

THE IMPORTANCE OF GRATUITOUS SERVICE CONTRACTS IN THE EXAMPLE OF A MANDATE CONTRACT

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Abstract

Employment relationships today are often replaced by civil law relationships. The literature accepts that they are equal forms of employment. However, it is often said that a mandate contract or service contract regulated by art. 750 of the Polish Civil Code is used to circumvent labor law. The purpose of a mandate contract is to make changes in the legal sphere of the mandatory as a result of actions taken by the mandatary. The relative rule from art. 735 PCC says that the party performing the mandate should be paid remuneration, but parties can agree or, if it results from circumstances, such a contract may be gratuitous. Dogmatic and legal text analysis has been used to discuss the presented issues. This paper establishes in which situations such a legal relationship requires effort and time, and for which the parties do not provide remuneration; the objectives that justify the conclusion of such contracts and their legal implications; and their significance in economic and civil turnover. The conclusion of the gratuitous mandate contract is usually justified by the relationship between parties (e.g. affinity, friendship) and a small workload. The gratuitous character does not affect the scope of duties and responsibilities of the mandatary, although it may affect the assessment required from the debtor's diligence in the performance of the obligation.

Key words: mandate contract, service contract, remuneration, employment

JEL classification: K12, K31

1. The employment contract and civil forms of 'employment'

Today the term "employment" covers both work performed under labor law and that realized on the basis of civil law contracts [1-3]. Indicated legal regimes are competing contracts in the flexible labor market. In principle, the same work can be done on the basis of an employment contract or civil law contract. However, there are types of work that can be performed only within the regime of employment (labor law). On the other hand, there are no activities that may be subject only to the civil law regime [1, p. 53]. Therefore, it is assumed that the relationship between these two bases of "employment" is a "one-sided verb" [4].

Both types of contracts have many common elements, including economic and social characteristics. At the same time there are important differences between them, such as social and health insurance conditions, as well as tax aspects [5-10]. Employment contracts are correlated and subordinated to the leadership of the employing entity and cover the performance of personal work (loaded by risk for the employing entity), the paid nature of the work, and the continuity of work (Legal definition of employment contract in art. 22 § 1 of the Labour Code define its main characteristics) [11], whereas the civil forms of employment are characterized by great diversity. First of all, the civil forms of employment leave the parties more freedom in shaping the content of the contract. For the employed individual they usually provide flexibility of work, which does not mean that the provision of work cannot be done in

a sustainable and economic dependence of the employing entity [9, 10]. Civil forms of employment allow the employing entity (hirer) a reduction in direct and indirect labor costs. It must be stressed that the submission of the particular legal relationship to the labor law regulations is connected to a system of guarantees and privileges of workers, which is not known in civil law [6, s. 50]. The lack of protection of basic social needs is a precise reason to criticize civil forms of employment. It is also the prerequisite for an approach to equate the two legal regimes. However, it must be noted that the diversification of employment forms is often sought by the parties of contract, *inter alia*, because it may be preferred in a particular situation. For example, it creates for the employed individual the opportunity to earn extra money based on the civil law contract.

Referring to the subject of this publication, it must be noted that in most European countries the rules of labor law do not allow for the stipulation in a contract that provides for a lack of remuneration (payment of wages is part of the statutory definition of a contract of employment) [8, s. 143, 167; 9]. The employment contract is always paid. While employment without payment is possible on the basis of civil law contracts, the feature of gratuity in the content of the contract plays no role in estimating whether the contract is a civil law contract or a contract of employment [12]. It is the real manner of contract realization that allows us to conclude with what type of contract we are dealing.

The literature discussed the problem of hiding under a civil law contract the employment contract, or vice versa. In the first case we usually have to deal with the circumvention of the provisions of labor law [13]. When parties of contract hide the employment contract, they usually aim to minimize or even avoid the costs associated with being subject to compulsory social insurance, for example costs arising from business activities. In such a situation the party has a claim to establish the existence of an employment relationship (Art. 198 Polish Code of Civil Procedure). On the other hand, in the case of simulating employment, in place of a mandate contract or specific work contract the party's intention can be to grant a party a specific legal status, which is a prerequisite for obtaining certain privileges or benefits (e.g., getting social security benefits, parental leave, or early retirement) [14 - 17].

The presented problem of hiding the real nature of contract may be solved by making legal regulations of both contracts uniform. However, equalization of the civil law contract and the employment contract, seems not to be desirable in the labor market. According to the principle of freedom of contract, the parties decide about the employment base. It is natural that both parties essentially aim for common objectives, i.e., profit and increasing income. Therefore, it is rightly assumed that, in accordance with the principle of the primacy of facts over the contract, it is crucial for the legal classification of the contract to have real implementation [8, s. 112; 6, s. 52].

2. Service contracts

Among the civil forms of employment the widest application, as the basis for the provision of work, is for specific contract work (art. 627 and next of the PCC), mandate contracts (Art. 734 and next of the PCC, including service contracts, art. 750 of the PCC), and agency contracts (art. 758 and next of the PCC). According to the indicated types of contracts only the mandate contract — and therefore also service contracts — may be a gratuitous type of contract.

A legislature foresaw the narrow approach of the mandate contract (the PCC regulation covers only legal action). At the same time, it is assumed that the provisions of the mandate contract shall apply to service contracts that are not regulated by other laws (art. 750 of the PCC) [18]. Therefore, legislature prefer to include the mandate contract regime over the

unnamed service contracts. The rules of the mandate contract are not applied to contracts governed as a separate type of contract, e.g., a bank account contract or a safekeeping contract [19]. It should be noted that, depending on the content and nature of the specific contracts, applying the provisions to the mandate is either direct or with some modifications, as well as certain provisions in general that may not be applicable [20-22].

The legal classification of service contracts in Polish law raises considerable difficulties. First of all, the PCC does not define the term “service,” which is widely understood as “business activity used to meet the needs of the people, led by entities with appropriate qualifications and by those who dispose of suitable equipment, etc.” [23]. The legislature entered the legal definition of “services” into the Provision of Services on the Polish Territory Act from 4 March 2010. According to the indicated act, service is a performance of the service provider on its own account (and risk), normally provided for remuneration, in particular for construction, trade, and profession services. On the basis of art. 750 of the PCC it is assumed that the subject of the provision of services are all kinds of factual acts, and a combination of factual and legal actions [24]. In practice, these contracts are the determined “mandate” [25].

The subject of the unnamed service contracts can be a single service, a greater number of services, and the provision of an indeterminate number of services. These are consensual contracts. They may have a pecuniary character or be gratuitous (free), and may be concluded for a definite period of time or an indefinite period. Based on the current doctrine and jurisprudence point of view, L. Ogiełło make an exemplary enumeration of situations that are regulated by art. 750 PCC [13, s. 457]. According to the author, this category of contracts includes contracts to oversee the activities of third parties, contracts to collect and give access to a specific information, contracts for teaching or education, contracts for medical services or care, contracts to maintain, contracts for repair or maintenance items, contracts of geological works purely exploration, contracts to making acts of control, contracts of agency activities or advertising, contracts for certain services in the field of tourism, contracts for certain services in the field of transport, contracts for services performed by the guardians, contracts on the protection of persons or property [13, s. 457]. The most popular service contracts are education, medical care, advertising, security, brokerage, legal services, and water supply and/or sewage [8, s. 169; 26 - 30].

The above examples evidence the fact that the unnamed contracts catalog is wide, and these contracts play an important role in the practice of civil law transactions. There is a high probability that this type of contract may be gratuitous. That is why the title of this publication references service contracts. And, because of the statutory reference to regulations to mandate contracts, further considerations are based on the provisions of art. 734 and the next PCC.

3. Mandate contract

3.1. Contract characteristics

A mandate contract is consensual. The purpose of a mandate contract is to make changes in the legal sphere of the mandator as a result of actions taken by the mandatary. The parties of such a contract can be any civil law entities, and its object, according to the content of art. 734 of the PCC, is legal action.

The mandate contract is based on mutual trust between parties. If it follows from a contract or custom, or if he is forced by the circumstances, the mandatary may delegate the performance of a mandate to a third party. Wherein, in such a case, the mandatary is obliged to inform the mandator immediately (so there is no need to perform in person) [8, s. 168]. A characteristic feature of a mandate contract is that the mandatary does not have to achieve a certain result, but he is obliged to make the effort to achieve it (for more information about

result obligations and careful action obligations, see: [31, 32]. However, it should be stressed that the mandatory performance is determined in the effect manner, i.e., he is to carry a legal action with due diligence [33] — an attribute that refers to the purpose, i.e., the effects expected by the mandator (for example, benefits that are not elements of the mandate contract). According to art. 355 of the PCC a debtor is obliged to use the care commonly required in relations of a given type.

The mandate contract can exist in two forms, namely the replacement of direct and indirect representation [20, s. 1488]. The first constitutes a rule, and means that mandatory acting on behalf of the mandator, i.e. the effects of his or her actions (acquisition of rights or duties) are formed on the side of the mandator. In the second case the mandatory can act in his or her own name but on behalf of the mandator, therefore such a contract is associated with the obligation to transfer acquired rights to the mandator [20, s. 1489].

Regardless of the contract subject, the mandate contract does not require a particular form [20, 1487]. Therefore, the effective contract can be concluded in any way (including verbally), and even the implicit declaration of will and silence [33]. However, the lack of written form may cause difficulties to prove the conclusion of the contract in the event of a dispute.

3.2. Remuneration (repayment)

3.2.1. Presumption of payment

Basic construction of a mandate contract is its payable variant, especially because of the provisions of art. 735 § 1 PCC, which introduce a presumption of payment [13, s. 438]. If the element of “free” performance has not been expressly reserved in the contract or has not resulted due to circumstances, the mandate performance should be paid remuneration [20, s. 1490]. Correspondent to art. 735 § 1 PCC is art. 836 PCC, which states that if the remuneration for safekeeping is not set forth in the contract or in tariff, the keeper is entitled to the remuneration accepted in the give relations unless it follows from the contract or the circumstances that he agreed to safekeep the thing without remuneration.

The payment is the relative norm of mandate contract, corresponding to the typical economic definition of contracts, which requires effort and time [20, s. 1490; 34]. The burden of proving a fact that a contract is “free” lies with the person who draws legal effects from those facts, so usually it lies with the person who says that the mandatory is not entitled to remuneration (the most thus giving the mandator) (art. 6 of the PCC) [33, s. 1203; 34, s. 1544]. Because repayment is not the essential element (*essentialia negotii*) of the mandate contract, it is discussed in the literature discussion if the paid mandate contract is mutual [20, s. 1490; 24, 28].

The amount of remuneration may be determined in any way. If the parties in the contract do not indicate the amount of remuneration, it is determined according to the applicable tariff, and in the absence thereof a legislature indicates that remuneration must take the value of the work (i.e., depending on time spent on the execution of the mandate, the complexity of the action, and the qualification of the mandatory) [20, s. 1491; 29].

Remuneration is payable only after the execution of the mandate, unless otherwise stated in the contract or special provisions [8, s. 167]. The rule is payment in cash. Remuneration which serves as payment for the performance should constitute a material benefit of real value, certainly not a symbolic value [35]. It would be worth considering how to treat other forms of gratification, e.g., gifts and discounts. However, this is a separate issue that requires extensive discussion.

3.2.2. The free charge contract (*gratuitous*)

A characteristic feature of gratuitous contracts (the structure of the gratuitous contract have, among others, donation contract, lending for use) is that only one party benefits from the contract. The “free” means that one party of a legal action does not get any equivalent (at the time of the provision, or in the future). A *contrario* in the contract would deprive the contract of its gratuitous nature. It cannot be ruled out that the person providing the gratuitous work wants to show gratitude or expects such kindness in the future [36]. Such a circumstance does not preclude the classification of a mandate contract as unpaid. Other claims would be too rigorous.

The source of a mandate contract is believed to be in the Roman *mandatum*, where the mandatary is obliged to perform for free activities in someone else’s interest [37]. The contract is based on a special trust, under which services of a higher kind were offered, e.g., doctors, lawyers, and architects, for which the person performing these activities could not claim compensation (or if that has been offered voluntarily) [13, s. 435; 37, s. 387]. It is worth considering whether a gratuitous mandate contract — as an altruistic formula of *de facto* performing work — is in actual civil turnover a unique phenomenon, or on the contrary has a broader practical significance [13, s. 438].

As noted before, the law requires a clear indication by the parties to the legal action that the mandate contract has been given free character (similarly in case of donation contract (art. 888 PCC.), loan contract (art. 720 PCC), safekeeping contract (art. 835PCC), or suretyship contract (art. 876 PCC)) [38]. Therefore, it is always a conscious decision entity. We can suppose that a reasonable operating entity of civil law will rather not decide to perform the usually time-consuming tasks (duties) involving physical or mental strength, and entail responsibilities, if in return they would receive no financial gain (although, in accordance with generally accepted view on the gratuitous legal actions, the obligations of the entity in comparison with the common standards are generally the subject of fewer requirements) [35, s. 208]. On the other hand, civil law legal entities carry out legal actions for various reasons. No adjustment to achieve the benefits may result from the usages prevailing in the sphere of relations [13, s. 444], a permanent practice of freely performing such services between the contracting parties, personal values (range of knowledge, experience, qualifications), the nature of the relationship or the relationship between the parties (e.g., kinship, friendship [33, s. 1203]) in conjunction with a slight effort needed to execute the mandate [20, s. 1490] or simply a lack of effort (e.g., the mandate to transport things, when the mandatary leaves the same thing for him or herself [34, s. 1544]), and finally just to help, for mercy’s sake, for his or her own satisfaction in order to benefit someone else, etc. Such a contract is certainly not a source of income for the person performing. This does not mean that it is completely selfless. The entity providing work for free can count on gratitude or help in the future.

It should also be noted that in terms of gratuitous mandate, contracts cannot be used for apprenticeship, graduate practices (to which the Graduate Practices Act from 17 July 2009 explicitly provides a limited range of rules on employment law) [39], and volunteering. Although, for example, an agreement between the beneficiary and the volunteer (according to art. 2 of the Act of 24 April 2003 on Public Benefit and Volunteer Work - Journal. Laws of 2003 No. 96, item. 873 - volunteer is a person who voluntarily and without remuneration performs services pursuant to the Act) has a civil character [40], it is not subject to the provisions of art. 750 of the PCC [41]. Therefore, we will not have to deal with the gratuitous mandate contract as well, if its conclusion results from, e.g., a desire to gain experience and collect *curriculum vitae* points. However, current trends in the labor market — namely the increase of free or low-paid “internship,” “practice” (which in fact means free performance of work) — are supported by the fact that these contracts are legally protected.

In view of the above, it can be questioned whether “work performance” with altruistic motives leads to the establishment of a legal relationship (even more so if the contract is not in writing). According to Piotr Machnikowski, if the mandatary took it from motives of politeness and it is not accompanied with the intention to cause a legal issue, it may be an obligation of non-normative nature, i.e., we cannot apply the provisions of the Act [33, s. 1203]. There is no doubt that it is not a legally binding obligation relationship that relies on the trivial objectives, such as social obligation, helping an elderly person with shopping, or helping a younger cousin in learning [42]. On the other hand, when it comes to greater obligations such as leading a lecture or offering legal advice, it does not seem that the intention of civil law was to leave them outside the protection of the law [42].

Theoretically, there are no obstacles to include in any form the gratuitous mandate contract, for example with the spouse, father, or mother. As stated before, it is justified for many reasons. However, such a contract may be questioned, for example by the social security institution.

4. Legal consequences of gratuitous mandate contract

The fact that the mandate contract is gratuitous in principle does not affect the rights and obligations of the contracting parties [37, s. 394; 38]. There are also no differences in terms of the conditions and scope of responsibility [33, s. 1203]. To the mandate contract, regardless of payment status, the provisions governing the consequences of the death of the mandator (Art. 747 of the PCC) or mandatary (art. 748 of the PCC), and the effects of the expiry of the mandate (art. 749 of the PCC) are applied. It should be emphasized that the provisions governing a mandate contract are dispositive, i.e., the parties may define mutual rights, obligations, and responsibilities than are otherwise regulated in Act.

The rights of the mandatary are governed by the following provisions:

- Art. 737 of the PCC (right to desist from mandator performance manner)
- Art. 738 of the PCC (providing for the possibility to delegate the performance of a mandate to a third party)
- Art. 742 of the PCC (regulating the obligation of the mandator to reimburse the mandatary for expenses, as well as releasing the mandatary from all obligations)
- Art. 743 of the PCC (concerning to pay an appropriate advance for required expenses).

In turn, the responsibilities of the mandatary are mainly determined by art. 740 of the PCC (obligation to inform the mandator about the progress of the case and to hand over to the mandator all that he obtained for him or her) and Art. 741 of the PCC (the mandatary cannot use the mandator’s things and money in his or her own interest). It is worth noting that the modification of the duties provided in Art. 746 § 1 and § 2 of the PCC are additive from payment of the contract and the liability for damages in the event of termination without valid reason.

The legislature, in terms of responsibilities of the parties, included joint and several liability (i.e., where on either side there is more than one entity, Art. 745 of the PCC). In addition, Art. 739 of the PCC provides for the extension of the responsibility of the mandatary in the case of delegating performance to another person without being entitled to do so. Generally, liability for damage arising in connection with the execution of the mandate regulates the general provisions (art. 471 and next of the PCC). Therefore, gratuitous of mandate contract does not exclude contractual liability.

In the literature it was noticed that we should consider that the lack of remuneration in a mandate contract impacts the due diligence required for performance of the contract. It is rightly assumed that because Art. 355 of the PCC does not differentiate the due diligence according to remuneration of a contract (although the required level of due diligence depends

from the type of legal relations), this feature — mean gratuitous — does not affect the diligence required from the performance [33, s. 541, 1203; 37 s. 396; 38].

It can be certainly stated that art. 744 of the PCC (rules concerning the payment of remuneration) does not apply to the gratuitous mandate contract, as well as art. 751 point 1 of the PCC (only the part concerning the limitation of claims for remuneration).

In addition, finding the gratuitous mandate contract as a particular form might argue for the narrow application of Art. 736 of the PCC. That provision refers to the obligation to notify the mandator of its non-acceptance by the mandatary, who professionally deals with such legal actions with others or who has declared readiness to settle such legal actions. It seems that since the gratuitous mandate requires a clear indication in the contract, the agreement cannot take place in the conditions provided in the mentioned Article.

5. Conclusion

As per the above discussion, the provision of unpaid work is possible only on the basis of the civil law form of employment. To make a mandate contract gratuitous requires particular circumstances and motives that lead parties to take such legal action. At the same time, in the case of a gratuitous mandate contract, the line between making a legal relationship and the obligation that has a non-normative nature is very subtle.

This paper stresses that legal protection, which is guaranteed by the provisions of Art. 734 and next of PCC, will not in practice be applied to obligations that are implemented for trivial purposes. Otherwise, the free-of-charge element does not affect the rights and obligations of the parties, and the due diligence required for performance of the contract, and the parties' responsibilities (except for excluding the application of provisions that directly relate to remuneration for performed activities).

Due to the flexibility forms (unrestricted) of a mandate contract, it is not possible to assess the scale of the discussed phenomenon. It seems that as a form of informalization of employment, a gratuitous mandate contract will be disclosed by the parties or in the event of a conflict, or when it is in their interest. Due to the difficulties this type of contract may encounter — especially in terms of public law (e.g., in connection with the social security scheme) — it is doubtful that the parties have sought the excessive formalization of a gratuitous mandate contract.

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