THE LEGAL CAPACITY OF THE PARTIES, AS A VALIDITY CONDITION FOR THE MANDATE CONTRACT

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Abstract: *This article aims to bring attention to the mandate contract, under the aspect of its validity conditions, more precisely the legal capacity required of the parties to be able to conclude such an agreement. First of all, the mandate contract must meet the general requirements for the validity of contracts, stipulated by art. 1179 para. (1) Civil Code. Regarding the form of the power of attorney, art. 1301 Civil Code specifies the fact that it will be effective only if it is given in compliance with the forms required by law ad validitatem for the conclusion of the contract that the representative is to make on behalf of the represented. In addition to these general conditions of contract validity, the conventional representation by mandate, in order to be effective, also requires the fulfillment of certain specific conditions, which essentially relate to the manifestation of the legal will of the participants in this tripartite operation, namely: the will of the representative to represent; the will of the represented to be represented; the will of the representative to perform legal acts through representation; the externalized will of the representative to represent and perform legal acts with the contracting third party and the externalized will of the third party with the value of accepting the contract with the representative (contemplatio domini).Therefore, the requirements for the valid and effective conclusion of the mandate contract must be assessed at the time of the conclusion of the convention, but in order for it to reach its final goal, consisting in the performance by the agent of the business entrusted by the principal, the requirements for the valid and effective conclusion of the targeted act, at the time of its completion, must also be met. Out of all these conditions claimed for the valid conclusion of the mandate, we have chosen to focus our attention in this study on the capacity required of the parties to contract, necessary so that conventional representation, as a tripartite operation, which involves a source act (the mandate agreement) and one/more targeted acts (the act/s concluded by the agent with third parties in the name and on behalf of the principal) will be validly formed.*

Keywords: *mandate; legal capacity; trustee; principal.*

JEL Classification: *K11; K12; K15; K22*

1.Introduction: doctrinal discussions about the validity conditions of the conventional mandate

The mandate, as an *"intuitu personae"* contract, claims for its valid conclusion the respect of both the general conditions of convention validity, provided in art. 1179 para. (1) of the Civil Code (the capacity of the parties to contract, the valid and unblemished consent, the valid object and a legal and moral cause), as well as some requirements specific to the mechanism of conventional representation, namely: (1) the existence of the power of representation; (2) the existence of the intention to represent, brought to the attention of the contracting third party; (3) manifestation of the representative's valid, free and untainted will. We also believe that for the valid performance of conventional representation, in addition to the valid, free and unblemished will of the representative, revealed as a condition by the doctrine, the same requirement must also be met in the person of the represented person, in order to empower another person to conclude a legal act whose effects are to be produced upon his person and his patrimony.

Regarding the capacity of the parties to contract, the doctrine recorded controversies generated by the question whether it is necessary or not for the representative to have full exercise capacity in order to validly conclude the legal operation for which he was empowered. First of all, there is the question of whether the trustee solely expresses the will of the principal at the conclusion of the act for which he was commissioned, or whether he also expresses his own will. Because if we believe that it only expresses the will of the principal, it will be enough that the latter has the ability to conclude the targeted act; as far as the trustee is concerned, he will only have to express a valid consent (that is to have discernment), that is also unblemished (art. 1299 Civil Code). If, on the contrary, we believe that the representative expresses his own will at the conclusion of the targeted act, then he will have to have the ability to conclude that act himself.

As far as we are concerned, we tend to believe that the trustee expresses not only the will of the principal in the execution of the power of attorney received, but also his own will. Secondly, we believe that it is necessary to differentiate between two aspects: is it necessary for the agent to have full exercise capacity to be able to validly conclude the targeted act, or he is required to only have the capacity required of the principal himself to be able to conclude the respective operation ? Of course that under the conditions of explicit regulation established by the legislator in the new Civil Code, the clarification of this aspect is easy: art. 1298 Civil Code claims both the represented and the representative, *"the capacity to conclude the act for which the representation was given."* Therefore, the capacity required of the agent will have to be related to the nature of the legal act for the conclusion of which he was authorized by the principal. As far as the principal is concerned, he must have the capacity required by law to be able to conclude the legal acts for which he instructs the trustee.

It must be emphasized that the legal regime applicable to the legal entity, in its capacity as principal, is more severe than that enjoyed by the natural person, who can be held responsible for the excessive acts of his agent only under the conditions of art. 1309 paragraph (2) Civil Code, that is, when the third party contracting in good faith can invoke against the principal the existence of an

apparent mandate. The legal person, on the other hand, in relations with third parties, *"is bound by the acts of its bodies, even if these acts exceed the power of representation conferred by the act of incorporation or statute, unless it proves that the third parties knew it at the time of conclusion of the act"* (art. 218 para. 2 Civil Code). This means that in relation to contracting third parties, the limits of the powers of representation of the bodies of the legal entity are considered to be those established by law, while those set by the principal himself (by conventional mandate) being opposable to third parties only if they are known by them. However, these legal regulations only concern the representation of the legal entity through its administrative bodies; on the other hand, the legal entity can also appoint its representatives under the conditions of common law, who will be agents subject to the provisions of the Civil Code regarding the mandate contract, so they will be able to act on behalf of their principal (that is, the legal entity represented) only within the limits of the mandate conferred to them, under the conditions of art. 2017 Civil Code.

Regarding the criteria for interpreting the limits of the powers of the trustee, two orientations have been outlined in doctrine and jurisprudence: one that supports the need for a strict and limiting interpretation of the scope of the general mandate and another that favors a more permissive interpretation of it. As far as we are concerned, we share the second orientation, as we consider that acts of disposition are not prohibited to the general trustee in an absolute manner. According to art. 2016 para. (1) Civil Code, the general trustee can only administer, but this right must be understood in its entirety. Thus, in practice, the administration of an estate involves, in addition to preservation acts, also acts of administration, as well as some acts of disposal of some of the assets of the principal, acts which, related to his patrimony as legal universality, are limited to the purpose of good administration. Also, the Civil Code stipulates that the trustee has the obligation to preserve the assets of the principal during the execution of the mandate (art. 2019 para. 2) and that the acts of preservation may include the sale of these goods, in cases of emergency (art. 2024 para. 2).

Regarding the form of proxy, art. 1301 Civil Code specifies, in a general manner, the fact that it will only be effective if it is given in compliance with the forms required *ad validitatem* by law for the conclusion of the contract that the representative is to conclude on behalf of the represented. In the context of doctrinal discussions about the form conditions of the mandate contract, controversies arose related to the validity of the tacit mandate. The regulation contained in art. 2013 para. (1) of the new Civil Code does not repeat the provision of art. 1533 of the old Civil Code, which explicitly recognized two types of mandate: the tacit mandate and the explicit one. Therefore, the doctrine raised the question whether, under the new provisions, the tacit mandate can still be recognized, the current regulation making explicit reference only to the tacit acceptance of the mandate, but remaining silent on the tacit offer to contract. We believe that this issue has been clarified, since jurisprudence and doctrine have repeatedly confirmed the admissibility of any means of proof of the tacit mandate, both regarding its conferment and acceptance, these means of proof being left to the discretion of the courts of judgment. Thus, the proof of the tacit mandate can be produced both by the parties and by third party contractors or other third parties, through any means of evidence allowed by law, which prove the undoubted intention of the parties to confer or accept the mandate,

regardless of the value of the act for the conclusion of which the mandate was conferred. The requirement of a document necessary *ad probationem* would contravene the very notion of a tacit mandate, since the written mandate is, by definition, explicit.

In our article, we shall focus on the analysis of the legal capacity of the parties to contract, as a fundamental condition necessary for the valid conclusion of the mandate contract.

2. The legal capacity required of the parties to conclude a mandate contract

Regarding the capacity of the parties to contract, the relevant rules are, according to art. 1181 Civil Code, mainly those regulated in Book I of the Civil Code, entitled *"About persons."*

However, in addition, the legislator enshrines specific regulations for the institution of representation (art. 1295-1314 Civil Code), where there is also a special provision regarding the capacity required of the parties in the case of conventional representation, a provision that is obviously incidental to the matter of the mandate.

Thus, art. 1298 Civil Code explicitly mentions that *"in the case of conventional representation, both the represented and the representative must have the capacity to conclude the act for which the representation was given."*

This unequivocal legal regulation puts an end to doctrinal controversies prior to the new Civil Code, generated by the question of whether or not it is necessary for the representative to have full exercise capacity in order to validly conclude the legal operation for which he was empowered.

In French law, for example, art. 1990 Civil Code explicitly stipulates that *"an unemancipated minor can be chosen as a trustee"*, of course with the consequence that he will only be held accountable by the principal within the limits in which the law allows minors to oblige themselves. Thus, *" the incapacity of the representative does not constitute an obstacle to the validity of a contract that he concludes on behalf of the represented one"* (Mazeaud et al., 1998: 147).

Similar opinions were expressed in Romanian doctrine as well.

Thus, some authors (Hamangiu et al., 1943: 107; Alexandresco, 1910: 570-571; Safta-Romano, 1999: 237; Murzea et al., 2007: 7) expressed the opinion that it is sufficient for the representative to have limited exercise capacity, since the effects of the act he concludes with the third party contractor will be produced on the represented, not on him.

A similar opinion (Vasilescu, 2003: 221), somewhat more nuanced, is the one that claims that the representative must have full capacity to exercise only at the time of concluding the representation agreement, because by this he is personally bound; regarding the act that he concludes on behalf of the represented, since this does not bind the representative, but the represented, it is sufficient for the authorized person to express an untainted consent at the time of making the agreement with the contracting third party, not being required to have the ability to bind himself in relation to the completed act. Therefore, the minor with limited exercise capacity could conclude, as a representative, a legal act that he could not validly perform for himself.

These opinions were contested by other authors (Deak, 1999: 344-345; Ghimpu et al., 1960: 323; Chirică, 1997: 258-259; Sanilevici, 1982: 201-202; Firică, 2013: 324), who argue that when concluding a contract through representation, the representative must have full capacity to exercise, in order to be able to express a valid consent, as he is not just a passive element of the mechanism of representation, a simple bearer of the will of the represented person, but expresses his own will when completing the contract. His own will intervenes in the execution of the power of attorney, since the representative has a certain freedom of action regarding the way of carrying out his mission, which is limited only by the object and the limits of the power of representation set by the represented. Thus, it was argued that the representative should not be confused with a simple spokesperson (*nuntius*) of the represented one, differing from him precisely by the freedom of decision that the latter allows him, within the limits indicated in the proxy.

All these doctrinal views call for some commentary.

First of all, one must answer the question whether the trustee expresses the will of the principal at the conclusion of the act for which he was commissioned, or he also expresses his own will. Because if we believe that he only expresses the will of the principal, it will be enough that the latter has the ability to conclude the targeted act; as far as the trustee is concerned, he will only have to express a consent that is valid (to have discernment) and unblemished (art. 1299 Civil Code). If, on the contrary, we conclude that the representative expresses his own will at the conclusion of the targeted act, then he will have to have the ability to conclude that act himself.

Although the legislator repeatedly and explicitly indicates (art. 1309 para. 1; art. 2017 para. 1) that the representative will have to act only within the limits of the powers conferred by the represented in order for the act concluded with the third party to oblige the latter, however, stipulates some provisions that leave a certain freedom of action and initiative to the representative, which could make one conclude that his own will plays a role in the execution of the power of attorney.

Thus, paragraph (2) of art. 2017 Civil Code explicitly states that the trustee *"can deviate from the instructions received, if it is impossible for him to notify the principal in advance and it can be assumed that the latter would have approved the deviation, had he known the circumstances justifying it"*, provided that the principal is notified immediately. Also, art. 2023 para. (2) Civil Code stipulates that the agent, although personally bound to carry out the mandate, may still substitute a third party, even without an express authorization from the principal, if unforeseen circumstances that cannot be brought to the attention of the principal make the personal execution of the mandate impossible, and it is assumed that the principal would have approved the substitution, had he known these circumstances. In case of unauthorized substitution, the agent also has the obligation to bring it to the attention of the principal immediately. Finally, the legislator also provides that, even in the absence of a special mandate (that is necessary in principle for any acts of disposition, according to art. 2016 paragraph 2 Civil Code), in cases of emergency, the trustee can proceed to sell the assets of the principal, with the diligence of a good owner, in order to preserve their value, if the goods are at risk of depreciating, with the repeated condition of immediately notifying the principal (art. 2024 Civil Code). Moreover, not only the trustee himself, but even his heirs or representatives have

the obligation to continue the execution of the mandate even after the occurrence of a reason for terminating the contract (death, incapacity or bankruptcy of one of the contracting parties), in order to avoid jeopardizing the interests of the principal/ of his heirs, if such a risk would result from the delay in execution.

Therefore, although the legislator establishes, as a matter of principle, the obligation of the trustee to act only within the limits set by the principal, he allows the agent, in expressly and limitedly indicated situations, to exceed these limits. However, one cannot fail to notice the fact that such deviations from the mandate are allowed only for the purpose of protecting the principal's interests and only under the condition that the latter cannot express his will in the sense of extending the limits/duration of the mandate. We believe that this freedom of initiative that the legislator allows the agent is actually based on the presumed will of the principal to approve the respective acts of the agent, the trustee never being able to act, even in such situations, against the will of the principal, but only on the basis of the principal's will, which in such cases cannot be explicit, but only legally presumed. Moreover, this presumption is a relative one, the principal being able to prove the contrary, in order to engage the trustee's responsibility for the excessive acts, proving that he had knowledge of the contrary will of the principal. At the same time, the principal retains in any circumstances the right to revoke the mandate, based on art. 2031 para. (1) Civil Code. Also, nothing prevents the principal from giving precise and imperative instructions to the agent regarding not only the object or the duration of the contract, but also regarding the manner of executing the mandate, instructions that the agent will be required to comply with, since he accepted the mission.

The mandate is, in principle, according to its nature, a contract concluded in the interest of the principal, the latter retaining throughout its execution by the trustee the ability to modify it, to hold the trustee accountable for his management (art. 2019 para. 1 Civil Code) and in the last resort to revoke it *"at any time"* and without owing any explanation to the trustee, and, more than that, even breaching a contractual clause by which the parties would have declared the contract *"irrevocable"* (art. 2031 para. 1 Civil Code).

However, we believe that one must look at the mandate from a realistic perspective, compared to what it has become over time: it is no longer a service done between friends, free of charge and in the exclusive interest of the principal. The mandate has become professionalized: it represents, at the present time, a legal framework that allows the performance of professional services, in the performance of which the mandate holders have a greater freedom to choose the optimal methods by which to exercise their duties. Moreover, the agent himself often has a vested interest1 in carrying out the business entrusted by the principal, a situation in which his freedom of action is all the more meaningful, and his own will expressed at the conclusion of the targeted act, all the more obvious. Therefore, as far as we are concerned, we believe that the trustee expresses not only the will of the principal in the execution of the power of attorney received, but also his own will.

Secondly, we believe that it is necessary to differentiate between two aspects: is it necessary for the agent to have full exercise capacity in order to be able to validly conclude the targeted act, or is he required to only have the capacity required of the principal himself to be able to conclude the respective operation? This is because, as we well know, those who lack full legal capacity, and even those

who are incapable, can conclude certain legal acts, within the limits established by law.

Of course that under the conditions of the explicit regulation established by the legislator in the new Civil Code, the clarification of this aspect is easy: art. 1298 Civil Code imposes for both the represented and the representative, *"the capacity to conclude the act for which the representation was given."*

Therefore, the capacity required of the agent will have to be related to the nature of the legal act for the conclusion of which he was authorized by the principal.

On the other hand, art. 41 para. (3) Civil Code provides that the minor with limited exercise capacity can conclude by himself preservation acts, administration acts that do not prejudice him, as well as disposition acts of small value, current in nature and executed on the date of their conclusion. Therefore, if the mandate contract itself, as well as the act with which the trustee is charged, belong to this category, we believe that it is also possible for them to be validly fulfilled by a minor trustee with limited exercise capacity, who acts alone, without the consent of his legal guardians.

Of course, the mandate will rarely be included in the category of acts listed by the quoted legal text, but it does not mean that this would be impossible. Besides, we don't see why it wouldn't be possible for a minor over 14 years of age to be empowered to conclude, for example, current acts of small value for the principal, as long as the minor, and even an incapacitated individual, could conclude such acts for their own benefit.

Moreover, the possibility for the minor with limited exercise capacity to become a trustee was enshrined by the initial regulations of the Civil Code from 1864, art. 1538, which provided that emancipated minors could be elected proxies, but this article was later amended by the Decree no. 185 of April 30th, 1949.

If, however, the mandate agreement or the act concluded by the trustee with limited exercise capacity cannot be included in the category of those acts that the legislator, by art. 41 para. (3) Civil Code, allows the person with limited exercise capacity to conclude by themselves, then they will be affected by relative nullity, even without proof of a prejudice (art. 44 Civil Code).

On the other hand, we consider that a mandate is perfectly valid, as well as the act concluded based on it, regardless of its nature, but on the condition that it is not an act prohibited by law to minors, even if the trustee is a minor with limited exercise capacity, if he obtains, at the latest, at the time of concluding the documents, the consent of his parents or, as the case may be, of his legal guardian, and in the cases provided by law, also the authorization of the guardianship court, both for the mandate contract and for the act that the minor concludes based on it (art. 41 para. 2 Civil Code). Some doctrinaires embraced this opinion even under the regulations of the 1864 Civil Code (Cosma, 1969: 96).

However, the legislator also establishes an exception, showing that *"a person lacking legal capacity or with limited legal capacity cannot be executor of a will"* (art. 1078 Civil Code). Therefore, the testamentary executor (trustee appointed by the testator, or by a third party appointed by the will, with the purpose of executing the testamentary dispositions, according to art. 1077 para. 1 Civil Code) will necessarily have to have full legal capacity.

As regards those who lack legal capacity (minors who have not reached the age of 14 and those prohibited by the court), although the legislator allows them to conclude on their own, in addition to the specific acts provided by law, also preservation acts, as well as disposition acts of small value, current in nature and executed at the time of their conclusion (art. 43 para. 3 Civil Code), we do not consider that these persons can validly conclude contracts as representatives, since, on the one hand, the mandate cannot be included in the category of acts that the legislator allows the incapable to conclude, and on the other hand, these persons, being totally lacking in discernment, could not express a valid consent at the conclusion of the targeted act, as required by art. 1299 Civil Code. Moreover, this conclusion results from the *per a contrario* interpretation of the provisions of art. 2030 para. (1) letter c) Civil Code. Thus, if the mandate is extinguished by the incapacity of the trustee, it follows that a mandate concluded with an incapacitated person cannot be valid. However, legal doctrine has also recorded opinions in the sense of admitting the validity of a mandate conferred to an incapacitated person (Firică, 2013: 324).

The legislator also establishes certain exceptional situations, in which the mandate must be continued by the trustee who has become incapacitated (as a result of his being placed under a court ban), but he will have to exercise his powers through his representatives.

Thus, paragraph (2) of art. 2030 Civil Code states that, in the case of the mandate whose object is the conclusion of successive acts within an ongoing activity, it will continue despite the occurrence of a cause for its termination, including incapacity of the trustee. Moreover, regardless of the type of activity that is the object of the mandate, its execution will have to be continued even after the incapacity of the trustee (or other causes of termination of the mandate, provided by art. 2035 Civil Code), if the delay risks putting in danger the interests of the principal or those of his heirs (art. 2035 para. 2 Civil Code). From the interpretation of the aforementioned legal regulations, we deduce that in such situations, the trustee who has become incapacitated will not be able to continue the execution of the mandate personally, but this obligation will have to be carried out through his representatives, which is natural, considering the fact that, as we have said, the execution of the mandate does not fall into the category of those acts, mentioned by art. 43 para. (3) Civil Code, which the incapacitated person can conclude by himself.

We believe that the occurrence of the trustee's *"incapacity"*, as it is understood by the legislator as a cause for the termination of the mandate, only means placing him under judicial prohibition. It does not call for, as argued in doctrine (Deak, 1999: 345; Firică, 2013: 324), the necessity of the full exercise capacity of the trustee. The incapacity can only occur as a result of the person being placed under a judicial ban, due to his lack of discernment, while a restriction of the trustee's capacity to exercise cannot occur after the conferment of the mandate, it being a state that characterizes the minor until reaching the age of adulthood. It is true that the measure of placing an individual under judicial prohibition, according to art. 164 para. (2) Civil Code, can also be ordered on minors with limited exercise capacity, but they are not considered from start as incompetent, but only if it is found in court that they do not have the necessary discernment to look after their own interests. Therefore, in the case of minors with limited exercise capacity, we believe that they

are capable of becoming trustees, as long as they are not placed under a court ban (this statement is also valid for adults with full exercise capacity).

Of course, it is unlikely that a person will choose to be represented by a trustee with limited exercise capacity, considering that he will be able to be held responsible for the concluded documents, both to the principal and to the contracting third party, only according to the general rules regarding the obligations of the incapable, that is only within the limits of his enrichment. Thus, according to art. 1647 para. (1) Civil Code, *"the person who does not have full exercise capacity is not required to return benefits except to the extent of his enrichment, assessed on the date of the request for restitution."* However, the legislator states that *"they can be held to full restitution when, with intent or serious fault, they made restitution impossible"* (art. 1647 para. 2 Civil Code). In relation to the contracting third party, the principal will be bound as if the trustee had full exercise capacity (Mazeaud et al., 1963: 679-680).

As far as the principal is concerned, he must have the capacity required by law to be able to conclude the legal acts for which he instructs the trustee, considering that they will produce their effects in his person and in his patrimony, he becoming a creditor and respectively debtor of third party contractors as party to the respective operations. This means that the principal will have to be a capable person, since the occurrence of his incapacity, as a result of being placed under judicial interdiction, determines the termination of the mandate contract, according to the provisions of art. 2030 para. (1) letter c) Civil Code. However, as it happens in the case of the trustee who has become incapacitated, the legislator stipulates that in certain situations this rule is derogated from, in the sense that the mandate will continue even after the occurance of the principal's incapacity. We are referring to the exceptions provided in art. 2030 para. (2) and art. 2035 para. (2) Civil Code, which we have previously mentioned, providing the continuation of the mandate regardless of the occurance of the trustee's or principal's incapacity, or of any of the other causes of contract termination provided by the aforementioned articles. In addition, for the situation of the principal's lack of legal capacity, the Code of Civil Procedures provides for a regulation of a special nature, which concerns the mandate of judicial representation. It *"does not cease with the death of the one who gave it, nor if he became incapacitated. The mandate lasts until it is withdrawn by the heirs or by the legal representative of the incapacitated"* (art. 88 Code of Civil Procedures).

Therefore, the legislator regulates several situations that except from the rule of the capacity of the parties, in which it is possible (even mandatory, but respecting the right of revocation/renunciation of the parties) to continue the mandate even after the occurance of the principal's or the trustee's incapacity.

Another aspect that must be mentioned in relation to the capacity required of the parties is the temporal one. In the doctrine, various opinions were expressed regarding the moment at which the parties must have the capacity to exercise (at least the restricted one, in our opinion). Of course, both the represented and the representative must be capable at the time of concluding the representation convention. At the same time, the representative will have to keep this capacity at the moment of concluding the act for which he was empowered, since he is the one who expresses the consent.

The controversies arise in relation to the capacity of the represented, namely whether it must persist at the time of concluding the targeted act by the representative, or whether it is sufficient that the represented was capable at the time when he conferred the power of attorney.

Thus, an author claims that *"the representative and the represented must have full capacity to exercise at the time of concluding the contract of mandate with representation, and the representative also at the time of concluding with the third party the legal act that is the object of representation"* (Sitaru, 2010: 158), from which we infer that this capacity is not required for the represented at the time of conclusion of the targeted act.

In another opinion expressed by French doctrine, it is argued that, on the contrary, the assessment of the existence of the capacity of the principal to confer the mandate must be related to the date of its execution, and not to the date of its conferment. This author (Martin, 2003: 353-357) supports the theory of the *"continuous"* formation of the mandate contract, according to which the will of the principal to *"double"* his legal power in the person of the trustee is continuously formed and expressed throughout the duration of the mandate. As a result, the legal inability to express an effective will, at any moment it may appear, paralyzes the continuous formation of the mandate, which, under these conditions, disappears. Therefore, *"the termination of the mandate is self-evident in the case of the principal's incapacity"*, since *"the represented must be capable at the time of concluding the act performed on his behalf"* (Mazeaud et al., 1963: 611). It is fundamentally justified by the simultaneous expiry of the mandate at the moment of the occurrence of the inability of one of the parties to express the valid will that creates it.

Finally, it was also argued that the represented should have full exercise capacity at the time of concluding the representation convention, this being necessary for the valid creation of the mandate, whereas at the time of concluding the targeted act, the represented should be able to assume obligations, a capacity that will be assessed in relation to the respective act (Vasilescu, 2003: 221).

As far as we are concerned, we do not believe that a person must have full capacity to exercise to be able to confer a valid mandate, as long as the mandate and the act that will be concluded based on it can be classified among those acts that minors with limited exercise capacity can conclude by themselves, according to art. 41 para. 3 Civil Code. Moreover, if he benefits from the approval of the legal guardians and, when required, according to the nature of the object of the act to be concluded by the trustee, from the authorization of the guardianship court (when the targeted act is an act of disposition), we believe that the minor with limited exercise capacity will be able to conclude any type of legal transaction through a trustee, except for those prohibited by law to minors. As stated in the doctrine, the minor with limited exercise capacity *"can give a mandate to someone else, validly, to conclude those legal acts, which he himself can conclude personally and alone; as, if there is the prior consent of the legal guardian, he can also give a mandate for the conclusion of a civil legal act for which the law requires such consent"* (Beleiu, 1982: 120).

In specialized literature (Sanilevici, 1982: 210; Manoliu et al., 1985: 5), the opinion was expressed that the principal with limited exercise capacity will need the consent of his legal guardians and the authorization of the guardianship court

whenever the mandate has an onerous nature, being considered an act of disposition, regardless of the nature of the targeted act, which may be a preservation or an administration act. However, another doctrinaire (Deak, 1999: 343-344), brought justified criticism to this guideline, showing that the principal is required to have a capacity that depends not on the nature of the mandate itself - onerous or free of charge -, but on the nature of the act that is intended to be concluded through the trustee. Thus, for example, the mandate, even with onerous title, being related to the level of the principal's entire estate, can be an act of administration, not of disposition, if it is conferred for the performance of an act of administration of his patrimony (for example, for hiring a contractor to make repairs to some of the principal's buildings, with the aim of preventing their value depreciation). Therefore, the simple remunerated character of the mandate does not automatically give it the nature of an act of disposition, for the conclusion of which the principal with limited exercise capacity needs the authorization of the guardianship court. Thus, it is possible, indeed, that the mandate *"borrows"* the legal nature of the targeted act, it being in itself, as stated in the doctrine, only a *"neutral act"* (Rizoiu, 2009: 180-234), the purpose of which is achieved precisely by the act for which it was conferred.

Regarding the issue of the need to maintain the principal's capacity at the time the trustee concludes the targeted act, we believe that this is undoubtedly necessary, since the act will generate effects directly on his person and his patrimony, and the trustee expresses at the time of concluding the operation the principal's will to oblige, this having to be the expression of current discernment. Moreover, the legislator himself unequivocally provides that the mandate ceases due to the incapacity of the principal (as follows from art. 2030 para. 1 Civil Code), with the exception of the previously mentioned situations, regulated by art. 2030 para. (2), art. 2035 para. (2) Civil Code and art. 88 Code of Civil Procedures.

Of course, it is difficult to assess what was the internal will of the principal at the time of conferring the mandate, more precisely if he wanted to maintain the power of attorney even in the event of his subsequent incapacity. The same problem has given rise to many doctrinal controversies related to the possibility of conferring a *post mortem* mandate, the validity of which is nevertheless recognized, the power of attorney clause for the cause of death being otherwise frequently used in various types of contracts. However, the situation is different from that of incapacity: while death is a foreseeable event, and a person can explicitly express their will by legal documents for the very cause of death, on the other hand, it is difficult to presume a tacit will to continue a contract in the event of incapacity one of the contracting parties, a situation that certainly no contractor anticipates at the time of concluding an agreement. In such situations, it is the role of the representative of the incapable person to decide on the best way to achieve their interests.

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