*pitanja i odgovori*

# KOJA SU OVLAŠĆENA LICA ZA PUNOVAŽNO PREUZIMANJE MENIČNE OBAVEZE?

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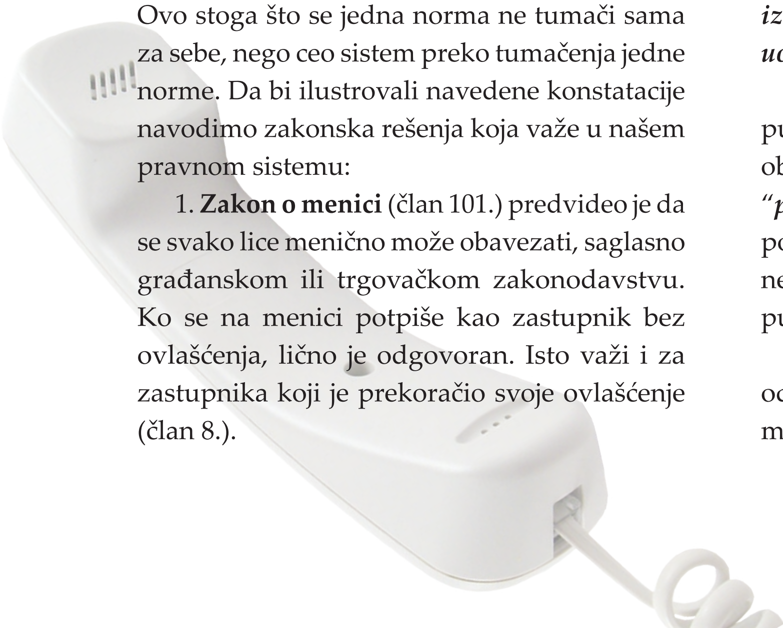
U novom sistemu platnog prometa menica je dobila veoma značajnu ulogu u sistemu plaćanja i izmirivanja međusobnih obaveza učesnika, obezbeđujući brz postupak naplate potraživanja.

Osnovno pitanje koje se postavlja u našoj poslovnoj praksi jeste: kakvo je ovlašćenje potrebno za punovažno preuzimanje menične obaveze od strane punomoćnika pravnog lica, pa je danas prisutno različito ponašanje banaka i ne retko odbijanje realizacije menice.

Po našem mišljenju, problemi nastaju zbog neusklađenih i prevaziđenih zakonskih rešenja. Pravni sistem se neprestano menja donošenjem novih propisa i svaka takva promena utiče i na značenje postojećih normi, što predstavlja jednu od poteškoća prava, čineći ga veoma složenim. Ovo stoga što se jedna norma ne tumači sama za sebe, nego ceo sistem preko tumačenja jedne norme. Da bi ilustrovali navedene konstatacije navodimo zakonska rešenja koja važe u našem pravnom sistemu:

1. **Zakon o menici** (član 101.) predvideo je da se svako lice menično može obavezati, saglasno građanskom ili trgovačkom zakonodavstvu. Ko se na menici potpiše kao zastupnik bez ovlašćenja, lično je odgovoran. Isto važi i za zastupnika koji je prekoračio svoje ovlašćenje (član 8.).



2. **Zakon o obligacionim odnosima** u pogledu obima punomoćja izričito propisuje da punomoćnik ne može bez posebnog ovlašćenja za svaki pojedini slučaj ''preuzeti meničnu obavezu, zaključiti ugovor o jemstvu, o poravnanju, o izabranom sudu, kao ni odreći se nekog prava bez naknade'' (član 91. stav 4.).

Za pravna lica važne su odredbe Zakona o obligacionim odnosima koje se odnose na poslovno punomoćje kojim se punomoćnik ovlašćuje da zaključuje ugovore i obavlja ostale poslove koji su uobičajeni u vršenju njihove poslovne delatnosti. Za razliku od opšteg punomoćja, Zakon predviđa i posebno (specijalno) punomoćje koje ovlašćuje na preduzimanje tačno određenog posla, odnosno vrste poslova i obuhvata ovlašćenja ***koja izlaze iz kruga redovnog poslovanja koja nisu uobičajena u prometu.***

Prema odredbi člana 95. stav 2 ovog Zakona punomoćnik ne može ''preuzeti menične obaveze ili obaveze jemstva'', ako nije dobio "***posebno ovlašćenje za svaki takav posao***". U pogledu obima poslovnog punomoćja Zakon ne pravi razliku između običnog i poslovnog punomoćja.

Restriktivni pristup Zakona o obligacionim odnosima, koji je usvojen pre tri decenije, može se razumeti u uslovima dominacije

# WHO ARE THE PERSONS AUTHORIZED FOR THE LEGAL ASSUMPTION OF THE BILL OF EXCHANGE OBLIGATION?

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In the new payments system, a bill of exchange has gained a very significant role in the system of payments and settlement of the mutual obligations of participants, enabling the quick collection of receivables procedure.

The main question raised in our business practice is: what kind of authorization is required for the legal assumption of the bill of exchange obligation by the representative of a legal entity. Thus, the banks today act in a different manner, and frequently refuse to honour the bill of exchange.

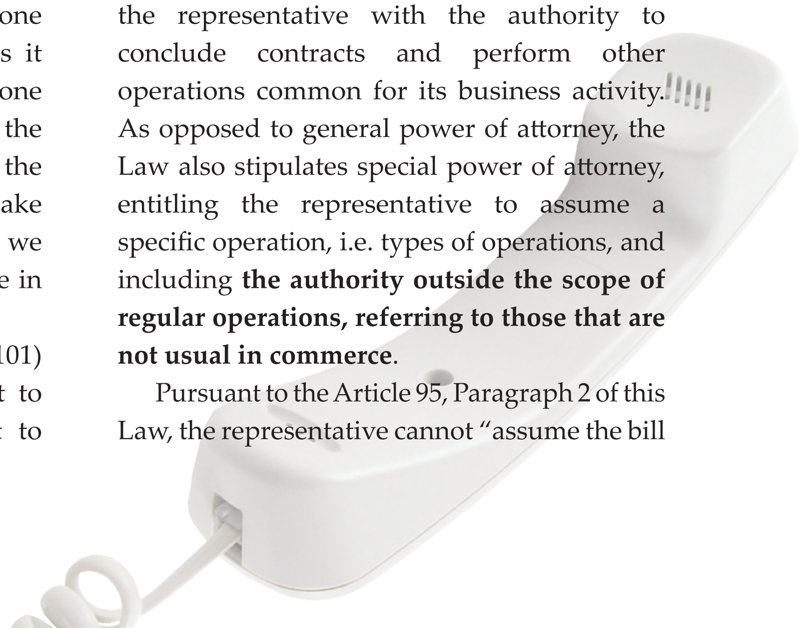
According to our opinion, the problems occur due to the non-coordinated and outdated legal solutions. The legal system constantly changes by the adoption of new regulations, each such change influencing the meaning of the existing norms, which represents one of the difficulties of the law, and makes it very complex. This happens because one norm cannot be interpreted by itself, but the whole system has to be viewed through the interpretation of this one norm. For the sake of illustration of the mentioned statement, we hereby present the legal solutions effective in our legal system:

**1. Bill of Exchange Law** (Article 101) stipulates that each person may commit to a bill of exchange obligation, pursuant to the civil or mercantile legislature. Whoever signs a bill of exchange as a representative without an authorization, shall be deemed personally accountable. The same holds for the representatives who exceed the limits of their authorization (Article 8).

**2. Law on Obligations** in respect of the scope of the power of attorney strictly stipulates that the representative without a specific authorization for each single case cannot "assume the bill of exchange obligation, conclude a contract on assurance, settlement, chosen court, or waiver any rights without paying a fee" (Article 91, Paragraph 4).

For legal entities the important provisions of the Law on Obligations are those related to the business power of attorney, providing the representative with the authority to conclude contracts and perform other operations common for its business activity. As opposed to general power of attorney, the Law also stipulates special power of attorney, entitling the representative to assume a specific operation, i.e. types of operations, and including **the authority outside the scope of regular operations, referring to those that are not usual in commerce**.

Pursuant to the Article 95, Paragraph 2 of this Law, the representative cannot "assume the bill



državne, odnosno društvene svojine, kada preuzimanje menične obaveze nije bilo uobičajeno u pravnom prometu i izlazilo je iz kruga redovnog poslovanja.

3. **Zakon o platnom prometu**[1] čini značajan pomak u pogledu uloge menice u sistemu plaćanja. Odredbama člana 46. stav 1. Zakona predviđeno je da pravna lica i fizička lica koja obavljaju delatnost mogu međusobne novčane obaveze izmirivati neposredno, prenosom hartija od vrednosti, ili saglasno članu 47, stav 1, tačka 3 Zakona, na osnovu naloga poverilaca na osnovu dospelih hartija od vrednosti, menica ili ovlašćenja koje je dužnik dao svojoj banci i svom poveriocu.

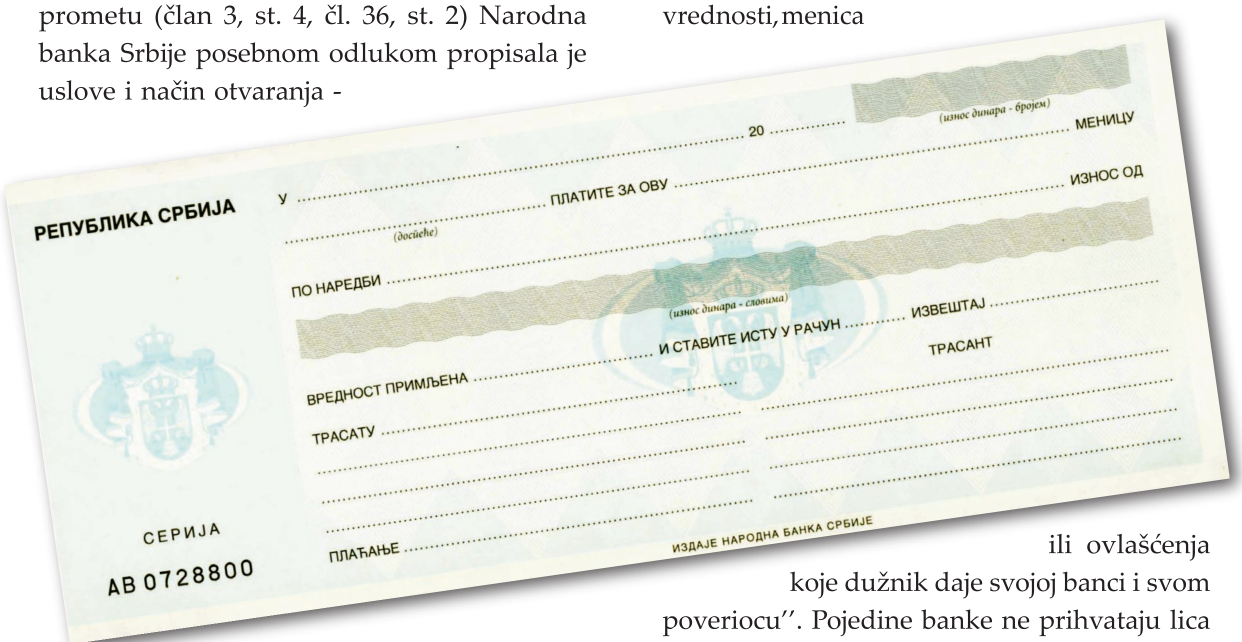
Na ovaj način u novom sistemu platnog prometa, menica je postala sredstvo plaćanja koja se redovno i masovno koristi i omogućava brzu naplatu sredstava bezgotovinski, prenosom indosamentom ili prezentacijom banci dužnika uz nalog poverioca za naplatu sredstava s računa dužnika.

Na osnovu ovlašćenja iz Zakona o platnom prometu (član 3, st. 4, čl. 36, st. 2) Narodna banka Srbije posebnom odlukom propisala je uslove i način otvaranja - vođenja i gašenja računa kod banke. Odlukom je propisano da podnosilac zahteva za otvaranje računa uz zahtev, između ostalog podnosi i karton deponovanih potpisa lica ovlašćenih za potpisivanje naloga, radi raspolaganja sredstvima sa računa, koji je potpisalo ovlašćeno lice iz rešenja o upisu u registar kod nadležnog organa i koji je overen pečatom. Karton deponovanih potpisa sadrži ovlašćenje za raspolaganje sredstvima sa računa, koje može biti samostalno ili kolektivno, ograničeno ili neograničeno. Ograničenje se može odnositi na visinu iznosa do kog ovlašćena lica mogu potpisivati naloge ili na osnove raspolaganja sredstvima.

Prema navedenom, ovlašćeno lice za zastupanje iz rešenja u upisu u registar kod nadležnog organa određuje lica ovlašćena za potpisivanje i utvrđuje im prava koja oni imaju kod potpisivanja instrumenata plaćanja.

U pogledu menične sposobnosti u praksi banaka je prisutno različito postupanje.

Ta praksa se odnosi prvenstveno na meničnu sposobnost punomoćnika - lica sa depo kartona. Pri tome se pravi razlika u odnosu na funkciju menice. Jedan broj banaka, u slučaju menice kao instrumenta plaćanja, na osnovu člana 4 Zakona o platnom prometu, ovlašćenim punomoćnikom smatra lica sa depo kartona, jer su izričito ovlašćena za raspolaganje sredstvima ''na osnovu dospelih hartija od vrednosti, menica




ili ovlašćenja koje dužnik daje svojoj banci i svom poveriocu''. Pojedine banke ne prihvataju lica sa depo kartona, te je u tom slučaju poverilac prinuđen da svoje potraživanje ostvaruje putem suda.

U ovom slučaju se Zakon o platnom prometu pojavljuje u odnosu na Zakon o obligacionim odnosima i kao lex specialis, čija je pravna snaga superiornija u odnosu na opšti zakon koji drugačije uređuje istu ili sličnu zakonsku

1 Zakon o platnom prometu (Službeni list SRJ, br. 3/02 i 5/03 i Službeni glasnik R. Srbije, br.43/04 i 62/06).

of exchange obligations or assurances", unless he/she has obtained **"the special authorization for each such operation"**. In respect of the scope of the power of attorney, the Law makes no difference between the regular and business power of attorney.

The restrictive approach of the Law on Obligations, adopted three decades ago, may be understood in the circumstances of domination by the state, i. e. social property, when the assumption of the bill of exchange obligation was not common in the legal circulation, and was outside the scope of the regular operations.

**3. Law on Payments Operations**[1] brings a significant progress in respect of the role the bill of exchange plays in the payments system. The provisions of the Article 46, Paragraph 1 of the Law stipulate that the legal entities and natural persons who conduct an activity may settle the mutual monetary obligations directly, by transferring securities, or, pursuant to the Article 47, Paragraph 1, Item 3 of the Law, on the basis of the creditors' order based on matured securities, bills of exchange or authorizations that the debtors gave to their bank and their creditor.

This way, in the new payments system, the bill of exchange became an instrument of payment used regularly and on a mass scale, enabling quick non-cash collection of funds, by an endorsement transfer or by presentation to the debtor's bank with the creditor's order for the collection of funds from the debtor's account.

On the basis of the authorization from the Law on Payments Operations (Article 3, Paragraph 4, Art. 36, Para. 2), the National Bank of Serbia issued a special decision, prescribing the conditions and the way of opening, maintaining and closing an account with a bank. The decision prescribes that the submitter of a request for an account opening, along with the request, among other things submits the deposited signatures card of the persons authorized for signing the orders enabling disposal with the funds from the account, signed by an authorized person from the decision on registration with the competent court, and verified by a seal. The deposited signatures card contains the authorization for disposal with the funds from the account, which may be individual or collective, limited or unlimited. The limitation may refer to the level of amount to which the authorized persons may sign the orders, or to the grounds of funds disposal.

According to the above mentioned, the authorized representative from the decision at the registration with the competent body appoints the persons to be authorized for signing the orders, and determines their rights at the occasion of signing the payment instruments.

In respect of the bill of exchange capability, there are different approaches present in the banks' practice.

This practice primarily refers to the bill of exchange capability of the representative – person from the deposited signatures card, the difference being made in respect of the bill of exchange function. Some banks, in case of the bill of exchange as a payment instrument, and according to the Article 4 of the Law on Payment Operations, consider the persons from the deposited signatures card to be the authorized representatives, because they have the explicit authorization for funds disposal "on the basis of matured securities, bills of exchange or authorizations given by the debtors to their banks and their creditors". Certain banks, however, do not accept the persons from the deposited signatures card, thus the creditors are forced to collect their claims through the court.

In this case, the Law on Payments Operations functions as a lex specialis in relation to the Law on Obligations, its legal strength being superior to the general law, which is regulating the same or similar legal subject-matter in a different way.

However, if the bill of exchange is used as an instrument of securing the receivables, certain banks apply the solutions from the

[1] Law on Payments Operations (Official Gazette of the FRY, No 3/02 and 5/03, and Official Gazette of the RS, No 43/04 and 62/06).

materiju.

Međutim, ako se menica koristi kao sredstvo obezbeđenja potraživanja pojedine banke primenjuju rešenja iz čl. 95. Zakona o obligacionim odnosima koja ne odgovaraju potrebama brzog, pouzdanog i savremenog pravnog prometa, naročito u privrednim odnosima.

Sadašnji i budući odnosi nesumnjivo ukazuju da bi zakonska rešenja o meničnoj sposobnosti punomoćnika trebalo promeniti i prilagoditi savremenom i efikasnom pravnom prometu.

Kako bi se razrešila postojeća neusklađenost u regulativi i omogućilo da menica u poslovnoj praksi dobije ono mesto koje po zakonu ima, Udruženje se obratilo Komisiji za izradu građanskog zakonika koju je obrazovala Vlada Republike Srbije, za tumačenje odredbe člana 95. stav 2. Zakona o obligacionim odnosima. Prema stavu Komisije od 19.03.2009. godine "*saglasno sada važećem Zakonu o platnom prometu karton deponovanih potpisa lica ovlašćenih za potpisivanje naloga radi raspolaganja sredstvima sa računa je dovoljno ovlašćenje dato poslovnom punomoćniku i za preuzimanje menične obaveze, jer je menica i instrument plaćanja*".

***Stoga je karton deponovanih potpisa u smislu Zakona o obligacionim odnosima posebno poslovno punomoćje za raspolaganje sredstvima sa računa koje obuhvata i preuzimanje menične obaveze.*** Ovo stoga što u izmenjenim poslovno-privrednim okolnostima preuzimanje menične obaveze u okviru je redovnog poslovanja i uobičajeno u prometu. Zbog masovne upotrebe instrumenata platnog prometa nije moguće izdavati ovlašćenje za svako pojedinačno preuzimanje menične obaveze, jer bi to usporilo pravni promet. Po ovom pitanju identičan je i stav Narodne banke Srbije.

Osim toga, u privrednim odnosima učesnici su profesionalci za koje važi pretpostavka o potpunom znanju, obaveštenosti o svim relevantnim pravnim i faktičkim pitanjima, kao i zahtev za posebnom pažnjom. Na toj osnovi nastala su brojna pravila modernog ugovornog prava. Pri tome treba imati u vidu i izričite odredbe Zakona o menici o ličnoj odgovornosti zastupnika bez ovlašćenja ili prekoračenja ovlašćenja kod preuzimanja menične obaveze.

Kao ovlašćena lica za preuzimanje menične obaveze, na osnovu svega napred rečenog, su:

- lice koje je ovlašćeno za zastupanje pravnog lica i koje je kao takvo upisano u registar kod nadležnog organa;
- lice koje je upisano na kartonu deponovanih potpisa lica ovlašćenih za potpisivanje naloga radi raspolaganja sredstvima s računa otvorenog kod banke;
- lice koje ima posebno ovlašćenje za preduzimanje konkretne menične obaveze, sa njegovim overenim potpisom.

Article 95 of the Law on Obligations that do not meet the need for quick, reliable and modern legal circulation, especially when it comes to economic relations.

The present and the future relations undoubtedly indicate that the legal solutions related to the bill of exchange capability of the representative should be changed and adjusted to the contemporary and efficient legal circulation.

In order to solve the existing non-coordination in the regulations, and enable the bill of exchange to acquire the position it deserves according to the law, the Association appealed to the Commission for the Preparation of the Civil Code, formed by the Serbian Government, for the interpretation of the provision of the Article 95, Paragraph 2 of the Law on Obligations. According to the opinion of the Commission, as of 19.3.2009 *"pursuant to the now existing Law on Payments Operations, the deposited signatures card of the persons authorized to sign the orders for disposal with the funds from the accounts is a sufficient authorization given to the business representative for the assumption of the bill of exchange obligation, since the bill of exchange is an instrument of payment, too".*

***Thus the deposited signatures card represents, in terms of the Law on Obligations, a special business authorization for disposal with the funds from the accounts, including the assumption of the bill of exchange obligation.*** This is due to the fact that in the altered business-economic circumstances the assumption of the bill of exchange obligation is within the regular business operations and is common in commerce. Due to the mass use of the payment operations instruments, it is not possible to issue authorizations for each individual assumption of the bill of exchange obligation, since it would slow down the legal circulation. The National Bank of Serbia has the same opinion on this issue.

Apart from this, the participants in economic relations are professionals assumed to possess the complete knowledge, and to be fully informed on all relevant legal and factual issues, and who are also required to be highly attentive. This was the basis for the numerous rules of the modern contractual law. In addition, what should also be taken into account are the explicit provisions of the Bill of Exchange Law in respect of the personal accountability of the representative without authorization or the exceeding of the authorization while assuming the bill of exchange obligation.

Based on all above-mentioned, the persons authorized for the assumption the bill of exchange obligation are the following:

- Person authorized for representing a legal entity, registered as such with the competent body;
- Person whose name is found in the deposited signatures card of the persons authorized for signing the orders for disposing with the funds at an account with a bank;
- Person with a special authorization for the assumption of a concrete bill of exchange obligation, with the verified signature.