

APPLICATION OF THE RULES RELATING TO THE MANDATE WITH REPRESENTATION IN THE CASE OF THE COMMISSION CONTRACT (I)

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Abstract

The present study was based on the fact that the current Civil Code stipulates that the special rules on the regulation of the commission contract, contract of mandate without representation, shall be supplemented with the rules in the contract of mandate area with representation.

The attempt to supplement the commission contract with the regulations from the contract of mandate itself has highlighted problems of interpretation, given the confrontation between these rules, on the one hand, and those specific to the commission, on the other.

The article deals mainly with the rules applicable to the obligations incumbent on the parties to the commission contract.

*The authors identify some possible different interpretations of the application of these provisions, interpretations they present and on which they formulate their own solutions, including in the form of the proposals of *lex ferenda*.*

The study is aimed at specialists in civil law, as well as theoreticians and practitioners, as well as at students and master students in the field of juridical sciences, to whom it proposes topics of reflection and the urge to express their opinion on them, in order to consolidate some substantiated theses in the field.

Keywords: *commission contract; consignee; principal; sub-commissioning; plurality of consignees.*

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1. The notion and the legal nature of the commission contract

In the regulation prior to the current Civil Code (2009), the commission contract was defined as the agreement for the supply of commercial business services by a consignee, on the account of the principal¹.

At the same time, research literature (Cărpenaru, 2004, p.473), in view of the presented regulation, defined the commission contract as a contract whereby a party, called consignee, undertakes to treat commercial business in its own name, but on the other's behalf, called the principal, on the basis of empowerment given in return for a remuneration, called a commission.

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¹ See Article 405 of the Commercial Code.

In the current regulation (Article 2043 of the Civil Code), the commission contract is "the mandate which has as its object the purchase or sale of goods or the provision of services on behalf of the principal and on behalf of the consignee acting professionally in return for remuneration called commission."

It follows from the above that this type of contract is a variety of contract of mandate without representation.

The legal nature of the contract in question has prompted controversial discussions in the doctrine. Thus, some authors (E. Safta - Romano, 1995, p. 31) disagreed with the qualification of the commission contract as a contract of mandate without representation. It has been appreciated that such a contract appears without representation only from the point of view of third parties with which the consignee concludes the legal acts for which the commission was given, namely, when the consignee does not notify them that the legal acts are concluded for the benefit of another person.

As such, it was proposed (E. Safta - Romano, 1995, p. 31) instead of the legal nature of a contract of mandate without representation of the commission contract to use of the phrase "variety" of the contract of mandate. This name would be more appropriate to reality than that of a contract of mandate without representation, because the representation is the essence of the contract of mandate.

Other authors (Petrescu, 1994, p. 188) have considered that, since the third person knows exactly who the principal is, it has the opportunity to express its legal will either for the purpose of concluding a contract of mandate with representation, or a mandate without representation, of the type of commission contract.

We believe, along with other authors (Stoican, 2016, p. 171) that along with the application of the current Civil Code, the issue of the legal nature of the commission contract has been definitively elucidated.

First, according to Article 2039 Civil Code, the mandate without representation, is defined as the contract under which a party, called trustee, concludes legal documents in its own name but on behalf of the other party, called principal, assuming to third parties the obligations arising out of these documents. Therefore, the mandate without representation lacks the power of representation because the trustee concludes legal document not in the name and on behalf of the principal, but in its own name.

Thus, in relations with third parties, the holder of the real right or of the claim right or of the assumed obligations is not the principal, but the consignee.

Secondly, even the law defining the commission contract (Article 2043 of the Civil Code) provides expressly that this contract is a mandate, which is concluded on behalf of the consignee, just as the principal in the mandate without representation acts in its own name.

Thirdly, we also refer to the architecture of the commission contract in the current Civil Code. Chapter IX of Title IX, which governs Section 2

(Contract of Mandate with Representation), and in Section 3 provides for rules relative to the mandate without representation. Under the mandate without representation, there are provisions on the commission contract, the consignment contract and the shipment contract, all of which are varieties of mandate without representation.

Fourthly, although the mandate without representation is a species of the contract of mandate, it also represents the genre for the three types of special contracts mentioned above, including the commission contract. *Per a contrario*, the commission contract is a species of the mandate without representation.

Fifthly, the commission contract is a mandate without representation that involves the professional exercise of intermediation (Piperea, Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, 2012, p. 2048), the representation not being related to the intermediation, but to its nature (Stoican, p. 169).

Sixthly, the legal nature of the commission contract as the contract of mandate without representation implies, in the event of a legislative lacuna, the application of the rules of the mandate with representation.

Before proceeding to the presentation in a subsequent section, of the rules of the actual contract of mandate, applicable in case of the commission contract, we consider that it is necessary to highlight some aspects on the delimitation of the commission contract in relation to other similar contracts. In this way, we hope to emphasize with greater gravity the physiognomy of this type of contract, and hence the way in which the norms related to the mandate itself are applied.

2. The delimitation of the commission contract from other contracts

2.1. A first delimitation refers to the *commercial mandate* of the old Commercial Code. The latter contract had as its object the performance by the commercial agent (the consignee) of transactions on behalf of the principal.

In the case of the commission contract governed by the Civil Code in force, the consignee is no longer empowered to carry out commercial deeds, but to perform operations on behalf of the principal. The commercial mandate that deals with the "handling" of commercial business in the name and on behalf of the principal is no longer regulated by current legislation.

The commission contract has as its object the conclusion of legal documents for the purchase or sale of goods or the provision of services in the name and on behalf of the consignee acting as a professional.

2.2. And with regard to the *contract of mandate with representation*, the commission contract is different. The most important is the circumstance that the trustee acts in the name and on behalf of the principal in the case of mandate with representation, while the consignee acts on behalf of the principal, but in its own name, in the situation of the commission contract.

Another distinction between the contract of mandate with representation and the commission contract is that the latter is mainly used in the work of

professionals, "ensuring the speed in the circulation of merchandise and of other goods that may be the object of the consignee"(Piperea, p. 2053).

Also, in the case of a commission contract, the consignee is no longer obliged, as the trustee, to inform the third party with whom he concludes the legal document on behalf of the principal, that it is empowered because the consignee, even if he remains bound to observe the tasks and instructions received from the principal, however, acts in its own name.

Research legal literature (Cărpenaru 2004, p.473) emphasized that in case of the contract of mandate situation we are dealing with a direct representation, while in the case of the commission contract, the representation is indirect.

The commission contract also differs from the *brokerage contract*. The latter is the agreement whereby the broker undertakes to the client to introduce it a third party for the purpose of concluding a contract with it (Article 2096 Civil Code).

Denominated in the doctrine (Căpățină, Ștefănescu, 1987, p. 145) by the term "agent contract", in the current Civil Code, this contract was regulated under the name of "brokerage contract", in line with the relevant customs.

A first distinction between the two types of contracts is given by the broker's independence in fulfilling the assumed obligation. Its main obligation is to put the customer in contact with the third party in order for them to conclude certain categories of contracts. On the other hand, the consignee is obliged to conclude on behalf of the principal, but in its own name, contracts for the purchase or sale of goods or the provision of services, being bound to observe strictly the instructions received from the principal.

Another distinction between the commission contract and the brokerage contract lies in their different object. The commission contract has as its object the conclusion of legal document by the consignee on behalf of the principal, whereas the brokerage contract has as object the identification by the intermediary of a co-contractor able to conclude a contract with its client.

3. Application of the rules corresponding to the mandate with representation

If the rules of the commission contract do not cover certain situations, namely they are incomplete, then, in addition, the norms related to the contract of mandate with representation are applied.

3.1. A first category of such rules consists of those relating to *accepting the mandate*, that is, to accepting the commission contract.

By transposing the rules in the matter (Article 2013 Civil Code) to the commission contract it follows that this type of contract can be concluded both in express and tacit form. Acceptance of the commission contract may be made based on the assumption that it results from its execution by the consignee and the ratification of the prefigured document concluded with the third party by the principal.

However, if the principal does not ratify the legal document on the grounds that it has not entered into any commission with the consignee, either in a tacit manner, the execution of the so-called commission contract does not amount to the presumption of its conclusion in tacit form.

At the same time, we consider that neither the document issued by the principal, which is signed by it alone, which gives the consignee certain powers of representation, commonly called "power-of-attorney", is a commission contract, since it was not accepted by the consignee. Such a document (power-of-attorney) has the legal nature of the offer to contract, and can become a commission contract only when it is expressly or tacitly accepted by the consignee. The tacit acceptance of the power-of-attorney gives rise to the commission contract only if it is executed by the consignee.

3.2. Another category of rules applicable to the commission contract refers to the *diligence of the consignee* in executing the commission contract. The provisions concerning the diligence of the trustee (Article 2018 Civil Code) apply, in the sense that in the case where the commission is for consideration (the title is presumed in the case of professionals), the consignee is required to act as a good owner in the performance of the contract.

The legal provision according to which, when the mandate is free of charge, the trustee is obliged to perform it "with the diligence which it manifested in its own affairs" (Article 2018 paragraph (1) second sentence of the Civil Code) does not apply in the commission contract because it cannot be free of charge (Puie, 2017, p. 67). The main argument of the lack of free-of-charge nature of the commission contract was rightly stated as the quality in which the consignee acts, that is, that of professional, both in relations with the principal and with third parties (Puie, 2017, p.67). The professional quality of the consignee thus implies the onerous nature of the commission.

The same idea is apparent from the European Union legislation. Thus, in *Directive 86/653 /EEC on the coordination of the laws of the Member States relating to self-employed commercial agents*, the notion of agents refers to self-employed brokers who are permanently authorized to negotiate the sale or purchase of products on behalf of another person (called "principal" by the Directive) or to negotiate and conclude such transactions for and on behalf of the principal concerned (Article 1, paragraph 2 of Directive 86/635 / EEC).

As regards the diligence of the commercial agent (the consignee), the legislature orders that in the course of its activity, that is to say in the performance of the commission, it must promote the interests of its principal and act loyally and in good faith (Article 3 paragraph 1 of Directive 86/635 / EEC.).

3.3. The rules *on the obligation of the trustee to give account* (Article 2019 of the Civil Code) also apply to the commission contract. Thus, the consignee is obliged to surrender to the principal everything it has received from third parties under the commission it has executed.

This obligation is incumbent upon the consignee even if the values, assets, documents received from third parties are not due to the principal. In the latter case, the third party will be able to recover its assets granted on no ground or their consideration from either the consignee, based on the undue payment or from the principal, through the oblique action.

At the same time, the consignee is obliged to preserve the goods or values received from third parties until they are handed over to the principal. The obligation to preserve involves keeping goods and values in good condition (free from damage), gathering fruit, taking conservative judicial measures, such as exercising actions or defenses destined to preserve possession of goods and values, etc (Puie, 2017, p.39).

3.4. If the consignee personally uses the amounts necessary to execute the commission, the rules governing *the payment of interest on the amounts owed by the trustee* apply (Article 2020 Civil Code).

In this respect, the consignee owes interest to the principal for the respective amounts from the day of their use, without delay.

Instead, for the amounts remaining from the execution of the commission, what would be due to the principal, the commissioner will pay interest to him calculated from the day it was sent notice of default. The interest owed by the consignee is repairable and may be added to the paying ones if they are provided in the commission. If repayment interests are not stipulated in the commission, their amount will be calculated in relation to statutory interest (Piperea, p.2034).

3.5. In principle, the consignee is not liable to the principal for non-fulfilment of the obligations assumed by third parties with whom the principal has concluded the legal acts envisaged.

By way of exception, the consignee is responsible for the failure by third party contractors with whom the principal concluded the legal document envisaged by the commission unless otherwise agreed and if the insolvency of the third party on the date of conclusion of the legal act envisaged was known or should be known by the consignee.

The exemption of liability of the consignee and the exception to this rule results from the application of the provisions relating to the liability of the trustee who has not fulfilled its mandate to the principal (Article 2021 Civil Code).

The exception from exemption is based on the culprit of the consignee *in eligendo*, a regulation that is novel in the current Civil Code.

As *lex ferenda*, we propose that the notion of "*insolvability*" used in Article 2021 Civil Code to be replaced by the phrase "*insolvency*".

*Insolvability*² is defined in the Article 1417 paragraph (2) of the current Civil Code as the inferiority of the patrimonial asset that can be subjected,

² In the doctrine, the insolvability of the non-professional debtor (trader at the time of the expression of the doctrine) was called "deconfiture". See A. G. Atanasiu, Al. S. Rățoi, About

according to the law, to enforcement against the total amount of outstanding debts.

Insolvency within the meaning of *Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings*³, as subsequently amended, means the state of the debtor's patrimony, characterized by insufficient monetary funds available for the payment of certain, liquid and due debts.

It is necessary, therefore, with regard to the content of the two syntagms, but also in view of the provisions of the special law in the matter, to replace the term of insolvability with that of insolvency.

3.6. Regarding the situation of the *plurality of consignees*, we note that, according to the applicable rules in the matter (Article 2022 Civil Code), the commission given to several consignees to work together does not exist unless it has been accepted by all the consignees concerned.

The question arises as to how the provisions of Article 2022 paragraph (2) Civil Code, according to which when there is a plurality of trustees, their acts oblige the principal, even if they were concluded by a single trustee apply in case of the commission.

We assume that these rules applied to the commission contract oblige the principal to accept the conclusion of the prefigured contract, only by a consignee, unless otherwise stipulated.

Lastly, consignees who have been obliged to work together are jointly and severally liable to the principal only if they have expressly assumed the obligation to guarantee the principal against the execution of the obligations by third parties (see Article 2022 (3) Civil Code in conjunction with Article 2052 paragraph (2) of the same law).

3.7. Since the law does not provide for rules on *substitution made by a consignee*, the rules of the substitution institution made by the trustee from the contract of mandate itself apply (Article 2023 Civil Code).

The rule here is that since the commission has an *intuit-personae* nature, as well as the contract of mandate with representation (Deak, Popescu, 2006, p. 235), the consignee must personally fulfil the commission contract.

However, by way of exception, that is to say, if the principal has expressly authorized the consignee, it may substitute another person for the execution of all or part of the commission contract.

Sub-commissioning may also be performed by the consignee, and if there is no express consent of the principal in this respect, subject to three cumulative conditions (Article 2023 paragraph (2) of the Civil Code). We are talking about:

a) Some circumstances that could not be foreseen and which impede the fulfilment of the contract have occurred in the fulfilment of the commission;

the treatment of the over-indebtedness of the simple particulars. Deconfiture vs. insolvency, in *Revista Română de Dreptul Afacerilor*, no. 7/(2007).

³ Published in the Official Gazette of Romania, Part I, no. 466 of June 25, (2014).

b) The consignee is unable to notify the principal in advance about the occurrence of these circumstances;

c) To suppose that the substitution would have been approved by the principal if it knew the circumstances that precluded the fulfilling of the commission contract.

In the above situation, the consignee has the obligation to notify the principal, immediately, on the sub-commissioning. If the sub-commissioning was not authorized by the principal, the consignee is responsible for the acts of the sub-consignee, as though they were fulfilled by itself.

If the sub-commissioning is authorized by the principal, the consignee is only responsible for the fault *in eligendo*. In all cases, the principal is the holder of a direct action against the sub-consignee.

3.8. If the goods received from third parties by the consignee for the principal show signs of deterioration or have been delayed, the rules governing *the conservation measures* that may be taken by the trustee in such a case (Article 2024 Civil Code) corroborated with provisions related to the obligations of the third party contracting the commission are applied (Article 2045 Civil Code).

As a consequence, the consignee will be obliged to take measures to preserve the goods received by the principal, but not by exercising the rights of the principal over third parties (as the trustee exercises the rights of the trustee to third parties for the preservation of the goods) because between the principal and the third party with which the consignee has concluded a contract, no direct legal relationships are born.

In the relations with the third party, the holder of the rights and obligations resulting from the commission is the consignee. As the owner of these rights, the consignee will exercise, in its own name, the rights to preserve the goods received from third parties. Incorrect third party execution of the contract concluded with the consignee determines the consignee's taking of measures for the preservation of the goods. The consignee exercises the rights to conserve the property as their legal guardian. In case of emergency, the consignee may proceed to the sale of these goods, with the diligence of a good owner, subject to the prompt notification of the principal.

Two more ideas have to be emphasized.

The first is that the rules on the obligations of the conservation consignee refer only to the goods, not to the values received by the consignee by the conclusion of the contract by the consignee with the third co-contracting parties. Values, funds and titles are retained by the conclusion of bank contracts, which represent special varieties of deposits (Article 2191⁴ Civil Code and Article 2192⁵ Civil Code).

⁴ Article 2191 Civil Code regulates the deposit of funds.

⁵ Article 2192 Civil Code regulates the deposit of titles.

The second point to be noticed relates to the fact that the measures for the preservation of goods received by the principal are taken by the consignee directly, without the need for the intervention of the court, as things used to be according to the norms provided in the former Article 71 Commercial Code (urgent sale of damaged goods or goods the storage of which could cost too much) and Article 377 Commercial Code (measures to be taken by the trustee when goods have been damaged due to transport).

3.9. Other rules in the matter of the contract of mandate with representation applicable to the commission contract are those related to the *amounts necessary for the performance of the contract and to the obligation to compensate the trustee* (Articles 2025 and 2026 of the Civil Code). By applying these rules, it means that the principal is obliged to provide the consignee with all the means (amounts) necessary to execute the commission contract, unless otherwise stipulated.

At the same time, the principal is obliged to return to the consignee the expenses incurred by the latter for the execution of the commission, plus the legal interest, from the day the commissioner made the expenses without any delay. The law stipulates that the restitution obligation covers the reasonable expenses (for the conclusion of the prefigured contract, travel expenses, materials etc.) made by the commissioner, that is the expenses necessary and useful for the operation of conclusion of the legal act with the third party even if it did not produce effects.

Of course, if the principal estimates that the amounts spent by a consignee for the performance of the commission are exaggerated, it may refuse to refund them, as long as it proves to make unnecessary expenses.

As regards the compensation of the consignee, the applicable rules (Article 2026 of the Civil Code) stipulate that the damage suffered by the consignee in the execution of the commission will be repaired by the principal provided that the damage was not caused by the commissioner's fault.

In doctrine (Deak, Popescu, 2006, p. 237), it was considered that the indemnity cannot be denied, even if the operation for which the power-of-attorney was received was not carried out, provided that the non-execution is not attributable to the person who must perform it.

This thesis is also valid under the current Civil Code conditions. As such, the principal is obliged to compensate the consignee for the damage suffered, even if the commission was not executed, but not by the consignee's fault. Moreover, the rules on the damage compensation must be supplemented by the special provisions regarding the right of retention belonging to the consignee (Article 2053 Civil Code). By virtue of this right, the consignee may retain the goods in its detention belonging to the principal, in order to guarantee its claims against it.

Research literature (Piperea, p. 2062) considered that the goods in the consignee's detention may be retained only for the payment of the commission.

As far as we are concerned, we consider that as long as the law does not distinguish and generally speaks of the claims of the consignee that it has on the principal, the retention right may be exercised both for the claims relating to the payment of the commission, and for those representing expenses advanced by the consignee for the execution of the contract, but also for the claims regarding the indemnities owed by the principal to the consignee for the damages suffered during the execution of the commission.

It is important to point out that, according to the unified law (Article 17, paragraph 3 of Directive 86/653 / EEC), the commercial agent (the consignee) is entitled to compensation for the damage leading to termination of contractual relations if: a) the commercial agent was not paid the commission from which he would have benefited from the proper performance of the contract, while the principal obtains substantial benefits as a result of the agent's work; b) the damage occurs in circumstances that did not allow the commercial agent to amortize the expenses and the costs that it incurred for the execution of the commission.

3.10. To the commission contract the norms on the *plurality of trustees* (Article 2028 Civil Code) apply. These rules applied to the commission outline the *principle of solidarity of principals with the consignee*. In this respect, when the commission was granted to the same consignee by several principals for a joint venture, each principal is jointly responsible to the consignee, solidarity which extends to all the effects of the commission. This kind of solidarity is a case of legal solidarity (Deak, Popescu, 2006, p. 238).

Comparing the rules applicable to the plurality of principals (Article 2028 Civil Code) with those applicable to the plurality of consignees (Article 2022 Civil Code), we note that in this second case, solidarity operates unless a contrary clause is stipulated in the contract.

By way of analogy, we consider that even in the case of plurality of principals, although the law does not provide for (Article 2028 Civil Code), joint liability can be eliminated by a contrary stipulation in the commission contract. In fact, the doctrine states in the same sense: "*there is no reason why the legal analogy would not work because the situations are similar and we are not in the presence of a rule restricting rights that cannot be extended by analogy.* (Piperea, p. 2040) "

Given these considerations, to remove any doubt and contrary interpretation we propose for *lex ferenda*, that the text of the law in question (Article 2028 Civil Code) shall be supplemented by specifying that joint and several liability of principals operate only in the absence of a contrary stipulation.

Instead of conclusions

Since the space available does not allow us to linger over all the rules relating to the contract of mandate with representations that are likely to apply

in case of a legislative gap to the commission contract, we reserve the right to analyze, in a future study, the other rules applicable to the contract in question. We refer to the rules of the contract of mandate with representation applicable to the commission contract regarding: the ways of terminating the contract; the conditions, effects and publicity of the revocation. When examining these institutions, we will also draw some conclusions.

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