FORMA HARTIJA OD VREDNOSTI PRAVNO-EKONOMSKA ANALIZA

Gordana Mrdak[1], Milija Bogavac[2], Mile Rajković[3], Miljan Žižić[4]

doi: 10.59864/Oditor12401M

Originalni naučni rad
UDK: 336.763:34

Apstrakt

Nezaobilazno je pitanje da utvrdimo da li postoje i kakvog je značaja za ocenu pravne prirode hartija od vrednosti promena bitne forme, i tačnije, napuštanje hartije od vrednosti kao pismene isprave u formu bestelesne skripturalne evidencije, bez obzira da li se ovo načelo (nazovimo ga načelom upisa), realizovalo u registru računovodstvene ili računarske tehnike.

Ovde se susrećemo sa nepreciznošću do sada usvojene formulacije koja nije dolazila do izražaja u uslovima nepostojanja konkurencije formi kod hartija od vrednosti. Naime, mi smo pravni odnos iz hartije od vrednosti poistovetili sa njegovim pojavnim oblikom kao bitne forme. U nameri da ispitujemo pravnu prirodu, ne hartija od vrednosti kao forme (koja ne može imati pravnu prirodu u navedenom smislu), već prava oličenog u takvoj formi, jasno je da govorimo i utvrđujemo postojanje eventualnih uticaja promena forme u kojoj je inkorporisano, odnosno predstavljeno (na dematerijalizovan način) isto pravo.

***Ključne reči**: forma, hartije od vrednosti, pravni režim.*

JEL: K22, K29

Uvod

Pravni režim hartija od vrednosti, upravo zbog njihove proliferacije, kako po vrstama tako i po prometu, bez obzira da li se radi o kratkoročnim ili dugoročnim hartijama, pa i zbog problematike koja se nameće obaveznom formom i neminovnom promenom izazvanom dematerijalizacijom takvih hartija, ponovno aktuelizira razmišljanje o njihovoj pravnoj prirodi. Mišljenja smo naime, da se u procesu rasprave o formi, teško može ignorisati onaj deo celine koji se odnosi na sadržinu pravnog odnosa, jer od toga zavisi i zaključak o pravnoj prirodi hartija od

[1] Docent, dr Gordana Mrdak, Univerzitet Alfa BK, Beograd, Srbija, E-mail: gordana.mrdak@alfa.edu.rs
[2] Redovni professor, dr Milija Bogavac, Univerzitet MB, Beograd, Srbija, E-mail: info@mbuniverzitet.edu.rs
[3] Docent dr Mile Rajković, Visoka škola akademskih studija "Dositej", Beograd, Srbija, E-mail: mile.rajkovic@vsdositej.edu.rs
[4] Miljan Žižić, doktorant, Poslovni i pravni fakultet, Univerzitet MB, Beograd, Srbija, E-mail: zizicmiljan90@gmail.com

vrednosti(Galjak, 2022). Teško je u domenu rasprave o pravnoj problematici dematerijalizacije, izbeći sve relevantne elemente hartija od vrednosti, budući da se posledični lanac uticaja dematerijalizacije proteže, i to suštinski, na svaki bitan element postojećeg sistema hartija od vrednosti(Ilić Popov & Popović, 2023). Druga je stvar, ali ipak povezana sa iznetim problemom, kako se naš zakonodavac po ovim pitanjima odnosi i opredeljuje u svojim sadašnjim ili budućim praktičnim rešenjima.

U našem obligacionom pravu, odsek koji se odnosi na regulativu hartija od vrednosti, nalazi se u odeljku koji reguliše jednostranu izjavu volje kao posebnom izvoru obligacija, različitu dakle od ugovora, kao jednog od klasičnih izvora ovog dela građanskog prava, uz druge izvore, kao što su na primer: naknada štete, poslovodstvo bez naloga i dr(Dimitrijević, 2023). Ovakva sistematizacija hartija od vrednosti u našem zakonodavstvu je bez sumnje posledica opredeljenja po kojem je jednostrana izjava volje posebni izvor obligacija u odnosu na ugovor i ostale izvore, čime su hartije od vrednosti zauzele svoje posebno mesto, kako u odnosu na ugovor, tako naravno, i u odnosu na druge izvore obligacija.

Bez obzira na iznetu činjenicu o tome kako se naš zakonodavac opredelio na ovaj način po pitanju pravne prirode hartija od vrednosti, razumljivo je da, kako u teoriji, tako i u praksi, o pravnoj prirodi hartija od vrednosti ima različitih pristupa i shvatanja. Očigledno je da njihovo polazište i osnova za shvatanja, svoj koren imaju u tome da li prihvataju ili ne prihvataju, pored ugovora i jednostranu izjavu volje kao jedan od izvora obligacija. Ako se negira jednostrana izjava volje kao izvor obligacija, tada neminovno ne može biti druge polazne osnove za opredelenje o pravnoj prirodi hartija od vrednosti od one ugovorne(Majstorović, 2021; Savić, 2022). Odatle i polazište ugovorne teorije o pravnoj prirodi ovih hartija po kojoj obaveza iz hartija od vrednosti ne može nastati pre ispunjenja onih uslova koji su relevantni za postojanje ugovora - a to su, u prvom redu, saglasnost dužnika i poverioca o bitnim elementima takvog ugovornog odnosa (Rstić, 2022). Prema tome, ugovorna teorija, negirajući da hartije od vrednosti predstavljaju poseban izvor obligacija, jer obaveza iz takvih hartija može da nastane samo zaključenjem ugovora između izdavaoca i primaoca (kupca), u stvari samu sebe ograničava shvatanjem, da izvora, kada se radi o hartijama od vrednosti, u jednostranoj izjavi volje nema, odnosno ne može biti (Schär, 2021). Drugim rečima, prema ovakvoj teoriji, hartija od vrednosti bi predstavljala ispravu koja je u suštini ugovor između dužnika - izdavača takve hartije, i poverioca - savesnog imaoca hartije, stečene dakle na zakoniti način. (Dašić et al., 2023, Dašić, 2023).

Ovakvo shvatanje nesumnjivo svoju slabu stranu ima u realnosti i činjenici da, kod kreiranja hartija od vrednosti, bez obzira na zaista potrebno prisustvo volje njenog izdavaoca za formiranjem pravne veze na osnovu režima takvih hartija, prema uslovima iz hartija, ove uslove nije ugovarao sa bilo kime, a najmanje sa

poznatim kupcem, u budućim obligacionim odnosima koje bi se, takvim sporazumom stvorili na način na koji ugovorno pravo predviđa. Ne bi se naime, ovakvom teorijom moglo objasniti kako to, da bez ugovora, izdavalac hartije na donosioca, mora da ispuni obavezu iz hartije savesnom imaocu sa kojim nikada nije sklopljen ugovor određene sadržine.

Pravna priroda hartija od vrednosti

Mišljenja smo da je bilo sasvim razumno napustiti shvatanje koje zastupa ugovorna teorija i pravnu prirodu hartija od vrednosti objasniti posebnim izvorom obligacija koje predstavlja jednostrana izjava volje, kako to čini posredno i naš zakonodavac. Međutim, ni time nije sve rešeno jer, uprkos takvom opredeljenju, ostaje dilema o tome, kada nastaje obaveza iz hartije od vrednosti - njenim nastajanjem u odgovarajućoj formi, ili tek njenim puštanjem u promet kao dodatnim uslovom?

Odatle i dva shvatanja koja se pojavljuju, ne samo kao teorijska već i kao praktično opredeljenje u zakonskoj praksi.

Naime, bez sumnje je jednostranoj izjavi volje, kao posebnog izvora obligacija, najbliži institut ponude za zaključenje ugovora, ali ova sličnost nosi u sebi privid koji je bitan. Ponuda za zaključenje ugovora je uvek upućena poznatom ili prepoznatljivom licu(Sobiech et al., 2021). Izvesno je da hartije od vrednosti mogu da glase na ime, ali to ime je redovno upisano nakon što imenovani pristane da stupi u odnos čija je sadržina naznačena u hartiji. Pitanje je ipak, da li obaveza iz hartije nastaje i pre nego što je hartija od vrednosti dospela u ruke imenovanog vlasnika ili savesnog imaoca, bez obzira da li je u pitanju hartija na ime ili na donosioca. Može se sigurno desiti da izdavalac hartije ovu izgubi, bude mu ukradena a da dođe u ruke savesnog imaoca ili imenovanog vlasnika iz hartije. U tom slučaju izdavalac ne bi mogao uspešno isticati prigovor koji je moguć prema prvom sticaocu ili nesavesnom sticaocu, već mora ispuniti obavezu iz hartije. Očigledno je da nikakav ugovor nije osnov ovako nastalog pravnog odnosa između izdavaoca i savesnog imaoca, pa stoga ne bi trebalo niti bi bilo moguće na ovakvom običnom primeru, braniti ne samo ugovornu teoriju kao ispravnu, već ni teoriju po kojoj obaveza za izdavaoca nastaje samim stvaranjem hartije od vrednosti (Vuković, et al., 2023). Ako ona ne bude stavljena u promet, nesumnjivo je da nema još nikoga ko bi stekao pravo na ispunjenje obaveze iz takve hartije, odnosno to pravo ostvariti, pre svega zato što hartiju ne može prezentirati dužniku. Takva teorija o, uslovno rečeno, potencijalnoj obavezi, pod nazivom kreacione teorije, prisutna je i u praksi, ali se njome teško može objasniti postojanje dužnika bez poverioca, pa time ni opravdano prihvatiti postojanje pravnog odnosa pre nego što hartija od vrednosti dospe u ruke savesnog imaoca, kao poverioca.

Izjava volje od strane jednog lica u svrhu stvaranja jednostrane obaveze određene sadržine, u našem pravu je relevantna, bez obzira da li se u trenutku izjave zna ili se ne zna određeno (ukoliko nije imenovan) ko je titular prava na ispunjenje jednostrane obaveze. On će se, za razliku od ugovora kao izvora obligacija, tek kasnije legitimisati u svojstvu poverioca. Treba ipak imati u vidu da kod ugovora pravni odnos po ovom osnovu nastaje istovremeno usaglašavanim izjavama, dok kod jednostrano izjavljene volje, pravo se "rađa" kasnije sa pojavom lica, koje ispunjava uslove iz takve jednostrano izjavljene volje, tj. tada prihvata uslove po kojima postaje poverilac odnosno, kod hartija od vrednosti, te uslove prihvata, kada postane savesni sticalac hartije.

Naš zakonodavac očigledno nije bio opterećen protivrečnostima koje u pogledu pravne prirode hartija od vrednosti imaju u sebi ugovorna i kreaciona teorija. On se opredelio za onu koja logički najbolje odgovara našim sledstvenim rešenjima koja se tiču prometa tih hartija, a to je trenutak kada hartiju od vrednosti njen izdavalac preda njenom korisniku(Nikolić, 2023).

Prihvatanjem ovakvog rešenja, otpadaju potencijalne mogućnosti da obaveze iz takve hartije nastanu pre njenog stavljanja u promet od strane njenog izdavaoca, Time, za naše pravno područje, ova teorija, koju nazivamo emisionom, rešava mnoga praktična pitanja, između kojih je za nas značajno i pitanje forme kao bitnog sastojka hartija od vrednosti.

Naime, kada je reč o formi, za ugovornu teoriju, morali bi da važe oni propisi koji se odnose na valjanost ugovora sa stanovišta takvog teorijskog i praktičnog pristupa, dok sa stanovišta onih koji za pravnu prirodu hartija od vrednosti prihvataju jednostranu izjavu volje kao izvor obligacionog odnosa, ostaje da razmotrimo u kojem pojavnom obliku (formi) takva izjava mora da bude izražena da bi bila relevantna za ocenu valjanosti takve hartije(Bremus et al., 2020). Ovo bez obzira da li se radi o teoriji kreacije ili emisije, mada je za nas ova poslednja interesantnija upravo zbog njenog prihvatanja u našoj zakonodavnoj praksi.

Pravni režim forme hartija od vrednosti

Izuzimajući Zakone o menici i čeku, koji su materiju ovih posebnih hartija od vrednosti regulisali prema međunarodnim merilima od samog početka sredinom 20. veka na jedinstven način, ideološki pogledi, Ustavni akt i sledstveni pravni propisi naše zemlje, koji su se odnosili na koncept svojine, a u vezi sa time kako sadržana tako i forme hartija od vrednosti, su u načelu bili zapostavljani sve do kodifikacije obligacionog prava. Zakon o obligacionim odnosima je u opštim odredbama usvojio klasičnu koncepciju forme i bitnih sastojaka hartije od vrednosti kao pismene isprave(Bučalina & Pejović, 2022). Definisanje hartije od vrednosti kao pismene isprave, jasno ukazuje na materijalizovanu ispravu u pismenoj formi u kojoj je inkorporisano ono pravo koje poverilac (zakoniti imalac), može ostvariti samo uz prezentiranje same hartije.

Tako je ostalo sve do skora uprkos odredbi samog zakona, po kojoj je moguće na obligacione odnose koji se određuju drugim zakonom, primeniti drugačije rešenje(Bevanda et al., 2021), i uprkos činjenici da je zakonodavac, koristeći ovo pravo, donosio poseban zakon o hartijama od vrednosti, koji se odnosi na uslove, način izdavanja i prenos deonica, obveznica, blagajničkih zapisa, certifikata i komercijalnih zapisa(Juelsrud & Wold, 2020). Naime i u smislu zakona, pod hartijom od vrednosti se podrazumeva pismena isprava koja glasi na ime ili donosioca, ali i njihove dematerijalizacije u trgovini bezgotovinskim načinom zaduživanjem ili odobravanjem računa. Naše pravo, drugim rečima, kada su u pitanju hartije od vrednosti, teško odstupa od njihove materijalne osobine. Drugo je pitanje, što bi u današnjim uslovima sve moglo da se podrazumeva pod navedenim pojmom, tj. da li je materijalizovani oblik hartija u vidu isprava, uvek identičan sa njenim pojavnim oblikom ili ne.

Uticaj opšteg tehnološkog napretka, sredstava i njihovih mogućnosti na pravo je nesumnjiv i istorijski potvrđen upravo kroz formu pravnih akata. Ovo naročito na one akte koje se u današnjem smislu reči smatraju masovnim, kakav je upravo slučaj sa hartijama od vrednosti i njihovim prometom u uslovima postojanja organizovanih i specijalizovanih tržišta, kakva je upravo berza. Ova masovnost ima još jedan odraz na obligaciono pravo(Fraisse et al., 2020). Bez obzira na kod nas usvojeno načelo jedinstvenog regulisanja pravnih odnosa iz ove oblasti, izuzimajući naravno izuzetke, činjenica je da se upravo tehnika meša u specifičnosti i potrebe za posebnošću regulative tipične za privredno pravo(De Jonghe et al., 2020). Pravni instituti rezervisani za ostale učesnike u obligacionim odnosima koji nemaju osobine subjekta koji obavljaju privrednu delatnost, imaju karakteristične individualnosti koje u klasičnom obliku čini vidljivom sve faze i forme procesa pregovaranja, zaključenja i ispunjenja ugovora. Hteli mi to ili ne, ova različitost, ne samo subjekata već i metoda pri zaključenju pravnih poslova, sama po sebi nameće specifičnosti koje se u oblasti privrednih odnosa odražavaju na potrebu posebnog regulisanja(Klincov et al., 2022). Nekadašnja, skoro bez izuzetka prisutnost ugovorenih strana, danas je, barem u privrednom pravu, po pravilu izuzetak, jer se obavlja između odsutnih ugovarača, koji se, u procesu zaključenja posla neretko nalaze veoma udaljeni u vlastitoj, ali i u drugoj zemlji, što izaziva i međunarodne implikacije. Odatle i shvatanje da je skripturalna forma u ovakvoj situaciji neophodna, ali je, sve više, zamenjuje elektronika svojim znacima(Milenković et al., 2023). Složenost i nepoznavanje na profesionalnom nivou specifičnosti uslova i postupaka trgovine u pojedinim slučajevima, uvodi u međuprostor posrednike-specijaliste koji sada međusobno, umesto onih za čiji račun se pojavljuju na tržištu, sklapaju poslovne aranžmane. Ova pojava je upravo karakteristična za poslovanje hartijama od vrednosti na berzama.

Evolucija pojavnih oblika novca, banaka i drugih finansijskih institucija, omogućava stvaranje žiralnog novca, pa u poslednje vreme i skripturalnog

pojavnog oblika, evidencije i dugovno-potražnih salda iz osnova prometa i izdavanja hartija od vrednosti(Biswas et al., 2022).

Ovaj oblik skripturalnog uspostavljanja režima hartija od vrednosti zastupljen je i u našem pravu. To samo po sebi potvrđuje da se pravni instituti javljaju u skladu za potrebama njihovog korišćenja. Uz pravilo da je potreba pravi podsticaj inovaciji, treba dodati i da to važi za njenu primenu(Cvetković, 2023). U našem pravu, međutim, nema potrebe za apsolutno novim, već u prilagođavanju onog što u svetu već postoji i funkcioniše, istina u uslovima koji se u mnogome razlikuju od naših, ali ipak ne takvim da način dematerijalizovanih hartija koji se kod nas koristi ne bi bio kompatibilan. Pitanje se ipak može postaviti u nešto izmenjenom obliku, tj., da li kada i kako, u našim uslovima primeniti, nazovimo ga uslovno, novi dematerijalizovani pojavni oblik za sve ili samo za posebne vrste hartija od vrednosti i u vezi sa time, kako promeniti kod nas vladajuću doktrinu o inkorporisanosti prava u hartijama od vrednosti kada tih hartija u fizičkom smislu nema(Ilić et al., 2022; Milanović, 2023). Drugim rečima, treba rešavati problem uspostavljanja pravnog režima hartija od vrednosti bez hartija i sledstveno tome, takvog prometa koji će u procesnom smislu biti automatizovan u takvoj meri, da izražavanje volje prodavca-vlasnika hartije, umesto u klasičnom smislu, bude modifikovano tako, da samo početak, u vidu naloga, pruži sve potrebne elemente za odvijanje procesa po unapred predviđenim pravilima i postupcima koji u krajnjoj konsekvenci dovode do promene vlasništva na „hartijama“ i sledstvenog plaćanja, što uspostavlja imovinsku ravnotežu učesnika u tom postupku, obuhvatajući, pri tome, ne samo prodavca i kupca, već i posrednike.

Da bi mogli ovom zadatku udovoljiti, neophodno je prići suštini problema koji se prvenstveno sastoji u tome da sagledamo bitne materijalne i procesne elemente stvaranja (emisije), prometa i realizacije prava iz hartija od vrednosti, a zatim utvrditi promene koje su nužne u pretpostavljenim novim uslovima, kako bi se mogao provesti odnosno uspostaviti novi pravni režim, koji se nadograđuje na stari kao njegov nastavak, bez prekida nužnog kontinuiteta(Vladisavljević et al., 2023).

Jedna od bitnih osobina hartija od vrednosti (isprava, imovinsko pravo i inkorporacija) upravo obavezna forma temelj je za ostale, jer su njome omogućene, nesumnjivo je da bi izlaganje o mogućnosti i potrebi njene zamene bio nemoguće, ako se o pitanju sadašnje forme ne priđe sa svih razloga koji se u pravnom prometu pojavljuju, ne samo u građanskoj već i upravnoj grani prava(Meier et al., 2021).

Zaključak

Prema izloženom, dakle, ostaje nam da razmotrimo svrhu i vrste forme, kao bitnog faktora u oceni potrebe njenog prilagođavanja tehničkim mogućnostima i potrebama prometa. U tu svrhu neophodno je, po našem mišljenju, razmotriti one

pojavne oblike forme u ugovornom pravu za izjave volje i shodno ih primeniti na situacije u kojoj se taj oblik treba pojavljivati za slučajeve jednostrane izjave volje i, u vezi sa time, o relevantnoj formi hartija od vrednosti i potrebi, da baš takva forma kod ovakvog jednostranog akta volje, bude zastupljena. Pri tome, naravno, ovakav metod nikako ne znači da prihvatamo ugovornu teoriju kod objašnjenja pravne prirode hartija od vrednosti, već koristimo samo shodnu primenu onih objašnjenja koja se odnose na formu izjave volje, a koja bi, po našem mišljenju, odgovarala svrsi.

Rasprava o formi kod hartija od vrednosti je značajna ako hoćemo da sadašnji vid te forme podvrgnemo reviziji, naročito iz razloga što je ta forma kod ovakvih akata bitna za njihovu valjanost, a služi i sprovođenju načela inkorporacije i prezentacije, te poboljšava negocijabilnost. Bilo koja promena u regulativi koja se odnosi na obaveznost forme, trebala bi biti u funkciji privredne i prometne svrsishodnosti hartija od vrednosti i pravnih odnosa koji će ovu svrsishodnost podržavati.

Interesantno je da naša nauka, kada je u pitanju forma, svoju pažnju zadržava uglavnom na onom izvoru obligacionih odnosa koji su oduvek bili kao takvi nesporni, a proizilaze iz volje učesnika u pravnom prometu. Radi se o ugovoru, koji je kao izvor obligacionih odnosa, bio uvek u centru pažnje kada se radi i o njegovoj formi, odnosno formi izjava volje na osnovu kojih je ugovorni odnos nastao. Da li je problematika forme kod drugih izvora prava bila tako beznačajna da nije zavredela pažnje, ili je problem bio u tome koji su sve izvori obligacija priznavani, ostavljajući po strani naknadu štete kod koje se, po prirodi stvari, ovaj problem ne nameće? Nesumnjivo je stoga, da sa stanovišta obaveze forme u onim obligacionim odnosima koji nastaju izjavama (izjavom) volje, ta problematika, barem kada su u pitanju hartije od vrednosti, uvek ostaje aktuelna ili barem aktuelizirana u situaciji kada pitanje promene (ne)adekvatnog oblika forme postane dominantno. Značaj forme priznajemo u onim obligacionim odnosima koji svoj izvor imaju u ugovoru, nema nikakve smetnje, već naprotiv, postoji potreba, da se pitanju forme, kada je više subjekata u pitanju sa ciljem pravnog obavezivanja, da saznanja iz ove oblasti, shodno razmotrimo i za druge slučajeve izvora obligacija i to upravo kod jednostrane izjave volje i hartija od vrednosti kao jednog od načina stvaranja obligacionog pravnog odnosa.

Literatura

1. Bevanda, V., Macura, R., & Blanuša, A. (2021). Uloga i značaj ekonomike poslovanja u razvoju savremenih preduzeća i organizacija. *Društveni horizonti*, *1*(1), 107-125. https://doi.org/10.5937/DruHor2101107B
2. Biswas, S., Horváth, B.L., Zhai, W., (2022). Eliminating the tax shield through allowance for corporate equity: Cross-border credit supply effects. *J. Money Credit Bank*. 54(6), 1803–1837.

3. Bremus, F., Schmidt, K., Tonzer, L. (2020). Interactions between bank levies and corporate taxes: How is bank leverage affected? *J. Bank. Financ.* 118, 105874.
4. Bučalina, M. A., & Pejović, B. (2022). Teorijska konceptuelizacija preduzetništva. *Društveni horizonti*, *2*(4), 235-253. https://doi.org/10.5937/drushor2204235B
5. Cvetković, M. (2023). Kripto kao predmet ugovorne obligacije prema Uredbi o tržištima kripto imovine (MICA) i Zakonu o digitalnoj imovini. *Zbornik radova Pravnog fakulteta u Nišu*, *62*(100), 159-187. https://doi.org/10.5937/zrpfn0-48243
6. Dimitrijević, M. (2023). Monetarni kredibilitet kao društvena vrednost u savremenom monetarnom pravu i pravu centralnih banaka. *Zbornik radova Pravnog fakulteta u Nišu*, *62*(99), 97-118. https://doi.org/10.5937/zrpfn0-45419
7. Dašić, B. (2023) Financing sports from the budget of the republic of Serbia. *Sports, media and business*, *9*(2), 183-194. https://doi.org/10.58984/smb2302183d
8. Dašić, B., Župljanić, M. & Pušonja, B. (2023). Uloga regulatornog okvira na prilive stranih direktnih investicija. *Akcionarstvo*, 29(1), 95-112
9. De Jonghe, O., Dewachter, H., Ongena, S. (2020). Bank capital (requirements) and credit supply: Evidence from pillar 2 decisions. *J. Corp. Finance,* 60, 101518.
10. Fraisse, H., Lé, M., Thesmar, D. (2020). The real effects of bank capital requirements. *Manage. Sci.* 66 (1), 5–23.
11. Galjak, I. (2022). Pravno uređenje investiranja u javnom sektoru. *Revija prava – javnog sektora*, 2(1), 27-44.
12. Ilić Popov, G., & Popović, D. (2023). Od činjenica do istine u poreskom postupku. *Zbornik radova Pravnog fakulteta u Nišu*, *62*(98), 15-35. https://doi.org/10.5937/zrpfn1-45264
13. Ilić, B., Milojević, I., & Miljković, M. (2022). Uloga akcionarskog društva u održivosti razvoja kapitala. *Održivi razvoj*, *4*(1), 19-28. https://doi.org/10.5937/OdrRaz2201019I
14. Juelsrud, R.E. & Wold, E.G. (2020). Risk-weighted capital requirements and portfolio rebalancing. *J. Financial Intermediation* 41, 100806
15. Klincov, R., Marjanović, N., Trnavac, D., Novović, M. & Obućinski, D. (2022). Shvatanje ekonomskih zakona u savremenoj ekonomskoj teoriji. *Akcionarastvo,* 28(1), 99-114
16. Majstorović, A. (2021). Pravni okvir savremenog budžetskog računovodstva. *Finansijski savetnik,* 26(1), 7-24
17. Meier, S., Gonzalez, M.R., Kunze, F. (2021). The global financial crisis, the EMU sovereign debt crisis and international financial regulation: lessons from a systematic literature review. *Int. Rev. Law Econ.* 65, 105945.
18. Milanović, N. (2023). Menadžment finansijske održivosti neprofitnih

organizacija. *Održivi razvoj*, *5*(1), 7-17. https://doi.org/10.5937/OdrRaz2301007M
19. Milenković, N., Radosavljević, M., & Vladisavljević, V. (2023). Korišćenje aplikacija sa otvorenom licencom u razvoju programa poslovnog preduzeća. *Održivi razvoj*, *5*(2), 35-49. https://doi.org/10.5937/OdrRaz2302035M
20. Nikolić, L. (2023). Savremene finansijske tehnologije i tradicionalno bankarstvo. *Zbornik radova Pravnog fakulteta u Nišu*, *62*(100), 125-142. https://doi.org/10.5937/zrpfn0-47158
21. Rstić, M. (2022). Menadžerski stavovi kao problemi u odlučivanju sportskih organizacija. *Menadžment u sportu*, 13(1), 25-31
22. Savić, B. (2022). Značaj integrisanog izveštavanja za funkcionisanje tržišta kapitala. *Akcionarastvo*, 28(1), 7-20
23. Schär, F. (2021) Decentralized Finance: On Blockchain-and Smart Contract-Based Financial Markets. *Federal Reserve Bank of St. Louis Review*, Vol. 103, No. 2.
24. Sobiech, A.L., Chronopoulos, D.K. & Wilson, J.O. (2021). The real effects of bank taxation: Evidence for corporate financing and investment. *J. Corp. Finance* 69, 101989
25. Vladisavljević, V., Milenković, N., Simić, M., Radosavljević, M. & Mičić, S. (2023). Elektronsko plaćanje u savremenom poslovanju sportskih kompanija. *Menadžment u sportu,* 14(1), 63-74.
26. Vuković, M., Urošević, S., Dašić, D. (2023) Threats to objectivity in the social science research. *Sports, media and business*, *9*(2), 143-158. https://doi.org/10.58984/smb2302143v

Datum prijema (Date received): 04.02.2024.
Izvršena prva korekcija (The first correction was made): 11.03.2024.
Datum prihvatanja (Date accepted): 17.03.2024.

FORM OF SECURITIES LEGAL AND ECONOMIC ANALYSIS

Gordana Mrdak[5], Milija Bogavac[6], Mile Rajković[7], Miljan Žižić[8]

Abstract

Unavoidable question to determine whether there are and what is the significance for the assessment of the legal nature of securities of changes in essential form, and more precisely, the abandonment of a security as a written document in the form of an incorporeal scriptural record, regardless of whether this principle (let's call it by the principle of registration), realized in the register of accounting or computer techniques.

This is where we encounter the inaccuracy of the formulation adopted until now, which did not come to the fore in the conditions of non-existence of competition in the form of securities. Namely, we identified the legal relationship from the security with its apparent form as an essential form. In order to examine the legal nature, not of a security as a form (which cannot have a legal nature in the aforementioned sense), but of the right embodied in such a form, it is clear that we are talking about and establishing the existence of possible effects of changes in the form in which it is incorporated, i.e. presented (in a dematerialized way) the same right.

Keywords*: form, securities, legal regime.*

JEL: K22, K29.

Introduction

The legal regime of securities, precisely because of their proliferation, both by types and by circulation, regardless of whether they are short-term or long-term securities, and also because of the problems imposed by the mandatory form and the inevitable change caused by the dematerialization of such securities, is being re-actualized thinking about their legal nature. Namely, we are of the opinion that in the process of discussing the form, it is difficult to ignore that part of the whole that refers to the content of the legal relationship, because the conclusion about the legal nature of securities also depends on it (Galjak, 2022) . It is difficult in the domain of discussion on the legal issue of dematerialization to avoid all

[5] Docent, dr Gordana Mrdak, Univerzitet Alfa BK, Beograd, Srbija, E-mail: gordana.mrdak@alfa.edu.rs

[6] Redovni professor, dr Milija Bogavac, Univerzitet MB, Beograd, Srbija, E-mail: info@mbuniverzitet.edu.rs

[7] Docent dr Mile Rajković, Visoka škola akademskih studija “Dositej”, Beograd, Srbija, E-mail: mile.rajkovic@vsdositej.edu.rs

[8] Miljan Žižić, doktorant, Poslovni i pravni fakultet, Univerzitet MB, Beograd, Srbija, E-mail: zizicmiljan90@gmail.com

relevant elements of securities, since the resulting chain of influence of dematerialization extends, essentially, to every essential element of the existing system of securities (Ilić Popov & Popović, 2023) . It is another matter, but still related to the presented problem, how our legislator deals with these issues and decides in his current or future practical solutions.

In our law of obligations, the section related to the regulation of securities is found in the section that regulates the unilateral declaration of will as a special source of obligations, different from contracts, as one of the classical sources of this part of civil law, along with other sources, such as are, for example: compensation for damages, management without a warrant, etc. (Dimitrijević, 2023) . This systematization of securities in our legislation is without a doubt a consequence of the determination according to which a unilateral declaration of will is a special source of obligations in relation to the contract and other sources, which gave securities their special place, both in relation to the contract and, of course, in compared to other sources of bonds.

Regardless of the stated fact about how our legislator decided in this way regarding the legal nature of securities, it is understandable that, both in theory and in practice, there are different approaches and understandings about the legal nature of securities. It is obvious that their starting point and the basis for understanding have their roots in whether or not they accept, in addition to contracts, a unilateral declaration of will as one of the sources of obligations. If a unilateral declaration of will is denied as a source of obligations, then inevitably there can be no other basis for determining the legal nature of securities than the contractual one (Majstorović, 2021; Savić, 2022) . Hence the starting point of the contractual theory about the legal nature of these securities, according to which the obligation from the securities cannot arise before the fulfillment of those conditions that are relevant for the existence of the contract - namely, in the first place, the agreement of the debtor and the creditor on the essential elements of such a contractual relationship. Therefore, the contract theory, denying that securities represent a special source of obligations, because the obligation from such securities can only arise by concluding a contract between the issuer and the recipient (buyer), in fact it limits itself by understanding that, when it comes to securities, there is no source in a unilateral declaration of will , that is, it cannot be (Schär, 2021) . In other words, according to this theory, the security would represent a document that is essentially a contract between the debtor - the issuer of such security, and the creditor - the bona fide owner of the security, thus acquired in a legal manner (Dašić et al., 2023, Dašić, 2023).

This understanding undoubtedly has its weak side in reality and the fact that, when creating securities, regardless of the really necessary presence of the will of its issuer to form a legal relationship based on the regime of such securities, according to the conditions of the securities, these conditions were not contracted

with anyone , and at least with a known customer, in the future obligation relations that would be created by such an agreement in the way that contractual law provides. Namely, such a theory could not explain how, without a contract, the issuer of a bearer bond must fulfill the obligation from the bond to a bona fide holder with whom no contract of a certain content was ever concluded.

Legal nature of securities

Of the opinion that it was quite reasonable to abandon the understanding advocated by the contract theory and to explain the legal nature of securities by a special source of obligations represented by a unilateral declaration of will, as indirectly done by our legislator. However, even that did not solve everything because, despite such determination, the dilemma remains as to when the obligation from the security arises - when it is created in the appropriate form, or only when it is put into circulation as an additional condition?

Hence the two understandings that appear, not only as a theoretical but also as a practical determination in legal practice.

Namely, without a doubt, the closest institution to the unilateral declaration of will, as a special source of obligations, is the offer to conclude a contract, but this similarity carries with it an appearance that is important. An offer to conclude a contract is always addressed to a known or recognizable person (Sobiech et al., 2021) . It is certain that securities can be registered in a name, but that name is regularly entered after the nominee agrees to enter into the relationship whose content is indicated in the document. The question is, however, whether the obligation from the security arises even before the security has reached the hands of the named owner or bona fide holder, regardless of whether it is a registered or bearer security. It can certainly happen that the issuer of the document loses it, it is stolen from him, and it ends up in the hands of the conscientious holder or the named owner of the document. In that case, the issuer would not be able to successfully assert a possible objection against the first acquirer or a negligent acquirer, but must fulfill the obligation from the paper (Vuković, et al., 2023). It is obvious that no contract is the basis of such a legal relationship between the issuer and the bona fide owner, and therefore it should not and would not be possible in such an ordinary example to defend not only the contractual theory as correct, but also the theory according to which the obligation for the issuer arises by the very creation securities. If it is not put into circulation, there is no doubt that there is still no one who would acquire the right to fulfill the obligation from such a paper, that is, exercise that right, primarily because the paper cannot be presented to the debtor. Such a theory about, conditionally speaking, a potential obligation, called the creation theory, is also present in practice, but it is difficult to explain the existence of a debtor without a creditor, so it is not justified to accept the

existence of a legal relationship before the security reaches the hands of the conscientious owner. , as a creditor.

A declaration of will by one person for the purpose of creating a unilateral obligation of a certain content is relevant in our law, regardless of whether at the time of the declaration it is known or unknown (if not named) who is the holder of the right to fulfill the unilateral obligation. He, unlike the contract as a source of obligations, will be legitimized as a creditor only later. However, it should be borne in mind that in the case of a contract, the legal relationship on this basis is created at the same time by agreed statements, while in the case of a unilaterally declared will, the right is "born" later with the appearance of a person who fulfills the conditions of such a unilaterally declared will, i.e. then he accepts the conditions according to which he becomes a creditor, that is, in the case of securities, he accepts the same conditions when he becomes a bona fide acquirer of securities.

Our legislator was obviously not burdened by the contradictions that the contractual and creation theory have in terms of the legal nature of securities. He opted for the one that logically best corresponds to our subsequent decisions regarding the circulation of those securities, which is the moment when the security is handed over by its issuer to its user (Nikolić, 2023) .

By accepting such a solution, there is no potential possibility that obligations from such paper arise before it is put into circulation by its issuer. Thus, for our legal area, this theory, which we call emission, solves many practical issues, among which the question form as an essential ingredient of securities.

Namely, when it comes to the form, for the contract theory, those regulations that relate to the validity of the contract would have to apply from the point of view of such a theoretical and practical approach, while from the point of view of those who, for the legal nature of securities, accept a unilateral declaration of will as a source of binding relationship, it remains to consider in which form such a statement must be expressed in order to be relevant for the evaluation of the validity of such a document (Bremus et al., 2020) . This is regardless of whether it is the theory of creation or emission, although for us the latter is more interesting precisely because of its acceptance in our legislative practice.

Legal regime of the form of securities

Excluding the Bill and Check Laws, which regulated the subject matter of these special securities according to international standards from the very beginning in the middle of the 20th century in a unique way, the ideological views, the Constitutional Act and the subsequent legal regulations of our country, which related to the concept of property, and in connection with it both contained and forms of securities, were in principle neglected until the codification of the obligation rights (Bučalina & Pejović, 2022). The Law on Obligations is in the

general provisions adopted the classic conception of the form and essential ingredients of a security as a written document(Bevanda et al., 2021. The definition of a security as a written document clearly indicates a materialized document in written form in which is incorporated the right that the creditor (legal owner) can exercise only with the presentation of the document itself.

It remained so until recently, despite the provision of the law itself , according to which it is possible to apply a different solution to the obligation relations determined by another law, and despite the fact that the legislator, using this right, passed a special law on securities, which refers to the conditions, method of issuance and transfer of shares, bonds, treasury bills, certificates and commercial bills (Juelsrud & Wold, 2020) . Namely and in terms of the law, a security is understood as a written document that is in the name of the bearer, but also their dematerialization in cashless trade by debiting or approving accounts. Our law, in other words, when it comes to securities, hardly deviates from their material nature. The second question is, what could be meant by the mentioned term in today's conditions, i.e. whether the materialized form of papers in the form of documents is always identical to its apparent form or not.

The impact of general technological progress, means and their possibilities on law is undoubted and historically confirmed precisely through the form of legal acts. This applies especially to those acts which in today's sense of the word are considered mass, which is exactly the case with securities and their circulation in the conditions of the existence of organized and specialized markets, such as the stock exchange. This massiveness has another reflection on obligation law (Fraisse et al., 2020) . Regardless of the adopted principle of uniform regulation of legal relations in this area, excluding exceptions of course, the fact is that the technique interferes with the specificity and need for specificity of regulations typical of commercial law (De Jonghe et al., 2020) . Legal institutes reserved for other participants in contractual relationships that do not have the characteristics of entities that perform economic activity, have characteristic individualities that in a classic form make visible all phases and forms of the process of negotiation, conclusion and fulfillment of contracts. Whether we like it or not, this diversity, not only of subjects but also of the method of concluding legal transactions, in itself imposes specificities that in the field of economic relations are reflected in the need for special regulation (Klincov et al., 2022) . The former, almost without exception, the presence of contracted parties is today, at least in commercial law, an exception as a rule, because it is performed between absent contractors, who, in the process of concluding the deal, are often very far away in their own country, as well as in another country, which causes international implications. Hence the understanding that the scriptural form is necessary in such a situation, but it is increasingly being replaced by electronics with its own signs (Milenković et al., 2023) . The complexity and lack of knowledge on a professional level of the specifics of trade conditions and procedures in some cases, introduces into the

intermediate space specialist mediators who now conclude business arrangements with each other, instead of those on whose behalf they appear on the market. This phenomenon is precisely characteristic of dealing with securities on the stock exchanges.

The evolution of forms of money, banks and other financial institutions, enables the creation of giratical money, and lately also scriptural forms, records and accounts receivable balances from the basis of circulation and issuance of securities (Biswas et al., 2022) .

This form of scriptural establishment of the securities regime is also represented in our law. This in itself confirms that legal institutes appear in accordance with the needs of their use. Along with the rule that need is the real incentive for innovation, it should also be added that this applies to its application (Cvetković, 2023) . In our law , however, there is no need for an absolutely new one, but in the adaptation of what already exists and functions in the world, true in conditions that differ in many ways from ours, but still not in such a way that the way of dematerialized papers that used by us would not be compatible. The question can still be asked in a slightly modified form, i.e., when and how, in our conditions, to apply, let's call it conditionally, a new dematerialized appearance form for all or only for special types of securities, and in connection with that, how to change the code our ruling doctrine on the incorporation of rights in securities when those securities do not exist in the physical sense (Ilić et al., 2022 ; Milanović, 2023) . In other words, it is necessary to solve the problem of establishing a legal regime of securities without papers and, consequently, such turnover, which will be automated in the procedural sense to such an extent that the expression of the will of the seller-owner of the paper, instead of in the classic sense, is modified so that only the beginning, in the form of an order, provides all the necessary elements for the process to proceed according to predetermined rules and procedures, which ultimately lead to the change of ownership of the " papers " and the consequent payment, which establishes the property balance of the participants in that procedure, including, at the same time, not only seller and buyer, but also intermediaries .

In order to be able to fulfill this task, it is necessary to approach the essence of the problem, which primarily consists in looking at the essential material and process elements of the creation (issue), circulation and realization of rights from securities, and then determine the changes that are necessary in the assumed new conditions , in order to be able to implement or establish a new legal regime, which builds on the old one as its continuation, without breaking the necessary continuity(Vladisavljević et al., 2023).

One of the important features of securities (deed, property rights and incorporation), the mandatory form is the foundation for the others , because they are enabled by it, there is no doubt that an exposition on the possibility and

necessity of its replacement would be impossible , if the issue of the current form is does not approach with all the reasons that appear in legal transactions, not only in the civil but also in the administrative branch of law (Meier et al., 2021) .

Conclusion

According to what has been stated, therefore, it remains for us to consider the purpose and types of the form, as an important factor in assessing the need to adapt it to the technical possibilities and needs of traffic. For this purpose, it is necessary, in our opinion, to consider those appearing forms of form in contract law for declarations of will and accordingly apply them to situations in which this form should appear for cases of unilateral declaration of will and, in connection with that, about the relevant form of documents of value and necessity, that just such a form should be represented in such a unilateral act of will. At the same time, of course, this method does not mean that we accept the contract theory when explaining the legal nature of securities, but we only use the appropriate application of those explanations that refer to the form of the declaration of will, which, in our opinion, would suit the purpose.

The discussion about the form of securities is important if we want to revise the current form of that form, especially for the reason that the form of such acts is important for their validity, and serves to implement the principles of incorporation and presentation, and improves negotiability. Any change in the regulation that refers to the mandatory form should be in function of the economic and traffic expediency of the securities and the legal relations that will support this expediency.

It is interesting that our science, when it comes to form, focuses its attention mainly on the source of obligation relations, which have always been indisputable as such, and arise from the will of the participants in the legal transaction. It is about the contract, which, as a source of contractual relations, has always been in the center of attention when it comes to its form, that is, the form of declarations of will on the basis of which the contractual relationship was created. Was the problem of form with other sources of law so insignificant that it did not deserve attention, or was the problem in which all sources of obligations were recognized, leaving aside compensation for damages where, by the nature of things, this problem does not arise? There is no doubt, therefore, that from the point of view of the obligation of form in those obligation relationships that arise from declarations (declaration) of will, this problem, at least when it comes to securities, always remains current or at least actualized in a situation where the issue of changing the (in)adequate form of the form become dominant. We recognize the importance of form in those obligation relationships that have their source in the contract, there is no obstacle, but on the contrary, there is a need to consider the matter of form, when several subjects are involved with the aim of

legal obligation, to consider knowledge from this area accordingly. for other cases of the source of obligations, namely in case of a unilateral declaration of will and securities as one of the ways of creating an obligatory legal relationship.

Literature

1. Bevanda, V., Macura, R., & Blanuša, A. (2021). The role and importance of business economics in the development of modern companies and organizations. *Društveni horizonti*, *1*(1), 107-125. https://doi.org/10.5937/DruHor2101107B
2. Biswas, S., Horváth, BL, Zhai, W., (2022). Eliminating the tax shield through allowance for corporate equity: Cross-border credit supply effects. *J. Money Credit Bank* . 54(6), 1803–1837.
3. Bremus, F., Schmidt, K., Tonzer, L. (2020). Interactions between bank levies and corporate taxes: How is bank leverage affected? *J. Bank. Finance* 118, 105874.
4. Bučalina, M. A., & Pejović, B. (2022). Theoretical conceptualization of entrepreneurship. *Društveni horizonti*, *2*(4), 235-253. https://doi.org/10.5937/drushor2204235B
5. Cvetković, M. (2023). Crypto as the subject of a contractual obligation under the Markets in Crypto Assets Regulation (MICA) and the Digital Assets Act. *Proceedings of the Faculty of Law in Nis* , *62* (100), 159-187. https://doi.org/10.5937/zrpfn0-48243
6. Dašić, B. (2023) Financing sports from the budget of the republic of Serbia. *Sports, media and business*, *9*(2), 183-194. https://doi.org/10.58984/smb2302183d
7. Dimitrijević, M. (2023). Monetary credibility as a social value in contemporary monetary law and the law of central banks. *Proceedings of the Faculty of Law in Nis* , *62* (99), 97-118. https://doi.org/10.5937/zrpfn0-45419
8. Dašić , B., Župljanić, M. & Pušonja, B. (2023). The role of the regulatory framework on foreign direct investment inflows. *Aksionarstvo* , 29(1), 95-112
9. De Jonghe, O., Dewachter, H., Ongena, S. (2020). Bank capital (requirements) and credit supply: Evidence from pillar 2 decisions. *J. Corp. Finance* , 60, 101518.
10. Fraisse, H., Lé, M., Thesmar, D. (2020). The real effects of bank capital requirements. *Manage. Sci.* 66 (1), 5–23.
11. Galjak, I. (2022). Legal regulation of investments in the public sector. *Review of law - public sector* , 2(1), 27-44.
12. Ilić Popov, G., & Popović, D. (2023). From facts to truth in the tax procedure. *Proceedings of the Faculty of Law in Nis* , *62* (98), 15-35. https://doi.org/10.5937/zrpfn1-45264
13. Ilić, B., Milojević, I., & Miljković, M. (2022). The role of the joint stock company in the sustainability of capital development. *Sustainable*

Development , *4* (1), 19-28. https://doi.org/10.5937/OdrRaz2201019I
14. Juelsrud, RE & Wold, EG (2020). Risk-weighted capital requirements and portfolio rebalancing. *J. Financial Intermediation* 41, 100806
15. Klincov, R., Marjanović, N., Trnavac, D., Novović, M. & Obućinski, D. (2022). Understanding economic laws in modern economic theory. *Shareholding,* 28(1), 99-114
16. Majstorović, A. (2021). Legal framework of modern budget accounting. *Financial Advisor,* 26(1), 7-24
17. Meier, S., Gonzalez, MR, Kunze, F. (2021). The global financial crisis, the EMU sovereign debt crisis and international financial regulation: lessons from a systematic literature review. *Int. Rev. Law Econ.* 65, 105945.
18. Milanović, N. (2023). Management of financial sustainability of non-profit organizations. *Sustainable Development* , *5* (1), 7-17. https://doi.org/10.5937/OdrRaz2301007M
19. Milenković, N., Radosavljević, M., & Vladisavljević, V. (2023). Using open-license applications in business enterprise program development. *Sustainable Development* , *5* (2), 35-49. https://doi.org/10.5937/OdrRaz2302035M
20. Nikolić, L. (2023). Modern financial technologies and traditional banking. *Proceedings of the Faculty of Law in Nis* , *62* (100), 125-142. https://doi.org/10.5937/zrpfn0-47158
21. Rstić, M. (2022). Menadžerski stavovi kao problemi u odlučivanju sportskih organizacija. *Menadžment u sportu,* 13(1), 25-31
22. Savić, B. (2022). The importance of integrated reporting for the functioning of the capital market. *Shareholding* , 28(1), 7-20
23. Schär, F. (2021) Decentralized Finance: On Blockchain- and Smart Contract-Based Financial Markets. *Federal Reserve Bank of St. Louis Review* , Vol. 103, No. 2.
24. Sobiech, AL, Chronopoulos, DK, Wilson, JO (2021). The real effects of bank taxation: Evidence for corporate financing and investment. J. Corp. Finance 69, 101989
25. Vladisavljević, V., Milenković, N., Simić, M., Radosavljević, M. & Mičić, S. (2023). Elektronsko plaćanje u savremenom poslovanju sportskih kompanija. *Menadžment u sportu,* 14(1), 63-74.
26. Vuković, M., Urošević, S., Dašić, D. (2023) Threats to objectivity in the social science research. *Sports, media and business*, *9*(2), 143-158. https://doi.org/10.58984/smb2302143v