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Legal characteristics of brokerage contracts

SUMMARY

PhD Thesis prepared at the Department
of Economic and Commercial Law
under the supervision of
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in the discipline of legal sciences

Lodz 2023

Brokerage contracts are a group of contracts commonly discussed in the legal doctrine. Nevertheless, the reasons and criteria for their separation, as well as the characteristics of the contracts included therein, are not obvious. The achievements of the Polish jurisprudence so far include, above all, publications concerning specific aspects of particular types of contracts. However, there is no civil monographic study devoted to brokerage contracts in general. The aim of the dissertation is to fill this gap, and in particular to explain: what features determine whether a specific type of contract belongs to brokerage contracts; what is brokerage in legal terms; what are the similarities and differences between the types of brokerage contracts and the legal consequences of perceiving them as a group of contracts.

Inductive reasoning is used to achieve the above-mentioned research objectives. In the first place, it consists in determining the basic design features of named and unnamed types of contracts, which are commonly classified as brokerage contracts. The generalization of the conclusions from the analysis of individual types of contracts makes it possible to identify their common elements (obligatory and optional ones) and the differences between them. The above also makes it possible to define the boundaries of a group of brokerage contracts, and consequently indicate contracts that do not belong to this set.

The presented concept of research (reasoning) has been implemented in eight chapters of the study. The first one includes introductory remarks concerning the justification for the choice of the topic of the study, the scope and order of considerations, as well as research methods. The second chapter introduces the issue of brokerage contracts by presenting the origins and socio-economic importance of brokerage. The main purpose of this fragment is to identify the phenomenon of brokerage and its functions in trading. Chapters three and four are devoted to the analysis of the features of brokerage contracts regulated in the Polish Code of Obligations of 1933, the Polish Commercial Code of 1934 and the Polish Civil Code of 1964, i.e. agency, commission and brokerage contracts (not applicable Articles 517–522 of the Polish Code of Obligations). Due to the need to maintain coherence and the order of considerations, the third and fourth chapters also discuss the contract of mandate and the importance of its provisions for brokerage contracts. Chapter five

presents the most important extra-code brokerage contracts, i.e.: specialized agency contracts, brokerage agreements, real estate brokerage contracts and mortgage loan brokerage contracts.

The considerations made in the first five chapters of the dissertation allow - firstly - to draw preliminary conclusions as to the premises qualifying certain types of contracts to the group of brokerage contracts. This makes it possible to identify contracts that do not belong to this group (mandate contracts, franchising contracts, distribution contracts, acquisition contracts and consultancy contracts) and the reasons for the assessments made in this regard. They are presented in chapter six. Secondly, determining the features of brokerage contracts is the basis for identifying the similarities and differences between them. Their consequence is the divisions and typologies of brokerage contracts distinguished in the doctrine and jurisprudence, referred to as types of brokerage. The seventh chapter is devoted to this problem.

The dissertation includes the final conclusions in the eighth chapter, in which an attempt was made to answer the research questions. The main conclusion of the considerations is that the basis for distinguishing brokerage contracts from other contracts, and at the same time the binder connecting this group, is the presence of an brokerage element on their basis, which most often constitutes a non-monetary performance of the broker. Brokerage means a service consisting in performing factual activities aimed at concluding a contract or economic exchange between parties other than a broker (brokerage) and (possibly and additionally) direct or indirect substitution of at least one of them. Therefore, each brokerage contract contains the broker's obligation to mediate.

Additional characteristic elements of brokerage contracts in relation to the provision of a broker are the commission nature of the broker's remuneration and the obligation of loyalty of the parties. They do not constitute necessary or sufficient grounds for classifying a specific contract as an brokerage contract. The broker's remuneration may have a form other than commission (fixed remuneration). Moreover, not every brokerage contract has to be payable. On the other hand, the duty of loyalty

also characterizes contracts whose subject matter is not brokerage (e.g. an insurance contract).

The basic elements distinguishing individual types of brokerage contracts refer to their subjective aspect (commercial and non-commercial brokerage), the presence or absence of a substitution element therein (*sensu stricto* and *sensu largo* brokerage), permanence or occasional performance of the broker (permanent and occasional brokerage), the named or unnamed legal nature of the contract and the method of specifying the subject of the target contract in the act (general and special brokerage).

An important conclusion of the study is that the current code system for regulating brokerage contracts is not an optimal solution and needs to be changed. Contrary to the legal status under the Polish Code of Obligations and the Polish Commercial Code, occasional (one-off) brokerage contracts are currently unnamed contracts for the provision of services, the legal regime of which should be determined in the first place on the basis of the provisions on the contract of mandate (Article 750 of the Polish Civil Code). The latter do not fully correspond to the legal nature of brokerage contracts. Correcting the described legislative solution by the judiciary requires complicated interpretative procedures. As a result, the study presents the author's concept of code regulation of the contract for temporary brokerage services, including draft regulations with justification.

In the last chapter of the dissertation, the *de lege ferenda* postulate (formulated in the course of work on the Akademicki Projekt Kodeksu Cywilnego) regarding the group regulation of brokerage contracts based on the functional (economic) approach to brokerage was also critically addressed. The conducted research justifies the maintenance of the traditional criterion of the taxonomy of contracts in the form of a characteristic performance. They also argue for the need to improve the existing solutions of the Polish Civil Code, based on a separate, typological regulation of individual types of brokerage contracts and leaving the issue of their taxonomy to doctrinal considerations.