvi, tudi če je ta sklenjena za določen čas in uveljavitev klavzule ob prenehanju te pogodbe, ustrezna.

4.5 Mirovanje pravic in obveznosti iz pogodbe o zaposlitvi za nedoločen čas

V primeru, da je za poslovodno osebo imenovana oseba, ki ima s tem delodajalcem že sklenjeno pogodbo o zaposlitvi za nedoločen čas (za opravljanje drugega dela), se lahko pogodbeni položaj te poslovodne osebe uredi v skladu s četrtim odstavkom 49. člena

ZDR-1. S poslovodno osebo se za določen čas (za čas mandata) sklene pogodba o zaposlitvi po 73. členu ZDR-1, pravice in obveznosti iz pogodbe o zaposlitvi za nedoločen čas pa medtem mirujejo.

Po prenehanju pogodbe o zaposlitvi, sklenjene za določen čas, te pravice, obveznosti in odgovornosti iz pogodbe o zaposlitvi za nedoločen čas spet »oživijo«. V tem delu (glede mirovanja pravic) gre za podobno rešitev kot v primeru suspenza pogodbe o zaposlitvi (urejenega v 53. členu ZDR-1), razlika pa je v tem, da v primeru suspenza delavec začasno ne opravlja dela, v tem primeru pa delavec opravlja delo, le po drugi pogodbi o zaposlitvi. Gre torej za to, da ima delavec hkrati sklenjeni dve pogodbi o zaposlitvi z istim delodajalcem.

4.6 Posebnosti pri pogodbeni ureditvi pravic in obveznosti, ki izhajajo iz 73. člena ZDR-1

Upoštevaje prvi odstavek 73. člena ZDR-1, se s pogodbo o zaposlitvi s poslovodno osebo lahko drugače uredijo pravice in obveznosti iz delovnega razmerja v zvezi s sklepanjem pogodbe o zaposlitvi za določen čas, delovnim časom, odmori in počitki, plačilom za delo, disciplinsko odgovornostjo in prenehanjem pogodbe o zaposlitvi. Pogodbena ureditev teh pravic in obveznosti je lahko za poslovodne osebe bolj ali manj ugodna od zakonske. Namen drugačne pogodbene ureditve po tem členu ni v priznavanju več pravic tem osebam (to je na podlagi drugega odstavka 9. člena ZDR-1 možno pri vseh delavcih, in glede vseh pravic in obveznosti), ampak v ustreznejši ureditvi nekaterih pravic, obveznosti in odgovornosti, katerih zakonska ureditev je neustrezna z vidika hkratnega statusnega položaja poslovodnih oseb.[23]

Sklepanje pogodbe o zaposlitvi za določen čas

Pogodba o zaposlitvi s poslovodno osebo se lahko sklene za določen čas, ki je lahko daljši od veh let (kar je sicer splošna časovna omejitev).[24] S takšno ureditvijo ZDR-1 omogoča pogodbenim strankam, da trajanje pogodbenega razmerja poslovodne osebe vežejo na predvideno trajanje statusno-pravnega razmerja. Statusno-pravni položaj (funkcija) poslovodne osebe je namreč običajno časovno omejen z mandatnim obdobjem (pri članu uprave in izvršnem direktorju že na podlagi zakona, pri poslovodji pa, če je tako določeno v družbeni pogodbi), ki praviloma traja več kot dve leti.[25]

Delovni čas, odmori, počitki

V 73. členu ZDR-1 določena možnost, da pogodbeni stranki drugače uredita delovni čas, odmore in počitke poslovodne osebe, je urejena tudi v 157. členu ZDR-1, ki se nanaša na posebnosti urejanja delovnega časa, nočnega dela, odmorov in počitkov za nekatere kategorije delavcev, med katere sodijo tudi poslovodne osebe. Pri tem je upoštevan poseben položaj poslovodnih oseb, za katere je značilno, da jim glede na naravo njihovega dela delovnega časa ni mogoče vnaprej razporediti (s strani kakšnega drugega organa v družbi) oziroma si ga razporejajo sami. Kljub temu, da v primeru poslovodnih

oseb v pogodbi o zaposlitvi ni treba upoštevati posamičnih zakonskih določb v zvezi z delovnim časom, ki so namenjene varstvu ostalih delavcev, jim morata biti zagotovljena varnost in zdravje pri delu.

Plačilo za delo

Upoštevaje 73. člen ZDR-1 se poslovodnim osebam plačilo za delo pogodbeno lahko uredi drugače, kot to sicer ureja ZDR-1. Če navedene določbe ne bi bilo, se pogodbeni stranki ne bi mogli ravnati po določbah prvega odstavka 270. in enajstega odstavka 290. člena ZGD-1, ki določajo pravila za določitev prejemkov člana uprave in izvršnega direktorja, prav tako ne bi mogli slediti Priporočilom Združenja Manager pri sklepanju managerskih pogodb (http://www.zdruzenje-manager.si/o-zdruzenju/kljucni-dokumenti) niti Priporočilom Združenja članov nadzornih svetov za kadrovanje in nagrajevanje članov uprav in izvršnih direktorjev (http://www.zdruzenje-ns.si/knjiznica/priporocila-in-kodeksi/), saj ta priporočila v veliki meri odstopajo od zakonske ureditve plačila za delo.

Pogodbeni stranki, ki pri tem nista vezani na sestavine plače, ko jih določa 126. člen ZDR-1 lahko poslovodni osebi s pogodbo o zaposlitvi prosto določita višino in obliko plačila za delo (plačo, nagrade, nagrajevanje z delnicami in opcijami, razne bonitete) in pri tem upoštevata njen položaj v družbi – predvsem dejstvo da kot član poslovodnega organa vodi posle družbe z veliko samostojnostjo in ima možnost vplivati na rezultate družbe. Glede tistih vprašanj, povezanih z nagrajevanjem poslovodne osebe, ki so izrecno urejena v pogodbi o zaposlitvi, velja pogodbena (in ne zakonska) ureditev, glede vseh ostalih vprašanj pa tudi za poslovodne osebe veljajo določbe ZDR-1. Če glede posameznih pravic, ki jih ZDR-1 določa, v pogodbi s poslovodno osebo ni drugačne ureditve, jim te pravice pripadajo v takšnem obsegu, kot izhaja iz ZDR-1 (na primer nadomestilo plače, regres za letni dopust, odpravnina ob upokojitvi). Za poslovodne osebe pa praviloma ne veljajo (panožne in podjetniške) kolektivne pogodbe. Če te kolektivne pogodbe za delavce določajo višji nivo pravic na posameznih področjih, to za poslovodno osebo ne velja, razen če se njegova pogodba o zaposlitvi sklicuje na kolektivno pogodbo, ki zavezuje delodajalca, ali če se mu enak (ali višji) nivo pravic, kot izhajajo iz kolektivne pogodbe, izrecno priznava s pogodbo o zaposlitvi).

Disciplinska odgovornost

Disciplinska odgovornost delavca kot institut, urejen z ZDR-1 se nanaša tudi na poslovodno osebo - delavca. V imenu delodajalca bi upoštevaje tretji odstavek 20. člena ZDR-1 v tem primeru nastopal organ, ki je v ZGD-1 določen kot organ, ki družbo zastopa proti poslovodstvu. Vodenje disciplinskega postopka s strani nadzornega sveta (upravnega odbora, skupščine družbenikov) proti poslovodni osebi sicer ni običajna aktivnost za te organe. Le-ti sicer nastopajo proti poslovodni osebi tudi kot zastopnik delodajalca, vendar vse dokler med njimi in poslovodno osebo obstaja zaupanje, vprašanje morebitnih (manjših) kršitev poslovodne osebe rešujejo brez uporabe

postopkovno zapletenega disciplinskega postopka, z zaupnim razgovorom. Za primer, da bi poslovodna oseba huje kršila svoje obveznosti, pa ima gospodarska družba nasproti poslovodni osebi na voljo tudi druge, iz statusno-pravnega položaja izhajajoče možnosti ukrepanja (odpoklic). To so po mojem mnenju tudi razlogi, zaradi katerih je ZDR-1 v 73. členu dopustil, da pogodbeni stranki v pogodbi o zaposlitvi s poslovodno osebo (disciplinsko odgovornost drugače uredita.

Prenehanje pogodbe o zaposlitvi

Iz 73. člena ZDR-1 izhaja, da lahko pogodbeni stranki drugače uredita tudi prenehanje pogodbe o zaposlitvi. V času veljavnosti ZDR (ki je vseboval identično določbo) so v tej zvezi obstajala različna mnenja o tem, na kaj se lahko nanaša drugačna pogodbena ureditev, predvsem ali se lahko pogodbeni stranki dogovorita za drugačen način prenehanja pogodbe o zaposlitvi, kot jih sicer ureja zakon, z namenom, da bi ob prenehanju statusno-pravnega položaja poslovodne osebe (lahko) prišlo tudi do prenehanja njenega delovnega razmerja.[26] Navedeno vprašanje je bilo za prakso zelo pomembno. V primeru nekrivdne razrešitve direktorja ali ob poteku njegovega mandata namreč pogodbe o zaposlitvi (ki je bila praviloma sklenjena za nedoločen čas), na podlagi zakonske ureditve ni bilo mogoče odpovedati.
Danes dvoma o tem, da je dopustno v pogodbi o zaposlitvi s poslovodno osebo drugače urediti tudi način prenehanje pogodbe o zaposlitvi ni več. Pogodbene stranke na različne načine urejajo prenehanje pogodbe o zaposlitvi ob prenehanju mandata poslovodne osebe – praviloma tako da s prenehanjem mandata preneha tudi pogodba o zaposlitvi ali tako, da je prenehanje mandata razlog za odpoved pogodbe o zaposlitvi. V praksi so različno določene tudi pravice direktorja ob prenehanju pogodbe o zaposlitvi (odpravnina, odpovedni rok, pravica do ponudbe drugega dela). Iz sodnih primerov izhaja, da so te pravice praviloma vezane na razlog za odpoklic in direktorju pripadajo le v primeru, če do odpoklica ni prišlo iz razloga na njegovi strani.[27] Pri uresničitvi pravice do ustreznega drugega dela, ki je dogovorjena s pogodbo o zaposlitvi za primer prenehanja funkcije, je v praksi pomembno predvsem to, ali ima delodajalec delovno mesto, ki bi ga lahko ponudil bivšemu direktorju, na voljo.[28]

Kadar je v pogodbi o zaposlitvi določeno, da je prenehanje funkcije (odpoklic, odstop poslovodne osebe) razlog za odpoved pogodbe o zaposlitvi, lahko pogodba preneha s potekom odpovednega roka. Čeprav je direktorju funkcija prenehala, pogodba o zaposlitvi vse do izteka odpovednega roka obstaja, delavec pa lahko koristi letni dopust, predaja posle, ali pa je zgolj upravičen do nadomestila plače.[29] Namen pogodbe o zaposlitvi (pa tudi civilne pogodbe) s poslovodno osebo je ravno v varstvu položaja poslovodne osebe, tudi ob prenehanju njenega statusnega razmerja (praviloma z odpovednim rokom oziroma odpravnino).

Če v pogodbi o zaposlitvi s poslovodno osebo prenehanje pogodbe o zaposlitvi ni urejeno, velja zakonska ureditev (določbe ZDR-1). V primeru krivdnega prenehanja funkcije poslovodne osebe praviloma pride v poštev izredna odpoved pogodbe o zaposlitvi, v primeru odpoklica zaradi nesposobnosti, odpoved pogodbe o zaposlitvi iz razloga

nesposobnosti in v primerih kot je zmanjšanje števila članov uprave, odpoved iz poslovnega razloga. V primeru, ko je poslovodna oseba odpoklicana iz razloga, ki ni na njeni strani (član uprave zaradi drugih ekonomsko-poslovnih razlogov po četrti alineji drugega odstavka 268. člena ZGD-1, izvršni direktor ali poslovodja pa brez krivde oziroma brez navedbe razloga) ali ji preneha mandata in ni ponovno imenovana, noben od zakonsko urejenih načinov prenehanja pogodbe o zaposlitvi ni čisto ustrezen.[30] V poslovni praksi se je v tej zvezi uveljavila redna odpoved pogodbe o zaposlitvi iz razloga nesposobnosti, Vrhovno sodišče RS pa je v več zadevah potrdilo zakonitost tovrstne odpovedi z utemeljitvijo, da odpoklicani direktor več ne izpolnjuje z zakonom (ZGD-1) določenih pogojev za opravljanje svojega dela, zato ne more izpolnjevati obveznosti iz pogodbe o zaposlitvi.[31]

Po pregledu sodnih odločitev Vrhovnega sodišča RS in Višjega delovnega in socialnega sodišča je mogoče ugotoviti, da je prišlo do zanimive prakse. Gospodarske družbe namreč odpovedi pogodbe o zaposlitvi iz razloga nesposobnosti ne uporabljajo le v primeru nekrivdnega odpoklica poslovodne osebe, ampak tudi v primeru odpoklica iz krivdnih razlogov[32] Ker so odpravnina in druge pravice praviloma vezane na nekrivdni odpoklic, poslovodni osebi v takšnem primeru ne izplačajo odpravnine. Poslovodna oseba mora pravico do odpravnine uveljavljati pred delovnim sodiščem, ki pri tem presoja obstoj krivdnih razlogov za odpoklic.[33] Po drugi strani pa delovna sodišča praviloma zavračajo zahtevke poslovodnih oseb, ki uveljavljajo nezakonitost odpovedi pogodbe o zaposlitvi iz razloga nesposobnosti, saj jo štejejo za utemeljeno s samim dejstvom odpoklica. Odločanje o veljavnosti sklepa o odpoklicu je v pristojnosti rednih sodišč, ki pa glede na ustaljeno sodno prakso[34] lahko zgolj ugotovijo ničnost sklepa (ob analogni uporabi OZ), ne odločajo pa o njegovi razveljavitvi (zaradi nezakonitosti oziroma neutemeljenosti). O vprašanju obstoja odpovednih razlogov redna sodišča odločajo le v zvezi z uveljavljanjem odškodnine zaradi morebitnega neutemeljenega odpoklica. Ugotovimo lahko, da se je v nekaj letih varstvo delovnopravnega položaja poslovodnih oseb zelo spremenilo. Če je bilo v preteklosti direktorju ob prenehanju funkcije težko odpovedati pogodbo o zaposlitvi, danes direktor težko doseže ugotovitev nezakonitosti odpovedi pogodbe o zaposlitvi tudi, če je bil odpoklic neutemeljen oziroma nezakonit.

5 Sklepno

Pravna ureditev pogodbenega položaja direktorjev v RS se tudi po več kot dvajsetih letih uvedbe gospodarskih družb, ni spremenila. Direktorji so lahko v delovnem razmerju, pa čeprav v njihovem pogodbenem razmerju z gospodarsko družbo ni elementov delovnega razmerja. To sedaj izrecno izhaja iz ZDR-1, ki omogoča sklenitev pogodbe o zaposlitvi celo direktorju enoosebne družbe. Za direktorja enoosebne družbe je to pomembno zaradi ugodnejšega socialno-pravnega položaja, v primeru ostalih direktorjev pa predvsem zaradi delovnopravnega varstva. Direktorja-delavca namreč varujejo vsi mednarodni in nacionalni delovnopravni viri, pa čeprav tega varstva pogosto ne potrebuje. V določeni meri je pravni položaj direktorja (poslovodne osebe) sicer drugačen od položaja drugih delavcev, saj to omogoča posebna zakonska in pogodbena ureditev. V večini primerov ta

drugačna ureditev omogoča usklajevanje delovnopravnega in korporacijskega položaja. Največ težav je povezanih s prenehanjem pogodbe o zaposlitvi, kar je posledica nerazumevanja namena pogodbe, ki direktorju (delavcu) zagotavlja varstvo tudi ob prenehanju statusnega položaja.

Notes

[1] Uradni list RS, št. 65/09 (ZGD-1 UPB3), 33/2011, 91/2011, 32/2012, 57/2012, 44/13 – odl. US, 82/2013 in 55/2015.
[2] Uradni list RS, št. 21/2013.
[3] Glej 1. odstavek 515. člena ZGD-1 in 2. odstavek 265. člena ZGD-1.
[4] Glej na primer 286., 287. člen ZGD-1.
[5] ZGD-1 poimenuje z izrazom izvršni direktor vse osebe, ki jih upravni odbor imenuje na to funkcijo (ne le člane upravnega odbora, ampak tudi tretje osebe).
[6] V primeru, da upravni odbor imenuje izvršne direktorje, namreč člani upravnega odbora (podobno kot člani nadzornega sveta v delniški družbi z dvotirnim sistemom upravljanja) z družbo ne sklenejo posebne pogodbe o opravljanju funkcije, ampak so plačani po sklepu skupščine oziroma na podlagi določbe v statutu (v obliki sejnin).
[7] Več o tem (Senčur Peček, 2008: 7-26).
[8] Glej 2. odstavek 270. člena, 8. in 11. odstavek 290. člena, 3. odstavek 515. člena ZGD-1.
[9] Tak izraz (»pogodba o opravljanju funkcije« oziroma »pogodba o opravljanju funkcije poslovodje«) uporablja tudi ZGD-1 (v 8. odstavku 290. člena 3. odstavku 515. člena).
[10] Korporacijski položaj direktorja nastane z imenovanjem, pogodbeni pa s sklenitvijo pogodbe. Sklenitev pogodbe ni nujna, niti obvezna, zato lahko direktor svojo funkcijo opravlja tudi, če pogodba ni (veljavno) sklenjena. Veljavno imenovanje osebe za direktorja pa je pogoj za veljavnost pogodbe o opravljanju funkcije direktorja, saj pogodba o opravljanju funkcije direktorja z osebo, ki ni direktor nima podlage (kavze).
[11] Korporacijsko pravo ureja položaj direktorja z vidika njegovega delovanja kot organa družbe, s pogodbo pa je urejeno varstvo osebnega položaja direktorja. Navedena položaja se prekrivata le v določenem delu (predvsem glede obveznosti direktorja, ki jih direktor prevzame skupaj s funkcijo in jih pogodbeno ni mogoče spremeniti ter glede določitve prejemkov direktorja-člana uprave ali izvršnega direktorja, pri katerih se morata pogodbeni stranki ravnati po določbah ZGD-1, ki to vprašanje načeloma urejajo) in le v tem delu mora biti pogodbena ureditev usklajena s statusno-pravno zakonodajo. V ostalem delu sta oba položaja med seboj neodvisna, in se presojata vsak po svojih pravilih.
[12] Korporacijski in pogodbeni položaj sta funkcionalno povezana, zato bo prenehanju korporacijskega položaja nedvomno sledilo prenehanje pogodbe. Pri tem pa se spet pokaže ločenost obeh položajev. Korporacijski položaj (funkcija) direktorja preneha po statusno-pravnih pravilih, za opredelitev trajanja in prenehanja pogodbe pa veljajo pravila, ki veljajo za pogodbo (pravila civilnega ali delovnega prava). Tudi namen korporacijskih pravil in pogodbene ureditve položaja direktorja je različen. Prva zagotavljajo čim uspešnejše funkcioniranje družbe (temu služi tudi zakonska možnost pristojnih organov družbe, da svobodno postavljajo in odstavljajo direktorja). Namen pogodbene ureditve položaja direktorja pa je v tem, da varuje direktorja, ne le v času trajanja opravljanja funkcije, ampak tudi v primeru prenehanja funkcije, ki za direktorja pomeni izgubo vira za preživljanje.
[13] Uradni list RS, št. št. 30/1993, 29/1994, 82/1994, 20/1998, 84/1998, 6/1999, 45/2001, 57/2004 in 139/2004.
[14] Pred tem je (v času družbene lastnine in samoupravljanja) je bila na ozemlju Republike Slovenije ureditev gospodarskih subjektov in položaja oseb, ki so te subjekte vodile, prilagojena temu

družbeno-ekonomskemu sistemu. Člani poslovodnih organov (direktorji) so bili v delovnem razmerju in v svojem delovnopravnem položaju v veliki meri izenačeni z ostalimi delavci.

[15] Uradni list RS, št. 42/2002, 103/2007..

[16] ZDR je v prvem odstavku 72. člena določal: »Če poslovodna oseba sklepa pogodbo o zaposlitvi….«.

[17] V primeru sklenitve pogodbe o zaposlitvi med poslovodno osebo in družbo, katere edini lastnik je ta poslovodna oseba, se takšno razmerje lahko šteje za delovno razmerje, ne glede na 4. člen ZDR-1 (se pravi, ne glede na to, ali v razmerju obstajajo elementi delovnega razmerja, med katerimi je najpomembnejši opravljanje dela po navodilih in pod nadzorom delodajalca.). Glej drugi odstavek 73. člena ZDR-1.

[18] Glej sodbo Vrhovnega sodišča opr. št. VIII Ips 167/2008 iz 29. oktobra 2009 in druge podobne sodbe, iz katerih izhaja, da direktor-družbenik enoosebne družbe ne more biti vključen v socialno zavarovanje kot delavec.

[19] Sodišče EU, ki sicer pojem delavca pojmuje zelo široko (tudi v primeru direktorjev), je pri tem izvzelo direktorja, ki je edini družbenik, saj ta ne more biti v razmerju podrejenosti (glej sodbo v zadevi C-107/94 z dne 27. junija 1996, P. H. Asscher proti Staatssecretaris van Financiën, ZOdl 1996, str. I-03089, točka 26, ki se citira tudi v novejših odločitvah).

[20] Predvidevati je mogoče, da je zakonodajalec želel direktorjem enoosebnih družb omogočiti socialno zavarovanje na podlagi delovnega razmerja (namesto, da bi posebej uredil socialno zavarovanje za poslovodne osebe, ki niso delavci, podobno kot je to urejeno v primerljivih pravnih sistemih).

[21] Ob tem pa kaže opozoriti na novejšo prakso sodišča EU, ki je v primeru uporabe nekaterih direktiv EU pričelo oblikovati enotni evropski pojem delavca. Nekatere od odločitev sodišča EU so se nanašale ravno na direktorja (na primer C-232/09, 11. november 2010, Dita Danosa proti LKB Līzings SIA, ZOdl 2010, str. I-11405; C-229/14, 9. julij 2015, Ender Balkaya proti Kiesel Abbruch- und Recycling Technik GmbH, še neobjavljeno), Sodišče pa je direktorja v smislu obravnavane direktive štelo za delavca, ne glede na to, da je imel z gospodarsko družbo sklenjeno pogodbo civilnega prava in se po nacionalnem pravu ni štel za delavca

[22] Drugačno stališče zavzema Vrhovno sodišče RS v primerih, ko gre za odpoved pogodbe o zaposlitvi poslovodni osebi, ki je bila pred tem odpoklicana. V sodbah VIII Ips 83/2011 iz 4. 9. 2012, ECLI:SI:VSRS:2012:VIII.IPS.83.2011 in VIII Ips 79/2013 iz 30. 9. 2013, ECLI:SI:VSRS:2013:VIII.IPS.79.2013 ter sklepu VIII Ips 162/2013 iz 10. 12. 2013, ECLI:SI:VSRS:2013:VIII.IPS.162.2013 je zavzelo stališče, da v tem primeru za odpoved ni pristojen organ, določen na podlagi tretjega odstavka 20. člena ZDR-1 (prej 18. člena ZDR), ampak zakoniti zastopnik po prvem odstavku 20. člena ZDR-1(novi direktor).

Navedenemu stališču ni mogoče pritrditi. Čeprav je bil direktor odpoklican, in formalno ni več poslovodna oseba, gre za odpoved pogodbe o zaposlitvi, ki je bila sklenjena za opravljanje funkcije poslovodne osebe. Organ družbe, ki je po statusni zakonodaji pristojen za imenovanje in odpoklic direktorja in za zastopanje družbe proti direktorju (v primeru delniške družbe je to nadzorni svet), je v skladu s tretjim odstavkom 20. člena ZDR-1 pristojen tudi za podpis pogodbe o zaposlitvi z direktorjem. Menim, da bi morali ta organ šteti kot pristojni organ tudi za odpoved te iste pogodbe o zaposlitvi, ne glede na to, kdaj do te odpovedi pride. Še vedno gre za nastopanje družbe v razmerju do osebe, ki je opravljala poslovodno funkcijo in glede vprašanj, ki se nanašajo na pogodbo glede poslovodne funkcije. Takšno je tudi stališče nemške teorije (Münchener Kommentar zum Aktiengesetz, 2008: 134, 135, 302, 1136-1139; Scholz Kommentar zum GmbH-Gesetz,, 2000: 1549; Lutter/Hommelhoff GmbH-Gesetz Kommentar, 2009: 309) in sodne prakse, ki temelji na nemški korporacijski zakonodaji (ki ji je sledil ZGD-1).

[23] Upoštevaje tretji odstavek 73. člena ZDR-1 velja ta možnost drugačne pogodbene ureditve pravic in obveznosti tudi za poslovodno osebo-edinega družbenika gospodarske. Glede na to, da gre za

pogodbo o zaposlitvi, ki jo kot delavec in kot delodajalec podpiše ista oseba, so pravila ki jih delovno pravo določa z namenom varstva delavca (šibkejše stranke) v razmerju do delodajalca, tu brez pomena. To velja tudi glede vsebine pogodbe o zaposlitvi in možnosti odstopa od zakonske ureditve. Pogodba o zaposlitvi je v primeru direktorja-družbenika enoosebne družbe namenjena predvsem temu, da se lahko direktor vključi v socialna zavarovanja kot delavec. Na tej podlagi je glede pravic iz socialnega zavarovanja izenačen z ostalimi delavci (ki pridobijo pravice tudi, če jim prispevki niso plačani), čeprav kot edini družbenik in direktor sam odloča o višini plače in o plačilu prispevkov (kar je značilnost samozaposlenih oseb).

[24] Glej prvo alinejo prvega odstavka 73. člena ter prvi odstavek 54. člena, drugi odstavek 55. člena ZDR-1.

[25] Glej prvi odstavek 255. člena, prvi odstavek 290. člena in drugi odstavek 515. člena ZGD-1.

[26] Glej v (Bečan et. al, 2008: 317).

[27] To glede odpravnine v primeru poslovodnih oseb v delniški družbi izhaja tudi iz tretje alineje sedmega odstavka 294. člena ZGD-1).

[28] Glej na primer sodbo VDSS Pdp 283/2015, 20. 8. 2015, ECLI:SI:VDSS:2015:PDP.283.2015 in sklep VDSS Pdp 372/2014, 20.8.2014, ECLI:SI:VDSS:2014:PDP.372.2014.

[29] Drugačno stališče izhaja iz sodbe Vrhovnega sodišča RS VIII Ips 38/2015, 21. 4. 2015, ECLI:SI:VSRS:2015:VIII.IPS.38.2015, točka 12.

[30] Podrobneje o tem v (Bečan et. al, 2008: 318-319); glej tudi (Senčur Peček, 2009: 7- 34).

[31] Glej sodbo VIII Ips 460/2006, 18. 6. 2007, ECLI:SI:VSRS:2007:VIII.IPS.460.2006, ki je bila prva tovrstna odločitev in sodbo VIII Ips 114/2014, 29. 9. 2014, ECLI:SI:VSRS:2014:VIII.IPS.114.2014, ki je ena novejših.

[32] Glej na primer sodbo VIII Ips 204/2014, 8.6.2015, ECLI:SI:VSRS:2015:VIII.IPS.204.2014.

[33] Na primer sodbi VS RS VIII Ips 181/2014, 13.1.2014, ECLI:SI:VSRS:2015:VIII.IPS.181.2014 in VIII Ips 204/2014, 8. 6. 2015, ECLI:SI:VSRS:2015:VIII.IPS.204.2014.

[34] Glej sodbo in sklep VS RS III Ips 243/2008, 27. 1. 2011, ECLI:SI:VSRS:2011:III.IPS.243.2008; sodbo VSK Cpg 43/2015, 20. 8. 2015, ECLI:SI:VSKP:2015:CPG.43.2015.

References

Bečan, I. et. al, (2008) Zakon o delovnih razmerjih s komentarjem (Ljubljana: GV Založba).

Bohinc, R. (1999) Delovnopravni in korporacijski položaj direktorjev, Podjetje in delo, 25(2), pp. 283-306.

Bratina, B., Kocbek, M. et. al, (2014) Veliki komentar Zakona o gospodarskih družbah (Ljubljana: IUS SOFTWARE, GV založba).

Dobrin, T. (1995) Nekatera vprašanja delovnopravnega in socialnovarstvenega statusa poslovodnih oseb, Podjetje in delo, 21(8), pp. 1116-1127.

Klampfer, M. (2001) Položaj managerjev po sodni praksi, In: Gospodarski subjekti na trgu, (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17. do 19. maj 2001, Portorož), pp. 331 – 350 (Maribor: Inštitut za gospodarsko pravo).

Kresal, B. (2001) Pravni položaj managerjev z vidika ureditve njihovega plačila, In: Gospodarski subjekti na trgu, (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17. do 19. maj 2001, Portorož), pp. 323 – 330 (Maribor: Inštitut za gospodarsko pravo).

Lutter/Hommelhoff GmbH-Gesetz Kommentar (2009) (Köln: Verlag dr. Otto Schmidt).

Münchener Kommentar zum Aktiengesetz (2008) (München: Verlag C. H. Beck; Verlag Franz Vahlen).

Schmidt, K .(2002) Gesellschaftsrecht (München, Köln, Berlin, Bonn: Carl Heymanns Verlag KG).

Scholz, F. (2000) Kommentar zum GmbH-Gesetz, I. Band (Köln: Verlag Dr. Otto Schmidt).

Senčur Peček, D. (2001) Pravni položaj direktorja gospodarske družbe, In: Gospodarski subjekti na trgu, (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17. do 19. maj 2001, Portorož), pp. 291-310 (Maribor: Inštitut za gospodarsko pravo).

Senčur Peček, D. (2007) Delovnopravni položaj direktorjev, doktorska disertacija, (Murska Sobota).

Senčur Peček, D. (2008) Pojem poslovodne osebe, direktorja in vodilnega delavca v gospodarski družbi, Delavci in delodajalci, 8(1), pp. 7-26.

Senčur Peček, D. (2009) Prenehanje pogodbe o zaposlitvi s poslovodno osebo (direktorjem) v primeru prenehanja funkcije poslovodne osebe, Delavci in delodajalci, 9(1), pp. 7- 34.

Senčur Peček, D. (2010) Je pogodba o opravljanju funkcije direktorja lahko pogodba o zaposlitvi?, Podjetje in delo, 36(5), 835-862.

Zakon o delovnih razmerjih (ZDR-1), Uradni list RS, št. 21/2013,

Zakon o delovnih razmerjih (ZDR), Uradni list RS, št. 42/2002, 103/2007,

Zakon o gospodarskih družbah (ZGD-1), Uradni list RS, št. 65/2009 (ZGD-1 UPB3), 33/2011, 91/2011, 32/2012, 57/2012, 44/13 – odl. US, 82/2013 in 55/2015,

Zakon o gospodarskih družbah (ZGD), Uradni list RS, št. 30/1993, 29/1994, 82/1994, 20/1998, 84/1998, 6/1999, 45/2001, 57/2004 in 139/2004,

Priporočila Združenja Manager pri sklepanju managerskih pogodb (2014) [http://www.zdruzenje-manager.si/o-zdruzenju/kljucni-dokumenti] (obiskano 1. 6. 2016)

Priporočila Združenja članov nadzornih svetov za kadrovanje in nagrajevanje članov uprav in izvršnih direktorjev (2007) [http://www.zdruzenje-ns.si/knjiznica/priporocila-in-kodeksi/] (obiskano 1. 6. 2016)

The Issue of the Order of Acquisition of Derivative Rights in Case of Bankruptcy of the Immovable Property Owner

RENATO VRENČUR

Abstract: The paper discusses operationalisation of the priority principle, which represents the other side of the principle of absoluteness. The principle of absoluteness is in fact reflected in two ways, namely so that real rights are enforceable against any person, and that the earlier or older real rights take precedence over subsequent or younger real rights (first in time, greater in right). Priority principle is operationalized in enforcement and insolvency law as well. Thus, the discussion in this paper focuses on legal issues of the order of acquisition of real rights in case of bankruptcy of the immovable property owner. A special emphasis is placed on the classification of mortgages and rights of superficies on the same immovable property.

Keywords: • property law • immovable property • principle of absoluteness • priority principle • bankruptcy • mortgage • right of superficies

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Problematika vrstnega reda pridobitve izvedenih pravic v primeru stečaja lastnika nepremičnine

RENATO VREČUR

Povzetek: Avtor v prispevku razpravlja o operacionalicaciji prednostnega načela, ki predstavlja drugo plat načela absolutnosti. Načelo absolutnosti se namreč odraža na dva načina, in sicer tako, da stvar-ne pravice učinkujejo zoper vsakogar ter da imajo zgodnejše oziroma starejše stvarne pravice prednost pred kasnejšimi oziroma mlajšimi stvarnimi pravicami (prior tempore, potior iure; hitrejši po času, močnejši po pravici). Prednostno načelo je operacionalizirano tudi v izvršilnem in insolvenčnem pravu. Tako se razprava v tem prispevku osredotoči na pravno problematiko vrstnega reda pridobitve stvarnih pravic v primeru stečaja lastnika nepremičnine. Poseben pou-darek pa je dan razvrščanju hipotek in stavbnih pravic na isti nepremičnini.

Ključne besede: • stvarno pravo • nepremičnine • načelo absolutnosti • prednostno načelo • stečaj • hipoteka • stavbna pravica

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1 Splošno

Absolutnost stvarnih pravic se odraža na dva načina, in sicer tako, (1) da stvarne pravice učinkujejo zoper vsakogar; (2) da imajo zgodnejše oziroma starejše stvarne pravice prednost pred kasnejšimi oziroma mlajšimi stvarnimi pravicami (prior tempore, potior iure; hitrejši po času, močnejši po pravici). Pravkar zapisano pomeni, da je prednostno načelo odraz načela absolutnosti (eden izmed vidikov načela absolutnosti). Določba 6. člena SPZ[1], ki opredeljuje vsebino prednostnega načela, je nedosledna, ko določa: »Če obstaja na isti stvari več stvarnih pravic, ima prej pridobljena stvarna pravica iste vrste prednost pred pozneje pridobljeno stvarno pravico.« Prednostno načelo ne velja samo za rangiranje več istovrstnih stvarnih pravic, pač pa razvršča oz. rangira tudi različne (izvedene) stvarne pravice. Tako je npr. prej pridobljena hipoteka lahko razlog za prenehanje (pogojno izključitev) kasneje pridobljene stavbne pravice, v kolikor hipotekarni upnik uresniči svoje prednostno poplačilno upravičenje.

Prednostno načelo, ki je kot pravno načelo tudi ustrezno operacionalizirano v SPZ in drugih predpisih (npr. v ZZK-1[2], ZIZ[3], ZFPPIPP[4]) velja za razvrščanje izvedenih stvarnih pravic. Dve izključni lastninski pravici na isti stvari ne moreta nastati (prej pridobljena lastninska pravica izključuje pravno možnost nastanka kasnejše lastninske pravice), nastane pa lahko več izvedenih stvarnih pravic na isti stvari. V tej zvezi velja že omenjeno pravilo, da ima prej pridobljena izvedena stvarna pravica prednost pred pozneje pridobljeno izvedeno stvarno pravico. Le stvarne pravice imajo izključevalni učinek za druge stvarne (in tudi obligacijske) pravice. V pravni teoriji razvrščamo izvedene pravice na primarne izvedene pravice in sekundarne izvedene pravice. Primarne izvedene stvarne pravice so pravice, ki obremenjujejo oz. omejujejo ali pogojno izključujejo lastninsko pravico (zastavna pravica, stavbna pravica, služnosti, stvarno breme). Sekundarne izvedene stvarne pravice pa so tiste izvedene pravice, ki se oblikujejo na primarni izvedeni stvarni pravici (npr. hipoteka na stavbni pravici; gl. 264. člen SPZ). Razvrščanje na primarne izvedene pravice in sekundarne izvedene pravice je pomembno tudi v pogledu trajanja in prenehanja izvedenih pravic. Prenehanje primarne izvedene pravice povzroči tudi prenehanje sekundarne izvedene pravice (argument iz drugega odstavka 264. člena SPZ). Npr. s prenehanjem stavbne pravice, preneha tudi hipoteka na stavbni pravici. Ustanovitev sekundarne izvedene stvarne pravice je pravno možna samo na tistih primarnih izvedenih stvarnih pravicah, ki vključujejo razpolagalno upravičenje. Takšna je praktično samo stavbna pravica. Prednostno načelo vsekakor velja tudi za razvrščanje različnih hipotek, kot sekundarnih izvedenih stvarnih pravic, na primarni izvedeni pravici (stavbni pravici). Če je npr. stavbna pravica obremenjena z dvema hipotekama z različnima trenutkoma učinkovanja, bo imela prej pridobljena hipoteka prednost pred kasneje pridobljeno hipoteko. Razvrščanje hipoteke in stavbne pravice na (primarni) stavbni pravici ne pride v poštev, saj je naša sodna praksa jasno zavrnila možnost ustanovitve podstavbne pravice.[5]

Smisel prednostnega pravila je v tem, da lastnik nepremičnine (oz. imetnik prenosljive primarne stavbne pravice) s poznejšim razpolaganjem ne more (pravno učinkovito)

razpolagati z lastninsko pravico tako, da bi posegel v že pridobljeno (starejšo) izvedeno pravico. Zato takšno razpolaganje ne učinkuje proti imetniku zgodnejše izvedene pravice. Ali obrnjeno, zgodnejša izvedena stvarna pravica ima izključevalni (absolutni) učinek za pozneje pridobljeno izvedeno stvarno pravico.

Prednostno načelo je konkretizirano oz. operacionalizirano na več mestih v SPZ (gl. npr. 136., 147., 153., 169., 176. člen SPZ) ter v nekaterih drugih področnih predpisih, kot so npr. 174. člen ZIZ ter 342. člen ZFPPIPP, 89. in 96. člen ZZK-1). Tako npr. ZIZ ureja razvrščanje hipotek (in »še živečih« zemljiških dolgov) na eni strani ter osebnih služnosti, stavbnih pravic in stvarnih bremen na drugi strani. Če so bile osebne služnosti, stavbne pravice ali stvarna bremena pridobljene pred vpisom hipoteke (tudi prisilne) ali zemljiškega dolga v zemljiško knjigo, ne prenehajo s prisilno prodajo nepremičnine. V nasprotnem primeru te pravice prenehajo, razen, če se imetniki teh pravic s kupcem drugače dogovorijo (174. člen ZIZ). Isto vsebinsko določbo vsebuje tudi 342. člen ZFPPIPP.

Izjema v pogledu prednostnega pravila velja za stvarne služnosti na podlagi prvega odstavka 174. člena ZIZ, ki ostanejo kot omejitev lastninske pravice na nepremičnini, ne glede na časovni trenutek njihovega nastanka. Čeprav je bila npr. hipoteka ustanovljena pred stvarno služnostjo, služnost s prisilno prodajo nepremičnine ne preneha (ugasne). Pravno pravilo prvega odstavka 174. člena ZIZ velja kot izjema od prednostnega pravila le za tiste prave pozitivne stvarne služnosti, ki so po vsebini »nujne poti«. Takšno značilnost imajo tudi služnosti v javno korist. Zato velja ta izjema po naši oceni le za prave pozitivne stvarne (poljske oz. zemljiške) potne služnosti ter za služnosti v javno korist. Če gre za stvarno služnost, ki po vsebini ne predstavlja »nujne pot« oz., če ne gre za služnost v javno korist, izjema ne pride v poštev. Izjema po naši oceni tudi ne pride v poštev za zasebne neprave stvarne služnosti. Izjema je utemeljena s tem, da so prave pozitivne stvarne potne služnosti potrebne za gospodarsko rabo in izkoriščanje gospodujoče nepremičnine ter bi ukinitev (prenehanje) takšne služnosti v posledici prisilne prodaje nepremičnine, terjala ponovno oblikovanje (ustanovitev) istovrstne služnosti za potrebe gospodujoče nepremičnine. Navedeno velja tudi za služnosti v javno korist, saj bi moral operater javnega (npr. energetskega, elektronskega komunikacijskega, telekomunikacijskega) omrežja ponovno ustanavljati istovrstno služnost za potrebe obratovanja in vzdrževanja javne infrastrukture določene vrste.[6]

2 Zemljiškoknjižno načelo vrstnega reda

Tudi zemljiškoknjižno načelo vrstnega reda, je po vsebini prednostno načelo, ki je operacionalizirano v številnih določbah ZZK-1. Oblikovano je celo nekoliko širše, kot v SPZ. Pravilo zajame tudi položaje, ko gre za takšne stvarne pravice, ki se medsebojno izključujejo. To velja za lastninsko pravico. Če npr. A proda isto nepremičnino B-ju in C-ju, bo postal lastnik tisti, ki bo prvi vložil zemljiškoknjižni predlog za vpis lastninske pravice. Na področju zemljiškoknjižnega prava je torej odločilna vložitev predloga za vpis, kajti vpisi pravic in pravnih dejstev v zemljiški knjigi učinkujejo od trenutka (začetek učinkovanja vpisov), ko je zemljiškoknjižno sodišče prejelo predlog za vpis, oz.

ko je prejelo listino, na podlagi katere o vpisu odloča po uradni dolžnosti (prim. 5. člen ZZK-1). V skladu z načelom vrstnega reda, zemljiškoknjižno sodišče torej odloča o vpisih in opravlja vpise po vrstnem redu, ki se določi po trenutku, ko je prejelo predlog za vpis, oz. ko je prejelo listino, na podlagi katere o vpisu odloča po uradni dolžnosti (prvi odstavek 10. člena ZZK-1 ter 122. člen ZZK-1). Ker pa vpisi učinkujejo od prejema predloga za vpis oz. od prejema listine, na podlagi katere se odloča o vpisu po uradni dolžnosti, se tudi vrstni red pridobitve stvarne pravice ravna po trenutku, od katerega začne učinkovati vpis (gl. drugi odstavek 10. člena ZZK-1).

Začetek zemljiškoknjižnega postopka se javno objavi s plombo. Drugače povedano, oblikovalni učinki vpisov (trenutek pridobitve, spremembe in prenehanja pravic; gl. 7. člen ZZK-1) nastopijo s trenutkom začetka učinkovanja vpisov (5. člen ZZK-1), ki je identičen začetku zemljiškoknjižnega postopka, kateri se javno objavi s plombo, ki je pomožni vpis in katerega namen je, da se publicira (javno objavi) začetek zemljiškoknjižnega postopka (134. člen ZZK-1). To pa tudi pomeni, da se publicitetni učinki vpisov (6. člen ZZK-1) začnejo že z vpisom plombe v zemljiško knjigo (135. člen ZZK-1).

Primer: Če bo vpisana (in s tem že razvidna) plomba za začetek zemljiškoknjižnega postopka glede vpisa hipoteke na nepremičnini, se kupec iste nepremičnine ne bo mogel uspešno sklicevati, da je bil v dobri veri v času vložitve zemljiškoknjižnega predloga za vpis lastninske pravice na svoje ime v zemljiško knjigo.

Glede na 135. člen ZZK-1 vpiše zemljiškoknjižno sodišče plombo po uradni dolžnosti na podlagi prejema zemljiškoknjižnega predloga ali listine, na podlagi katere o vpisu odloča po uradni dolžnosti. Pri tem Informacijski sistem e-ZK zagotavlja, da se plombe vpisujejo po vrstnem redu, ki se določi po trenutku začetka zemljiškoknjižnega postopka in da je plomba vidna na rednem izpisu iz zemljiške knjige najpozneje do začetka uradnih ur delovanja informacijskega sistema e-ZK naslednjega delovnega dne po dnevu začetka zemljiškoknjižnega postopka. Plomba se vpiše tako, da se navedejo naslednji podatki: 1. oznaka, da gre za plombo, 2. opravilna številka, pod katero se vodi zemljiškoknjižni postopek, 3. trenutek (dan, ura in minuta) začetka zemljiškoknjižnega postopka, 4. trenutek (dan, ura in minuta) začetka učinkovanja vpisa, 5. vrsta vpisa, ki se z zemljiškoknjižnim predlogom zahteva ali o katerem zemljiškoknjižno sodišče odloča po uradni dolžnosti, 6. podatki o stanju postopka in 7. podatki o tem, ali je bil vpis dovoljen ali pa je bilo o vpisu odločeno negativno. Ne vpiše pa se plomba, 1. če je zemljiškoknjižni predlog vložen v nasprotju s prvim ali drugim odstavkom 125.a člena tega zakona, 2. če je obvestilo sodišča ali drugega državnega organa, ki je podlaga za vpis v zemljiško knjigo po uradni dolžnosti, vloženo v nasprotju s prvim odstavkom 125.a člena ZZK-1, 3. če je obvestilo geodetske uprave, ki je podlaga za poočitev iz 1. ali 2. točke 114. člena ZZK-1 poslano v nasprotju s sedmim odstavkom 115. člena ZZK-1, 4. v zvezi s poočitvami spremembe podatkov o osebi iz 3. točke 114. člena ZZK-1.

Vrstni red (kasnejše) pridobitve stvarnih pravic je mogoče varovati tudi z nekaterimi pravnimi instituti zemljiškoknjižnega prava (predznambe, zaznambe vrstnega reda, zaznambe spora ipd.).

3 Posebej o problematiki rangiranja hipotek in stavbnih pravic

Prej pridobljena hipoteka je (lahko)[7] razlog za prenehanje kasneje pridobljene stavbne pravice. Oblikovalni učinek prenehanja stavbne pravice nastopi s pravnomočnostjo sklepa o izročitvi nepremičnine, izdanega v zvezi s prisilno prodajo nepremičnine v postopku izvršbe ali stečaja (gl. npr. 174. člen v zv. s 192. členom ZIZ in 342. členu ZFPPIPP ter 89. in 96. člen ZZK-1). Če je bila stavbna pravica pridobljena pred vpisom (najzgodnejše) hipoteke (tudi prisilne) ali zemljiškega dolga v zemljiško knjigo, s prisilno prodajo ne preneha (drugi odstavek 174. člena ZIZ).[8] Drugače povedano, tiste stavbne pravice, ki so bile ustanovljene za hipotekami, bodo zaradi prisilne prodaje prenehale.[9] Iz kupnine, dobljene s prisilno prodajo, se bodo poplačali hipotekarni upniki, rangirani pred stavbno pravico. Tudi imetnik stavbne pravice se lahko poplača za izgubo svoje pravice (v znesku verzijske terjatve zaradi povečanja vrednosti tuje nepremičnine), vendar iz kupnine, dobljene s prisilno prodajo, če je je še kaj ostalo, nato pa hipotekarni upniki, ki so rangirani za imetnikom stavbne pravice.[10] Verzijska terjatev je posledica učinka akcesije (ko ponovno zaživi načelo povezanosti zemljišča in objekta; superficies solo cedit).[11]

Če je bila stavbna pravica ustanovljena z najboljšim vrstnim redom, ne preneha zaradi prisilne prodaje. Zaradi tega dejstva jo mora upoštevati pooblaščeni ocenjevalec vrednosti pri določitvi (ugotovitvi) vrednosti nepremičnine.[12] Upoštevati mora npr. tudi donose nepremičnine zaradi plačevanja solarija (nadomestila za uporabo nepremičnine). Ker stavbna pravica z najboljšim vrstnim redom v primeru prisilne prodaje ne preneha, se nepremičnina stečajnega oz. izvršilnega dolžnika proda z bremenom stavbne pravice.

Tudi določba 342. člena ZFPPIPP ne ureja obravnavane pravne položaje drugače kot ZIZ. (v bistvenih značilnosti) enako kot ZIZ. Citirano določbo ZFPPIPP je treba razlagati v povezavi s 96. členom ZZK-1 in 89. členom ZZK-1. To pomeni, da učinkuje zaznamba stečaja v resnici tako kot zaznamba izvršbe. Ta pa učinkuje že od vpisa prve (najzgodnejše) in vsake naslednje hipoteke. Vse navedeno pripelje do prav takšnega rezultata, kot ga ureja 174. člen ZIZ. Tudi, če je bila stavbna pravica ustanovljena pred dnem začetka stečaja, bo prenehala, če je pred njo hipoteka (pogodbena, prisilna na podlagi sklepa o izvršbi ali pridobljena v postopku zavarovanja, ali zemljiški dolg – tisti, ki so seveda že zmeraj »živi«, ker so bili ustanovljeni pred novelo SPZ-A).[13] Le, če pred njo ni hipoteke ter je bila ustanovljena pred začetkom stečaja, bo na nepremičnino ostala ter s prisilno prodajo ne bo prenehala, ampak bo bremenila lastninsko pravico še nadalje (praviloma do poteka časa, za katerega je bila ustanovljena), v kolikor ne bo npr. izbrisana zaradi uspelega izpodbijanja v stečaju (če je bila ustanovljena v izpodbojnem obdobju ter če so izpolnjene ostale predpostavke za izpodbijanje pravnih dejanj stečajnega dolžnika).

Določba 342. člena ZFPPIPP je bila do novele ZFPPIPP-G[14] nedosledna. Določala je, da »s plačilom kupnine prenehajo naslednje pravice tretjih na premoženju, ki je predmet prodajne pogodbe:

1. zastavna pravica ali hipoteka in zemljiški dolg,
2. pravica do prepovedi odtujitve in obremenitve ter
3. osebne služnosti, stvarno breme ali stavbna pravica, če so bile pridobljene po trenutku, od katerega po 244. členu tega zakona učinkuje začetek stečajnega postopka.«

Začetek stečajnega postopka učinkuje z začetkom dneva, ko je bil objavljen oklic o začetku stečajnega postopka (glej prvi odstavek 244. člena ZFPPIPP). Izolirana uporaba navedene določbe bi privedla do napačnega sklepa (na podlagi argumenta a contrario). To je do sklepa, da stavbna pravica s prisilno prodajo nepremičnine ne bo prenehala, če je bila ustanovljena pred objavo oklica o začetku stečajnega postopka (čeprav so morda pred njo že vknjižene hipoteke). Vendar je bila takšna razlaga tudi v času pred novelo ZFPPIPP-G napačna. V primeru, ko so pred stavbno pravico hipoteke, nastopi učinek ekstenzivnosti hipoteke (gl. tudi 140. člen SPZ), kar pomeni, da se prej pridobljena hipoteka razteza tudi na kasneje pridobljeno stavbno pravico. Prav zaradi tega takšna stavbna pravica v primeru prisilne prodaje preneha, hipotekarni upnik pa se poplača iz celotne vrednosti nepremičnine, ki zajema tudi vrednost stavbne pravice. Drugačna razlaga bi povzročila pravno in dejansko devastacijo imetnika zgodnejše hipoteke, kar ne bi bilo v duhu prednostnega pravila.

Z novelo ZFPPIPP-G je bila dopolnjena določba 3. točke prvega odstavka 342. člena ZFPPIPP, kar vse tudi v celoti ustreza naši razlagi:

»(1) S plačilom kupnine prenehajo naslednje pravice tretjih na premoženju, ki je predmet prodajne pogodbe:

1. zastavna pravica ali hipoteka in zemljiški dolg,
2. pravica do prepovedi odtujitve in obremenitve ter
3. naslednje osebne služnosti, stvarno breme ali stavbna pravica:
   - če je lastninska pravica na nepremičnini, ki je predmet prodajne pogodbe, omejena s hipoteko ali zemljiškim dolgom: če so bile pridobljene po trenutku, od katerega učinkuje vpis najzgodnejše hipoteke ali zemljiškega dolga v zemljiško knjigo,
   - v drugih primerih: če so bile pridobljene po trenutku, od katerega po 244. členu tega zakona učinkuje začetek stečajnega postopka.«

Prenovljena določba 3. točke prvega odstavka 342. člena ZFPPIPP ne vsebuje prehodne določbe, saj predstavlja le zapis pravilne uporabe prednostnega pravila. To pomeni, da se spremenjena 3. točka prvega odstavka 342. člena ZFPPIPP uporablja tudi za postopke, ki so bili 26. aprila 2016 že v teku, ko je začela veljati novela ZFPPIPP-G. Tudi predlagatelj zakona pojasnjuje, da je bilo z novelo ZFPPIPP-G besedilo samo redakcijsko popravljeno. V obrazložitvi te spremembe je vlada kot predlagateljica novele ZFPPIPP-

G navedla: »Sedaj veljavno besedilo 3. točke prvega odstavka 342. člena ZFPPIPP ni dosledno, saj po 6. členu SPZ (prednostno načelo) zaradi izključujočih učinkov hipoteke oziroma zemljiškega dolga, z njuno uveljavitvijo prenehajo tudi pozneje pridobljene osebne služnosti, stvarno breme ali stavbna pravica. V stečajnem postopku ima prodaja nepremičnine učinke sodne uveljavitve hipoteke oziroma zemljiškega dolga. Zato sedaj veljavno besedilo 3. točke prvega odstavka 342. člena ZFPPIPP zavaja k napačnemu zaključku, da pozneje pridobljene osebne služnosti, stvarno breme ali stavbna pravica ne prenehajo, čeprav iz tretjega odstavka 342. člena ZFPPIPP izhaja, da se tudi te pravice izbrišejo v skladu s 89. členom v zvezi s 96. členom ZZK-1. Zaradi jasnosti se predlaga ustrezna sprememba 3. točke prvega odstavka 342. člena ZFPPIPP.«

Slovenski zakonodajalec se je pri pripravi SPZ sicer zgledoval (še največ) po nemški ureditvi (tudi glede normativne ureditve stavbne pravice), vendar pa je mogoče zlasti pri stavbni pravici (katero je uredil na novo) zaznati številne nedoslednosti in izrazito podnormiranost tega pravnega instituta. Možnost ustanovitve stavbne pravice na nepremičnini, ki je že obremenjena s hipoteko (ali drugo zemljiško zastavo, ki vključuje poplačilno pravico iz vrednosti nepremičnine), je npr. v nemškem pravu izključena. To pomeni, da se lahko po omenjeni ureditvi ustanovi stavbna pravica samo na neobremenjeni nepremičnini (nepremičnini, ki ni obremenjena s pogodbeno hipoteko, zemljiškim dolgom, stvarnim bremenom, prisilno hipoteko). V par. 10 nemškega Erbbaurechtsgesetz-a (ErbbauRG) iz leta 1919,[15] je v tej zvezi določeno sledeče: »Das Erbbaurecht kann nur zur ausschließlich ersten Rangstelle bestellt werden; der Rang kann nicht geändert werden.« Nemška ureditev je gramatikalno povsem jasna, ko pravi, »da je dedna stavbna pravica lahko ustanovljena izključno v prvem vrstnem redu ter da ni dovoljena sprememba vrstnega reda.«[16] Več kot zgovorno je dejstvo, da je v primerjalni ureditvi stavbna pravica zaradi njene kompleksnosti (in posebnosti) urejena v posebnem zakonu (to velja tudi za avstrijsko ureditev).[17] Oba zakona sta stara okoli 100 let, kar pomeni, da gre za tradicionalen in (dogmatično) izgrajen pravni institut.

Stavbna pravica bi morala imetniku zagotavljati stabilen pravni položaj, to pa je mogoče le v primeru, če je ustanovljena z najboljšim vrstnim redom. SPZ te problematike ni uredil ustrezno. Na zagotavljanje stabilnosti pravnega položaja kaže tudi rok, za katerega je lahko ustanovljena stavbna pravica. Celo določitev maksimalnega roka trajanja (99 let) stavbne pravice lahko izzveni v naši ureditvi v celoti v prazno, če se ustanovi za zemljiškimi zastavami. Položaj se lahko še dodatno zaplete, če zaideta npr. v stečaj tako lastnik nepremičnine, kot tudi imetnik stavbne pravice. V takem primeru je treba odgovoriti na vprašanje, kaj spada v stečajno maso imetnika stavbne pravice. Govorimo seveda o primeru, ko je stavbna pravica ustanovljena za hipotekami. Če spada v stečajno maso lastnika nepremičnine celotna nepremičnina, skupaj s prirastjo (zgradbo oz. napravo - sestavino, ki jo je investiral imetnik stavbne pravice), ostane za stečajno maso imetnika stavbne pravice le verzijska terjatev, ki je v resnici enaka »0«. To pa je treba prijaviti kot pogojno terjatev v stečaju lastnika nepremičnine. Teh položajev zakonodajalec ni predvidel.

4 Prisilna hipoteka se mora umakniti pravici v pričakovanju

Ne glede na dejstvo, na je npr. izvršilni upnik pridobil prisilno hipoteko, ki učinkuje od zaznambe izvršbe, z najboljšim vrstnim redom, ga prednostno pravilo ne bo varovalo v razmerju do pravice v pričakovanju, čeprav ob pridobitve prisilne hipoteke za pravico v pričakovanju ni vedel. Slovenska sodna praksa je oblikovala koncept lastninske pravice v pričakovanju. Ta izhaja iz podmene, da v razmerju med odsvojiteljem (prenositeljem) in pridobiteljem začne prenos lastninske pravice (in upravičenj, ki jih ta vključuje) učinkovati že s tem, ko prenositelj izstavi (in izroči) pridobitelju zemljiškoknjižno dovolilo z vsebino, določeno v 23. členu SPZ, na katerem je prenositeljev podpis notarsko overjen (41. člen ZZK-1). Pridobitev lastninske pravice v polnem obsegu je v razmerju do prenositelja odvisna izključno od ravnanja pridobitelja, t.j. vložitve predloga za vpis lastninske pravice v zemljiško knjigo. Takšna pravica v pričakovanju je močnejša tudi v razmerju do upnika, ki je pridobil prisilno hipoteko na podlagi sklepa o izvršbi, saj hipoteke ni pridobil v pravnem prometu, ampak zaradi teka izvršilnega postopka ter ga zaradi tega ne varuje načelo zaupanja, ki pravi, kdor v pravnem pošteno ravna in se zanese na podatke o pravicah, ki so vpisani v zemljiški knjigi, zaradi tega ne sme trpeti škodljivih posledic (10. člen SPZ).[18]

Ne učinkuje pa pričakovana pravica v razmerju do tistih, ki so v dobri veri ter v zaupanju v podatke zemljiške knjige pridobili stvarno pravico v pravnem prometu (na podlagi pravnega posla) od odsvojitelja. Prav takšno varstvo kot dobroverni pridobitelj, katerega varuje načelo zaupanja, uživa tudi tisti, ki je pridobil pravico v dobri veri pri prisilni prodaji. Tudi v razmerju do dobrovernega kupca pri prisilni prodaji, je pravica v pričakovanju šibkejša.

V primeru, ko je kupcu izstavljeno in izročeno veljavno zemljiškoknjižno dovolilo, kupcu ni treba uveljavljati izločitvene pravice v stečajnem postopku, saj lahko kot upravičenec (oseba, v korist katere učinkuje zemljiškoknjižno dovolilo) po 3. oz. 4. točki tretjega odstavka 94. člena ZZK-1 doseže vknjižbo lastninske pravice brez sodelovanja stečajnega dolžnika.[19]

Sporno je bilo stališče sodne prakse v zadevah VS, sodba II Ips 475/2008, 5. 4. 2012, VS, sodba II Ips 385/2008, 17. 5. 2012 in VS, sodba II Ips 132/2009, 12. 7. 2012, ki je utemeljevalo, da je lastninska pravica v pričakovanju močnejša (le) v razmerju do nedobrovernih imetnikov prisilnih hipotek. Ker pridobitelja prisilne hipoteke načelo zaupanja ne varuje, je povsem irelevantna njegova dobra ali slaba vera glede obstoja izstavljenega in izročenega zemljiškoknjižnega dovolila pridobitelju (imetniku pravice v pričakovanju). Če pravica v pričakovanju ne učinkuje proti dobrovernemu imetniku prisilne hipoteke, to pomeni, da ga varuje načelo zaupanja, kar pa ne drži, kot je sprva očitno neusklajeno zatrjevala sodna praksa. V drugih, zlasti pa kasnejših odločbah, je stališče jasno: … »Dobra vera upnika glede izvenknjižnih okoliščin povezanih z lastninskim stanjem nepremičnine v trenutku vpisovanja neposlovnih - prisilnih hipotek ni pomembna«.[20]

Če je razpolagalni pravni posel začel učinkovati pred začetkom učinkovanja hipoteke, pridobljene v izvršilnem postopku, lahko pridobitelj (imetnik pravice v pričakovanju) z ugovorom tretjega (in če upnik ugovoru nasprotuje s tožbo za nedovoljenost izvršbe na to nepremičnino), uveljavlja zahtevek, da nepremičnina ne spada med premoženje dolžnika (prim. prvi odstavek 64. člena in tretji odstavek 65. člena ZIZ), z enako vsebino, kot ga v stečajnem postopku uveljavlja s prijavo izločitvene pravice. Zato je tudi v izvršilnem postopku pri presoji, ali določena nepremičnina spada med premoženje dolžnika, pomembno, ali je do takrat, ko začne učinkovati hipoteka, pridobljena na podlagi sklepa, s katerim je izvršilno sodišče dovolilo izvršbo na določeno nepremičnino, lastninska pravica na tej nepremičnina v razmerju med dolžnikom in pridobiteljem, že prešla na pridobitelja. Če je do takrat lastninska pravica v razmerju do dolžnika že prešla na pridobitelja, lahko pridobitelj v zvezi z izvršilnim postopkom uspešno uveljavi zahtevek za nedovoljenost izvršbe na to nepremičnino zaradi prisilne izterjave odsvojiteljeve obveznosti. Pri tem moramo biti pozorni, da upnika, ki je izvirno pridobil hipoteko na podlagi oblikovalne sodne odločbe (sklepa o dovolitvi izvršbe na nepremičnino), ne varuje načelo zaupanja v zemljiško knjigo (in načelo varovanja dobrovernega pridobitelja), saj se to načelo uporablja samo glede poslovnih pridobitev stvarnih pravic.[21]

5 Namesto zaključka - vprašljivo stališče sodne prakse glede prednostnega načela

VSL, sklep III Ip 4566/2014, 3.2.2015: Sodišče prve stopnje je v obrazložitvi izpodbijanega sklepa pojasnilo, da se ocenjuje vrednost nepremičnine parc. št. 479/9 k. o. X, ki je obremenjena s stavbno pravico, ki je bila v zemljiški knjigi vpisana po tem, ko je upnik v vodilni izvršilni zadevi na nepremičnini že imel vknjiženo hipoteko. Pojasnilo je, da bo s prodajo nepremičnine na podlagi 2. odstavka 174. člena ZIZ stavbna pravica ugasnila, razen če se njen imetnik, to je pritožnik S. B. d.o.o., ne bo s kupcem kako drugače dogovoril. Ugasnitev stavbne pravice s prodajo nepremičnine na podlagi 2. odstavka 174. člena ZIZ ima namreč (razen v primeru drugačnega dogovora s kupcem), v skladu s 1. odstavkom 263. člena SPZ, za posledico, da postane zgradba sestavina nepremičnine. S tem pa preide lastninska pravica na zgradbi od imetnika stavbne pravice na kupca - novega lastnika nepremičnine (načelo superficies solo cedit), ki mora imetniku stavbne pravice ob prenehanju plačati določeno nadomestilo.

Z odločbo se ne strinjamo. V primeru prenehanja stavbne pravice zaradi prisilne prodaje nepremičnine, ker je bila stavbna pravica ustanovljena za hipoteko, kupec nepremičnine ne dolguje imetniku stavbne pravice nobenega nadomestila (gl. razdelek »3. Posebej o problematiki rangiranja hipotek in stavbnih pravic«). Bivši imetnik stavbne pravice se poplačuje v skladi s 199. členom ZIZ. To pomeni, da mu pripada nadomestilo zaradi izgube stavbne pravice, poplačuje pa se iz kupnine, dobljene s prisilno prodajo enovite nepremičnine. Zato mu kupec prisilne prodaje ne dolguje ničesar.

Notes

[1] Stvarnopravni zakonik – SPZ (Uradni list RS, št. 87/02, 91/13).
[2] Zakon o zemljiški knjigi – ZZK-1 (Uradni list RS, št. 58/03, 37/08 – ZST-1, 45/08, 28/09, 25/11 in 14/15 – ZUUJFO).
[3] Zakon o izvršbi in zavarovanju - ZIZ (Uradni list RS, št. 3/07 – uradno prečiščeno besedilo, 93/07, 37/08 – ZST-1, 45/08 – ZArbit, 28/09, 51/10, 26/11, 17/13 – odl. US, 45/14 – odl. US, 53/14, 58/14 – odl. US, 54/15 in 76/15 – odl. US).
[4] Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Uradni list RS, št. 13/14 – UPB, 10/15 – popr., 27/16 – ZFPPIPP-G).
[5] VSK, sklep CDn 309/2013, 3.9.2013: Naša zakonodaja ne daje ustrezne pravne podlage za obremenitev stavbne pravice s stavbno pravico (ustanovitev t.i. podstavbne pravice). Iz obrazložitve: Predlagateljica se glede na podatke spisa zavzema za to, da bi se pri že vknjiženi stavbni pravici z ID znakom xxx v korist imetnika H. d.o.o. ustanovila (pod)stavbna pravica v korist pridobitelja F. d.o.o. Bistveno vprašanje v tej zadevi je, ali je stavbno pravico mogoče obremeniti s stavbno pravico. Po oceni pritožbenega sodišča naša zakonodaja za tak zaključek ne daje ustrezne pravne podlage. Iz 3. člena SPZ izhaja, da so predmet stvarne pravice lahko stvari (kot samostojni telesni predmeti), medtem ko je premoženjska pravica lahko le predmet užitka in zastavne pravice. Glede na to določbo stavbna pravica ne more biti predmet obremenitve s stavbno pravico in bi drugačno stališče, kakršnega zagovarja v pritožbi povzeta pravna teorija, preseglo meje, ki jih določa 3. člen SPZ. Nadalje ta zakon v XI. delu, ki ureja institut stavbne pravice, kar se tiče razpolaganj, izrecno predvideva (le) tri opcije. Prvič, stavbna pravica je prenosljiva in se za njen prenos smiselno uporabljajo določbe, ki veljajo za prenos lastninske pravice na nepremičninah (tretji odstavek 256. člena). Nadalje je možna etažna delitev zgradbe, zgrajene na nepremičnini, obremenjeni s stavbno pravico (258. člen) ter zastavitev zgradbe, ki je zgrajena na nepremičnini, obremenjeni s stavbno pravico (264. člen). Tudi ZZK-1, ki izhajajoč iz SPZ in upoštevaje posebno naravo stavbne pravice konkretno opredeljuje način njene vknjižbe, ne regulira vpisa, s katerim bi se obstoječa stavbna pravica obremenila z novo stavbno pravico.
[6] Glede pravne usode služnosti v javno korist v primeru prisilne prodaje nepremičnine, je treba upoštevati vsa tista pravila, ki v tej zvezi veljajo za prave pozitivne stvarne služnosti. Zanje velja (tako za pozitivne prave stvarne služnosti, kot tudi za služnosti v javno korist), da so »stabilne«, kar pomeni, da s prisilno prodajo nepremičnine ne prenehajo, ne glede na vrstni red ustanovitve. Tudi v primeru, če je bila npr. pred služnostjo v javno korist ustanovljena hipoteka, služnost s prisilno prodajo ne preneha. Argument za takšno stališče je treba iskati v pravni naravi služnosti v javno korist, ki je po svoji vsebini vrsta stvarne služnosti, s katero se zagotavljajo javne dobrine.
[7] Če se hipoteka izbriše zaradi prenehanja terjatve (v posledici izpolnitve obveznosti, ki je bila zavarovana s hipoteko), bo stavbna pravica napredovala v najboljši rang ter bo njenemu imetniku zagotavljala stabilen pravni položaj.
[8] Pravnomočni sklep o izročitvi nepremičnine je sočasno tudi pravni temelj za prenehanje hipotek (tudi prisilnih) in zemljiških dolgov (prvi odstavek 173. člena ZIZ), izvedenih stvarnih pravic, ki so bile pridobljene za najzgodnejšo hipoteko oz. zemljiškim dolgom, obligacijskih pravic in pridobitev lastninske pravice v koristkupca prisilne prodaje. Po izdaji sklepa o domiku in po položitvi kupnine izda sodišče sklep, da se nepremičnina izroči kupcu in po pravnomočnosti sklepa v zemljiški knjigi vpiše nanj lastninska pravica na nepremičnini ter izbrišejo tiste pravice in bremena, za katere je to določeno s sklepom o domiku (prvi odstavek 192. člena ZIZ).
[9] Opozarjamo še, da s prenehanjem stavbne pravice (primarne izvedene pravice), avtomatično prenehajo tudi vse izvedene pravice (sekundarne izvedene pravice), ki so bile ustanovljene na stavbni pravici.

[10] V 199. členu ZIZ je določeno sledeče: »(1) Če se o nadomestilu za osebne služnosti, stavbne pravice ali stvarna bremena, ki s prodajo ugasnejo, upravičenci in upniki, ki so po vrstnem redu za poplačilo za njimi, ne morejo sporazumeti, ga določi sodišče, ki pri tem upošteva zlasti čas, kolikor bi služnost, stavbna pravica oziroma breme še trajale, njihovo vrednost ter starost upravičencev. (2) Kupec in upravičenec do osebne služnosti, stavbne pravice ali stvarnega bremena se lahko sporazumeta, da kupec prevzame služnost, stavbno pravico oziroma stvarno breme, nadomestilo, določeno po prejšnjem odstavku, pa se odbije od kupnine.«
[11] V tej zvezi gl. tudi 263. člen SPZ.
[12] Gl. npr. tretji odstavek 178. člena ZIZ ter 327. člen ZFPPIPP.
[13] Zakon o spremembah Stvarnopravnega zakonika – SPZ-A (Uradni list RS, št. 91/13).
[14] Zakon o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju – ZFPPIPP-G (uradni list RS, št. 27/16).
[15] RGBl. S. 72, ber. S. 122, nazadnje spremenjen leta 2013; BGBl. S. 3719.
[16] Gl. tudi pri (Baur, Baur in Stürner, 2009: 386).
[17] V par. 5 avstrijskega Baurechtsgesetz-a (BauRG) iz leta 1912 (RGBl Nr. 86/1912, nazadnje spremenjen leta 2012; BGBl. Nr. 30/2012) je določeno sledeče: »Pfand- und andere Leistungsrechte, die auf Geldzahlung gerichtet sind oder dem Zwecke des Baurechtes entgegenstehen, dürfen dem Baurecht im Range nicht vorgehen.«
[18] VS, sklep III Ips 106/2009, 23. 10. 2012.
[19] VSL sklep I Cpg 1733/2014, 25. 11. 2014.
[20] Treba je še pojasniti, da se v obravnavani situaciji toženka tudi ne bi mogla uspešno obraniti s sklicevanjem, da ni vedela za dolžnikovo razpolaganje z nepremičninama. Revizijsko sodišče je tako kot Ustavno sodišče že večkrat pojasnilo, da se na zemljiškoknjižno stanje in dobro vero lahko sklicuje le tisti upnik, ki je pridobil pogodbeno zastavno pravico na nepremičnini, ne pa tudi tisti, ki je zastavno pravico pridobil šele z zaznambo sklepa o izvršbi v zemljiški knjigi, kot to velja za toženca. Prednost pred nevknjiženim lastnikom bo torej imel le tisti upnik, ki je hipoteko pridobil na pravnoposlovni podlagi in je pošteno zaupal v zemljiškoknjižno stanje (VS, sodba II Ips 132/2009, 12. 7. 2012).
Dobra vera upnika glede izvenknjižnih okoliščin povezanih z lastninskim stanjem nepremičnine v trenutku vpisovanja neposlovnih - prisilnih hipotek ni pomembna (VS, sodba II Ips 243/2013, 22. 1. 2015).
[21] Tako (Plavšak in Vrenčur, 2015: 636-637).

References

Baur, F., Baur, J. F. & Stürner, R. (2009) *Sachenrecht* (München: Manz Verlag).
Plavšak, N. & Vrenčur, R. (2015) Pomen razpolagalnega upravičenja pri razpolaganju z lastninsko pravico na nepremičnini, *Pravnik*, 70(9/10), pp. 595-641.

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The Brussel Regulation Recast - Abolishing the exequatur maintaining the exequatur function?

CHRISTIAN WOLF

Abstract: The paper discuss the German view of the abolishing of the exequatur according to Brussel Ia. Firstly, the paper gives a short overview of the main principles of the German national enforcement system. It will be demonstrated that the principle of formalization has been a main principle for domestic as well for cross broader enforcement in Germany. The abolishing of the exequatur leads to an exemption of the principle of formalization in Germany. Secondly, the paper discusses the question whether the exequatur served as a tool of democratic legitimation of state power. The enforcement of a judgment even in civil matters is based on the power of a state to put a court´s judgment into effect. Lastly, the paper demonstrates how the control function of the exequatur is upheld under the new Brussel Ia system in Germany.

Keywords: • Brussel Ia recast • torpedo claims • basic structure of the German enforcement system • principle of the German enforcement system especially the principle of formalization • abolishing of the exequatur according to Brussel Ia • function of the exequatur especially the democratic legitimation function • maintaining the function of the exequatur

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1 Introduction

The European system of recognition and enforcement law is in a process of transformation. On the one side, the European commission and its allies have been tirelessly advocating the principle of mutual trust between the member states and the free movement of court decisions among the European Union. On the other side, it is questionable if the factual requirements for a common room of mutual trust exist among all member states. The discussion about the so-called torpedo claims (Schack, 2014: par 851) has illustrated the gap between European wishes and the European reality.

In opposition to the recognition and enforcement regulations of the second generation, the recast of Brussel I had been much more moderate as originally expected. Nevertheless, the recast raises fundamental questions in regard to the enforcement and recognition process (III. 2.); and some rather technical and maybe unexpected questions (IV.). As enforcement law is a very technical law, which is closely linked to property law, it seems to be helpful for the cross-border discussion to provide a brief introduction about the main principles of the German enforcement system (II.).

2 The basic structure of the German enforcement system

2.1 The principle of formalization

In a civil law country like Germany, it is characteristic for the German jurisprudent to structure a legal subsystem like enforcement law by means of certain principles.[1] For the basic understanding of the German enforcement system, five principles are predominant: The principle of formalization, the principle of decentralization, the principle of priority, the principle of strict enumeration of enforcement actions and the principle of clarity and definiteness (Baur, Stürner & Bruns, 2006: § 6). One of the most important principles of the German enforcement law may be the principle of formalization.[2]

Generally speaking, the principle of formalization immunizes the enforcement proceeding as far as possible against all questions related to substantive law. The principle of formalization can be subclassified into two parts. The first part deals with the enforcement conditions and the second part relates to the enforcement actions. More precisely: In the enforcement proceedings the enforcement authorities do not have to control or correct the judgement.[3] They have to enforce the judgment on the basis of very formal conditions. The main conditions are the title (§ 704 ZPO: “Compulsory enforcement may be pursued based on final judgments that have become final and binding, or that have been declared provisionally enforceable”) and the court certificate of enforceability (Vollstreckungsklausel, § 724 ZPO: “Compulsory enforcement will be pursued based on an execution copy of the judgment furnished with the court certificate of enforceability (enforceable execution copy)”.

The reason for both conditions lies within the separation between the trial proceeding and the enforcement proceeding.[4] The court of the trial proceeding is in general not responsible for the enforcement of the judgment.[5] The competence for enforcement lies with the Vollstreckungsgerichte (courts responsible for execution, § 764 ZPO). These are the local courts (Amtsgerichte). This separation between trial and enforcement proceeding requires an efficient communication between the trial court and especially the court-appointed enforcement officer (Gerichtsvollzieher).

The hinge between the trial proceeding and the enforcement proceeding is the court certificate of enforceability (Vollstreckungsklausel).[6] In order to pass the information from the trial court - that the title is enforceable - to the court responsible for the execution (Vollstreckungsgericht), we use the court certificate of enforceability (enforcement clause). The wording of the enforcement clause is quite simple and regulated in § 725 ZPO:

"The above execution copy is issued to (designation of the party) for the purposes of compulsory enforcement."

The court certificate of enforceability has to be added to the execution copy and has to be signed by the recording clerk of the court's registry. Furthermore, it needs to be furnished with the court seal.

More information about the trial proceeding are not required for the enforcement. Particularly, we do not involve the trial court or a judge in order to permit the enforcement proceeding unlike in Austria where an Exekutionsbewilligung (enforcement permission) is necessary.[7] However, the foundation of the enforcement is the judgment and the title produced on the basis of the judgment, and not the original claim of the enforcement creditor.[8] The enforcement proceeding leaves no room for examining the judgment or the title. The enforcement court is bound by the decision of the trial court.[9]

The principle of formalization also deals with the enforcement actions. It is in the interest of a rapid and uncomplicated enforcement proceeding not to examine detailed and complicated legal questions regarding whether a certain object or enforcement action is possible. For the purpose of having an easily manageable enforcement proceeding, the enforcement actions are also formalized.[10] For example, the court appointed enforcement officer does not verify whether or not the judgment debtor is the owner of the attached movable asset (physical object). He only has to prove if the movable asset is in custody and in control of the debtor, § 808 ZPO.

This principle of formalization enables us to largely entrust the enforcement proceeding to a paralegally trained enforcement officer instead of a judge. The court-appointed enforcement officer is responsible for physical enforcement acts, § 753 ZPO, being our main institute in enforcement proceedings.[11] The court-appointed enforcement officers do neither have to have studied law nor do they have to obtain any other form of academic

education. After completing a lower secondary school, they are trained as Justizfachwirte during a state-organized and -recognized apprenticeship. After several years as recording clerks of the court registry,[12] they have the opportunity to take part in an additional trainee program to become Gerichtsvollzieher (enforcement officer). This program takes one and a half years and is rated between level 4 and 5 in the classification of the European Qualification Framework.[13]

On the other hand, the principle of formalization needs remedies providing for a correction if the requirements in accordance with the principle of formalization do not match the requirements of substantive law. The competence to prove this does not lie with the enforcement court but with the trial court. We have three different legal actions to achieve that the substantive law overrules the requirements of the principle of formalization.

The first legal action is the action to oppose enforcement (§ 767 ZPO Vollstreckungsgegenklage)

The action to oppose enforcement enables the judgment debtor to raise questions of substantive law against the title of the judgment.[14] The basis for the enforcement proceeding is not the original claim but the title as ruled in the judgment. Therefore, it does not matter in terms of the enforcement proceeding if the claim of the judgment creditor is paid or dissolved. The judgment debtor has to address this question in a special trial proceeding - the action to oppose enforcement.[15]

The second legal action is a third-party proceeding instituted to prevent the execution of a judgment (§ 771 ZPO Drittwiderspruchsklage)

During the enforcement proceeding we do not prove the ownership of the debtor concerning the attached object of enforcement. In regard to movables, it is sufficient that the debtor has the custody of and the control over the object of enforcement. The substantive law is based on the assumption that the person who possesses an object is also the owner of the object, § 1006 BGB.[16] Since this assumption is disprovable, the same applies for the enforcement proceeding. The custody of and the control over the object of enforcement establishes only a disprovable assumption that the owner of the attached movable is simultaneously the debtor. But a third-party can contest this in a trial proceeding.

The last legal action is the action for preferential satisfaction (§ 805 ZPO Klage auf vorzugsweise Befriedigung)

This legal action has a close connection with the principle of priority and will be explained later (sub).

2.2 The principle of decentralization

The principle of decentralization means that the enforcement process is not a single proceeding like the trial proceeding. Firstly, we have several competent units for different enforcement actions. Under the umbrella of the local courts (Amtsgerichte), the court-appointed enforcement officer is responsible for the attachment of movables; the officer of justice (Rechtspfleger) is responsible for the attachment of a monetary claim[17] and the enforcement court is in charge of the enforcement in land.[18] Last but not least, the trial court is responsible for the enforcement of actions that may not be taken by others and omissions, § 888 ZPO. The underlining principle constitutes that the court-appointed enforcement officer is responsible for all enforcement acts in regard to physical power; the enforcement court, especially the officer of justice (Rechtspfleger), is in charge of all enforcement measures in the legal field like the attachment of a claim, and the trial court for all enforcement acts which need a deep understanding and judgment of the case (Baur, Stürner & Bruns, 2006: § 6 par 6.50; Gaul, 1971: 90).

Decentralization also means that the German enforcement law does not know gradus executionis (Baur, Stürner & Bruns, 2006: § 22 par 22.7). In principle, it is upon the creditor to choose among several enforcement instruments. It is also possible to use some of the instruments simultaneously.[19] Furthermore, it is possible to receive an additional, enforceable execution copy of the judgment, § 733 ZPO. Before the court executes this additional enforceable execution copy of the judgment, the creditor must be heard. In addition, it is necessary that the debtor has a legitimate interest. This is the case if the creditor wishes to enforce the judgment in different assets of the debtor which are located in different enforcement districts or functionally different enforcement bodies are responsible for the enforcement.[20]

It is obvious that this system may jeopardize the legitimate interests of the debtor. Thus, the enforcement system provides several tools to protect the interests of debtor. Firstly, each enforceable execution copy must be noted on the original judgment, § 734 ZPO. This record enables the court, the creditor and the debtor to be informed about the number of the enforceable execution copies. All partial payments must be noted on the enforceable execution copy. In case of a final payment, the enforceable execution copy must be surrendered to the debtor, § 757 ZPO. Finally, the enforcement has to be terminated if a public record or document is produced, or a private record or document created by the creditor shows that the creditor - after the delivery of the enforceable judgment - is satisfied, § 775 No 4 ZPO. If the debtor does not possess such a document, he has to start a legal action to oppose enforcement, § 767 ZPO.[21]

2.3 The principle of priority

The German enforcement law follows the principle of priority (§ 804 sec 2 ZPO, § 11 sec 2 ZVG). This means that the creditor who is the first to attach an asset of the debtor will be satisfied before the creditor who was next in attaching the same asset (Baur, Stürner

& Bruns, 2006: § 6 par 6.37 et seqq). In contrast, the insolvency law in Germany follows the equal treatment principle.

If a dispute arises between two creditors (who have attached the same asset) over the question who must – following the principle of priority - be satisfied first, both creditors can raise a legal action for preferential satisfaction (§ 805 ZPO Klage auf vorzugsweise Befriedigung).

2.4 The principle of strict enumeration of enforcement actions

Like the law of property the enforcement law only allows an enumerative numbers of enforcement species (Baur, Stürner & Bruns, 2006: § 6 par 6.63 et seqq). For example, the German law requires the attachment of individual movables. It is impossible to attach a warehouse as a whole. Outside the scope of enforcement as described by the law, enforcement is not possible (Baur, Stürner & Bruns, 2006: § 2 par 2.9 et seqq).

2.5 The principle of clarity and definiteness

The principle of clarity and definiteness (Bestimmtheitsgrundsatz) has a close connection to the principle of formalization and has a common ground with the principle of strict enumerations of enforcement actions. The principle of clarity and definiteness means that the title which has to be enforced must be unequivocally and clear. It is the task of the trial to verify what the debtor owes the creditor and what the enforcement agent has to enforce. This is the consequence of the separation of the trial process and the enforcement process.[22]

3 The abolishing of the exequatur according to Brussel Ia

3.1 The abolishing of exequatur as an alien element in the German enforcement system

Nearly each[23] domestic judgment and each title needs a court certificated enforcement clause in Germany for the enforcement process, §§ 724, 795 ZPO. Before the recast of Brussels Ia a foreign judgement within the scope of Brussel I needed the court certificate of enforceability in regard to § 9 AVAG. The clause has been very similar to a court certificate of enforceability for a domestic judgement. In principle, Germany did not ask for additional proceedings and requirements. The exequatur was smoothly integrated in the domestic enforcement law (Oberhammer, 2010: 197, 199). Even until the revision of the Brussel convention in 1989 the German version of the convention was using the word "Vollstreckungsklausel"[24] and not the wording "für vollstreckbar erklärt worden sind"[25] used until Brussel Ia recast.[26]

Brussel Ia forced Germany to accept an exemption from the basic structure of the enforcement law. The court certificate clause of enforcement is based in the principle of

formalization. For the enforcement of a judgment within the scope of the Brussel Ia we have expressively stated, that a court certificate of enforceability is not required. Therefore § 1112 ZPO reads:

§ 1112 ZPO
Dispensability of court certificate of enforceability

If a title which is enforceable in another Member State of the European Union, the enforcement domestically will take place, without the need for a court certificate of enforceability.

This is obviously an exception from the normal requirements of enforcement. It becomes even more significant if one takes into account that § 794 sec 1 no 9 ZPO equates a European judgment with a domestic judgement.[27] In accordance with Art 42 sec 1 Brussle Ia it is sufficient that the creditor provides the enforcement authority with a copy of the judgment and a certificate issued pursuant to Art 53 Brussel Ia. In this context Hess is speaking of the substitution of the national through a European court certificated enforcement clause.[28] But the questions arises whether a European process of court certificated enforcement clause can really substitute the national proceeding to issue a certificated enforcement clause.

3.2 Functions of the exequatur

The exequatur had several functions (Thöne, 2016: p. 50 et seqq). Often the function of the exequatur is subdivided in to two main functions, the title import function and the title inspection function (Oberhammer, 2010: 197; Hess, 2010: § 3 par 25). On a more detailed examination, these functions can be further subdivided. The import function serves as a tool to implement the foreign title and to perpetuate the title. The control function also serves as tool to develop and strengthen a common standard of the rule of law.

The implementation function is endangered because the recognition and enforcement law was harmonized but not the enforcement law as such (Thöne, 2016: 50 et seq). Generally speaking, the German enforcement law requires a title which fulfills the principle of clarity and definiteness. It must be easy and simple to take from the judgment and its title what the debtor has to do.[29] This could lead to problems if the foreign judgment does not harmonize with the principle of clarity and definiteness. Especially with regard to interest rates one can find different national styles (Seidl, 2010, 54 et seqq). Therefore, the foreign title must be adapted to the national law of the state of enforcement. Until the recast of Brussel Ia this was one of the functions of the exequatur decision in accordance with Art 38 Brussel I.[30]

The perpetuate function is far more than a technical issue and it is closely linked to the control function. The perpetuate function will give an answer to the question what the

fundamental basis for the enforcement is. Is this the foreign title or the court certificated enforcement clause? The enforcement of a judgment is an act of sovereignty (Hoheitsgewalt).[31] Therefore, the prevailing opinion saw the legal basis for the enforcement of a foreign judgment not in the foreign title but in the exequatur.[32] This opinion has led to two consequences. First, the enforcement clause was argued to serve as a democratic legitimation tool for the administration of state power in the enforcement process.[33] Naturally, this argument is disputable. The argumentative reference that sovereignty required a court certificate of enforceability for the enforcement process was said to be based on an extreme outdated understanding of state power from the 19th century (Nelle, 2000: 408). However, this does not hold true. In the 19th century the monarch and his state was the sovereign. To reject arguments of sovereignty in the 19th century meant to protect the civil society with the bourgeois against the monarch. Under the reign of democracy the citizens are the sovereign. Habermas speaks in this context about the equiprimordiality of private autonomy and public autonomy (Habermas, 1992: 151 et seqq). We are all bourgeois and citizens in the same moment. Under the democracy-oriented basic understanding the vanishing point of the argumentation must be the democratic legitimation derived from the individuals whose freedom is shaped by the judgment, even if such legitimation is very indirect (Von Bogdandy &Venzke, 2014: 290).

Second, on a much more technical level the exequatur also served as a limitation of the action to oppose enforcement (Vollstreckungsgegenklage). As long as the judgment of the Member State of origin did not build the basis for the enforcement but the enforcement declaration of the Member State addressed, it had been easy to limit the effect of the action to oppose enforcement to the Member State addressed. The decision to abolish the enforcement of a judgment in the country of origin had no immediate influence on the enforceability of the judgment in Germany under the condition that the judgment had been declared enforceable in Germany (Geimer, 2015, par 3101; Schack, 2014, par 1026). Brussel Ia leads to a different result. Because the judgment of the Member State of origin is the foundation of the enforcement the effect of the action to oppose enforcement, which arose in the Member State addressed, cannot be limited to the Member State addressed. The court of the Member State addressed decides with effect in all Member States whether the judgment sill can be enforced (Thöne, 2016: 89 et seqq).

The control function in a narrower sense means to bind the use of state power to certain standards of human rights.[34] To enforce a judgment is the use of state power. The usage of state power must be justified in line with human rights. The state which enforces a judgment cannot delegate the responsibility to the Member State of origin.[35] Of course, it is mutually recognized that the Member State addressed do not have the right of the revision au fond (Geimer & Schütze, 2010: Art 37 par 1). But mutual trust cannot substitute the responsibility of the Member State addressed for its own exercise of state power in the enforcement process.[36] Mutual trust takes place on the collective level, the violation of the creditor's fundamental and human rights by enforcing a foreign judgment, which for example violates the right to be heard, takes place on the individual level. As

Oberhammer put it (Oberhammer, 2006: 477, 497): "One sacrifices individuals, who experienced gross injustice, on the altar of mutual trust between the Member States (and of course a certain acceleration of the cross-border enforcement)." The main aim of the civil process is to safeguard and ensure individual rights. Abolishing the control function of the exequatur means to sacrifice the individual rights for the aim of the European integration (Wolf, 2012: 250, 254).

At least the control function also works as tool to develop and strengths a common standard of the rule of law. It may encourage the Member State of origin to improve its legal standards, if the Member State addressed refuses to enforce the judgment of state of origin (Thöne, 2016: 74). This function cannot be substituted by the state of origin. But this is the concept of the European Regulations of the second generation, like European Small Claims Regulation or the European Enforcement Order. For example in Chaper III of the European Enforcement Order a minimum standard which must be fulfilled is defined and the state of origin has to certify that its own proceeding has met this minimum standard as laid out in chapter III of the regulation.[37] With other words the state of origin itself certifies that it has met all requirements. As Bajons says this is nothing less than a violation of the principle that no one can be judge in its own affairs (Bajons, 2005: 1, 19). An encouragement to meet all minimum standards and not to be blamed by the courts of the Member State addressed is not connected with this concept.[38]

4 Abolishing the exequatur but maintaining the function of the exequatur?

Brussel Ia has abolished the exequatur, but this does not mean that the four functions of the exequatur also have vanished. Even though we do not have any court experience about that yet, we can assume that most of the functions maintained. Nevertheless, the new regulation needs some new adjustments. In detail:

The implementation function of the exequatur can be found in Art 54 Brussels Ia now. The implementation problems arise for example if a foreign judgement states just the legal interest must be paid without telling how to calculate the interest rate (Seidl, 2010: 57 et seqq). Recital 28 sentence 2 states that the Member States should determine who is in charge for the adaption. Contrary to recommendations in the legal literature (Hess, 2011: 125, 129; Roth, 1994, 350) the law makers in Germany did not create a special jurisdiction at the courts responsible for execution (Vollstreckungsgericht) or at the locally competent OLG, comparable to the jurisdiction under § 765 ZPO. Rather the law makers leave it to the competent enforcement officers to adapt the foreign title to the national system.[39] This decision may cause problems in the future (Gössl, 2014: 3479). In order to adapt a foreign title to the domestic enforcement system it is necessary to functionally evaluate the foreign measure on a comparative law basis and to judge which domestic measure is equivalent.[40] This task does not fit into the enforcement proceeding and will mostly need a much higher qualification than the one which the court appointed enforcement officer has received.

In accordance with Art 54 sec 2 Brussel Ia § 1114 provides a legal remedy system against the adapting decision of the enforcement officer. But this remedy system does not lead to the trial court system as for example the countermeasures against execution (Vollstreckungsgegenklage or Oppositionsklage) Instead, the debtor or the creditor are only provided with a remedy system, which was developed to correct a violation of the formal requirements of the enforcement law and not to clarify questions of substantive law (§ 766 ZPO, Reminder serving as a legal remedy against the nature and manner of compulsory enforcement Vollstreckungserinnerung). Therefore, in the literature it is advocated to allow a declaratory proceeding to clarify the adapting requirements (Gössl, 2014: 3479).

Originally a title must have been inspected before the title could be enforced. The enforcement could have only taken place after the title of a European judgement had been declared enforceable, Art 38 Brussels I. Now, we have inversed the process. In every member state, except Denmark, a European judgement can be enforced only on the basis of the certificate in accordance with Art 53 Brussels Ia.
Art 42 sec lit b explicitly only asks for such a certificate from the court of origin and § 1112 ZPO mirrors this. Nevertheless, there are several possibilities to inspect the judgement in the member state addressed. The yardstick for these inspections is in any case Art 45 Brussel Ia. There is no right to review the substance of the Judgement, Art 52 Brussels Ia. In general, with regard to this there are no changes to Brussel I. Solely Art 45 sec 2 lit e i Brussel Ia now additionally allows a refusal of the enforcement if the court of Member State of origin has violated the jurisdiction privilege of the employees.[41]

For the administration of the inspection function we have four different procedural tools which are all highly regulated through Brussel Ia itself. Three of these tools deal with the question whether the judgment can be recognized in the Member State addressed. The last tool affects the enforcement itself.[42]

The judgment of the Member State of origin is automatically recognized in the Member State addressed as Art 36 sec 1 Brussel states. Nevertheless, it may be disputable whether the conditions for the recognition are fulfilled. This question can be raised by the debtor as well as by the creditor. Both sides have a specific application process which is governed by Art 46 to 51 Brussel Ia. Only as far as the application process is not governed by the regulation, the national law has to fill the gap, Art 47 sec 2 Brussel Ia. In German law § 1115 ZPO serves as fill-in.[43]

The right to a positive declaratory action in accordance with the conditions of sec 3 subsection 2 Brussel Ia is regulated in Art 36 sec 2 Brussel Ia for the creditor. The opposite right to a negative declaratory action for the debtor is stated in Art 45 sec 4.

Beside these proceedings under the conditions of sec 2 subsection 2 Brussel I a there is no room for an additional declaratory proceeding, exclusively regulated by national law (In Germany the positive or negative Feststellungsklage, § 253 ZPO). The relationship

between the application processes in accordance with Art 36 sec 2 and Art 45 sec 4 is not self-explanatory. Geimer elaborates that the res judicata of this decision also unfolds res judicata for the application proceeding. This question is governed by European law not by national law.[44]

If one of both sides has raised a declaratory action, the other side is hindered to raise the opposite declaratory action. Art 29 et. Seqq. Brussel Ia should be applicable to this question.[45] Art 29 Brussels Ia is not directly applicable - as this is not a cross boarder question - but the Kernpunkttheorie or the same cause of action, in the understanding of the European court of justice as developed in the Gubisch case[46], fit much better than the German Streitgegenstandtheorie.[47]

The third inspection function is laid out in Art 46 Brussel Ia. The debtor and only the debtor can initiate the application process in accordance with Art 46 Brussel Ia. Because of the abolishing of the enforcement declaration, the creditor has no need for a legal remedy in the enforcement phase. The relationship between the application process in accordance with Art 46 Brussel Ia and the declaratory proceeding in regard to Art 36 sec 2 and Art 45 sec 4 Brussel Ia is not expressively regulated (Hau, 2014: 1417, 1419). However, on a closer reflection, the same what had been said about the relationship between the positive and the negative declaratory judgment must in principle apply here. In contrast to that, Art 29 et seqq. Brussel Ia cannot be applicable in this regard. The logic of the enforcement process requires that in an ongoing enforcement proceeding, the application process in accordance with Art 46 Brussel Ia has to prevail.

The decision in accordance with Art 46 Brussel Ia can only be based on the reasons given in Art 45 and not on any additional reason, especially none in the sense of Art 41 sec 2 Brussel Ia (Zöller & Geimer, 2016: Art 46 par 2). The common ground between all three application processes is that the effect is limited to the Member State addressed.[48]

At least, Art 36 sec 3 Brussel Ia allows an incidental review of the judgment of origin if the judgment has an impact on a German trial proceeding.

The perpetuated function has not been maintained under Brussel Ia. Because the debtor has the possibility to start the inspection process in the case of enforcement, one can still argue that the requirement of the democratic legitimacy of exercising state power is fulfilled. The consequences for the action to oppose enforcement (Vollstreckungsgegenklage) are more critical. Regarding Brussel I we have discussed three different questions. The first question has been, whether the action to oppose enforcement could be integrated in the exequatur process with regard to Art 43 Brussel I.[49] The European court of justice decided that the action to oppose enforcement (Vollstreckungsgegenklage) cannot be combined with the exequatur process.[50] In the meantime, also Art 41 sec 2 Brussel Ia states this very clearly. The second question had been, whether the court of the Member State of origin or the court of the Member State addressed should have jurisdiction over the action to oppose enforcement.[51] The last

question has been, whether the action to oppose enforcement only deals with the enforceability of the judgment in the Member State addressed or in all member states (Thöne, 2016: 55).

The consequence of abolishing the perpetuate function is that now, the Member State addressed has the competence to decide the action to oppose enforcement (for example § 1117 ZPO). Furthermore, in accordance with Art 24 sec 5 the Member State addressed has the exclusive jurisdiction and the decision must be recognized in all member states (Thöne, 2016: 89 et seqq). In opposition to this, it cannot be disputed that the action to oppose enforcement has a very close connection to the original trial process and its decision (Halfmeier, 2007: 381, 385 et seq). The impact of abolishing the perpetuating function on the action oppose enforcement may not be intended; to find a balanced solution between the interest of the debtor and the creditor is still a pending issue.[52]

Notes

[1] In general: (Röhl & Röhl, 2008: 283 et seqq).
[2] Gaul in (Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 9 et seqq).
[3] Gaul, Zur Struktur der Zwangsvollstreckung, Rpfleger 1971, p. 90.
[4] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 2 et seqq).
[5] Compare to the historic development (Baur, Stürner & Bruns, 2006: § 3).
[6] Becker-Eberhard in (Gaul, Schilken & Becker-Eberhard, 2010: § 16 par 4 et seqq).
[7] Fort the Austrian Law: (Rechberger & Oberhammer, 2009: par 86 et seqq).
[8] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 42).
[9] For example BGHZ 152, 166 et seqq.
[10] BGH, NJW-RR 2010, 16; Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 47).
[11] (Glenk, 2014: 2315; Seiler in (Thomas & Putzo, 2016: § 753 par 1).
[12] § 2 APVO-Justiz-GVD.
[13] The European Qualifications Framework (EQF) is available at: https://ec.europa.eu/ploteus/en/content/descriptors-page.
[14] Herget in (Zöller, 2016: § 767 par 1).
[15] Schneiders in (Kindl, Meller-Hannich & Wolf, 2015: § 767 par 1 et seqq).
[16] Berger in (Jauernig, 2015: § 1006 par 1).
[17] § 20 Abs. 1 Nr. 16 RechtspflG.
[18] § 1 ZVG.
[19] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 27 et seqq).
[20] Wolfsteiner in (Krüger & Rauscher, 2012: § 733 par 13).
[21] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 5 par 30).
[22] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 10 par 21)
[23] No court certificated enforcement clause is necessary for writs of execution (Vollstreckungsbescheid), § 796 ZPO; writs of seizure (Arrestbefehlt), § 929 ZPO and Injunction regarding the subject matter of the litigation (einstweilige Verfügung), § 936 ZPO. Detailed commentary on the exemptions Wolfsteiner in ((Krüger & Rauscher, 2012: § 724 par 9).
[24] ABl EG 1983 C 97/2, 10 (de).
[25] ABl EG 1990 C 189/2, 10 (de).

[26] While the respective English versions do not reflect such distinction in their wording (cf. "enforcement issued" and "declared enforceable"), the wording in the German translations indicates a different mechanism of enforcement by use of a different wording.
[27] To this function of § 794 sec 1 no. 9 Hess in (Schlosser &Hess, 2015: Art 39 par 1).
[28] Hess in (Schlosser & Hess Art, 2015: 53 par 1).
[29] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 10 par 21).
[30] BGH, NJW 1993, 1801; (Baur, Stürner & Bruns, 2006: § 55.26).
[31] Gaul in (Gaul, Schilken & Becker-Eberhard, 2010: § 1 par 16 et seqq).
[32] Schack, Internationales Zivilverfahrensrecht, 6. Ed. 2014, par 1026; BGH, NJW 2014, 702; BGH, 1993, 1801; Geimer, IZPR, 7. Ed. 2015, par 3101; Geimer, Anerkennung ausländischer Entscheidungen in Deutschland, 1995, p. 163.
[33] Pfeiffer, FS für Jayme, 2004, p. 674 et seqq.; (Weber, 2009: 214 et seqq).
[34] Very clear Schack in (Weitz & Gudowski, 2011: 1345, 1354).
[35] Schack in (Weitz & Gudowski, 2011: 1345, 1354).
[36] Compare Recitals 18 of the regulation (EC) No 805/2004 (European Enforcement Order for uncontested claims), which abolished the exequatur.
[37] Art 6 sec 1 lit c REGULATION (EC) No 805/2004.
[38] Rechberger in (Weitz & Gudowski, 2011: 1277, 1301).
[39] Bt-Drs. 18/823, p. 22.
[40] Dörner in (Saenger, 2015: Art 54 EuGVVO par 1).
[41] Dörner in (Saenger, 2015: Art 45 par 30).
[42] As far as Mäsch in (Kindl, Meller-Hannich & Wolf, 2015: Art 45 EUGVVO par 1) speaks about five remedies, he still basis his argumentation on Brussel I. Brussel I only knew the positive declaratory action in Art 33 sec 2 but not the negative declaratory action. Therefore, there had been a discussion whether the debtor must have the possibility to raise a negative declaratory action. Compare for the discussion also Geimer in (Geimer & Schütze, 2010: Art 33 par 85 et seqq). Meanwhile Brussel Ia has expressly regulated this question in Art 45 sec 4. Therefore, there is no room for an analogous application of Art 36 sec 2 Brussel Ia.
[43] Stadler in (Musielak & Voit, 2016: Art 36, 3 f).
[44] Geimer in (Fitz et al., 2015: 311, 316 et seq.); following Geimer, Hau, MDR 2014, 1417 et seq.
[45] Geimer in (Fitz et al., 2015: 311, 323; Zöller & Geimer, 2016: Art 36, par 62).
[46] ECJ, Judgment from 08.12.1987 - case 144/86.
[47] For the Streitgegenstandstheorie only (Rosenberg, Schwab & Gottwald, 2010: § 91).
[48] (Zöller & Geimer, 2016: Art 36 par 40); Franzina in (Dickinson & Lein, 2015: par 1374).
[49] See Oberhammer in (Stein & Jonas, 2011: Vol. 10, Art 43 par 15 et seqq).
[50] ECJ, Judgment from 13.10.2011 case 139/10
[51] Oberhammer, in (König & Mayr, 2012: 83 et seqq).
[52] Compare Oberhammer, in (König & Mayr, 2012: 83, 99 et seqq).

References

Bajons, E. M. (2005) Von der Internationalen zur Europäischen Urteilsanerkennung und -vollstreckung. Entwicklungsstadien des österreichischen Rechts auf dem Weg zum Europäischen Vollstreckungstitel, In: Bittner… (et al.) (eds.) *Festschrift für Walter H. Rechberger zum 60. Geburtstag*, pp. 1-21 (Wien: Springer).

Baur, F., Stürner, R. & Bruns, A. (2006) *Zwangsvollstreckungsrecht*, 13. ed. (Heidelberg: C. F. Müller).

Dickinson A. & Lein, E. (2015) *The Brussel I regulation recast* (Oxford: Oxford University press).

European Commission (n.d.) *The European Qualifications Framework* (EQF), available at: https://ec.europa.eu/ploteus/en/content/descriptors-page (July 19, 2016).
Fitz, H… (et al.) (eds.) (2013) *Festschrift für Hellwig Torggler* (Wien: Verlag Österreich).
Gaul, H. F., Schilken, E. & Becker-Eberhard, E. (2010) *Zwangsvollstreckungsrecht*, 12. ed. (München: C. H. Beck).
Gaul, Zur Struktur der Zwangsvollstreckung, Rpfleger 1971, p. 90.
Geimer, R. & Schütze, R. A. (eds.) (2010) *Europäisches Zivilverfahrensrecht: Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVTVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, 3. ed. (München: C. H. Beck).
Geimer, R. (1995) *Anerkennung ausländischer Entscheidungen in Deutschland* (München: C. H. Beck).
Geimer, R. (2015) *Internationales Zivilprozessrecht*, 7. ed. (München: C. H. Beck).
Glenk, H. (2014) Unverzichtbares Allerlei – Amt und Haftung des Gerichtsvollziehers, *Neue Juristische Wochenschrift, NJW*, 32, pp. 2315-2318
Gössl, S. L. (2014) Die Vollstreckung von dynamischen Zinssätzen unter der neuen EuGVVO, *Neue Juristiche Wochenschrift, NJW*, 48, pp. 3479-3483.
Habermas, J. (1992) *Faktizität und Geltung* (Suhrkamp Verlag).
Halfmeier, A. (2007) Die Vollstreckungsgegenklage im Recht der internationalen Zuständigkeit, *IPRax*, 5, pp. 381-387.
Hau, W. (2014), Brüssel Ia-VO – Neue Regeln für die Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivil- und Handelssachen, *Monatsschrift für Deutsches Recht, MDR*, 24, pp. 1417-1421.
Hess, B. (2010) *Europäisches Zivilprozessrecht* (Heidelberg: C. F. Müller)..
Hess, B. (2011) Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts, *IPRax*, 2, pp. 125-130
Jauernig, O. (2015) *Bürgerliches Gesetzbuch*, 16. ed. (München: C. H. Beck).
Kindl, J., Meller-Hannich, C. & Wolf, H.-J. (2015) *Gesamtes Recht der Zwangsvollstreckung*, 3. ed. (Baden-Baden: Nomos).
König, B. & Mayr P.G. (eds.) (2012) *Europäisches Zivilverfahrensrecht in Österreich III* (Wien: Manz).
Krüger, W. & Rauscher, T. (eds.) (2012) *Münchener Kommentar zur Zivilprozessordnung: ZPO*, 4 ed. (München: C. H. Beck).
Mansell, H.-P. … et al. (eds.) (2004) Festschrift für Erik Jayme (München : Sellier European Law Publishing).
Musielak, H.-J. & Voit, W. (2016) *Zivilprozessordnung*, 13. ed. (München: C. H. Beck).
Nelle, A. (2000) *Anspruch, Titel und Vollstreckung im internationalen Rechtsverkehr* (Tübingen: Mohr Siebeck).
Oberhammer, P. (2006), Der Europäische Vollstreckungstitel: Rechtspolitische Ziele und Methoden, *Juristische Blätter*, 8, pp. 477-497.
Oberhammer, P. (2010) The Abolition of Exequatur, *IPRax*, 3, pp. 197-199.
Rechberger, W. & Oberhammer, P. (2009) *Exekutionsrecht*, 5. ed. (Wien: Facultas.wuv).
Röhl, K. F. & Röhl, H. C. (2008) *Allgemeine Rechtslehre*, 3. ed., (München: Verlag F. Vahlen).
Rosenberg, L., Schwab K. H. & Gottwald, P. (2010) *Zivilprozessrecht*, 17 ed. (München: C. H. Beck).
Roth, H. (1994) Konkretisierung unbestimmter ausländischer Titel, *IPRax*, pp. 350-351.
Saenger, I. (Hrsg.) (2015) Zivilprozessordnung, 6. ed. (München: C. H. Beck).
Schack, H. (2014) *Internationales Zivilverfahrensrecht*, 6. ed. (München: C. H. Beck).
Schlosser, P. F. & Hess, B. (2015) *EU-Zivilprozessrecht*, 4. ed. (München: C. H. Beck).

Seidl, S. (2010) Ausländische Vollstreckungstitel und inländischer Bestimmtheitsgrundsatz: eine Untersuchung zum autonomen und europäischen Exequaturrecht und zur Abschaffung des Exequaturverfahrens (Sellier european law publishers).

Stein, F. & Jonas, M. (eds.) (2011) *Kommentar zur Zivilprozessordnung*: *ZPO*, 22. ed. (München: C. H. Beck).

Thomas, H. & Putzo, H. (2016) *Zivilprozessordnung*, 37. ed. (München: C. H. Beck).

Thöne, M. (2016) *Die Abschaffung des Exequaturverfahrens und die EuGVVO: Bestandsaufnahme, Bewertung, Ausblick (Veröffentlichungen zum Verfahrensrecht)* (Tübingen: Mohr Siebeck).

Von Bogdandy, A. & Venzke, I. (2014) *In wessen Namen?* (Suhrkamp Verlag).

Weber, M. (2009) *Europäisches Zivilprozessrecht und Demokratieprinzip* (Tübingen: Mohr Siebeck).

Weitz, K. & Gudowski, J. (eds.) (2011) *Aurea praxis aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego, Tom I – II*, (LexisNexis).

Wolf, C. (2012) Hess: Europäisches Zivilprozessrecht, *ZZP - Zeitschrift für Zivilprozess*, 125(2), pp. 250-259.

Zöller, R. (eds.) & Geimer, R. (2016) *Zivilprozessordnung*, 31. ed. (Otto Schmidt).

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Cross-border Legal Representation as Seen in a Case Study

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Abstract This case example illustrates the by no means insignificant cross-border activities of lawyers and their work within the scope of the European single market. In this context it is essential for an independently practising lawyer to know under what conditions s/he may also be professionally active, outside the country in which s/he is authorised to practice.

Keywords: Cross-border legal representation • freedom to provide services • TFEU (Treaty on the functioning of the European Union) • "Federal Law on the freedom of establishment and provision of services by European lawyers in Austria" (EIRAG) • Directive 98/5/EEC (Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained) • Limitation of action

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1 The case in outline

The transportation of two conveyor belts from the Netherlands to Austria was intended. A company in the Netherlands (A-Co Ltd.) commissioned another company from the Netherlands (B-Co Ltd.) with this task. This latter company, B -Co Ltd. of the Netherlands in turn commissioned an Austrian company (C-Co Ltd.) with the transport contract. The Austrian company C-Co Ltd. finally commissioned a Slovenian company (D-Co Ltd.) with the job of transporting the load from Rotterdam to Austria for delivery to the company E-Co Ltd. The Slovenian D-Co Ltd. took over the goods for transportation in Rotterdam. A part of this goods consignment was damaged in transport following departure as a result of not having been fixed and secured in an orderly manner for transportation. The Austrian C-Co Ltd. subsequently sued the Slovenian D-Co Ltd. at the Graz Provincial Court in its capacity as the Commercial Court on the basis of CRM and the threat of the impending limitation period. Only then did B-Co Ltd. of the Netherlands bring a suit against the Austrian C-Co Ltd. before the District Court of Rotterdam, also because of the impending limitation period.

This case example illustrates the by no means insignificant cross-border activities of lawyers and their work within the scope of the European single market. In this context it is essential for an independently practising lawyer to know under what conditions s/he may also be professionally active, outside the country in which s/he is authorised to practice. In seeking an answer to the above problem it is first essential to establish and differentiate the time period involved for this activity: in the case of simply temporary activity in another EU member state the freedom to provide services as a fundamental freedom in the EC should be observed, while in the case of permanent and continuous activity the freedom of establishment – also provided for as a fundamental freedom within the EU – is the relevant issue.

2 Freedom to provide services

The freedom to provide services makes it possible for independently self-employed persons, who are based in one member state, to temporarily conduct a business activity also in another member state. The relevant regulations can be found in the TFEU[1] (Treaty on the functioning of the European Union), more precisely in its Articles 56 to 62. The determining factor for a service provision under the terms of the European legislation is that the service provided has effect in another member state than that in which there is authorisation to practice. Three various case constellations can be differentiated in this context: in the first case the lawyer proceeds to another member state than the one in which s/he is licensed in order to carry out an activity in law (active or positive freedom to provide services), in the second case, the client proceeds to the country in which the lawyer is authorised to practice, in order to make use of legal services (passive or negative freedom to provide services), and the third case is the possibility of providing legal services through means of communication (for example through letters or phone calls) with both the lawyers and clients involved remaining in their respective home countries (correspondence services). A point to be taken into account here is the prohibition of

discrimination as laid down in Article 57 paragraph 3 of the TFEU , which subjects the unequal treatment of domestic and foreign service providers to an immanent justification provision.

The decisive criterion here is – as already mentioned in the beginning – that the service is only of a temporary nature and not carried out permanently and continuously. The decision on whether an activity is only carried out temporarily is made on a case-by-case basis, taking into account the criteria duration, frequency, regularity of recurrence and continuity. Where the lawyer makes use of an own infrastructure – for example lawyer's chambers – this does not rule out any qualification for a purely temporary activity. But this infrastructure must, however, be an essential requirement for the carrying out of the activity.

3 Services Directive for Lawyers

More detailed requirements for the carrying out of an activity as a lawyer in another member state can be found in the Directive 77/249/EEC. In Austria this Directive is currently implemented and in force as the "Federal Law on the freedom of establishment and provision of services by European lawyers in Austria" (EIRAG).

The Directive calls for lawyers from another member state to be given equal treatment with that of local domestic lawyers when carrying out their activities in another member state. The demand made on the lawyers on the other hand, is that they must comply with and maintain the directives of the state in which their service is provided (this leads for example, subjection to the professional regulations of two countries). Furthermore the professional title as used in the country of origin must be maintained and the relevant professional organisation in the country of origin together with the court in which the lawyer if licensed to practice must be disclosed. In cases of legal activities in the practice of law by lawyers from another EU state, the member state has the competence to decide for itself on the requirement for nominating a local lawyer under national law to act in conjunction with the lawyer from abroad. Such a person would be a lawyer licensed to practice at the court seised. This lawyer would – in the sense of a protective mechanism – have to instruct the foreign lawyer about all existing formal requirements under the applicable rules of procedure, as also warrant the adherence of these requirements. Exceptions to the requirement for appointing a local lawyer acting in conjunction with lawyer from abroad exist in the case where the national legal regulations do not foresee mandatory representation by a lawyer. Section 6 of EIRAG furthermore requires that a person authorized to accept service is nominated when the lawyer from abroad starts the first proceedings in court.[2]

4 Freedom of establishment

When a lawyer, who resides in another member state, has the intention of participating in the business life of another member state in a continuous and stable manner with the intention of gaining an economic benefit, then this situation relates on the European level

to the application context of the freedom of establishment. This is regulated in Articles 49 to 55 of TFEU and is also applicable to lawyers. This fundamental freedom relates in its scope to the taking up and exercising of gainful self-employment as also the founding and managing of a company. The decisive criterion here is the continuous and permanent practice of the profession of the lawyer in another member state. In terms of the legal framework conditions, all relevant national regulations are to be observed. Similar to the freedom to provide services, the freedom of establishment also includes a discrimination prohibition; and any limitations imposed require appropriate justification.

5 Directive on the recognition of professional qualifications

On the secondary legislation level the directive on the recognition of professional qualifications is intended to assure the recognising of an acquired professional qualification. Where for example times spent in education and professional examinations are necessary in order to be admitted to a profession, then an appropriate completion is required in order to fall under the scope of application of the directive. Once the qualification is obtained, the right to exercise this profession also extends to another member country. A person wishing to work as a lawyer maybe required to take an adjustment course or a qualification examination. This is based on the consideration that the activities of a lawyer demand precise knowledge of national law. The professional qualifications of the relevant home country must also be taken into account within the scope of such a qualification examination. Furthermore the host country (auch receiving country) can require verification of the reliability, the clean criminal record, intellectual and bodily health and the absence of any record of behaviour to the discredit of the profession from the foreign lawyer. On a successful completion of the examination, the lawyer is permitted to use the professional title of the host country and is also subject to the same rights and obligations as the domestic lawyers.

6 The Establishment Directive for Lawyers

Directive 98/5/EEC (Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained) provides a lawyer, wishing to be established professionally in another member state with two possibilities for doing so: on the one hand to practice under the original professional title acquired and on the other the possibility for integration in the professional status of the host country, using the professional title used here. This Directive is currently implemented and in force in Austria as the “Federal Law on the freedom of establishment and provision of services by European lawyers in Austria and amendments to the regulations for lawyers” (EIRAG).

7 Retaining the professional title of the country of origin

When the lawyer decides to settle with the professional title as used in the country of origin, then no time limitations exist on the right to exercise the professional activities of lawyer – in contradiction to the original limitation terms outlined in the draft directive (5

years). The professional title is – as a warning signal– to be adjusted to the official language of the host country, without permitting the risk to arise of mistaking the professional titles of the country of origin. When the professional titles of both member states are the same, then the professional organisation of the country of origin or the court in which the lawyer is licensed to practice should be given as supplementary information (Section 12 EIRAG). Furthermore this must be recorded with the responsible body of the host country – by submitting a certificate confirming the right to practise law in the country of origin. In this context the host country can also demand that a professional liability insurance policy is also taken out.

On fulfilment of these criteria the lawyer from abroad is permitted to carry out the same professional activities as a lawyer established with the respective appropriate professional title in the host country. This also includes provision of legal consulting and advice on the national law of the lawyer's country of origin, EU and international law as also on the law of the host country. A limitation can be imposed in the context of representing a client in the courts by the national legislature through specifying the requirement for calling in a local lawyer to act in conjunction with the other lawyer [Einvernehmensrechtsanwalt]. In terms of the applicable codes of professional conduct both those of the host country and also those of the country of origin are applicable.

8 Complete integration

When the lawyer decides on the option of complete integration there are once again two possibilities for achieving this: on the one hand a full integration following a three year activity working with the law of the host country and on the other hand a full integration process following a shorter activity period.

9 After three years

The qualification test that would otherwise be required by the host state does not have to be taken when in a first step a lawyer is merely registered and active under her/his original professional title (1) and has been professionally active for three years with the law of the host country including EU law and (2) verification can be produced of effective and regular professional activity. In such cases it can be assumed that the knowledge needed has been acquired. "Effective and regular professional activity" is understood in this case to be "actual practice of the profession without interruption". The verification for this, which the lawyer needs to produce, must take the form of case documentation. A supplementary explanation of these cases handled can also be required. When the lawyer has fulfilled this requirement then s/he must be admitted to the profession of a lawyer insofar as this will not result in a detriment to public order (to terms of infringements against the compelling general interests in society which must be taken into account without fail as determined by the member states).

10 Before the expiry of three years

If the lawyer is not in a position to provide the appropriate verification, then the possibility for full integration still exists – without taking a qualification test. This decision must be made by the authority responsible for professional authorisation in the host country; however, the lawyer does not have claim to that. The decision is made on the one hand based on the entire professional experience of the candidate and on the other based on participation in courses and seminars. The objective here is that further education and training can compensate for a lack of professional experience. This must be verified by the responsible authority in the course of a discussion. This discussion must not, however, have the range and scope of a qualification test.[3]

11 Conclusion

In the case presented here it is necessary to integrate a local lawyer in the relevant member state since only knowledge of the relevant national standards can guarantee comprehensive legal protection and optimal representation in the courts.

Notes

[1] The consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.

[2] *Garber*/*Nunner-Krautgasser*, Grenzüberschreitende anwaltliche Tätigkeit im europäischen Binnenmarkt – Teil I: Dienstleistungsfreiheit, 207 ff. (Cross border activities of lawyers in the Single European Market – part I: Freedom to provide services, p 207 et seq.).

[3] *Garber*/*Nunner-Krautgasser*, Grenzüberschreitende anwaltliche Tätigkeit im europäischen Binnenmarkt – Teil II: The freedom of establishment, 243 ff.