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TREŚĆ UMOWY O POWIERZENIE GRANTU

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Adnotacja. W artykule autor bada cechy umowy o powierzenie grantu, w szczególności jej istotne warunki. Szczególną uwagę zwrócono na badanie pojęcia grant i jego natury prawnej. Stwierdzono, że grant to środki przyznane w sposób nieodwołalny, na czas określony, na realizację celów wyznaczonych przez dobroczyńcę, wymagające sprawozdania z ich wykorzystania. Ponadto w artykule omówiono problematyczne kwestie procesu wyboru odpowiedniego prawa do umowy o powierzenie grantu w przypadku, gdy jedna ze stron jest zagranicznym dobroczyńcą.

Słowa kluczowe: grant, umowa o powierzenie grantu, darowizna na cele charytatywne, treść umowy, istotne warunki umowy.

CONTENT OF THE GRANT CONTRACT

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Abstract. In the article, the author pays attention to the specifics of the grant agreement. In particular to its essential conditions, such as the subject of legal relations. The author explores the concept of a grant, its legal nature, and its consolidation in Ukraine's national legislation. Based on the key issues, it is concluded, that grant is a quantity of money given free for a specific purpose and specific period of time. Also, the article describes problem issues of the conflict of law and the process of choosing the applicable law to the grant contract in case one of the parties is the international donor.

Key words: grant, grant contract, charitable donation, the content of the contract.

ЗМІСТ ГРАНТОВОГО ДОГОВОРУ

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Анотація. У статті авторка досліджує особливості грантового договору, зокрема його істотні умови. Окрему увагу приділено дослідженню поняття «грант» та його правової природи. Зроблено висновок, що грант – це кошти, що надаються на безповоротній, строковій основі на реалізацію цілей, встановлених благодійником, з наступним звітом про їх використання. Крім цього, у статті розглянуто проблемні питання процесу вибору застосовного права до грантового договору у випадку, якщо однією зі сторін є іноземний благодійник.

Ключові слова: грант, грантовий договір, благодійна пожертва, зміст договору, істотні умови договору.

Introduction. With the growing number of grant aid recipients in Ukraine, it seems crucial to conduct a comprehensive study of grant aid relations, including contractual regulation. The article aims to reveal the content of the grant contract. In order to achieve the above goal, it is necessary to do the following steps: study the general provisions on charitable activities in Ukraine; determine the features of grant as a subject of such relations; provide a general description of the grant agreement and its legal nature; determine the content of the grant contract.

Methods and materials. General scientific and special methods were used in the research process, particularly the philosophical and formal-legal methods. The results achieved in the research process can be used in lawmaking activities to determine the place of the institution of the grant agreement in civil law, its content, in practical

activities - in the process of implementing grant projects by civil society institutions. The paper analyzes the current legislation and the work of such scientists as P.S. Attiyah, Stephen A. Smith, M.O. Mykhailiv, J.V. Chevychalova, O. Chaban, E.D. Boyarsky.

Results and discussion. The non-profit sector, often associated with concepts such as the "social economy", "third sector" and "third system", is a growing social and economic force all over the world. Non-profit sector organizations can help reduce regional disparities in service provision, access to goods, services and job opportunities. Their importance is also growing in the face of new emerging needs (Non-profit sector, 2003: 12). In this regard, a question arises on financing activities of the "third sector" and the answer might be the well-known instrument of providing grant assistance.

For today, the role of the contract as a universal legal form of mediating all spheres of society is significantly growing. P.S. Attiyah exploring the role of contract law in modern society proposes to consider not thinking of contract law as one central paradigmatic type of conduct but about clusters of typical situations and just look for situations rather than simple transactions. The author highlights the following key elements of typical situations: consent, mutual benefit and trust (Attiyah, 1986: 5). Providing grants is an efficient way to finance "third sector" initiatives and these relations, first and foremost, should be associated with a high level of trust and mutual benefit.

According to part 1 of article 626 of the Civil Code of Ukraine (hereinafter – Civil Code), a contract is an agreement between two or more parties to establish, change, or terminate civil rights and obligations. Article 638 of the Civil Code describes that the contract is concluded if the parties have duly agreed on all the contract's essential terms: the subject, essential conditions defined by law, and all those conditions on which at the request of at least one of the parties must be agreed (Civil Code, 2003: article 626, 638). The Commercial Code of Ukraine in article 180 also provides essential conditions: subject, price and duration of the contract (Commercial Code, 2003: article 180).

Stephen A. Smith in his work "Contract theory" proposes to focus on three aspects of the interpretation of contractual terms: 1) the objective approach 2) the importance of context and 3) the rules of interpretation. He mentioned that courts interpret contractual terms not by seeking contractual parties' subjective or inner intentions but rather by asking how the terms would have been reasonably or objectively understood. Contractual terms mean what the person to whom they were communicated the listener reasonably understood them to mean (Stephen A. Smith, 1993: 271).

As a general rule, the "subject" is the main essential condition of any civil contract. The agreement can not be considered concluded until the parties agree on it.

Regarding the grant, its provision is regulated by the Law of Ukraine "On charitable activities and charitable organizations" dated from 05.07.2012 № 5073-VI (hereinafter – the Law № 5073-VI). The legislator in Law № 5073 describes forms of charitable assistance as "charitable donation" and "charitable grant" – targeted aid in the form of currency values, which the beneficiary use within the period specified by the benefactor (Law № 5073-VI, 2012: article 6).

In addition, the term "grant" also disclosed in the next legal acts, for example, the Resolution of the Cabinet of Ministers of Ukraine "On the Creation of a Unified System for Attraction, Use and Monitoring of International Technical Assistance" dated 15.02.2002 № 153 in clause 3 disclose that international technical assistance can be attracted in the form of financial resources (grants) in national or foreign currency (Resolution, 2002: article 3).

According to the Law of Ukraine "On the Ukrainian Cultural Fund", the grant is financial resources provided on a gratuitous and irrevocable basis (Cultural Fund, 2017: article 3). More broadly the definition of the grant is contained in the Law of Ukraine "On Scientific and Technical Activities", where the grant is a financial or other resource provided on a gratuitous and irrevocable basis by the state, legal entities, individuals, including foreign and (or) international organizations (On Scientific and Technical Activities, 2016: article 1). In this case, the legislator defines the concept of a grant, not being limited only by a financial component of such assistance, considering the possibility of its provision in the form of other resources, for example, equipment.

Among scientists, special attention to the grant as a subject of the agreement paid by M.O. Mikhailiv. She discloses grant as financial resources and other means, gratuitously and/or irrevocably transferred in compliance with the intended purpose by the grantor to the recipient for the purpose of carrying out reforms and implementing projects (programs) (Mikhailiv, 2010: 183).

It also should be noted, that provision of grant assistance is closely related to cross-border cooperation and the key question here is to establish the law, applicable to the relationship. So to resolve the issue of applying for the proper legal order, private international law uses its conflict law method.

The Law of Ukraine "On Private International Law" in article 5 enshrines the fundamental principle of autonomy of the will (lex voluntadis), and in article 43 its use is of primary importance when solving a conflict of law issue on the choice of law applicable to the contract. According to this law, while concluding a contract, the parties can choose: a) the law that will apply to the contract or only in its part; or b) different law to apply to different parts of the contract. Moreover, the principle of autonomy of the will on the choice of law does not require the parties to have any relationship between the chosen one. The parties can choose the law of any third state (On Private International Law, 2005: article 5, 43).

According to article 4 of the Hague Principles on the Choice of Law in International Commercial Contracts (hereinafter – the Hague Principles), the choice of law or any change in the choice of law must be made clear or follow from the provisions of the contract (Hague Principles, 2015). So, if the parties have reached an agreement on the chosen substantive law at the request of at least one of the parties, then this condition of the contract is essential

for this contract (Chaban O., Kotukha O., 2020: 44). For example, in model grant agreements, many foreign private charitable foundations indicate the law that will apply to legal relationships.

In particular, the typical grant agreement of the National Endowment for Democracy (NED) defines: "since the NED is located in Washington DC, in the United States, the Grant Agreement is governed by the laws of the US federal government and the laws of Washington, DC" (NED, 2012: 23). The choice of law agreement is usually contained in the main contract, but sometimes it can be contained in a separate document concluded before. Even if the choice of law agreement is part of the contract, it should be assessed separately from the main contract. This means that the agreement on the choice of law does not affect the statement that the main agreement is invalid, non-existent or ineffective (Hague Principles, 2015). Suppose the choice of law or a change in the previously chosen law is made after the transaction. In that case, such a choice has the opposite effect and is valid from the moment of the transaction. Still, it cannot be the basis for recognizing the transaction as invalid due to non-compliance with its form, and also cannot limit or violate the rights acquired by third parties prior to the choice of law or change the previously chosen law (Chaban O., Kotukha O., 2020: 45).

Article 47 of the Law of Ukraine "On Private International Law" defines the scope of the chosen law, which covers: 1) the validity of the contract; 2) interpretation of the contract; 3) rights and obligations of the parties; 4) performance of the contract; 5) consequences of non-performance or improper performance of the contract; 6) termination of the contract; 7) consequences invalidity of the contract; 8) assignment of the right of claim and transfer of a debt in accordance with the contract (On Private International Law, 2005: article 47). In turn, article 9 of the Hague Principles enshrines an open list, where in addition to those listed in the Law of Ukraine "On Private International Law" spheres also mention that the chosen law covers the burden of proof and legal presumptions, as well as pre-contractual obligations (Hague Principles, 2015).

The validity of the principle of autonomy regarding the choice of law limits the law on circumvention of the law. Boyarsky E. D. notes that the application of the law is the activity of the competent bodies of the state. Since the subject of the application of conflict law rules is the court, it follows that the court is the subject of circumvention of the law. In particular, the definition contradicts that enshrined in article 5 of the Law of Ukraine "On Private International Law" the principle of autonomy of will, according to which in cases provided by law, the participants may independently choose the right to such legal relations, departing, in fact, from those established by the legislator conflict of law prescriptions (Boyarsky E.D, 2015: 162).

However, despite the possibility to choose the law, in the case where the choice of the parties can not be clearly expressed, in accordance with article 44 of the Law of Ukraine "On Private International Law" applies the law that has the closest connection. The closest connection is traditionally understood as the formula of attachment, which forms a flexible conflict rule. The flexibility of this concept is based on the lack of clear criteria for determining the closest relationship of a legal relationship with a particular legal order. However, the lack of clear criteria can be seen as a positive feature of the closest relationship, which provides this phenomenon more frequent use (Chevychalova J.V., 2016: 120).

The law chosen by the parties is an essential condition and must be reflected in the content of the contract. In addition, special attention when choosing an applicable law should be paid to the issue of circumvention of the law, because the Law of Ukraine "On Private International Law" does not provide its definition, only indicating its consequences.

As for the type of contract, according to Law № 5073, providing grant assistance is possible by conducting the charitable donation agreement. By its legal nature, a «charitable donation agreement» is a kind of "donation agreement" (the main provisions of which are contained in article 729 of the Civil Code). As for the "donation" as a subject of the contract, in article 729 of the Civil Code, "donation" is provided to achieve a certain, pre-agreed goal.

So based on the "donation agreement" definition in the Civil Code, the donor undertakes to transfer a gift free into the ownership. The key legal obligation here is the obligation of the donor to transfer the gift. This obligation is fulfilled by handing over the gift, or by handing over documents confirming the ownership, or other documents proving that the gift belongs to the donor. At the same time, there are differences between the "charitable donation agreement" and the "donation agreement" enshrined in the Civil Code. First, the subject of the charitable donation agreement cannot be property rights. The subject of a "donation agreement" is assigned for specific, pre-agreed purposes (at the same time, the subject of a "charitable donation agreement" could be only assigned for charitable purposes, according to the Law № 5073-VI).

Also, it should be mentioned, that in most cases, grant aid providers (donors) choose a competitive process for determining the beneficiaries (recipients of grant aid). In this case, grants are provided based on the results of competition programs announced for non-profit organizations. During which the project must go through the procedure for applying for a grant and, in case of winning the competition, receive funds (assistance). Thus, when announcing a grant competition, the benefactor applies with an informational proposal to agree on certain conditions; accordingly, the agreement's essential terms must be indicated in the announcement of the competition. The result of the competition is the conclusion of an agreement on the provision of a grant with the winner of the competition.

Regarding the essential conditions of the grant contract, M.O. Mikhailiv suggests recognizing the following conditions: subject; the purpose for the funds, resources and services; the rights and obligations of the donor and recipient; the duration of the assistance (for example, a one-time transfer or within a certain period); the procedure for coordinating the provision of grant; the timetable for the implementation of measures; the procedure for using the transferred equipment or its acquisition; the procedure for reporting to the donor; cost estimate for project

implementation; responsibility of the recipient for misuse of the benefit; other conditions agreed by the parties (Mikhailiv M. O., 2010:183).

Following the standard form of the grant agreement, approved by the State Institution "Ukrainian Cultural Fund", the essential conditions of the grant contract are the subject of the agreement, the purpose of the funding, the timing of the project, the amount of the grant, the procedure for payments and the procedure for settlements; rights and obligations of the parties; responsibility of the parties; ownership of the completed project; allowable costs; accounting and technical control; early termination of the contract; force majeure circumstances (force majeure); settlement of disputes; other conditions (Standard Form of the grant agreement, 2018).

Conclusion. Thus, the grant contract is a subtype of a donation agreement, the general provisions of which are contained in the Civil Code. However, because of the specifics of the grant as a subject of legal relations, the agreement on grant assistance must indicate the purpose and the period for which grant assistance is provided, rights and obligations of the parties, including the procedure for monitoring the use of grant funds. In addition, if a foreign benefactor provides the grant aid, the contract must specify which legal order must be applied to such an agreement.

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