

Mandate / Negotiorum Gestio

1. Mandate: Consensual contract

- Request+agreement: If, upon request of a party (mandator), the counterpart (mandatarius) agrees to carry out the affairs of the former, a contract of mandate is concluded.
- The mandatarius' obligation is 'to carry out' the mandator's affairs, not to bring about an agreed 'result'. No guarantee as to the 'success' of the operation.
- A relationship of trust; mandatarius' duty of care.
- Expenses of carrying out the affairs must be reimbursed. But 'fee arrangement' is not essential.
- No mandate as to one's own affairs.

2. Mandate and agency

- Creation of agency (granting the power of attorney) is not an essential element of a contract of mandate.
- Mandator's request may consist of any lawful manner of carrying out the mandator's affairs (factual, legal, economic, non-economic).
- 93Da4472: Police requested a hospital to treat a victim of an accident. The hospital treated the patient following the police's request. No mandate. Whose 'affair' was it?

3. Mandate and partnership contract

- A partner who carries out the partnership business owes a duty of care to the partnership, rather than to the other partner or to any particular partner. 2004Da30682
- Article 681 (mandatarius' duty of care) applies mutatis mutandis to a partner when he carries out partnership business (Article 707).
- But this does not mean that a partner is a mandatarius

of another partner or a mandate is automatically created or exists between partners.

- A partner cannot be a mandatarius of the partnership business (because the partnership business is his own affairs as a partner).

4. Mandatarius' duty of care

- Even if no fee is agreed, mandatarius who freely accepted to carry out the mandated business must do so with the level of care expected of a good manager (*bonus paterfamilias*)
- 2000Da55775: Sales agent (mandatarius) of a manufacturer of heavy plant (mandator) has the duty to scrutinize the creditworthiness of buyers and obtain adequate security to ensure payment of price.
- 96Da22365: Estate management company (mandatarius) held liable for failure to inform the residents' governing body (mandator) of the newly available choice in electricity supply contract for the apartments complex. The residents thus remained with the existing electricity supply contract which was less favourable than the newly available supply contract.
- Even if mandator made a 'specific' request, the mandatarius (especially, the ones with professional expertise) must offer competent advice as to the consequences of the requested course of action:
 - 2000Da61671: A notary was asked to cancel the existing hypothec (which was in the name of mandator's wife) and register a new hypothec in the name of the mandator. At the time of the request, however, the property was attached by another creditor (after the hypothec had been registered). The notary had a duty to explain that the existing hypothec could have been 'assigned' to the mandator without losing the priority over the attachment. Hypothec which is registered after

the attachment has no priority over the creditor who attached it.

- 2005Da38294: An importer of rye seed requested a customs broker to apply for the 0 rate customs for the seed indicating that the seed would qualify for exemption of customs duty. The customs broker followed the request and no duty was paid. The customs authority concluded that the rye seed is subject to customs duty and the importer was ordered to pay a penalty rate of customs duty.
- 2001Da71484: Estate agent who has not (yet) received the fee nevertheless has the duty of care. Mandator's breach (non-payment of the agreed fee) does not "automatically" terminate the mandate or relieve the mandatarius of his duty of care.
- 2004Da7354: A lawyer (mandatarius) retained for a case must provide advice for the client (mandator) **even after the conclusion** of the particular litigation where an unfavourable judgment was rendered (the prospect of successful appeal and steps to be taken to correct the obvious errors of the judgment)
- The same rule applies to a contractor: (Supreme Court case 2014Da31691) The owner instructed to use bricks to build a retaining wall which was quite high. The contractor carried out the work as instructed without explaining that using bricks is not appropriate when the retaining wall is high and that alternative methods should be used. After the work is completed, the retaining wall began to crack and to crumble down. The Supreme Court held that "regardless of the demand of the owner, the contractor, as a professional of civil engineering and construction, has the basic duty to make sound judgment to achieve the safety, durability and appropriateness of the retaining walls which are to be built on a slanted terrain." The contractor's defence that he merely complied with the owner's demand was rejected.

5. Mandatarius' duty to account, etc.

- Must give an account of the affairs upon mandator's request and at the end of the mandate. Art. 683
- Must hand over to the mandator what was received in the course of carrying out the mandator's affairs. Art 684
- Mandatarius may, only in unavoidable circumstances, entrust the mandated business to a sub-mandatarius. On the other hand, mandator may authorise mandatarius to do this. Sub-mandatarius owes the duty of care directly to the mandator as well as to the mandatarius. Art. 682

6. Mandator's obligations

- Must reimburse the mandatarius' expenses which were necessary to carry out the mandate. Interest begins to accrue from the moment the expenses have actually been spent. Art 688(1). Whether the expenses were 'necessary' shall be determined in light of the duty of care. Expenses negligently spent (wasted) may not be claimed. As long as the mandatarius was not negligent, even if the expenses subsequently turn out to be unnecessary, they will still have to be reimbursed so long as the mandatarius incurred the expenses upon a *reasonable* belief that they were necessary.
- If mandatarius obligated himself in the course of carrying out the mandate, mandator shall be required to discharge such obligation on behalf of the mandatarius (upon demand of mandatarius). Instead of demanding the mandator to discharge the obligation, mandatarius may demand mandator to provide adequate security (to ensure reimbursement). Art. 688(2)
- Mandatarius may demand an advance payment of necessary expenses. Art. 687 Any surplus which is left over must be returned to mandator. Art. 684(1). If mandatarius had to rely on a judgment to claim and receive an *advance payment*, and if it turns out that the estimated expenses turn out to be inaccurate (too much or too little), what

about *res judicata*?

- 93Da43873: First demand bank guarantee. If it is objectively manifest that the beneficiary's demand is abusive, the guarantor (mandatarius) has a contractual duty to refuse payment. If the guarantor nevertheless paid to the beneficiary under such circumstances, the debtor (mandator) may refuse to reimburse the guarantor's expenses as they were negligently 'wasted'.
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- Must hold mandatarius harmless: If mandatarius, through no fault of his, sustained loss caused by a third party in the course of carrying out the mandate, the mandator must compensate (even if the mandatarius acquires a claim against the party who caused the loss). Art. 688(3). Upon compensation, the mandator may exercise the mandatarius' claim against the party who caused the loss (subrogation under Art. 481).

7. Termination at will; Art. 689

- Either party may terminate mandate provided that it was not at a moment which would adversely affect the counterpart. If, due to the timing of the termination, it caused loss to the counterpart, the loss must be compensated.
- 98Da64202: Even where a fee was agreed, mandator may terminate without having to compensate for the mandatarius' loss of the fee. Only the loss caused by the 'timing' of termination needs to be compensated. Where a fee was agreed to be paid 'upon completion of a task', the mandator may terminate before the completion of the task. In such a case, the mandatarius would lose the fee (because the task was not completed). Such termination is not necessarily a termination at a time which is disadvantageous to the mandatarius.
- 98Da47108: Mandatarius was being paid a salary and there was a covenant not to terminate the mandate for the

first two years. Mandate is in the interest of mandatarius as well as mandator. Although termination is still possible, if the mandator's termination was without justifiable ground, the resultant loss to the mandatarius must be compensated.

- If mandatarius has already incurred an obligation to a third party in order to carry out the mandate, mandator may not terminate with impunity. Termination, under such circumstances, is at a moment which would adversely affect the counterpart. Termination is possible but mandator must hold the mandatarius harmless. Incurring an obligation to a third party is already an "expense" of the mandatarius.

8. Termination by operation of law; Art. 690

- Death, bankruptcy of a party.
- Mandatarius' loss of full capacity.
- Emergency measures: Mandatarius' successor has a **duty**/right to take emergency measures until the mandator (in the case of mandator's death, his successor) can handle the business for himself. (Art 691)
- The party affected by death or bankruptcy must notify the counterpart of the termination. Until such notice is made, the counterpart may treat the mandate as valid. Art. 692 (vis-à-vis the counterpart). Also see Art. 129 (vis-à-vis third party)

9. Other relationships where mandatarius' duty of care is applicable *mutatis mutandis*

- Partner in the execution of a partnership business (Art. 707)
- Director in carrying out the company's business (Art. 382 of Commercial Code)
- Court appointed Manager of absentee's assets (Art. 24)
- Parent or guardian in managing the children's or ward's assets (Art. 919, Art. 956)

- Creditor who exercises the debtor's right via *action oblique*
- Assignor of a credit who received the payment from the debtor before the notice of assignment is served to the debtor (97Do666)
- Guarantor who provided a guarantee for a debtor upon the debtor's request. 93Da43873

10. Negotiorum Gestio