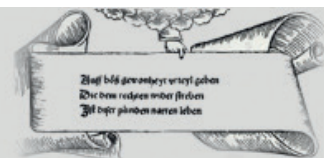




Jurisdictio



Storia e prospettive della Giustizia

N. 3-2022 - VITA GIUDIZIARIA 4

ISSN 2724-2161

Faton Shabani - Jusuf Zejneli

GIFT CONTRACT:
THE CHALLENGE OF SAFEGUARDING
THE CHARITABLE PURPOSE FROM MISUSE

Editoriale Scientifica

*Faton Shabani*¹ - *Jusuf Zejneli*²

GIFT CONTRACT: THE CHALLENGE
OF SAFEGUARDING THE CHARITABLE PURPOSE
FROM MISUSE

1. *Introduction*

With the gift contract, the donor is obliged to transfer or hand over to the gift recipient a certain object in ownership, or to assign a right, or to release a debt, or to take over a debt without compensation.³ A gift is constituted by clear intention of the donor to transfer his interest in property together with physical or symbolic delivery.⁴ It is a legal action by which the holder of the property right voluntarily transfers this title together with the possession of the thing to someone else, without asking for something in return. Through the gift, the donor voluntarily adds to the beneficiary's wealth and does so motivated by the spirit of kindness and generosity. It follows from the legal term of the gift contract that it, on the one hand, is a legal basis for acquiring the right of ownership over an item, while on the other hand it is a basis for transfer of rights, from one side to the other, i.e. transfer of claim and takeover on debt. A gift can be made subject to certain conditions. It is necessary that these conditions must be valid conditions according to the provisions of the Law on Obligations. Where an unconditional gift-deed and an agreement between the donor and donee were executed on the same day, it was held that the condition

¹ Associate Professor; University of Tetova; Tetova; Republic of North Macedonia; faton.shabani@unite.edu.mk.

² Associate Professor; University of Tetova; Tetova; Republic of North Macedonia; jusuf.zejneli@unite.edu.mk.

³ Article 555 of the *Law on Obligations*, Official Gazette of the Republic of North Macedonia, No. 18/2001. Amended by the Law amending the Law on Obligations, Official Gazette of the Republic of North Macedonia, No. 4/2002, No. 5/2003, No. 84/2008, No. 81/2009, No. 161/2009. Decision of the Constitutional Court of Republic of North Macedonia, No. 121/2001, No. 78/2001, No. 67/2002, No. 59/2002.

⁴ R. HALSON, *Contract Law*, Pearson Education Limited, Harlow-2001, p. 161.

prescribed in agreement would attach to the gift as the gift-deed and the agreement formed part of the same transaction.⁵ Apart from the express intention of the donor to transfer his property gratuitously, the contract of gift also requires acceptance of the gift by the donee or other person qualified to accept on his behalf. It follows that the contract of gift is a bilateral juristic act which requires the declaration of intention by both parties to be legally effective.⁶ As in the case of other ordinary contracts, it is based on an offer (by a donor) that is accepted (by a donee). Prior to acceptance by the donee, the contract is not formed and the donor may still decide to cancel the gift. Upon delivery of the property, however, the gift becomes property of the donee and it cannot be revoked merely on the will of the donor unless expressly permitted by law.

2. *History*

Gifts are something which is a part of our lives since times immemorial. Be it someone's birthday or wedding or great achievement, gifts have always been a way of showcasing one's love and affection. The gift constitutes the ancient institute that acquired institutional shaping in Roman Law. In the early stages, there was the so-called real gift that represented the transfer of the thing from the donor to the recipient of the gift through formal and solemn acts of transfer of ownership. This transfer required the voluntary action of the one who had possession of the thing to transfer the thing and ownership to him (*donatis*) to the other and the action of the one to whom the gift was addressed to accept it (*acceptus*, i.e. *captus*). In that sense, donation was a disposition for the benefit of somebody else, for which this other party was not expected to give any recompense.⁷ In the second phase it was passed to the general concept where the cause of the donation (*causa donationis*) was expressed, through the elaboration of the

⁵ A. SINGH, *Textbook on the Transfer of Property Act* (2nd edition), Universal law Publishing Co., New Delhi 2009, p.437.

⁶ A. STASI, *Elements of Thai Civil Law*, Koninklijke Brill, Leiden 2016, p. 91.

⁷ R. ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1990, p. 479.

legal thought, which distinguished the donation in general from the fact with which it was concretized. In fact, *causa donationis* was the motive for making the gift.⁸ Donation is conceived as a voluntary action that leads to the impoverishment of the donor and the simultaneous enrichment of the one to whom the gift was given. In addition to the objective element required of gifts in the old stage, in the classical Roman period the subjective element was also required - the intention to give something for free (*animus donandi*). To determine the scope of the Roman concept of *donatio* is not all easy. Theoretically, for instance, it would have been possible to include the unrecompensed transfer of a thing for use. But that situation was covered by *commodatum*; hence: “*utendum dare non est donare*” or, to use an occasional attempt by the Roman jurists to distinguish between donations and similar, related types of transactions.⁹

3. *Necessary conditions for validity*

In terms of the form, the gift contract, based on the purpose and motive for which it is concluded, is rightly listed in the list of strictly formal contracts. In order to protect the interests of the parties and to provide greater legal certainty, the domestic legislature provides that the contract for the gift must be concluded in writing. The contract for gift for a movable object concluded in oral form is valid, if it is handed over to the gift recipient. When a gift is made with a contract in favor of a third party, the acceptance of the gift recipient does not have to be in writing, unless the subject of the gift contract is real estate. When the subject of the gift contract is real estate in the form, the provision on the form of the contract for sale of real estate shall be appropriately applied.¹⁰

An important condition is the ability to donate. Only a person with full business ability can make a gift. In order to be a donor, a person must

⁸ U. ALBANESE, *Massime, Enunciazioni e Formule Giuridiche Latine: traduzione, comment e riferimenti sistematici alla legislazione italiana*, Ulrico Hoepli Editore, Milano 1993, p. 48.

⁹ ZIMMERMANN, *The Law of Obligations*, cit., p. 480.

¹⁰ *Article 556 of the Law on Obligations*.

be legally qualified to make a binding agreement and have the ability to understand its effects. Under the conditions provided by the Law on Obligations and other law, a gift can be given by a person with limited, i.e. special business capacity.¹¹ On the other hand, a gift can be received by a person with limited legal capacity, as well as a legally incapable person. If the gift is received by a legally incapable person, the legal representative of that person may, with a statement given to the donor, approve the gift within 30 days.¹²

4. *Gift revocation*

Given the fact that the gift is a transfer of property from the donor to donee voluntarily without expecting anything in return, it is a rule that the gift cannot be revoked and the property already handed over by the donor cannot be recovered. This is done for the sake of maintaining the legal security of the parties involved, as well as for the sake of the most just realization of the purpose and motive for which the gift contract is concluded. However, the law provides for some cases when the gift can be revoked.

- The donor may terminate the contract and revoke the made gift, in case the recipient with his behavior towards him or a person close to him, shows extreme ingratitude. This right also passes to the heirs of the donor. This include the case where the donee refuses to help the donor who is in need of the basic necessities for existence although he was able to supply them. This right terminates with the expiration of a maximum of one year counting from the day when the donor found out about the ingratitude of the recipient, and at most after the expiration of five years from the expressed ingratitude. In case of revocation due to ingratitude, the recipient is obliged to return everything he received in the name of a gift.¹³

- The donor can claim revocation of a gift if the donee commits a serious criminal offense against the donor, such as misappropriation of

¹¹ Article 557 of the Law on Obligations.

¹² Article 558 of the Law on Obligations.

¹³ Article 563 of the Law on Obligations.

property, theft, violence, fraud, physical assault, slander, pressure in connection with wills, and other crimes punishable under the Penal Code.¹⁴

- The donor who does not have sufficient means for living, or for support of the persons who are obliged by law to support them, may terminate the contract, and if he / she has already handed over the object to the recipient, he / she may revoke the gift and request the recipient to return what of the received gift is still in the property of the recipient. The donor may avoid the revocation, if he undertakes that he will adequately provide the donor with the funds he lacks. If the donor has made several gifts, the revocation shall be made in reverse order of occurrence.¹⁵

However, ordinary, occasional gifts, prize gifts, as well as gifts of gratitude cannot be revoked. Gifts made for charitable and generally useful purposes may not be revoked either.¹⁶

5. *Preventive measures of the legal legislation in force for the protection of charity in gifts*

(a) Law on Public Sector Employees

Individuals who have established employment relationships with any of the employers in the public sector, such as state government bodies, local government, bodies established in accordance with the constitution, laws, institutions which perform actions in the field of education, science, health, work, culture, sports, social protection and child protection or in other activities of public interest such as agencies, funds, public institutions and public enterprises established by Republic of North Macedonia or municipalities, City of Skopje, municipalities in the City of Skopje, are considered employed in the public sector.¹⁷ With the Law on Public Sector Employees regulates the general principles, job classification, evidence,

¹⁴ A.STASI, *Elements of Thai Civil Law*, cit., pp. 92.

¹⁵ Article 564 of the *Law on Obligations*.

¹⁶ Article 566 of the *Law on Obligations*.

¹⁷ Article 2 of the *Law on Public Sector Employees*, Official Gazette of the Republic of North Macedonia, No. 27/2014. Amended by the *Law amending the Law on Public Sector Employees*, Official Gazette of the Republic of North Macedonia, No. 199/2014, No. 27/2016, No. 35/2018, No. 198/2018.

types of employment, general rights, duties and responsibilities, mobility and other general issues for public sector employees. This means that the issue of gifts is also regulated by this law.

According to the Law on Public Sector Employees, the issue of prohibition for accepting gifts is regulated as follows: (1) Employees in the public sector may not accept gifts related to their work, with the exception of protocol gifts, and temporary gifts at a lower value. Gifts that do not exceed the value of 1000 denars, or gifts received from the same person whose total value does not exceed 3000 denars in the given year, are considered gifts with a lower value. Gifts received by official persons or by international organizations, given during visits, being a guest or other similar circumstances, are considered protocol gifts. (2) The prohibition and restrictions set forth above also apply to the employee's spouse, persons living together with the employee in the extramarital union, their children, parents and persons living in the same family household.

In this case, public sector employees are required to warn donors that gifts that exceed the aforementioned value become the property of the employer. In case the donor insists on accepting the gift, the employee, or persons with close family ties to him, are obliged to deliver the gift to the employer. Details of gifts received, their value, donors and other circumstances are entered in the gift records.¹⁸

Gifts that exceed the legal value become the property of the employer and employees must notify the donor.

(b) Law on Administrative Servants

Law on Administrative Servants regulates the status, employment and promotion of administrative employees.¹⁹ Administrative servants are those persons who have entered into employment relationships to perform administrative work in central and local government bodies, institutions

¹⁸ Article 39(3)-(4) of *the Law on Public Sector Employees*.

¹⁹ Article 2 of the *Law on Administrative Servants*, Official Gazette of the Republic of North Macedonia, No. 27/2014. Amended by the *Law amending the Law on Administrative Servants*, Official Gazette of the Republic of North Macedonia, No. 199/2014, No. 48/2015, No. 154/2015, No. 5/2016, No. 142/2016, No. 11/2018. Decisions of the Constitutional Court of Republic of North Macedonia, No. 147/2014, No. 80/2016, No. 74/2014, No. 163/2014, No. 121/2015.

which carry out activities in the field of health, education, culture, sports, social protection, work, institutions which carry out activities from the public interest organized as funds, public institutions, public enterprises and agencies.²⁰

It should be noted that administrative officials have disciplinary responsibilities if they do not perform their duties in accordance with applicable laws. In the context of the circumstances under which disciplinary liability arises, the following are also sanctioned: “Acceptance of gifts or other benefits”. It is noted that the Law on Administrative Servants prohibits the acceptance of gifts for administrative employees and this is determined within their disciplinary measures.²¹

(c) Decree on the Manner of Disposal of the Received Gifts, the Manner of Managing the Records of the Received Gifts and other Issues related to Receipt of Gifts

This Government’s Decree regulates the manner of disposing of the received gifts and their recording, notifying the parties about the conditions and the manner of giving the gift to employees in the public sector, through public notification. In the official premises of the public sector institutions, in an appropriate manner, visible and accessible to the parties, a notification is posted on the conditions and the manner of giving gifts to the employees in the public sector.²² The managers of the public sector institutions authorize a person who keeps records and takes care of the receipt, storage and storage of gifts. The employee in the public sector who received a gift, no later than two working days from the day of receipt, reports it to the authorized person and immediately after submitting the application submits it to the employer. The aforementioned application form contains: data on the name of the institutions in which the recipient is employed, the name and surname of the gift donor, the name and surname of the gift recipient, the reason according to which the gift was accepted, type / description of the

²⁰ Article 3 of the *Law on Administrative Servants*.

²¹ Article 73 of the *Law on Administrative Servants*.

²² Articles 1-3 of the *Decree on the Manner of Disposal of the Received Gifts, the Manner of Managing the Records of the Received Gifts and other Issues related to Receipt of Gifts*, Official Gazette of the Republic of North Macedonia, No. 153/2014.

gift, value of the gift and date of receipt of the gift. The aspect of the value of the gift is determined in harmony with the market price, the evidencing can be done in writing or electronically.²³

6. Conclusion

The contract for the gift, despite the main element that characterizes and differs a lot from other contracts, such as the purpose for charity, faces various attempts to violate and violate exactly this purpose. This situation is most evident in the case of gifts made to employees in the public sector.

The misuse of gifts in the public sector is obvious and has led to the Republic of North Macedonia being labeled as a country with a high level of corruption. According to 2020 Corruption Perceptions Index launched by Transparency International, North Macedonia scores just 5 points, which is 8 points less since 2012 (100 - highly clean; 0 - highly corrupt). Such a situation has undoubtedly been affected by the provision of the Law on Public Employees, according to which officials can receive gifts worth up to 3,000 denars per year, which is considered a "lower value".

The legislator through the legal provision providing the possibility that employees in the public sector can accept gifts up to the value of 3000 denars, consciously opens the door to corruption of the administration through the so-called "petty corruption". As a result, citizens not only face illicit acts such as bribery in money, but also recognize other more sophisticated forms of corruption, such as nepotism, clientelism, and abuse of office. The public administrative services sector has been negatively affected by corruption, respectively, it is considered an obstacle to be efficient and effective in providing services to citizens and business companies.

This kind of corruption in this area is a centuries-old tradition and it is the most difficult to eradicate because it is a daily occurrence. The difficulties are even greater in the fight against corruption given the fact that the North Macedonian public still does not perceive corruption as one of the main problems in the country and citizens remain inclined to accept corruption as a social norm and part of their behavior.

²³ Article 4 of the *Decree on the Manner of Disposal of the Received Gifts*.