THE MANDATE AND THE AGENCY CONTRACT

TULAI Dana Lucia
Political Economy Department, Faculty of Economical Sciences and Business Administration, Babeș-Bolyai University, Cluj-Napoca, România
dana.tulai@econ.ubbcluj.ro

Abstract: *The creation of the Anglo-Saxon system of law, the agency contract received its own rules at a European Community level by the adoption of the Council of Europe Directive no. 86/653 of 1986, regarding the harmonization of the member states legislations concerning the independent commercial agents. This directive was intended to eliminate the existing regulatory differences in the laws of the member states relating to commercial representation, which affected competition and the smooth running of trade relations within the Community. "The exchange of goods must take place under conditions that are similar to those of the single market, and this requires the resemblance of the legal systems of the member states to such an extent as to satisfy the proper functioning of the common market." (the Council Directive of the 18th of December 1986). In the Romanian law system, the commercial agents, as independent auxiliaries of traders, were submitted to the regulations of the Commercial Code, namely art. 402. Afterwards, the principles set by the named European Directive were imported to our legal system as well; this type of contract was enshrined as a sui generis agreement by the Law no. 509/2002 regarding the permanent commercial agents. This law was repealed by the entry into force of Law no. 71/2011 regarding the implementation of Law no. 287/2009 on the Civil Code, which, achieving a unitary regulation of private law relations, codifies this type of contract in art. 2072-2095.This category of independent auxiliaries, the agents, has emerged from the needs imposed by the activity of the trader, who wants to expand his activity to a more or less distant market, without increasing the costs and risks of setting up branches abroad. Through this legal mechanism, he will be able to use an individual or a legal person in order to achieve the stated purpose, granting them a remuneration for all contracts concluded by the principal as a result of their intervention. This person works as a self-employed professional, placing, in a certain area, the products of one or several principals. In market economy countries, real agent companies have been set up, in the legal form of joint stock companies, whose object of activity is the intermediation of business between companies in the country of origin and companies in other countries. In the Common Law system, commercial agents are independent intermediaries of different categories (factor, mercantile agent, broker), which are specialized in dealing with commercial operations in a certain branch of activity, but they are subjects to the same legal regime. Therefore, the agency contract is a legal mechanism characterized by increased flexibility, which better meets the current requirements of speculative activities and which, as has been rightly said in the doctrine (Prescure, 2003: 52), will gradually replace the old commission agreement. Thus, producers of goods for export frequently resort to the contract of agency, that they consider to be a simple yet efficient means of organizing the distribution of their goods outside their state of origin.*

Keywords: *agency; mandate; agent; principal; representative; represented.*

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

The new Civil Code also accomplishes for the first time in our legal system, a definition of this type of contract, as being the one by which "the principal permanently empowers the agent either to negotiate or both to negotiate and conclude contracts, in the name and on behalf of the principal, in exchange for a remuneration, in one or several determined regions." (art. 2072 para. 1 of the Civil Code).

We think that the maintenance of the name "principal", also enshrined in the Law 509/2002, is uninspired, as it can lead to confusion with the principal of the commission contract (art. 2043-2053 of the Civil Code), or even with the principal referred to in art. 1373 of the Civil Code, which would be an error, the legislator even specifying that the agent "is an independent intermediary acting in a professional capacity", therefore he cannot be at the same time the employee of the principal, so he will not be held liable for the damage caused by the agents to third parties, as if they were acting under the direction, supervision and control of the principal.

As far as the legal nature of the agency contract is concerned, it is the subject of doctrinal controversies, generated in part by the way in which Law no. 509/2002 used to stipulate on the object of the contract; as we will see, even the current regulation of the Civil Code is likely to create some confusion.

First of all, we must note the provision stipulated by the legislator in art. 2095 of the Civil Code, in the sense that, to the extent of their compatibility, the provisions regarding the agency contract will be supplemented with those regarding the commission contract, respectively with the provisions regarding the mandate with power of representation, which are applicable when the agent also has the power to represent the principal at the conclusion of contracts. This provision therefore suggests that the agency is a kind of mandate contract, whether with or without power of representation, a theory otherwise supported in doctrine (Prescure, Crisan, 2003: 45-46) under the rule of the old regulation of this contract, namely the Law no. 509/2002, which, in its turn, referred to the commercial mandate (art. 26).

We believe that in order to determine the legal nature of the relationship between the agent and the principal, it is necessary to identify the object of the agreement, that is the tusks entrusted by the principal to the agent, but also the way in which the agent works to fulfill them.

The agent prospects the clientele, receives orders on behalf of the principal, sometimes even concludes contracts of sales, purchase and provision of services in the name and on behalf of the principal. Sometimes, he also assumes complementary tasks, especially what is generically called "consignment of goods", that is he receives the goods in storage, keeps them in good condition, then, after concluding the contract with the customers, ensures delivery, invoices and charges the price, all in exchange for a special remuneration.

In the French law, the agent is defined in art. L134-1, para. 1 of the Commercial Code as follows: "The commercial agent is an agent who, as an independent professional, without being bound by a service lease, is entrusted, on a permanent

basis, to negotiate and possibly conclude contracts of sale, of purchase, lease or provision of services, in the name and on behalf of producers, traders or other commercial agents. He may be a natural or legal person." Thus, the French law details the activities carried out by this category of business intermediaries, the agent appearing as a sales service provider and the plurality of their powers gives contractors the advantage of good knowledge. (Leloup, 2005: 45) Working with the same clients for several ranges of items, the agent gains a much more in-depth experience than the one who empowered him, regarding how to approach and negotiate with each client. As a consequence of the plurality of products offered, the agent may be more requested by costumers, who find it more convenient to address him to ensure a release of surplus stock, rather than to address buyers. The sales agent may collaborate with several companies, that have different strategies, which gives him a broad vision and a flexibility of the marketing strategy, that can benefit the principals (Leloup, 2000: 30). It is common ground, however, that the staff member's ability to work for more than one principal is limited by the non-compete obligation imposed on him by the principals.

The Romanian Civil Code synthetically defines the object of the agency contract in the provisions of art. 2072 para. 1: the agent may be empowered by the principal either to negotiate or both to negotiate and to conclude contracts, in the name and on behalf of the principal.

In the situation where the agent receives not only the power to negotiate, but the principal expressly gives him the power to conclude contracts in the name and on behalf of the principal, we believe that the relations between the parties will certainly be specific to the mandate with power of representation. This also can be deduced from the provision of para. 2 of art. 2095 of the Civil Code, which stipulates that "if the agent also has the power to represent the principal at the conclusion of contracts, the provisions of this chapter shall be supplemented accordingly with those concerning the mandate with power of representation." Therefore, in such a situation, the wording chosen by the legislator leaves no room for interpretation as to the nature of the relationship between the parties.

The controversy arises in the situation where the agent is only a negotiator for the principal, in which case the agent's mission will merely be to procure orders(offers) from third parties, which he will make available to the principal, who will himself conclude the respective contracts with the third parties, without the agent participating in the conclusion of the operations. The confusion was caused in part by the provisions of the Law 509/2002, which stipulated that the power of attorney given to the agent in such situations, would be to negotiate business for the principal, in contrast to the situation where the agent is empowered to negotiate and conclude business on behalf of and at the expense of the principal. This expression of the legislator, in the sense that the agent negotiates business for the principal, but without specifying whether he does it in the principal's name or in his own name, has led some authors (Cărpenaru, 2003: 85) to think that in such cases, the agent acts on the basis of a mandate without power of representation, which gives him the power to negotiate with third parties the terms and conditions of future contracts, allowing them to be concluded directly between the principal and the third parties.

Other authors have been more reserved in qualifying the nature oif the contract, taking into account the unclear expression of the legislator on the matter. For example, one author (Clocotici, Gheorghiu, 1995: 80) sincerely expresses this ambiguity, pointing out that, as defined by the Law no. 509/2002, the situation of the negotiating agent is uncertain, not being able to establish whether he behaves as an agent (negotiates in the name and on behalf of the principal) or as a commissioner (negotiates in his own name, but for the principal).

Whatever the opinion expressed by the doctrinaires, either in the sense of the existence or non-existence of the power of representation, it seems that the opinion is unanimous regarding the fact that the relations between the agent and the principal are mandate-like (either mandate with power of representation or commission).

As far as we are concerned, we cannot but express some doubts about the legal status of the agent, if he does nothing but negotiate the conclusion of future contracts, that is his mission is to procure contract offers for the principal.

Art. 2009 of the Civil Code defines the mandate as „the contract by which a party, called agent, undertakes to conclude one or more legal acts on behalf of the other party, called principal". The agent who does nothing but put his client (principal) in connection with third parties who would be interested in concluding contracts with him, does not conclude legal acts on behalf of the principal, but makes simple material acts: prospecting clients, taking orders and receiving orders on behalf of an industrial enterprise or of another agent; in other words, he negotiates the transactions that the principal will later conclude directly with the third parties. From this point of view, we could say that the activity of the agent is closer to that of an independent intermediary rather than to that of a representative. At the same time, however, we cannot ignore an essential difference, namely that the agent negotiates the conclusion of future contracts between the principal and third parties in the exclusive interest of the principal, while the intermediary, as it appears from the legal regulation of his activity (art. 2096-2102 of the Civil Code), works in an impartial manner in relation to the contracting parties; practically, the activity of the intermediary is carried out in the interest of both future contractors, to whom it ensures a more efficient sale of goods or service provided.

The new Civil Code establishes a regulation that seems to clarify the legal nature of the agency contract as a mandate without the power of representation, more precisely a commission, in cases where the agent, not having power of representation of the principal at the conclusion of contracts, will not be able to qualify as a representative agent. Thus, art. 2095 para. 1 of the Civil Code states that "the provisions of the present chapter (chapter on the agency contract) shall be supplemented with the provisions regarding the commission contract, insofar as the latter are compatible".

Therefore, is the negotiating agent a commissioner? We consider that it is difficult to assumer that the agent will always be empowered by the principal to negotiate with future clients in his own name, as the clientele is most often attracted precisely by the reputation of the principal's trademark. Therefore, we do not believe that the empowerment given to the agent to negotiate business should always be considered as a mandate without representation.

In arguing the view that it is an essential condition of the agency contract that the intermediary activity be carried out in the name and on behalf of the principal, an author (Iacob, 2010: 72) relies on the rules of the European Comission Directive no. 86/653 of the 18th of December 1986, arguing that the named provisiones do not apply to the activity carried out by an independent intermediary on behalf of the principal, but in his own name, because the definition of the agent in the Directive is limited to concrete criteria, without any direct reference to the activity carried out in one's own name and with no indication in the sense of extending the provisions to the commissioner. The two occupations are different and therefore "the commercial agent must not be mistaken for a commissioner", concludes the author.

Still, we must note that the Romanian legislator did not adopt the European Community regulations ad literam, since there are differences between the provisions of the Directive and those of the Romanian Civil Code both in defining the agent notion, as well as in other aspects of the contract. For example, the intermediary activity carried out by the agent, as defined in the Directive, only concerns the negotiation or the negotiation and conclusion of transactions for sale or purchase of goods. Therefore, the intervention of the European Community legislator is limited in this matter exclusively to intermediation for the purpose or sale-purchase of goods, and does not concern all intermediary activity carried out on a permanent, independent and professional basis, regardless of its object, as the one taken into account by the Romanian legislator in the provisions of the Civil Code (art. 2072). The current Romanian regulations on the matter lead us to the conclusion that the agent has the possibility to act as a commissioner, that is, in his own name, when negotiating contracts on behalf of the principal, stipulating that the agents will be submitted, in addition to the special regulations of the Code regarding the agency contract, to the rules of the commission contract, to the extent of their compatibility (art. 2095 para. 1). The Law no. 509/2002 and later the Civil Code have adjusted to the obligation of Romania, as an European Union member state, to transpose into national law the Community provisions regarding the agency contract. On the other hand, we believe that the national legislator, in exercising its attribution of sovereignty, has understood to extend the range of activities covered by the agency contract to any form of business intermediation which is permanent, whether it takes place in the name and on behalf of the principal or in the name of the agent and on behalf of the principal, excluding the activity of those persons to whom the Civil Code expressly refers in this regard (art. 2073).

Therefore, as far as we are concerned, we believe that the agent who only has the power to negotiate contracts can either act in his own name or in the name of the principal, according to the instructions given to him; the power of representation is always attached to the power of attorney only for the conclusion of contracts, not for their negotiation.

Therefore, if the agent who negotiates and concludes contracts on behalf and in the name of the principal always acts on the basis of a mandate with power of representation, the agent who only negotiates contracts for the principal has an uncertain status: the legislator tells us that the provisions concerning the commissioner apply to him, insofar as they are compatible (art. 2095 para. 1 of the Civil Code). Therefore, he will in principle have the legal regime of a commissioner

(although he does not conclude contracts for the principal, but only negotiates them on his behalf and in his own name). However, we believe that the status of commissioner, as it results from the regulations contained in art. 2043-2053 of the Civil Code, cannot be compatible with that of the agent to whom the principal expressly gave the power to negotiate not only on his behalf, but also in his name. In this case, the agent not only does not actually conclude legal acts for the principal (as does any representative, including the commissioner), but he negotiates in the name of the principal, not in his own name, which disqualifies him as a commissioner. Therefore, his legal status is uncertain: on the one hand, he works in the name of the principal, so he cannot be a commissioner; on the other hand, although he works in the name and on behalf of the principal, he does not conclude legal acts, so he cannot be a representative, within the meaning of art. 2009 of the Civil Code. A person - the agent - who does only material acts in the name and on behalf of another is a service contractor rather than a representative/commissioner.
The legal relations that are established between the agent and the principal are most often ruled by the mandate contract, regardless of its form (mandate with/without power of representation, commission). Under the mandate, the agent will be required to inform the principal of the status of the power of attorney received, of the accomplishment of his duties, of the market and competition in the territory; he also has the obligation to comply with the reasonable requests from the principal regarding obtaining useful commercial information (Belu Magdo, 1996: 133).
However, there are certain differencies between the agency and the mandate contract, which is why the agency has its own special regulation.
The relationship between the agent and the principal is established on contractual basis, the Civil Code expressly and imperatively stipulating the essential rights and obligations of the parties, from which they cannot derogate against the interests of the agent (art. 2094).
First of all, the agent's activity is of a professional and lasting nature, while the representative acts occasionally; the agent is empowered “on a permanent basis” to negotiate, or to negotiate and conclude business in the name and on behalf of the principal, while the representative obliges to conclude “one ore more legal acts” on behalf of the represented. The object of the mandate given to the agent is the conclusion of professional acts for the principal. The agent has a permanent power of attorney either for the negotiation of sale or purchase of goods on behalf of the principal, or for the negotiation and conclusion of such transactions in the name and on behalf of the principal, in exchange for a payment. Therefore, business intermediation under the agency contract will be long lasting and professional, not occasional, as it is in the case of the common mandate.
An indicator of the permanence of the agent's power of attorney is the amount of transactions mediated by him for the principal. However, Community case-law has shown that when an agent is empowered to conclude a single contract on behalf of the principal, which is subsequently extended for several years, it will be considered that the power conferred to the agent is permanent if the principal gives the agent the power to negotiate successive extensions of the contract (decision of the European Community Court of Justice of January 2004). Therefore, the

permanence of the agent's power of attorney is a matter of fact, at the discretion of the courts.

The agency contract is concluded either for an indefinite or for a definite period of time, as it results from art. 2089 of the Civil Code, while the mandate cannot be for an indefinite period, the law stipulating that it will end after three years, if the parties have not stipulated the contractual term (art. 2015 of the Civil Code). Therefore, the activity of the agent must be contracted for a long period of time and it must involve numerous operations. Jurisprudence (Cass. Com. of the 16th of Jan. 1968) pointed out that a representative who would only deal with isolated operations in the name and on behalf of a company could not claim to have the qualification of a permanent commercial agent.

As the legislator expressly stipulates, the agent acts as an independent intermediary, and cannot be the employee of the principal. The independence enjoyed by the agent in the performance of his duties is one of the essential features of his legal status and any contrary clauses, which would transform the relations between the parties into an employment contract, will be devoid of legal effects. Such clauses could be considered those that would stipulate the obligation of the agent to devote himself uniquely and absolutely to the representation of the principal, the interdiction to have other activities than those for which he was employed by the principal, the organization of the agent's work by the principal an so on. Therefore, the agent organizes his work autonomously in order to carry out the power given by the principal. The existence of employment relations between the agent and the principal is excluded. The representative, on the other hand, executes his mandate under the orders of the represented, any deviation from them being qualified as exceeding the limits of the mandate, with the consequence of the representative's personal liability and the inapplicability of those operations to the principal. However, it is true that the represented does not always impose on the representative the manner in which the mandate must be fulfilled, as he may confine himself to indicating the acts that must be performed on his behalf, or even to confer the representative a general power of attorney. In the case of the agent, on the other hand, the activity of intermediation is organized by himself autonomously, as an independent professional activity, the principal not being able to impose on the agent the way to carry out his work, but only to verify the compliance of the agent with certain specific requirements of the contract, such as the exclusivity, non-competition, good faith and loyalty clauses. The agent will, however, have to “follow the reasonable instructions given by the principal” (art. 2079 para. 1 of the Civil Code), which suggests that it is the agent's attribute to choose the way in which he carries out his tasks, taking into account, of course, the instructions of the principal, but only to the extent the the agent, as a professional, considers them to be reasonable.

The agent must “take the necessary steps to negotiate and, where appropriate, conclude the contracts for which he was empowered, in conditions which should be as advantageous as possible for the principal” (art. 2079 para. 2 of the Civil Code). Thus, he assumes, like the representative, an obligation of means to pursue the interests of the principal in business. As he is always a paid agent, he will have to act with the diligence of a good owner, his fault being assessed according to the

abstract criteria of a prudent and diligent individual, a good parent of family (culpa levis in abstracto). The representative also owes such a concern in managing the business of the represented, when being remunerated; however, the representative can also act free of charge, in which case his fault will be less severely assessed: he will only owe the diligence with which he conducts his own business (culpa levis in concreto) (art. 2018 para. 1 of the Civil Code).
As regards the obligation of information that the agent has, it is more extensive than that of the representative. Thus, the agent must communicate to the principal "all the necessary information" for the performance of the contract, such as those related the the contractual territory, market requirements, possible claims regarding the defects of the goods sold or of the services provided by the principal. The representative must notify the represented of any changes in the performance of the contract or of any new circumstances that could make the represented want to modify or revoke the mandate; when the contractual relations are terminated, the representative will have to give an account of his management. We think that these obligations also apply to the agent, based on the provisions of art. 2095 of the Civil Code.
The obligations incumbent to the agent will have to be fulfilled personally by him or by his employees. The Civil Code allows the substitution of the agent with another person, but only under the conditions provided by art. 2023. The agent will therefore be responsible for the subagent, if he did not have the consent of the principal for the substitution or if, having an agreement in principle, but without indicating the person of the substitute, he did not perform with the diligence of a good owner of business when choosing the subagent.
The mandate contract is by its very nature free of charge, even though it is presumed onerous if given to a professional (art. 2010 para. 1 of the Civil Code). The agency contract is essentially onerous, since the agent is acting in a professional capacity, pursuing his own patrimonial interests through the activity he carries out. Moreover, the Civil Code explicitly stipulates that the regulations related to the agency contract are not applicable to the activity of persons providing unpaid services as agents (art. 2073 para. 1 of the Civil Code).
The agent will negotiate or negotiate and conclude a multitude of contracts for the principal, in one or more determined regions, his obligation of exclusivity being able to target certain geographical areas, determined by the contract, or certain clients 9art. 2074 of the Civil Code). The representative is required to carry out the tasks entrusted by the represented with diligence (art. 2018 para. 1 of the Civil Code), being also bound by an obligation of loyalty towards the represented.
Finally, in the vision of the Civil Code, the common mandate is concluded and executed in the exclusive interest of the principal, which explains the power of the represented, who can revoke the mandate at any time and in any situation, ad nutum (art. 2031 para. 1 of the Civil Code). On the other hand, the agent, acting in the performance of his duties, carries out that activity as an ordinary and independent professional. The power of attorney given by the principal to the agent is usually permanent, being the very support of his professional activity. The agent, developing the principal's clientele, contributes to the growth of his own business. The principal is interested, by concluding the agency contract, in capitalizing his own

manufactured goods or providing the services that are subject of his speculative activity; the agent is interested in negotiating and concluding as many contracts as possible for the principal, since he will be remunerated accordingly. Therefore, the conclusion and the execution of the agency contract is done in the interest of both contracting parties, benefiting both the principal and the agent. Therefore, permanent commercial agents have often been described by the doctrine as “the prototype of the representative in common interest”.

References

1. Prescure, T., Crisan, R (2003) Contractul de agenție – un nou contract numit în dreptul comercial român, *Dreptul* 7/2003, pp.52
2. Leloup, J. M. (2005) *Agents commerciaux – Status juridiques. Strategies professionnelles*, 6ed., Dalloz, Paris, pp. 45
3. Leloup, J. M. (2000) Le choix de l'externalisation de la force de vente, *Les cahiers du D. R. H.*, pp. 30
4. Cărpenaru, S. D., (2003) Contractul de agenție în reglementarea Legii nr. 509/2002, *Curierul judiciar* 11/2003, pp. 85
5. Clocotici, D., Gheorghiu, Gh. (1995) Unele considerații privind contractul comercial de agent, în contextul relațiilor comerciale internaționale, *R. D. C.* 2/1995, pp. 80
6. Iacob. I. L. (2010) Reglementarea europeană a contractului de agenție comercială (1), *R. D. C.* 1/2010, pp. 72
7. Belu Magdo, M. L. (1996) *Contracte comerciale tradiționale și moderne*, ed. Tribuna Economică, București, pp. 133