# The concept and general characteristics of Polish securities law

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The article presents the general characteristics of Polish securities law and the main juridical, legislative and practical issues arising in this area of legal transactions. Securities law comprises a set of regulations that govern the principles of creating securities, the rules of trading in these instruments and the principles of exercising rights and performing obligations stemming from securities. Polish law does not define the concept of a security. The doctrine generally assumes that a security is a document stating a specific property right of a transferable nature, which incorporates this right into this document, the possession of which is a necessary condition for the exercise of this right and its disposal. Securities law in Poland has not been codified and its sources are dispersed. General issues are regulated in the provisions of Art. $926^6$–$926^{16}$ of the Civil Code, while specific issues are regulated in legislative acts regulating particular types of securities, acts devoted essentially to other issues but also containing regulations of particular types of securities, and in normative acts of the European Union, in particular, in Regulations of the European Parliament and the Council (EU). Securities have been regulated in more or less detail under Polish law. However, there are considerable legislative issues that need to be addressed with regard to certain types of securities which have recently become "dematerialised" and this "dematerialisation" has made the traditional legal solutions governing them, which were essentially based on property law constructions, inadequate. What the Polish legislator has not achieved yet is uniform set of legal solutions that could apply to both tangible and intangible, dematerialised securities taking the form of book entries only. As a result, we have to do with a certain regulatory dualism in this area in Poland. The general provisions on securities contained in the Civil Code are generally applicable to traditional securities, whereas the issue and trading in dematerialised securities is regulated by other provisions as well, mainly the Act on trading in financial instruments of 2005.

*Keywords:* security, financial instrument, bill of exchange, cheque, bill of lading, share, investment certificate, bond.

## 1. Basic concepts: securities law and securities

Securities law refers to all legal regulations governing the issuing of securities, the rules of trading in securities and the rules of exercising the rights and obligations arising from securities.

For legal provisions determined as above, the concept of a security to which they apply is of key importance. Although the term "security" has long been used in many normative acts, the Polish legislator has not provided a legal definition of this concept. Most representatives of the doctrine consider this position of the legislator to be appropriate, noting that because of the complex legal nature of securities, their different types, the emergence of new varieties of these instruments, as well as in view of the fact that the form and manner in which securities operate are subject to evolution, it would be extremely dif-

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ficult, if at all feasible (*omnis definitio in iure civili periculosa est*) to construct a correct, classic, timeless and system-wide definition of a security. The legislator's resignation from defining the concept of a security is also intended to leave the system open and to facilitate the process of developing new types of securities according to the needs of practice.

Against the background of such a normative state of affairs, the general notion of a security is still the subject of a scholarly discussion in Poland, and the views presented in it are not uniform. It is generally accepted that securities are documents stating certain property rights, but these documents have special characteristics (they are qualified documents) owing to a special relationship between them and the property rights they confirm, which consists in the fact that the holding of such a document is the necessary condition for ascribing a right under this document to a person formally entitled under it, and at the same time is the condition for the exercise of the right specified in the document. This special feature of securities makes them play a much more important role than that of ordinary documents which only serve to provide evidence of a specific right (documentary evidence). When describing a security, we often say that it embodies (or incorporates) a specific right that it confirms, and thus is a carrier of that right and, at the same time, of its economic value. As a result, a disposition of a right from a document is followed by a disposition of the document (it is generally said that the right follows the document), in contrast to ordinary documentary evidence, where the principle that the document follows the law applies[1].

Under the German doctrine, as well as in Polish legal science, there are essentially two competing concepts focused on explaining the essence of a security. Both aim at finding a criterion that would allow to distinguish a security from other documents in circulation. The theory of a narrow approach to a security (the circulation theory) assumes the circulating capacity of the document as the criterion for such a distinction. This theory is based on the assumption that the incorporation of a right in the document is primarily aimed at increasing the circulation (or facilitating the disposal) of a given security. In line with this approach, the concept of a security is limited to documents intended for circulation (i. e. bearer securities and securities to order). Consequently, this concept does not, in principle, extend to cover registered documents because the assignment of rights incorporated in them requires transfer. The theory of a broad approach to securities (the execution theory) puts an emphasis on a formal criterion which in the necessity to possess the document. A document is a carrier of the right stated in it and in order to exercise this right it is necessary, and at the same time sufficient, to hold and present the document[2]. Looking at the provision of Art. 921[6] of the Civil Code which states that in order to exercise the right from a security it is necessary to present (submit) a document to the debtor, it seems that the Polish legislator has adopted a broad approach to securities[3].

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[1] *Grzybowski S.* Papiery wartościowe — zagadnienia ogólne // System prawa cywilnego: in 4 vols. Vol. 3, part 2 / ed. S. Grzybowski. Warszawa: Zakład Narodowy imienia Ossolińskich, 1976. P. 985 et seq.; *Komosa T.* Papiery wartościowe // Przegląd Prawa Handlowego. 1995. No. 4. P. 1; *Bączyk M., Koziński M. H., Michalski M., Pyzioł W., Szumański A., Weiss I.* Papiery wartościowe. Kraków: Zakamycze, 2000. P. 49 et seq.; *Radwański Z., Panowicz-Lipska J.* Zobowiązania — część szczegółowa. Warszawa: C. H. Beck, 2019. P. 345; *Machnikowski P.* Numerus clausus papierów wartościowych inkorporujących wierzytelności // Państwo i Prawo. 2000. Iss. 8. P. 53.

[2] *Grzybowski S.* Papiery wartościowe — zagadnienia ogólne. P. 985; *Bączyk M., Koziński M. H., Michalski M., Pyzioł W., Szumański A., Weiss I.* Papiery wartościowe. P. 49; *Radwański Z., Panowicz-Lipska J.* Zobowiązania — część szczegółowa. P. 346; *Romanowski M.* Zagadnienia ogólne papierów wartościowych // System prawa prywatnego: in 20 vols. Vol. 18: Prawo papierów wartościowych / ed. A. Szumański. Warszawa: C. H. Beck, 2016. P. 20 et seq.

[3] *Bączyk M., Koziński M. H., Michalski M., Pyzioł W., Szumański A., Weiss I.* Papiery wartościowe. P. 51; *Jastrzębski J.* Pojęcie papieru wartościowego wobec dematerializacji. Warszawa: Wolters Kluwer, 2009. P. 78 et seq.

The process of de-materialisation (or digitisation) of documents, which has recently intensified, affects securities as well. As a result, the traditional term "security" ceases to be adequate when it comes to many modern designators of the term. The doctrine of civil law points out that the electronic form displaces and dismantles all traditional institutions of civil law. This affects securities in particular. It is difficult to talk about a security when it usually exists merely as a record in a computer system[4]. With this in mind, both the doctrine and the legislator are now looking for new terminology to be used for this institution, moving away from the association with traditional paper documents. Instead of the notion of a security, the following terms are proposed in particular: *prawo wartościowe* (a right in value), *dowód wartościowy* (a proof of value), *certyfikat wartościowy* (a certificate of value), *tytuł wartościowy* (a title in value), *walor* (a value) or *instrument finansowy* (a financial instrument)[5].

## 2. The sources of securities law

Securities law is not a codified branch of law in Poland. Neither is there a single legislative act in Polish legislation devoted entirely and comprehensively to securities. Their regulation is dispersed and has been addressed partly in the Civil Code[6] (Art. $55^1$, 169 § 2, 329, 849 § 3 and Art. $926^6$–$926^{16}$), and partly in other legislative acts devoted entirely or only to a certain extent, to selected securities.

The provisions of Art. $926^6$–$926^{16}$ together with the provisions of the Decree of 10 December 1946 on the redemption of lost documents[7] are as a rule considered to constitute the general part of Polish securities law[8].

Detailed provisions cover the regulations contained in the following legislative acts:

— those governing particular types of securities: Act of 28 April 1936 — Bill of exchange law[9] (regulating bills of exchange); Act of 28 April 1936 — Cheque law[10] (regulating cheques); Act of 15 January 2015 on bonds[11] (regulating bonds);

— those which are essentially devoted to other issues, but also contain regulations relating to certain types of securities: Act of 29 August 1997 — Banking law[12] (regulating bank securities); Act of 29 August 1997 on the National Bank of Poland[13] (regulating the securities of the National Bank of Poland); Act of 29 August 1997 on covered bonds and mortgage banks[14] and the Act of 14 March 2003 on the Bank of National Economy (*Bank Gospodarstwa Krajowego*)[15] (regulating covered bonds); Act of 15 September 2000 — Commercial Code of Companies and Partnerships[16] (regulating shares and subscription warrants); Act of 29 July

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[4] *Radwański Z.* Kodeks cywilny wymaga unowocześnienia // Kancelaria. 2010. No. 7–8. P. 18.

[5] *Janiak A.* Papiery wartościowe // Kodeks cywilny. Komentarz: in 4 vols. Vol. 3: Zobowiązania. Część szczególna / ed. A. Kidyba. Warszawa: Wolters Kluwer, 2014. P. 1465 et seq.

[6] Act of 23 April 1964 — The Civil Code // Dz. U. [Journal of Laws]. 2019. Item 1145.

[7] Dz. U. 1947. No. 5. Item 20.

[8] *Sójka T.* Papiery wartościowe // Kodeks cywilny: in 3 vols. Vol. 3: Komentarz. Art. 627–1088 / ed. M. Gutowski. Warszawa: C. H. Beck, 2019. P. 1045 et seq.

[9] Dz. U. 2016. Item 160.

[10] Ibid. Item 462.

[11] Ibid. 2020. Item 1208.

[12] Ibid. 2019. Item 2357.

[13] Ibid. 2019. Item 1810.

[14] Ibid. 2020. Item 415.

[15] Ibid. Item 1198.

[16] Ibid. Item 526.

2005 on trading in financial instruments[17] (regulating rights in shares and depository receipts); Act of 18 September 2001 — the Maritime Code[18] (regulating bills of lading); Act of 27 May 2004 on investment funds and management of investment funds[19] (regulating investment certificates); Act of 27 August 2009 on public finances[20] (regulating securities); Act of 19 November 2009 on gambling games[21] (regulating e. g. lottery tickets);

— those addressing regulated trading in securities and the principles of the supervision of financial markets, including the securities market: Act of 29 July 2005 on trading in financial instruments[22]; Act of 29 July 2005 on public offering and conditions of introducing financial instruments into an organised trading system and on public companies[23]; Act of 21 July 2006 on the supervision of the financial market[24].

Provisions of European Union law also play an important role as a source of securities law in force in Poland. This is understandable in view of the need to ensure the proper functioning of the common market and to implement the principle of free movement of capital as laid down in the Treaty. The European legislator has various means of unifying and harmonising legislation within the European Union. In the past, the predominant method of harmonising law was through directives which required their timely and appropriate implementation into the national laws of the Member States. In recent years, to achieve these objectives, regulations have increasingly been used to achieve these goals, and they are automatically and directly applicable in all Member States. Amongst this group of the sources of securities law, the following should be specifically noted:

— Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC;

— Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps;

— Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/68/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC;

— Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on financial instruments and amending Regulation (EU) No. 646/2012;

— Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012;

— Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories, amending Directives 98/26/EC and 2014/65/EC and Regulation (EU) No. 236/2012;

[17] Dz. U. 2020. Item 89.
[18] Ibid. 2018. Item 2175.
[19] Ibid. 2020. Item 95.
[20] Ibid. 2019. Item 869.
[21] Ibid. Item 847.
[22] Ibid. 2020. Item 89.
[23] Ibid. 2019. Item 623.
[24] Ibid. 2020. Item 180.

— Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of re-use and amending Regulation (EU) No. 684/2012;
— Commission Implementing Regulation (EU) 2016/824 of 25 May 2016 laying down implementing technical standards with regard to the content and format of the description of the functioning of multilateral trading facilities and organised trading facilities supplementing Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments submitted pursuant to this Directive;
— Commission Delegated Regulation (EU) 2017/588 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange-traded funds;
— Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC;
— Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements for the implementation of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the provision of information and the facilitation of the exercise of shareholders' rights;
— Commission Delegated Regulation (EU) 2017/1946 of 11 July 2017 supplementing Directives 2004/39/EC and 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards concerning an exhaustive list of information that proposed acquirers must include in the notification of a proposed acquisition of a qualifying holding in an investment firm.

## 3. The systemic qualification and specific features of securities law

From a systemic point of view, the classification of securities law as a branch of law is neither clear nor obvious. Securities law has a nature of a comprehensive branch of law and is distinguished on the basis of the criterion of its subject matter. Most of the provisions related to this subject, especially the provisions defining the statutory types and forms of securities, the principles of their creation, the trading in them and the performance of the resulting obligations, belong to the area of civil law or broadly understood private law, and are part of the law of obligations. However, the scope of this branch of law also includes regulations that are classified as commercial law or company law (in particular regulations concerning shares and investment certificates), as well as financial law (e. g. regulations governing treasury securities). Furthermore, regulations defining the rules of organisation and supervision of the regulated securities market are also included in either public financial law or administrative law. Last but not least, certain criminal law provisions are also covered by securities law.

Generally, when it comes to securities law, the emphasis is on formalism. The provisions of this branch of law specify, in particular, the necessary components of individual types of securities and usually provide for invalidity of a security that has been issued with formal defects. In the field of securities law, a different approach applies than in the case of the law of contracts, where the principle of the freedom of contract and the *favor contractus* directive apply.

A stricter approach is also applied to the interpretation of declarations of intent expressed in the content of securities. Although the interpretation of such declarations is not ruled out, significant restrictions apply in this regard. Firstly, when interpreting securities, only the content of the document itself may be the subject of interpretation, but not the circumstances surrounding the act of issuing the security. This is therefore a different approach to the interpretation of contracts, where, to a large extent, the context of the situation surrounding the conclusion or performance of the contract is taken into account. Secondly, a so-called objective method of interpretation is used when interpreting the content of the securities, similarly to the interpretation of legal provisions.

## 4. The functions of securities

The functions of securities determine the scope of application of these instruments in economic practice. Typically, securities may be divided based on the function they perform and the following functions may be distinguished 1) identification; 2) circulation; 3) credit; 4) investment; 5) payment; and 6) warranty. The above functions divide further into general functions (characteristic of all securities, such as e. g. entitlement or capability of being in circulation) and specific functions which arise from the characteristics of a given type of security.

The identification function is the primary function of securities. It facilitates the identification of the person with a right in the security. It is based on the presumption that the person who is entitled financially under the bond (obligation) relationship is the one identified by the possession and content of the security presented. In practice, there are different ways of identifying the person entitled, depending on whether the security is a registered, commissioned or bearer security.

The circulation function of securities is manifested by the facilitated way of trading in such securities, so that they may be circulated smoothly and intensively (a very intensive trading is called circulation). This function is effectively performed by bearer securities in particular, as their transfer requires only the presentation (or hand-over) of a document. Also securities to order are relatively easily transferred by means of endorsement.

The credit function means that the security may be used by its issuer to take out a loan. This may involve both, a trade credit obtained from a single contractor (as in the case of a bill of exchange), and the acquisition of even quite substantial amounts of capital on refundable terms from a wider range of lenders, as occurs in the event of the issue of series debt securities (covering treasury securities, bonds, bank securities, covered bonds, etc.).

The investment function is expressed in the fact that the security becomes an equity investment for its buyer, being a free cash deposit. In a developed market economy, investments in securities are the third main channel, besides the banking and budgetary systems, for the movement of capital, which favours a better use of free funds for enhanced economic growth.

The payment function means that securities embodying certain financial values may be used in trading as a means of payment. Securities representing monetary receivables are particularly predestined to this role. From a formal point of view, a security is not a legal tender and may only be treated as a substitute for money. However, with the use of a security, the debtor may effectively discharge himself or herself of the monetary obligation with the consent of the creditor on a *datio in solutum* basis.

Owing to the warranty (collateral) function of a security, its possession provides for the creditor a strong (sometimes even indisputable) proof of the existence of the claim, and, on the other hand, ensures that the creditor claiming the claim from the security may benefit from certain procedural facilitations. In this way the security increases the creditor's legal security and makes it easier for him or her to collect debts from the debtor.

Other functions of securities include equity financing, debt financing, sometimes they also play a speculative function, or may act as an as insurance, incentive, receipt and the like[25].

## 5. Classification of securities

There are different classifications of securities in the doctrine, based on different criteria.

According to the normative criterion adopted in Art. 92116 of the Civil Code, securities may be divided into 1) those incorporating claims (so-called creditor or debt securities), and 2) those incorporating rights other than claims.

Due to the nature of incorporated rights, the doctrine makes a more detailed division of securities and distinguishes among them: 1) securities representing claims, including in particular monetary claims (e. g. a bill of exchange, a cheque, a bank security, a covered bond); 2) securities representing rights to items placed in the custody of the issuer, so-called commodity securities (e. g. a bill of lading); 3) securities representing rights to shares, so-called equity securities. Due to the way in which the person entitled is described, the following distinction is made: 1) registered securities — they hold as an authorised person the person named in the content of the document or the person to whom the authorisation from the document has been assigned by a transfer connected with the handover of the document (Art. 9218); 2) securities to order — they hold as the authorised person the person indicated in the content of the document or the person to whom the authority from the document has been assigned by endorsement connected with the handover of the document (Art. 9219); 3) bearer securities — they hold as the authorised person any person holding the security (Art. 92111).

Considering the method of the transfer of rights incorporated in the document, the following are distinguished: 1) securities assigned by transfer and handing over of a document (Art. 9218); 2) securities assigned by endorsement and handing over of a document (Art. 9219 § 3); 3) securities assigned by handing over of a document (Art. 92112).

There is an overlap between the divisions of securities in terms of how entitlement is designated and how rights are assigned from that security. Registered securities are assigned by transfer, securities to order are assigned by endorsement, and bearer securities are assigned by a submission (or handing-over) of a document.

With regard to the relation between the creation of the right incorporated in the document and the creation of the document itself, a distinction is made between 1) constitutive securities (the right from such a security cannot arise before the document is created, e. g. a bill of exchange), and 2) declaratory securities (the right arises earlier, but is associated with the document only upon its creation, e. g. a share).

With respect to the form of the right's carrier a distinction is made between 1) tangible, classic securities (in this case the carrier of the right is a document in a tangible form, e. g. a piece of paper), and 2) dematerialised securities.

With regard to the size of the issue, a distinction is made between 1) individual securities (issued in single copies, e. g. a bill of exchange, a cheque, a bill of lading), and 2) series securities which are issued in series (e. g. bonds, shares, etc.)[26].

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[25] *Kołacz J.* Prawo papierów wartościowych i rynku kapitałowego. Warszawa: Wolters Kluwer, 2007. P. 15 et seq.; *Jastrzębski J.* Pojęcie papieru wartościowego wobec dematerializacji. P. 19 et seq.; *Janiak A.* Papiery wartościowe. P. 1473 et seq.; *Romanowski M.* Zagadnienia ogólne papierów wartościowych. P. 6 et seq.

[26] More in: *Komosa T.* Papiery wartościowe. P. 3 et seq.; *Bączyk M., Koziński M. H., Michalski M., Pyzioł W., Szumański A., Weiss I.* Papiery wartościowe. P. 37 et seq.; *Kołacz J.* Prawo papierów wartościowych i rynku kapitałowego. P. 16 et seq.; *Zawada K.* Papiery wartościowe // Kodeks cywilny. Komentarz: in

## 6. The *numerus clausus* principle

The prevailing position of the doctrine is that under Polish law the *numerus clausus* principle of securities applies[27]. This means that certain securities may only be issued if the law provides for such a possibility. It is also pointed out that the law should classify a certain specific document as a security directly (as has been done e. g. with regard to bonds, covered bonds, bank securities, securities of the National Bank of Poland or investment certificates) or by defining its specific features and functions (as done with regard to bills of exchange, cheques, bills of lading). Although the *numerus clausus* principle has not been expressed unequivocally by the Polish legislator, according to the prevailing view, it is a general rule of law which may be derived from the provisions of the Code as well as from all other relevant regulations governing securities, and from their systematics adopted by the legislator. The adoption of the *numerus clausus* principle is justified by reasons of the safety and security of trading in securities and the need to protect the confidence of their acquirers[28].

## 7. De-materialised securities and systems of their registration

Dematerialised securities devoid of the tangible form of a traditional document require for their functioning registration in a special register constituting a securities depository. The term "depository" shall be understood as a system of registration of securities, including securities accounts, summary accounts and deposit accounts maintained by entities authorised to do so by law. The Polish institution established to maintain the securities depository is the National Securities Depository (*Krajowy Depozyt Papierów Wartościowych S. A. — KDPW*) which may, however, delegate the performance of these activities to other entities pursuant to Art. 3 (21) of the Act on the trading in financial instruments (The Act).

Pursuant to Art. 4 (1) of the above Act, accounts with dematerialised securities may be maintained by brokerage houses and banks conducting brokerage activities, trust banks, foreign investment firms and broker's firms operating their branches in the territory of the Republic of Poland, the National Securities Depository or a company to which it has delegated the performance of such activities, and the National Bank of Poland — if the

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3 vols. Vol. 2 / ed. K. Pietrzykowski. Warszawa: C. H. Beck, 2020. P. 904 et seq.; *Jastrzębski J.* Pojęcie papieru wartościowego wobec dematerializacji. P. 98 et seq.; *Romanowski M.* Zagadnienia ogólne papierów wartościowych. P. 77 et seq.; *Machnikowski P.* Papiery wartościowe // Kodeks cywilny. Komentarz / eds E. Gniewek, P. Machnikowski. Warszawa: C. H. Beck, 2019. P. 1794 et seq.

[27] E. g.: *Michalski M.* Zasada numerus clausus w prawie papierów wartościowych // Przegląd Sądowy. 1995. No. 11–12. P. 62 et seq.; *Romanowski M.* Zagadnienia ogólne papierów wartościowych. P. 133 et seq.; *Janiak A.* Papiery wartościowe. P. 1471 et seq.; *Szumański A.* Problem dopuszczalności prawnej emisji nowych typów papierów wartościowych. Z problematyki numerus clausus papierów wartościowych w prawie polskim // Studia z prawa gospodarczego i handlowego. Księga pamiątkowa ku czci Profesora Stanisława Włodyki / ed. W. Pyzioł. Kraków: Dom Wydawnictw Naukowych, 1996. P. 427 et seq.; *Radwański Z., Panowicz-Lipska J.* Zobowiązania — część szczegółowa. P. 348; *Machnikowski P.* Numerus clausus papierów wartościowych inkorporujących wierzytelności. P. 53 et seq. — Expressing different views, especially: *Chłopecki A.* Czy w prawie polskim obowiązuje zasada numerus clausus papierów wartościowych // Przegląd Sądowy. 1995. No. 2. P. 37 et seq.; *Zoll F.* Klauzule dokumentowe. Prawo dokumentów dłużnych ze szczególnym uwzględnieniem papierów wartościowych. Warszawa: C. H. Beck, 2004. P. 212 et seq.; *Zoll F., Wacławik A.* O zasadzie numerus clausus wierzycielskich papierów wartościowych. Uwagi na tle ochrony interesów inwestorów na rynku pożyczek masowych // Transformacje Prawa Prywatnego. 2003. No. 1. P. 9 et seq.

[28] *Radwański Z., Panowicz-Lipska J.* Zobowiązania — część szczegółowa. P. 348; *Romanowski M.* Zagadnienia ogólne papierów wartościowych. P. 156 et seq; *Jastrzębski J.* Pojęcie papieru wartościowego wobec dematerializacji. P. 426 et seq.

designation of such accounts allows identification of persons with rights attached to securities. Dematerialised securities accounts may also be opened with participants in the depository of securities or the securities registration system operated by the National Bank of Poland, which act as intermediaries that sell securities issued by the State Treasury or by the National Bank of Poland as long as the records they make concern these securities and allow identification of persons entitled to the rights attached to them.

Pursuant to Art. 7 (1) of the Act, rights to dematerialised securities arise when they are first recorded in a securities account, and they are due to the person holding such an account. At the request of a securities account holder, the entity maintaining the account must issue, separately for each type of security, a written personal deposit certificate. At the request of the account holder, some or all of the securities recorded in the account may be indicated in such a certificate. The deposit certificate confirms the entitlement to the exercise of the rights arising from the securities indicated in the certificate as these rights are not or cannot be exercised solely on the basis of the entries in the securities account. However, the right to participate in a general meeting is excluded pursuant to Art. 9 (1) and (2) of the Act. The deposit certificate is not a security. It is merely an identification, or an entitlement document[29].

The issuer of securities, wishing to introduce them to trading in a dematerialised form, must conclude an agreement with the KDPW to register these securities with the depository.

Pursuant to Art. 5 (1) of the Act, securities admitted to public trading, to trading on a regulated market, introduced to the alternative trading system (*alternatywny system obrotu — ASO*) or issued by the State Treasury or the National Bank of Poland are no longer in the form of a document as of the moment they are registered pursuant to the agreement for registration of such securities in the depository. This means that these securities may only exist in an intangible, book-entry form. Securities will also have this form only if separate regulations concerning the issue of the particular securities provide so. For other securities, the issuer shall decide whether they should have a dematerialised (book-entry) form or a traditional form.

Securities which are permitted by law to operate in a traditional or dematerialised form (e. g. shares) may change from a tangible to a book-entry form or vice versa. If securities are issued in a paper form, the issuer — before concluding an agreement to register such securities in the depository — must physically deposit all the paper-form securities in a depository maintained by an investment company, a custodian bank, the KDPW or a company to which the KDPW has delegated the performance of deposit activities, and the entity maintaining the depository is obliged to create a register of persons entitled under such securities (this process is called dematerialisation). The reverse process of withdrawing dematerialised securities from the depository system and making traditional paper documents available to investors (rematerialisation) is also possible.

## 8. Regulation of trading in securities

Within the framework of securities trading, primary trading and secondary trading are distinguished. Primary trading is related to the process of creating securities and consists in the disposal of the created security by the issuer to the primary buyer (first creditor). The concept of secondary trading, on the other hand, covers each subsequent and further disposal of a given security.

In the case of traditional (paper) securities, their disposal (both in primary and secondary trading) requires, in order to be effective, not only an agreement between the par-

[29] E. g.: *Janiak A.* Papiery wartościowe. P. 1515 et seq.

ties to the transaction, but also the delivery (handing-over) of the document to the purchaser. Transactions underlying the trade in such securities are therefore actual acts in the law. Secondary trading in securities in the traditional paper form (depending on whether they are registered, to order or bearer securities) may be conducted by transfer and handing over of the document, by endorsement and handing over of the document, or by handing over the document itself.

Different trading rules apply to book-entry securities. Pursuant to Art. 7(2) of the Polish Securities Act, the transfer of book-entry securities is effected when a relevant entry is made in the securities account. In trading in book-entry securities, the equivalent of the handover of a document is therefore the relevant entry in securities accounts. It should be noted that the trading mechanism is the same, regardless of whether the securities are registered or bearer. Doctrine therefore indicates that, with regard to dematerialised securities, the traditional distinction between registered securities and bearer securities is no longer relevant[30].

Bulk securities issued in book-entry form are normally traded on regulated securities markets, in particular a stock exchange or a regulated over-the-counter market. The provisions governing these markets set out in detail the rules under which securities of a particular type are traded on them. At the same time, under the current legislation there is no obligation to carry out transactions in securities exclusively on a regulated market. Investors are not deprived of the possibility of committing themselves to sell their securities outside of organised trading[31].

## 9. Principles of exercising rights from securities

Traditional (paper) securities are carriers of liabilities with the nature of a "payable debt". In practice, this means that, in order to receive a claim, a creditor must approach the debtor and present a document in order to exercise the right[32]. Such a construction is justified by the circular nature of securities. In normal contractual relations, generally, the role of the debtor is to deliver the benefit to the hands of a creditor, whom the debtor knows and knows where to find him/her in order to deliver the debt to his/her hands (the so-called "payable debt"). However, in the case of obligations arising from securities, the debtor usually does not know who the creditor is when the obligation falls due, as the security is usually put into circulation by its original purchaser. The legal nature of a security is based on the assumption of the subjective invariability of the debtor, not the creditor[33]. In addition, the debtor is always known to the holder of the security, as the debtor's name is indicated in the document. Under these conditions it is justified to charge the creditor who holds the security with the obligation to collect the performance from the debtor.

Pursuant to Art. 9216 of the Civil Code, the debtor should make the performance against the return of a document. An alternative solution is to make the document available to the debtor in order to deprive it of legal effect in a customarily accepted manner. Therefore, the debtor should always make the performance conditional upon the presentation of a security and should not render the performance to a person who does not want

[30] *Sójka T.* Papiery wartościowe. P. 1050.

[31] *Woźniak R.* Wprowadzenie do prawa papierów wartościowych. Warszawa: Wolters Kluwer Polska, 2019. P. 192.

[32] *Szpunar A.* Uwagi o papierach wartościowych na okaziciela // Przegląd Prawa Handlowego. 1993. No. 11. P. 1; *Radwański Z., Panowicz-Lipska J.* Zobowiązania — część szczegółowa. P. 351.

[33] *Michalski M.* Regulacje prawne dotyczące listów zastawnych // Prawo Papierów Wartościowych. 2000. No. 4. P. 1.

to present such a document or cannot do so[34]. The usual ways of depriving a security of its legal effect (cancellation) include, in particular, tearing it up, crossing out its content, perforating the document, placing an appropriate note on about the cancellation of the obligation[35]. The obligation to return a security or to make it available for the purpose of having its legal effect cancelled is intended to protect the debtor. Such a solution protects the debtor from the risk of being called upon to perform again, which could take place if, after performance, the document which has not been deprived of its legal effect remained in the possession of the creditor or a third party. This provision also justifies the conclusion that if the creditor fails to present a security, the debtor may refuse to perform the obligation arising therefrom, without running the risk of falling into default.

Different rules apply to the performance of obligations arising from dematerialised securities. The exercise of rights attached to such securities by entitled persons is not possible without the institutions that maintain deposit accounts or securities accounts for these securities. The intermediary institutions that are required in such cases, do not perform not only a deposit function but also a clearing function in relation to securities. The National Depository is essentially responsible for handling the performance of issuers' obligations towards those entitled under such securities. However, the same tasks may also be performed by entities authorised by the KDPW. General rules of clearing and settling transactions concerning dematerialised securities are regulated in Art. 45a et seq. of the Act on the trading in financial instruments, while detailed and technical issues are further specified in the regulations of clearing entities.

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[35] See: *Żabiński Z.* Uwagi o zwyczajach obrotu czekowego // Zeszyty Naukowe Akademii Ekonomicznej w Krakowie. 1987. No. 247. P. 5 et seq.

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## Понятие и общая характеристика польского законодательства о ценных бумагах

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В статье представлена общая характеристика польского законодательства о ценных бумагах, освещены основные юридические, законодательные и практические вопросы, возникающие в этой области юридического оборота. Законодательство о ценных бумагах — это комплекс правовых норм, регулирующих принципы создания ценных бумаг, их оборота и осуществления прав и выполнения обязательств по ценным бумагам. Польское законодательство не содержит определения понятия «ценная бумага». В доктрине принято считать, что это документ, устанавливающий конкретное отчуждаемое имущественное право, который связывает данное право с документом (включает его) таким образом, что наличие документа является необходимым условием для реализации этого права и распоряжения им. Положения о ценных бумагах в Польше не кодифицированы и содержатся в различных источниках. Общие вопросы регулируются положениями ст. $926^6$–$926^{16}$ Гражданского кодекса Польши, а частные урегулированы в законах, посвященных отдельным типам ценных бумаг, в актах, касающихся в основном других вопросов, но также содержащих положения о конкретных типах ценных бумаг, и в нормативных актах Европейского союза, в частности в распоряжениях Европейского парламента и Совета ЕС. Польский законодатель регулирует такие виды ценных бумаг, как вексель, чек, коносамент, акция, подписной варрант, депозитарная расписка, инвестиционный сер-

тификат, облигация, ипотечная (обеспеченная) облигация, банковская ценная бумага, казначейские ценные бумаги, ценные бумаги Национального банка Польши, лотерейный билет или другое подтверждение участия в азартной игре. Наибольшие законодательные проблемы в настоящее время связаны с явлением дематериализации некоторых видов ценных бумаг. Это приводит к тому, что традиционные правовые решения в отношении ценных бумаг, основанные на конструкциях вещного права, неприменимы к дематериализованным ценным бумагам. До сих пор польский законодатель не смог разработать единых правовых решений, применимых как к материальным, так и к дематериализованным ценным бумагам. De lege lata в этой сфере существует специфический дуализм правового регулирования. Общие положения о ценных бумагах, содержащиеся в Гражданском кодексе Польши, обычно применяются к традиционным ценным бумагам, а выпуск и оборот дематериализованных ценных бумаг регулируются положениями иных правовых актов, в основном Закона 2005 г. об обороте финансовых инструментов.

*Ключевые слова:* ценная бумага, финансовый инструмент, вексель, чек, коносамент, акция, инвестиционный сертификат, облигация.

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