AGENCY CONTRACT WITH POWER OF REPRESENTATION

THESIS SUMMARY

Keywords: *agency, principal, agent, intuitu personae, representation, substitution, dismissal, bond, effects*

This paper aims to bring attention to a typology of contract that is as old as it is current. Today, more than ever, the agency contract proves its usefulness, not only as a traditional means of achieving free acts, selfless and friendly service, but especially as a legal mechanism that allowes the deployment of numerous professional activities. As trade gained huge territorial expansion and diversification, business intermediaries have become increasingly important, even vital, and agency, in its various manifestations, provides a highly flexible legal framework for achieving their business.

In our scientific approach, we focused mainly on the study of jurisprudence, which is otherwise quite rich in this field, as well as on a thorough analysis of juridical literature. Unfortunately, in Romanian doctrine, the agency contract made less subject to the attention of authors, whose studies focused more on other types of special contracts, to the detriment of agency. However, we must acknowledge the contribution in this field of authors such as Fr. Deak, St. Cărpenaru, R. Motica or Cl. Roşu, whose works have served as landmarks in our scientific labor. We also gave special attention to the legal institution of representation, which has been the subject of analysis by authors like L. Pop, I. Deleanu, Gh. Beleiu, M. Banciu or P. Vasilescu. Specific studies which raise very interesting issues related to the agency contract have been published in magazines especially, may we here recall the work of Mr. R. Rizoiu, concerning the use of agency as a mean to guarantee bonds, or the work of various authors on the isuues of common interest agency, that of tacit or apparent proxy. Certain authors have been particularely attracted to the different uses of agency, such as that given to the managers of companies, which, through the special practical implications that it has in business life, has caused vivid and steady doctrinal dispute, or the proxy for legal representation, especiallly that of the assigned attorney.

An important inspiration source, which has caused us much unrest, trying to form our own position in the interpretation of some aspects of the agency contract for which the legislature has established less explicit regulations, were the French doctrine and jurisprudence. In particular the work of classics such as Baudry-Lacantinerie and A. Wahl, F. Laurent, M. Planiol and G. Ripert prove their depth of analysis, validity and timeliness argument even ourdays, as well as the more recent works of writers such as Ph . Malaurie, L.Aynès and P.-Y. Gautier or Ph. Pétel.

Regarding the matter of agency from the perspective of comparative law study, we have analyzed especially the regulation of the contract in the French Civil Code, which was the source and model of the Romanian Civil Code of 1864, as well as the provisions of the Italian Civil Code or those of the Civil Code of Québec, which establishes rules of Anglo-Saxon influence, inspiring the Romanian legislator in their efforts to modernize legal institutions by the provisions of the new Civil Code. Regarding the Commmon Law legal system, this, as we have shown, expresses a completely different view of the institution of representation and agency contract, so that references thereto have only been tangential, as a comparative presentation would involve autonomous studies which would have to be extremely extended and deepened.

Finally, the main object of our study was the settlement of the contract of agency with representation, as it is enshrined in the provisions of the new Romanian Civil Code, to which we have to admit the merits of achieving a more modern, systematic and detailed regulation of the agency contract, as well as that of other related legal institutions, such as that of representation, or more recently established institutions in Romanian legislation, such as administering the property of others, fiduciary or intermediary contract.

As for us, we appreciate the work of unification of laws made by the legislator through the provisions of the new Civil Code, which adheres to such a trend established by other legal systems, namely to include all private legal institutions in the regulations of the Civil Code. Thus, at present, the agency contract enjoys unitary regulatory provisions of the new Civil Code, which puts an end to the boundary established by the legislature earlier by stipulating the commercial agency separately from the civil one. Of course, in addition to the general rules of the Civil Code, the various categories of special agents benefit from their own particular regulations.

We also appreciate the salutary initiative of Romanian legislature to achieve, through the new Civil Code regulations, a systematic statutory agency agreement, by including among its provisions the agency without representation (art. 2039 et seq.) and by the consecration of express stipulation regarding the commission and its variations (art. 2043 et seq.) or the agency contract (art. 2072 to 2095). The brokerage contract is also regulated (art. 2096 to 2102), allowing clear delimitation from agency. Also, the Romanian legislator devotes the first distinct regulation of the institution of representation (art. 1295 to 1314 of the Civil Code), as well as that of the administration of the property of others (art.792-857).

Throughout our study, we have aimed to achieve an overview of the agency contract with power of representation, based in particular on the new set of regulations in this area of the new Civil Code, on a comparative presentation with the previous legislation, namely that enshrined in the Civil Code of 1864 and with the relevant provisions of the French Civil Code, which has always served as an indicative benchmark for our civil law. We have also paid attention to those matters which are the subject of a doctrinal debate and uneven jurisprudence, trying to form our own argued position and to even emit some suggestions of *lege ferenda*, on those matters that we believe could benefit from an optimization of the existing legal regulations.

The paper is structured in four chapters.

The first chapter includes general considerations regarding representation by agent, presenting the concept of the agency contract in its historical evolution and delineating this type of contract from other similar legal institutions such as representation, management of the property of others or fiduciary contract.

Thus, on the relationship between agency and representation, we have shown that agency is essentially a contract by which legal documents are being signed on behalf of another (as shown in art. 2009 of the Civil Code), but not always in the name of the latter, today the legislator stating explicitly that "*agency is with or without representation*" (art. 2011 of the Civil Code.). Therefore, we consider that representation is only the nature of agency, but not its essence.

Regarding the delimitation of agency to a juridical institution that has been newly introduced by the Romanian legislator, under the influence of the Civil Code of Québec, namely the administration of the property of others, we have shown that they differ by two fundamental

features. First, the trustee is charged with the power of representation of the principal as regards third parties, power the administrator does not hold, since he just manages property or estate that he has been entrusted with for this purpose. Secondly, the trustee has the power to enter into legal transactions relating to both the principal as an individual and their heritage; the administrator, however, can achieve both legal acts and legal facts, but they will only affect the goods that they administrate.

We have also presented one of the situations where rules that are specific to administration of the property of others are mostly applicable, namely the fiduciary contract, which finds its own rules in art. 773-791 of the new Civil Code. We believe that the feature that equally characterizes these institutions is the *intuitu personae* nature: the relations between the parties are essentially based on trust. However, although there are some common features between fiduciary and agency contract, we can also identify clear differences that delineate the two legal institutions. The object of the fiduciary contract is to transfer certain rights. Therefore, we distinguish a clear differentiation between the agency and fiduciary contract: the agent has a simple power of representing the principal in the conclusion of legal transactions entrusted by the latter, whereas the trustee acquires a personal right to the property in trust. The trustee is not an agent of the settlor or of the beneficiary, since he has his own rights over the goods he holds in trust. We have also suggested, in order to better applicability of the trust, especially in business relationships, clearer regulations concerning the trustee's rights, since his legal status is uncertain, as well as a release of the excessive formalism that is proper to trust at this time.

In our study, we have dedicated special attention to the agency contract, governed by the provisions of the new Civil Code (art. 2072 to 2095), which repealed L. no. 509/2002 concerning the permanent traders. The usefulness of this type of contract and its wide spread in business are well known. We have tried to identify the legal nature of the agreement, subject to doctrinal disputes arising in part on how the Law no. 509/2002, and the new regulation of Civil Code, stipulate on the contract. We have shown that, for our part, we believe that the agent who has only contract negotiating power may act either on their own behalf or on behalf of the principal, as instructed by the latter, since the power of representation is always attached to proxy only for contracting, not for negotiation. Therefore, the agent that negotiates and concludes contracts on behalf and in the name of the principal is always acting as an agent with power of representation,

but the agent that only negotiates contracts for the principal has an uncertain status: on the one hand, he is working in the name of the principal, so he cannot be a broker within the meaning of art. 2043 of the Civil Code; on the other hand, while working in the name and on behalf of the principal, he does not conclude legal documents, so he cannot be an agent with power of representation within the meaning of art. 2009 of the Civil Code.[1] A person (in this case, the agent) which only does material acts on behalf and in the name of another, is a contractor rather than an agent.

Also, in Chapter I, we have presented various applications of the agency to specific matters, either regulated by the Civil Code or other laws.

Particular attention was paid to the tacit proxy of reciprocal representation of the spouses. In this respect the question is whether, under the new legal regulations, which repealed the statutory mandatory community property of the spouses, the legal presumption of their tacit mandate still exists or not. As far as we are concerned, we believe that art. 345 of the new Civil Code enshrines the presumption of tacit mandate of the spouses in respect of acts of conservation, use, management and acquisition of common property, whether movable or immovable, which either of the spouses can enter both in their own name as or as legal representative of the other spouse, as an expression of parallel management of common goods mechanism (excluding express limitations set by art. 345 paragraph 1 sentence II and paragraph 3 of the Civil Code), a system that was picked up by our legislator from the provisions of the Belgian Civil Code. In light of the new regulations, it can be concluded that tacit mandate to represent each of the spouses in managing common property is no longer *de plano* presumed by the legislator, since it is characteristic of the legal community of property regime. Now the spouses may waive the consent of the legal regime, but with the opportunity to give each other power of representation in achieving their rights by way of an agreement.

We have also addressed the issue of the legal nature of the relationship between the manager and the company, that has generated much doctrinal debate over recent years. Classic Commercial law imposed the theory of the contractual bond between the manager and the

[1] Article 2009 of the Civil Code defines mandate as the "*contract whereby one party, called the trustee, be obliged to enter into one or more legal acts on behalf of the other party, called the principal.*"

company. Thus, it was considered that the basis of the relationship between the manager and the company was a common law agency contract. The Civil Code itself establishes,in a more general manner, the same solution, stating that "*relations between the legal person and those who make up its management bodies are subject, by analogy, to the rules of agency, unless otherwise provided by law, the articles of incorporation or status.* "[2] These legal provisions seem to support the theory of contractual nature of the relationship between the manager and the company, more so, the more the ideea of the agency bond appears repetitively in other texts of the Company Law.[3] As far as we are concerned, we'd rather share the theory of the organicist nature of these relationships. As it is clear from the express provisions of art. 72 of the Company Law, agency bonds are established between the administrator and the company, derived from the partnership agreement or from the decision of the General Meeting of Shareholders. Express acceptance of the appointment as an administrator, according to art. 153[12] par. (3) of the L. no. 31/1990, leads to the establishment of contractual relations with the company. At the same time, however, we can not ignore the rules of public order established by the legislator with regards to the administration of companies, such provision being *ex lege* applicable to those who act as administrators. They show the legal framework in which the company establishes juridical relations to third parties, through its management body. The administrator, in their relations with the company, acts as an agent, under the stipulations of the agreement that they concluded, accepting the status and powers fixed by the acts of Incorporation or by the decision of the General Assembly of Shareholders. At the same time, in his direct relationship with third parties, the administrator has the identity of a body of the company, having powers of representation derived directly from the law, which empower him to act in the name and on the behalf of the company even outside the limits set by the proxy, insofar as such acts are within the limits established by law, and third party contractors acting in good faith are not aware of the conventional restriction of the administrator's duties. We therefore consider that in relations with third parties, the person who acts as administrator of the company will act as a legal

[2] Article 209 paragraph (3) of the Civil Code

[3] Article 137 [1] paragraph (3); art 137 [2] paragraph (4): "*When there is one administrator and he wants to give the proxy up, he will have to convene the Ordinary General Meeting.*" Art. 144 [1] paragraph. (1): *"Board members shall exercise their proxy with prudence and diligence of a good administrator."*; Art. 153 [1] [2] paragraph (1): *"The term of the proxy of managers, respectively that of the Executive Board and the Supervisory Board members, is determined by the articles of Incorporation, but it may not exceed four years. [...] ".*

representative (statutory body) thereof. The source of the functions and power of representation of the administrator will be primary legal and only secondarily conventional, since art. 55 paragraph (2) of Law no. 31/1990 states that "*the terms of the articles of incorporation or the decisions of statutory bodies of companies [...], which limit the powers of these bodies given by law, are inapplicable to third parties, even if they were published*."

With regards to the judicial representation proxy, doctrine has often revealed the difficulties arising from trying to determine the legal nature of the contract between attorney and client, caused by the complexity of the lawyer's mission. Given the fact that the attorney's activity is often more complex and extensive than that of a trustee, we consider the legal assistance agreement to be a special typology of convention, a legally named contract which involves various obligations of the lawyer; therefore, this complex operation may meet both an agency contract, to the extent that the lawyer is representing the client in the development of legal acts, may they be material or procedural, as well as a contract for work, which implies that the contractor does material acts and dees for the benefit of the client, such as giving assistance / advice or drafting legal documents. In conclusion, we consider this contract to be complex, enjoying its own special legal regulation established by L. no. 51/1995 and the Statute of the Attorney Profession, to which the regulations of the Civil Code and those of the Code of Civil Procedure serve as common law.

Finally, also in Chapter I of our study, we presented the legal characteristics of the agency contract. We pointed aut the welcomed changes made by the legislator in the definition of the agency agreement, by removing its gratuity presumption, in the context of the last decades, which have seen an accelerated professionalization of this type of contract. Through this, the Romanian legislator expresses the evolution of the agency contract, as well as its natural and necessary consequences: these days, agency seems more like paid work, involving a specific protection of the trustee against the principal, as well as a necessary protection of the consumer against the professional trustee.

The issue of identifying agency as a unilateral or bilateral contract sparkled some doctrinal dispute. If the proxy was given to the trustee in return for a salary, it is obvious that the agreement will have a mutually binding nature, as both parties bind each other: the reason for which each contracting party takes up a bond is the corellative obligation assumed by the other

party. If the agent works free of charge, the principal does not owe the trustee a payment of money for the services rendered by him, but during the execution of the proxy, the burden to other obligations arises. What is missing, however, is the interdependence of mutual obligations of parties, which, in our view, is an essential element that qualifies a contract as being mutually binding.

Chapter II of the paper is devoted to the analysis of the conditions of validity of conventional agency, both the substantive and the formal conditions being presented separately. Thus, we have shown that in addition to the general requirements for validity of contracts stipulated by art. 1179 par. (1) of the Civil Code, certain conditions that are specific to the tripartite mechanism of conventional representation will have to be met, namely (1) the existence of representativeness , (2) the existence of the intent to represent, communicated to a third party contractor , (3) the manifestation of the representative's will, which has to be valid, free and uncorrupted. We also believe that to achieve valid conventional representation , besides valid, free and uncorrupted will of the representative , that juridical doctrine has revealed as a condition, the same requirement must be met with the person represented, in order to empower another person to enter into a legal act whose effects will occur in their person and their heritage .

On the ability of parties to contract, doctrine has recorded controversy generated by the question of whether the representative has to have full legal capacity in order to enter into valid legal transaction for which they were authorized. First, the question is whether the trustee expresses at the conclusion of the act for which he was empowered the principal's will, or he expresses his own intent as well. For if we consider that he only expresses the will of the principal, shall be sufficient for the latter to have the ability to enter into the target document; in what concerns the trustee, he will only need to express a valid (that is to have discernment) and uncorrupted consent (art. 1299 of the Civil Code). If, on the contrary, we consider that the representative expressed their will to the conclusion of the targeted act, then they should be able to conclude that act themselves. As for us, we tend to believe that the agent will not only express the principal's will in executing a proxy, but his own will as well. Secondly, we believe that we should differentiate between two aspects: is it necessary for the trustee to have full legal capacity to conclude a valid targeted act, or is it required to only have the ability required for the principal himself in order to complete the operation? Of course that given the explicit rules established by the legislator in the new Civil Code, it is easy to clarify this aspect: art. 1298 of the Civil Code

requires both representative and represented *„the capacity to conclude the act for which representation was given."* Therefore, the ability required of the trustee would have to be reported to the nature of the legal document for the conclusion of which they were authorized by the principal. In what concerns the principal, they must have the ability required by law in order to conclude the legal acts for which they had enpoweder the trustee.

We have pointed out that the legal regime applicable to legal entities, as principals, is more severe than that enjoyed by individuals, who can be held responsable for the excessive acts of their agent only in terms established by art. 1309 par. (2) of the Civil Code, namely when the third party contractor may rely in good faith on the apparent existence of a proxy given by the principal. A legal entity, instead, in its relationships with third parties, "*is bound by the acts of its legal bodies, even if those acts exceed the power of representation conferred by the articles of incorporation or by statut, unless it proves that the third party had knowledge of this at the moment of the conclusion of the act*" (art. 218 par. 2 of the Civil Code). This means that in relation to third party contractors, the limits of the powers of representation of the legal entity bodies are considered to be those established by law, those set by the principal himself (conventional agency) being valid against third parties only if known by them. But these legal provisions concern the representation of the legal entity through its administration; the legal entity may also appoint representatives according to common law; these trustees will be subject to the provisions of the Civil Code relating to agency, so they can act on behalf of their principal (that is the legal entity represented) only within the powers given to them, in terms of art. 2017 of the Civil Code.

On the criteria of interpretation of the limits set for the trustee's powers, two orientations have emerged in doctrine and jurisprudence: one that advocates a strict interpretation and limiting the extent of general proxy and another, which favors a more permissive interpretation of it. As far as we are concerned, we share the second orientation, as we consider that acts of alienation are not prohibited to the general agent by an absolute manner. According to art. 2016 par. (1) of the Civil Code, an agent with general proxy can only conclude acts of administration, but this right should be understood in its fullness. In practice, heritage management involves, in addition to actual preservation and management measures, some acts of alienation concerning some of the principal's goods; these acts, relative to the principal's heritage as legal universality,

circumscribe the goal of good administration. Also, the Civil Code stipulates that the trustee is required to ensure the preservation of the principal's property during the execution of the proxy[4]; these acts of preservation may involve even the sale of these goods[5], in cases of emergency .

Another issue raised in the paper is the form of the agency contract and the validity of the tacit proxy. The new rules contained in art. 2013 par. (1) of the Civil Code does not reproduce art. 1533 of the old Civil Code[6], which explicitly recognized two types of proxy: the tacit and the express proxy. Therefore, juridical doctrine has raised the question whether, under the new legal provisions, a tacit proxy can be recognized as valid, since current regulations only expresses reference to the tacit acceptance of the proxy, but keeps silent about the tacit offer to contract. We believe that this issue has been clarified, since jurisprudence and doctrine have repeatedly confirmed the admissibility of any evidence of tacit mandate, both in terms of its conferring and its acceptance, these means of proof being left to the discretion of the courts of law. Thus, evidence of tacit proxy will be carried out by both the parties and the third party contractors or other third parties, by any means permitted by law, proving beyond doubt the intention of the parties to confer, respectively to accept the proxy, regardless of the value of the act for which the proxy was granted. The *ad probationem* requirement of a written document would contravene the very notion of tacit proxy, because the written proxy is express by definition.

Chapter III of the paper presents the effects of the agency contract with power of representation, both over the relationship between the contracting parties, and over their relations with third parties.

Thus, we have analyzed separately the principal's and the trustee's obligations, as they result from the provisions of the new Civil Code. Although the present legal provisions conduct a detailed and systematic regulation of the effects of the agency agreement, we dare to propose *de*

---

[4] Article 2019 para. (2) of the Civil Code provides: "*During the period of time in which the goods received in the execution of the proxy, from the principal or on his behalf, are in possession of the trustee, he is bound to preserve them.*"

[5] Article 2024 para. (2) of the Civil Code: "*In case of emergency, the trustee shall sell the goods with the diligence of a good owner.*"

[6] Article 1533 of the Civil Code of 1864: *„(1) The proxy may be express or implied. (2) Acceptance of the proxy may also be tacit and result from its execution by the trustee."*

lege ferenda an explicit stipulation of the mutual loyalty obligation of the parties. Currently, this only results implicitly from the provisions of art. 2018 of the Civil Code for the agent, and of art. 2025 par. (1) of the Civil Code for the principal. Doctrine generally recognizes the duty of loyalty only for the representative in the case of an ordinary proxy; only in the case of a proxy given in common interest of the parties doctrine recognizes the obligation of loyalty for the principal as well. The principal's obligation to provide the trustee with the instructions necessary for proper accomplishment of their mission, which, in its turn, only echoes of the regulations of art. 2025 par. (1) of the Civil Code, would be desirable to be explicitly stipulated in the case of non-professional trustees. As a corollary, professional agent should have an obligation to advise the principal, similar to that established by French law. Also, we consider necessary to stipulate an obligation of confidentiality for the trustee, concerning the information which has come to their notice in the performance of their proxy.

We have stressed that the execution of the mission of the trustee does not necessarily imply actual conclusion of the act for which the trustee was empowered, but it is sufficient for the agent to prove that they have acted with due diligence required to achieve their mission. The difference in treatment which the legislator shows towards a remunerated representative in comparison with an unpaid trustee on the matter of the diligence required (art. 2018 para. 1 of the Civil Code) has been interpreted by some authors in the sense that in the case of a paid agent, the trustee whose fault was found by the court would be obliged to repair all damage suffered by the principal, while in the case of an unpaid agent, only partial reparation will be granted. As far as we are concerned, we believe that the principle of full compensation for the damage will apply regardless of the consideration of the paid/free duty of the representative, as far as it could be ascertained direct causal link between the agent's fault and the damage suffered by the principal. In other words, we consider that the distinction between free and paid agency is done only in which regards the criteria for determining the fault of the trustee in the manner of execution of their mission; once the fault is established, it will draw the necessary repair of the direct damage that has resulted from it, according to the law applicable to contractual liability.

As a principle, the Civil Code[7] exempts from liability the trustee who has fulfilled their duty, in the case in which third party contractors fail to discharge properly their obligations towards the principal. The possible non-performance by third party contractors of the obligations assumed towards the principal, or a defective performance thereof, is from the point of view of the trustee, a fortuitous event, for which liability is not presumed, but it will engage only when the trustee explicitly binds themselves for such cases. Trustee's liability against the principal on contractual grounds, must necessarily be based on their guilt about how they have carried out the mission entrusted by the principal, under the general conditions of the contractual liability of the debtor . Therefore, the obligation to execute the proxy is not accompanied by an obligation to guarantee the performance by the third party of their obligations. However, parties to the contract of agency may decide, by their agreement, to hold the trustee liable for improper performance of obligations by third party contractors against the principal.

Regarding probation by the trustee of the fulfillement of the duty of care, remember that the agent can take both obligations of result and obligations of means. However, regarding the main obligation of the trustee, that is to care for the principal's businesses diligently, this is an obligation of means; the trustee is not presumed guilty in the absence of the principal's probation, who is unhappy with the way his agent's pay of tasks.

The act concluded with oneself and the dual representation have also been the subject of our analysis. Thus, we believe that the basis of invalidation of the contract that the representative concluded with themselves or by double representation can not be breach of the duty of loyalty of the trustee, derived from the convention, as stated in literature; we consider that it will lead the principal to seek damages only, to the extent that such operation has caused them damage, by getting a lower value from the other contractor. In any case this does not constitute grounds for invalidation of the act.

On the obligation of the trustee to give account to the principal, we have pointed out the possibility of tacit dispensation from the obligation of the trustee to give account, in cases of relationships based on a high degree of confidence. We therefore consider that real accounting

[7] Article 2021 of the Civil Code: "*Unless otherwise agreed, the trustee who has fulfilled the mission does not respond to the principal on the obligations assumed by the persons with whom they have contracted, unless their insolvency was or it should have been known at the time of the conclusion of the contract with those people."*

will be held by the trustee only if the principal expressly required it; since the law does not explicitly require any form of this management, it is up to the principal to determine the form in which the trustee must present the accounts.

Regarding the trustee's obligation to give the principal all assets held under proxy, it is important to note that the agent must deliver not only direct, but also indirect gains, according to the principle "*ex mandato apud eum , qui mandatum suscepit , nihil remanere debet* ". A highly debated issue in the literature and in legal practice is the prescription of the principal's right to act against the agent for the execution of their obligation to give account. Currently, the principal's limitation of right of action for the return of money or other property received by the trustee from third parties during the execution of the proxy, will operate according to the regulations established in the new Civil Code[8]. Of course that these provisions of the Civil Code are applicable only to agency contracts concluded after the entry into force of the new Civil Code, on October the 1st 2011, according to art. 102 para. (1) of Law no. 71/2011 for the implementation of L. no. 287/2009 on the Civil Code.[9]

Particular attention was paid to the agent substitution operation, considering its legal nature and the effects generated between the parties and to third parties.

First, we consider the situation covered by paragraph (2) of art. 2023 of the Civil Code to be assimilated by the legislator to that in which the principal authorized the substitution, the legal consequences of achieving the substitution being the same in the relations between the parties, with the additional requirement imposed by paragraph (3), namely that the trustee would immediately notify the principal about the substitution. Also, according to the new regulations of the Civil Code (art. 2023 para. 5), the duty of care which the trustee must exercise when choosing a substitute would have to be much greater; he can be found guilty not only for known insolvency or disability of the substitute, but basically whenever the substitute does not have the same capacity as the trustee himself to execute the proxy.

[8] Article 230 of L. no. 287/2009 on the Civil Code, republished, establishes that at the entry into force of the new Civil Code (October 1st., 2011) repeales Decree no. 167/1958 on statute of limitations

[9] Article 102 para. (1) L.P.A. no. 71/2011: "*The contract is subject to the provisions of law in force at the time when it was concluded in all that regards its conclusion, interpretation, effect, performance and termination.*"

In the determination of the legal nature of the operation of agent substitution, we have shown that, traditionally, it is regarded as a typical case of subcontract. As far as we are concerned, we consider that the two concepts differ both by the fact that substitution can be made without the permission of the principal, except in those cases where it is expressly prohibited by law, as well as by the responsibility that the agent owes for the substitute's deeds, which, in the case of an allowed substitution, is only a liability for their own fault, concerning the way in which the agent had selected and trained their substitute. In conclusion, we believe that agent substitution does not meet every aspect of the legal regime of subcontracts; it rather seems to be a *sui generis* institution, with its own characteristics, which differ according to the specific circumstances in which the trustee substitution occurs.

We stressed the importance of *de lege ferenda* recognition of a direct action of the substitute against the principal. The French positive law it is an established fact that the two extreme parties of the substitution operation can act directly against each other. Alongside the original action given by the legislator to the principal, there is another in favour of the substitute, thanks to the effective intervention of jurisprudence. In our law, unfortunately, in the absence of an express provision of the law, the substitute does not have the possibility of resorting to direct action against the principal, but only the ordinary oblique action (under art. 1560 para. 1 of the Civil Code), this being obviously a much more difficult way of satisfy their interests in relation to the principal. Therefore, we believe that an orientation of our magistrates towards the French case law would be welcome, in oreder to meet the principle of equity, as currently the substitute is at a disadvantage relatively to the principal, who is the beneficiary of a direct action, under art. 2023 par. (6) of the Civil Code. In the light of an already lengthy French case law in this respect, it has emerged as an obvious conclusion the usefulness of this action and, indeed, we dare to talk about the need to recognize it in Romanian law through a legal express provision or at least by case law constantly oriented in this direction.

Regarding the principal's obligation to indemnify the trustee for the damages they have suffered duet o the execution of the proxy, we have shown that the repair will cover not only the losses suffered by the trustee as a natural and necessary consequence of the execution of tasks received, but also due to accidental causes, as long as the principal can not prove that their origin would be a breach of the trustee.

With regard to the remuneration due by the principal to the trustee, French law considers that the judge may change the amount of the fees fixed for the trustee, if it was set in advance, without having known the real importance of the service that would be provided by the trustee. Our recent doctrine has abandoned this approach, considering that the principal can be relieved of the obligation to pay the remuneration agreed by the trustee only if they demonstrate a breach of the contract by the agent, which is an opinion that we share.

Another issue which was the subject of our analysis was the situation of plurality of principals. In legal literature, divergent views have been expressed on the question whether principals' solidarity operates in those cases in which they had given the power of representation through different proxies. In Italian law, for example, the legislator has explicitly clarified this issue, showing that the power should have been given by all principals in a single proxy[10]. This requirement, however, is not claimed by the Romanian legislator, which suggests that the joint liability of principals against the agent is incident even if the power to represent was conferred to achieve a common interest business, but through different acts (documents). Of course that all principals must have agreed to be bound jointly against the agent that they have delegated to carry out business on the behalf of all of them; so consensus (agreement - negotium juris) should be done by unanimous agreement, but it can be recorded in separate documents (proxy-instrumentum probationis).

In what concerns the relations of the representative with third party contractors, we have showen that even if in principle no direct relationship is being established between the agent and them, exceptional situations may occur, in which the trustee themselves establishes direct legal relationship with third party contractors, either on tort or even contractual grounds, by making a personal commitment to the third party, through a distinct act. Regarding excessive acts concluded by the agent without authorization or in excess of proxy limits, although doctrine supports the idea of their validity, as acts producing direct effects between the third party and the agent, we believe that these acts are void for lack of consent of the principal, who has not expressed the will to join the act either directly or through a representative. In what concerns the

[10] Article 1726 of the Italian Civil Code: "*If the power to represent was given by many people through a single act and with the purpose of concluding a contract of common interest, revocation has no effect unless it has been done by all the principals, except if a just cause is being invoked.* "

agent, he signed the document on behalf of the principal, so with the intention that the legal operation performed would produce direct effects on the principal, the agent having no intention to be personally bound by its effects; the third party contractor, in their turn, joined the act to establish direct contractual relationship with the principal, not the agent. So, without creating any contractual relationship between the third party contractor and the agent, the excessive act determines tort liability of trustee to third party, but this is conditional on the good faith of the latter at the time of contracting and the existence of an injury suffered by the third, due to the unenforceability of the act against the principal, which is a damage that the third party contractor will have to prove.

Ratification was also presented in the paper, showing that it can be achieved in the same terms as the proxy, that is, in principle, it is a consensual act, since the requirement of symmetry of forms is operating only when the act done by the trustee is *ad validitatem* a solemn one. Tacit ratification results from the intent of the party, inferred from the facts taken into consideration by the court and especially from voluntarycomplete/partial execution of the obligation, that has been done deliberately by the party against which the contract is being invoked.

Regarding the apparent proxy, doctrine and jurisprudence sometimes stated that principal's liability to third parties acting in good faith for the acts concluded by the agent outside the limits of their power is based on the presumption of *in eligendo* fault. We can not share this view. For purpose of enforcing against the principal the excessive acts of the agent, the third party will have to prove the principal's guilt, which can not be presumed. Thus, under the rule of the current regulations, apparent proxy will only exist if the third party claiming it can prove culpable and misleading conduct of the principal, since it can not exist in absence of the fault of the "represented" one.

The fourth and final **chapter** of our study is dedicated to the termination of the agency contract, showing the causes of interruption of contractual relations (focusing particularly on contract revocation and the issues that it generates), the clauses of contract continuation following the occurrence of a case of contract cease and the exceptional situations where the legislator imposes that contract should continue, even if there are grounds for its termination.

Regarding the duration of the contract, it should be noted that unless the parties have expressly agreed on a certain contractual term, the legislator provides that the agency contract

shall cease after "*three years from its conclusion*" (art. 2015 of the Civil Code). Therefore, the contracting parties can not agree on a perpetual agency contract. So, in light of the new regulations, the contract may only be agreed for a fixed or determined period of time, which will either be expressely agreed by parties or established by a suppletive legal regulation.

We also consider it is important to note that the agency contract has an essentially revocable nature. Agency is revocable by its very nature, preserving this character despite any stipulation to the contrary. The posibility that the parties would stipulate irrevocability clauses was taken into consideration by the Romanian legislator, the new Civil Code containing explicit provisions regarding the proxy that the parties have declared to be *„irrevocable"*: art. 2031 par. (1), art. 2032 par. (2). In this case, proxy revocation shall produce its specific effect anyway, ending the contract, but the principal's conduct, in breach of such agreement of the parties, will be severely appreciated, being presumed guilty for unjustified dismissal if they do not prove that the revocation was due to the fault of the trustee himself or to unforeseeable and unavoidable circumstances (art. 2032, paragraph 2). So if there is such a clause of "*irrevocability"*, it does not deprive the principal of the power to revoke the proxy, only the burden of proof of the reasons of dismissal shifts from the agent to the principal, if the agent asks for damages for unjustified dismissal. We must not believe that the mere fact of revocation of a preoxy stated "*irrevocable*" will necessarily determine the principal's responsibility to indemnify the trustee, as the principal, under par. (2), art. 2032 of the Civil Code, can free themselves from this liability, by proving that their decision to revoke the proxy was determined by the fault of the agent himself, or by a fortuitous reason.

Regarding the effects of the proxy revocation, we have shown that this unilateral action taken by the principal shall take effect by termination of contractual relations between the parties, from the moment when the agent knows or should have known it, regardless of the form in which it was issued, or the fact that the principal has notified the trustee, or the latter knew / was able to know about it in another way (as resulting from reading art. 2036 and 2031 of the Civil Code). For the withdrawal of the proxy done by the principal to be enforceable against third parties, they, in their own turn, must have, or should have had knowledge of it. The new Civil Code regulations distinguish between the two categories of obligations of the principal in case of revocation: specific obligations, arising from the law (art. 2025, 2026, 2027 and the one that is

correlative to the agent's right stipulated in art. 2029), which are due regardless of the reason for revocation, and the obligation to pay additional damages, designed to repair the damage caused by the dismissal, but only if it was unjustified or unexpected. Therefore, revocation by itself does not entitle the trustee to damages, since it represents the exercise of a legal right of the principal. De lege ferenda, we consider that it would be useful to mention that withdrawel of the proxy can be done tacitly not only by empowering a new trustee for the same business, but also by its realization by the principal himself; such provision already exists, for example, in the Italian Civil Code (article 1724).

Another question raised in this paper is the allowance for revocation. We believe that if the parties agreed on a salary due to the trustee, they will be entitled to collect it fully, as long as the principal can not prove that their decision to revoke the proxy was determined by the agent's own fault in execution of the mission. According to art. 2032 of the Civil Code, in the event of unjustified or unexpected dismissal, the principal will be bound to pay the trustee both their due salary (art. 2032 para. (1) sentence 1, in relation to art. 2027), as well as to repair the damage caused by the revocation (art. 2032 para. (1) second sentence). In addition, if the agent had suffered damage resulting from acts of executing the proxy, until it was revoked, it will also be repaired by the principal (art. 2032 para. (1) sentence 1, in relation to art. 2026). Under the current legislative regulations, unpaid trustee will be entitled to a repair only under the conditions laid down in art. 2032 of the Civil Code, that is to repair damage directly caused by unexpected or unjustified revocation, which the trustee will have to prove according to common law regulations. Regarding the clause by which the agent gives up his indemnity, the trustee will always preserve the right to claim compensation if the revocation of its proxy is ordered abusively or unduly by the principal, which is causing him harm, even if the agent had explicitly gave up the rifght to claim damages through a previous clause. We appreciate that no amount will be payable by the principal because of the mere fact of dismissal, without proving its unfair and prejudicial nature, no matter what the parties had established by contract. We believe that art. 2031 par. (1) of the Civil Code establishes a rule of public policy, concerning a special regime of unilateral revocation of the proxy done by the principal, which is different from the one established by the common law (art. 1276 of the Civil Code), which allows the parties to condition the right of contract withdrawal of a benefit such as an allowance.

A matter to which doctrine has given special attention is the right to revoke a proxy given for common interest of the parties. This right is questionable, given that the principal's discretionary right to revoke the proxy is based precisely on the fact that the proxy was given to satisfy his interest and therefore only he is able to determine whether this interest is being pursued and achieved by the agent or not. Given the manner in which the legislator intended to regulate the right of the principal to revoke the proxy, we consider that the situation of the proxy given in common interest of the parties is similar to that of the proxy which was declared "*irrevocable*"[11]: the principal may exercise the right to revoke the proxy, which is sealed by the law through mandatory provision, which does not allow the parties to waive the clause to the contrary, declaring the proxy "*irrevocable*". In the case of a proxy agreed by parties for their common interest, it can be assumed that the parties wanted it to not be revoked in its sole discretion by one of them, which would violate the interests of the other in the business, therefore, for it to be unilateralely irrevocable. This being the presumed intention of the parties, it may be considered that they would have tacitly agreed on an irrevocability clause; the proxy, being given by mutual agreement to achieve their interests, will be abolished in the same manner, that is all by agreement of both stakeholders. The consequence would be the application in the matter of the proxy given in common interest of the legal provisions concerning the proxy the parties declared "*irrevocable* ", namely art. 2031 par. (1) and art. 2032 par. (2) of the Civil Code. Revocation of the proxy given in common interest by the principal will be considered "*undue"* whenever it will not be motivated by the agent's fault or by a fortuitous event, which the principal will have to prove. In their absence or in the case of unconvincing means of evidence, the principal will be obliged to compensate the agent for damages due to revocation of their proxy.

Given the legal provisions regarding unilateral termination of contracts established by the new Civil Code, we could not ignore the issue of the impact that these regulations generate over the agency contract. The right of the contracting parties to unilateralely withdraw the proxy has its legal basis firstly in special legal provisions which concern this contract (art. 2030 to 2034 ,

[11] Likewise V. Terzea, in *The New Civil Code annotated with doctrine and jurisprudence*, volume II, Ed. Universul Juridic, Bucureşti, 2012, p. 939: "*according to art. 2032 par. (2) of the new Civil Code, when the parties consider the proxy to be irrevocable, it is possible to revoke the proxy, under the condition to pay for damages, if unjustified. Therefore (...), in the case of a proxy given in common interest of the parties, revocation of the proxy is possible.* "

2036 to 2038 of the Civil Code) and only secondarily, to the extent that the special legal provisions shall not depart from it, in the general provisions laid down by the legislator in the matter of unilateral termination of contracts, namely art. 1276-1277 of the Civil Code. We conclude that in the case of the agency contract, the new provisions concerning the possibility of unilateral termination of the contract, namely art. 1276-1277 of the Civil Code do not produce changes in the rights of the parties to terminate the agreement unilaterally, which was established by specific rules concerning the agency contract. The possibility of unilateral termination of the contract is governed by special legal stipulations, which are justified by the nature of the contractual relationship, that is essentially *intuitu personae*, so it justifies the special arrangements that benefit the parties in relation to the general rule.

Regarding the trustee's giving up the proxy, in legal literature it has been expressed the view that the parties may agree by contract on a clause by which the representative would be waiving his right to withdrawal. In light of the provisions of the new Civil Code, we consider that such a stipulation of the parties would be ineffective, not being able to deprive the agent of his right of contract renunciation, which is sealed through a legal provision that we consider to have the character of public policy, and not a suppletive nature. We believe that the courts of law should pay particular attention to those situations in which the agent will invoke external reasons that led to the impossibility of execution of the proxy; whether the trustee gives up the mission due to such causes, or because of their own fault, they will anyway have the right to be paid not only for the acts that they actually performed for the principal, but also for those that they would have achieved, if reasons not attributable to them had not made them unable to achieve them. Depriving the agent of the right to remuneration should in all cases only be a consequence of their negligence that caused failure of those operations. When plurality of agents, we consider that the legislator should establish the rule of their unanimous consent if they want to give up their mission, but only if they were contractually obliged to work together.

Another cause for termination of the agency agreement is death, incapacity or bankruptcy of either party. We believe that de lege ferenda, the legislator should distinguish between two different assumptions on future regulation of this issue. The first situation would be the death / disability / bankruptcy of the principal, when the agent should indeed, as proof of his loyalty to the principal and of the due diligence in managing his interests, continue execution of the proxy, despite the occurrence one of the circumstances mentioned, until the principal / heirs /

representatives shall give discharge, whereas terminating the contract no longer presents imminent and immediate risk of damage to their interests. In other words, in such cases, the requirement currently imposed by the legislator through art. 2035 par. (2) should be maintained. Another hypothesis, however, totally different, we think, is the death / inability / failure that occurs with the representative person themselves, and making it objectively impossible for them to be able to continue execution of the proxy. In such a situation, we think that the current requirement imposed by the legislator to the heirs / representative is excessive, binding them to continuate the execution themselves, otherwise obviously ordered to compensation (according to art. 2034 para. 3 of the Civil Code), where they would exercise the right to give up the mission. We believe, therefore, that in such circumstances, the obligation of the heirs / representatives of the trustee to immediately notify the principal the cause for termination of the contract (obligation imposed by the legislator in art. 2035 para. 1 of the Civil Code.) would be sufficient and more fair than to oblige them to continue themselves a mission they had not accepted and for which they are not proficient. Certainly the current legal regulations allow them to free themselves from this obligation, which seems excessive, but only with the consent of the principal or by giving up the proxy, with an order to pay damages under the terms of art. 2034 par. (3) of the Civil Code.

Regarding the clauses stipulating continuation of the contract after the occurrence of one of the causes of termination, we consider that in order to decide on the suppletive or imperative nature of the provisions in art. 2030 par. (1) of the Civil Code, we should differentiate between the cases of contract termination that are referred to by the statutory text. Thus, in terms of revocation of the proxy done by the principal, as well as the trustee's right to resign, we consider that the regulations contained in art. 2031 par. (1) and art. 2034 par. (1) of the Civil Code establish that the parties may exercise this right "*at any time*"; for the principal, the legislator even explicitly states that they will end the contract unilaterally by their will even if it was declared "*irrevocable*" by the parties. Therefore, since the legislator respects the discretionary right of the parties to terminate the contract in an unilateral way, we consider that the parties may not derogate from this rule, so stipulation of any provision waiving the right to revoke / give up proxy will be ineffective, its only possible effect being the production of an obligation to pay damages. Therefore, the provisions of the art. 2030 par. (1) point a) and b) are mandatory. Regarding the situation of death, incapacity or bankruptcy of one of the parties, we consider that

art. 2030 par. (1) of the Civil Code, which states the termination of the contract in the occurrence of such circumstances, has only a suppletive nature, parties being allowed to stipulate further continuation of the contract.

Regarding the exceptional continuation of the contract after the occurrence of a case of termination, we consider that the protection conferred to the parties by art. 2030 par. (2) of the Civil Code consists only in the possibility to request the other party compensation for the damage caused by exercising the right of withdrawal as regulated by art. 2030 of the Civil Code; an enforcement of the obligation in this case, namely continuing the contract against the will of one party would not be possible even in such circumstances, the parties / their heirs keeping the right to withdrawal, that they may exercise at "*any time*", with the only possible consequence of an order to pay damages under the conditions specified in art. 2032 and 2034 para. (3) of the Civil Code.

Finally, our work concludes with a final section of **conclusions,** which have been exposed to in this summary, and with the presentation of a **selective references**, that has served as a milestone in our scientific work.

Certainly never a scientific paper can be considered complete or satisfactory to the author. Some aspects of the relations generated by the agency contract will be subject to future concerns, since we intend to extend our study of this matter.

AGENCY CONTRACT WITH POWER OF REPRESENTATION

CONTENTS