

AGENCY CONTRACTS – EXISTING REGULATIONS IN ROMANIAN LAWS

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Abstract

Agency contracts are created as legal instruments with a highly important role for the business activity, given that they are the basis for professional intermediation. Regulations have changed in time, in an attempt to offer a better apprehension of the notion and applicability of this type of contract through the legislative framework. In Romanian law, this type of contract was regulated for the first time by Law no. 509 in 2002 on permanent commercial agents, law that was repealed when the new Civil Code came into force on October 1, 2011.

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Currently, in Romania agency contracts are regulated by articles 2.071-2.095 of the Civil Code². Article 2.072 of the Civil Code defines agency contracts as contracts whereby a principal firmly empowers an agent either to negotiate, or to both negotiate and sign contracts in the name and on behalf of the principal, in exchange for remuneration, in one or several specific regions³.

Thus, it was decided, for instance, that an arrangement whereby one party identifies partners for the beneficiary, intermediates the beneficiary's offer and controls the works schedule according to the orders sent by the persons accepting the offer, in exchange for remuneration determined in advance as a percentage, has the legal nature of an agency contract⁴.

With respect to the scope of application, such is set in accordance with article 2.071 of the Civil Code by excluding the activities to which agency contracts do not apply, and namely: activities of the persons that act as intermediary in case of stock exchange markets and regulated freight markets and derivative financial instruments⁵; persons acting as insurance and reinsurance agents or brokers⁶; persons providing a service that is not remunerated as agents.

The same article, in paragraph (2), sets forth that as defined in the Civil Code, the following are not deemed agents: persons who (i) have the capacity of legal or statutory body of a legal entity with the right to represent it; (ii) are shareholders and are empowered to duly represent the other shareholders; (iii) have the capacity of trustee in bankruptcy, liquidator, legal guardian, curator, custodian or attachment-administrator in relation with the committee.

The definition provided in article 2.072 of the Civil Code also indicates the legal features of this contract.

A first legal feature of agency contracts is their reciprocal nature, with rights and obligations for both parties.

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² Law no. 287/2009 on the Civil Code, republished in Official Gazette no. 505/2011, Part I.

³ For details regarding the view taken by the doctrine and previous regulations, see Gh. Stancu, "Intermediarii in comert. Contractul de agentie" in Dreptul magazine, issue 11/2007, T. Pescure, R. Crisan, "Contractul de agentie – un nou contract numit in dreptul comercial roman", in Dreptul magazine issue 7/2003, D. Velicu, F. Basenghi, "Impactul dreptului comunitar in definirea reprezentarii comerciale – contractul de agentie" in the magazine Revista Romana de Drept Comunitar issue 4/2006.

⁴ See Decision no. 747 of February, Commercial Division of the High Court of Cassation and Justice of Cassation Bulletin no. 4/2006, p. 35.

⁵ See Law no. 297/2004 on the capital market, published in Official Gazette no. 571/2004, Part I and Law no. 357/2005 on stock exchanges, published in Official Gazette no. 1115/2005, Part I, which regulate these categories of intermediaries.

⁶ See Law no 32/2000 on insurance companies and insurance supervision, published in Official Gazette no. 148/2000, Part I, which regulates these categories of insurances.

Moreover, agency contracts are onerous contracts, as both parties are to achieve a pecuniary purpose. At the same time, they are contracts with successive performance, the parties' obligations being performed based on a schedule, during a certain term that is provided in the contract.

Another feature of an agency contract is that it is a contract concluded based on the mere will of the parties – thus it is consensual – and its written form is necessary *ad probationem*.

As to the legal nature of an agency contract, as indicated by the very definition of this contract, we are dealing with a power of attorney granted by the principal to the agent, in order for the latter to either negotiate contracts, or to both negotiate and sign contracts in the name and on behalf of the principal.

In other words, if we are dealing with a simple empowerment to negotiate, this is a mandate without representation. In this case, an agent only identifies offers that he/she makes available to the principal for execution by the latter. However, if the power of attorney refers to both negotiation and execution of contracts, we would be dealing with a mandate with representation based on which agents not only negotiate but also enter into contracts with third parties in the principal's name.

Considering these specific characteristics of agency contracts, article 2.095 of the Civil Code sets forth that the provisions of agency contracts are supplemented by the provisions of the finder's fee contract, insofar as the latter contracts are compatible, and if an agent has the power to represent a principal for the signing of contracts, such provisions will be supplemented by the norms regarding mandate contracts with representation.

Given these resemblances, please note, however, that in the case of agency contracts we are dealing with their own specific features, which render them independent contracts and which explain their separate description in the regulations⁷:

➤ A first distinctive feature as opposed to mandate contracts – with or without representation – is the fact that an agent acts as an independent intermediary, and he/she cannot be at the same time a dependent intermediary, this being expressly regulated by article 2.072 paragraph (2) of the Civil Code.

Therefore, unlike fee-based agents, respectively, proxies who act based on the principal's instructions, agents organize their activity independently, employment relations, for instance, being implicitly excluded between them.

➤ another distinctive feature is that the intermediation activity based on a agency contract is a professional activity and does not have an occasional nature; the professional nature of this activity results from article 2.072 paragraph (2) of the Civil Code, which sets forth that agents act professionally.

➤ In case of such contracts, we may also speak of a common interest of principals and agents for the intermediation activity, principals being interested in selling their merchandise, while agents in negotiating and entering into contracts depending on which they will be remunerated.

➤ In the case of agency contracts, we are speaking of several legal deeds that refer to several specific regions, and not one or several concrete legal deeds.

As to the power of attorney granted to an agent, the contract must provide clauses regarding the subject matter of this power of attorney, more specifically under what conditions negotiations for contracts will be carried out with various third parties, respectively under what conditions contracts are negotiated and signed in the name and on behalf of a principal.

⁷ Also see Stanciu D. Cărpenaru, "Tratat de drept comercial român" Universul Juridic Publishing House, Bucharest, 2012, p. 548-549.

This implies that agency contracts should indicate the essential elements of contracts to be concluded afterwards, such as the services, prices and also the commercial area, regions where the agent may act. Moreover, in accordance with article 2.076 of the Civil Code, agency contracts may even include clauses regarding the fact that agents may sell on credit, grant discounts or deferred payment.

Article 2.076 of the Civil Code sets forth the so-called exclusivity clauses.

Thus, the agent may not negotiate or enter into on his/her behalf, without the principal's consent, in the determined region, contracts regarding goods and services similar to those that are subject matter of the agency contract.

If not otherwise provided in the contract, the agent may represent several agents in the same region and for the same type of contracts. If expressly set forth in the contract, an agent may represent several competing principals.

Moreover, article 2.075 of the Civil Code also provides non-compete clauses, namely those clauses that may be included in agency contracts whereby the professional activity of an agent is limited during the validity of the contract and also after its termination⁸.

Please note that, in accordance with paragraph (2) of the same article, the non-compete clause is drafted in writing under the penalty of absolute nullity.

This clause only applies for the geographic region or for the group of persons and the geographic region to which the contract refers and only for the goods and services for which an agent is authorised to negotiate or enter into contracts, any expansion of such range being null and void. The non-compete clause cannot survive for more than two years after termination of an agency contract. Any longer term provided in a contract will be reduced to the two-year term provided by the laws.

An agency contract will also set forth the agent's remuneration, which, in accordance with article 2.082 of the Civil Code, may be expressed as a flat amount, or may be determined depending on the number of contracts or commercial deeds, or their value, respectively. When it is expressed as a variable amount, this remuneration will be called fee.

If an agency contract does not provide remuneration, the same legal text sets forth that in this case remunerations will be determined in accordance with the customary practices applied to the place where an agent carries out his/her activity, or depending on the goods that are subject matter to the agency contract. In the absence of such customary practices a reasonable remuneration is taken into account, in relation with all matters in the contracts signed.

As per article 2.088 of the Civil Code, the contract is concluded for a limited or an unlimited term. If it is signed for an limited term and continues to be performed by the parties after the expiry of such term, it will be deemed automatically extended for an unlimited period. In fact, we deem that this provision is useless since even in its absence we consider that the willful performance of the contract after its expiry equals tacit extension thereof by the parties.

As to the form of an agency contract, as set forth in article 2.078 of the Civil Code, such contracts are signed in writing, either certified by a notary or not. If the law does not provide otherwise, the written form is an *ad probationem* condition, not an *ad validitatem* one.

Referring to the effects of agency contracts, such contracts give rise to obligations devolving on the two signing parties – agent and principal. Once enforced, agency contracts will be effective towards third parties as well.

In accordance with article 2.079 of the Civil Code, an agent⁹ has several obligations, namely:

⁸ Also see D. Florea, "Aspecte teoretice și practice privind clauza de neconcurență în activitatea agenților comerciali", in *Curierul judiciar* magazine, issue 2/2010, p. 79.

⁹ Of an Anglo-Saxon origin, created along with the growth of business activity internationally, agency contracts still appear in modern law systems. Thus, in English law, for instance, when speaking of agent's obligations, it is clearly delimited that an

- To fulfill personally or by representatives, the obligations arising out of the power of attorney granted, for good faith and loyalty. In other words, an agent may be replaced but only in accordance with the provisions of article 2.023 of the Civil Code, i.e. if he/she is authorized to be substituted or if unpredictable circumstances prevent him/her from fulfilling the authorization and he/she is unable to inform beforehand the principal of such circumstances, or if it may be presumed that the replacement was approved.

Nevertheless, the principal must inform the agent within a reasonable term whether it accepts, refuses or does not perform a contract negotiated or concluded by the agent, in accordance with article 2.080 of the Civil Code.

- To procure and notify the principal of the information that the latter may be interested in regarding the regions set under the contract or required other information that he/she holds. This refers to information regarding the offered services, the prices charged, operations of other vendors in the area etc.

- To use its best endeavors to negotiate and to sign, respectively, the contracts for which it is empowered under conditions as advantageous as possible for the principal.

- To comply with the reasonable instructions from the principal. This refers to the normal instructions, customary for such contracts, instructions about which it must be provided that they are imperative or, on the contrary, to be used only for guiding purposes or otherwise, to the agent's discretion;

- To keep in its registers a separate record for contracts which concern each principal. This legal provision suggests that if an agent represents several principals, he/she must have separate records for each.

- To store the goods or the samples so as to ensure their identification. Such storage must ensure that the principal's good reputation is not damaged, and, in addition if an agent represents several principals, the goods or samples must be easily identifiable.

In their turn, principals have obligations set under the legal provisions, i.e. by article 2.080 of the Civil Code – being bound to act in their relation with agents in good faith and with loyalty:

- To make available to their agents, in due time and in the proper quantity, samples, catalogues, rates and other documents necessary to agents for fulfillment of their authority.

- Thus, this refers to the documentation and samples without which agents cannot fulfill their authority in relation with third parties.

- To supply to their agents the information required for them to perform the agency contract. If the general framework for fulfillment of the contract is set precisely by the agency contract, the subsequent circumstances that arise represent information that principals must transmit their agents, for instance changes of economic circumstances, newly arising particularities, etc.

- To inform their agents, in due time, when they anticipate that the volume of the contracts will be significantly smaller than the one their agents were normally expecting. This is the case when markets change and this leads to a lower contract volume, which agents must be aware of.

- To pay their agents the due remuneration under the conditions and by the terms set forth in the contract.

As per article 2.082 paragraph (5) of the Civil Code, in addition to an agent's remuneration, as provided in the agency contract, an agent is entitled to a fee, only if he/she is fully or partially remunerated with a fee.

When this condition is fulfilled and we are dealing with a fee, agents are paid as such when we are dealing with contracts signed during the term of the agency contract, wither as a result of the agent's intervention, or without the agent's intervention, but with a client previously procured by him/her, or with a certain client for which he/she received an exclusive authority.

An agent is also entitled to a fee for contracts signed after termination of the agency contract, but only provided that they were signed as a result of the agent's intervention or if the third party's order was received by the principal or the agent before termination of the agency contract.

In the case of contracts that are not performed, although signed, the fee is due nevertheless if the agent complied with its obligations.

In order to calculate the fee, principals must send their agents copies of the invoices sent to third parties and the method to calculate the fee.

Regardless whether a contract is concluded by an agent in the name and on behalf of his/her principal, meaning that an agent negotiated and signed the contract, or the contract with third parties is signed by the principal, meaning an agent only negotiated the contract, the legal relations with third parties are decided between them and the principal, and agents have no obligation from this perspective.

Therefore, any complaint of a third party regarding the delivered goods and services will be submitted to the principal in all cases. If sent to an agent the latter only directs them to the principal, immediately informing it thereon.

Agency contracts are terminated depending on whether the contract sets forth that it is signed for limited or unlimited term.

If the contract is for a limited term, it will expire on the date set forth in the contract. After this date, if the parties continue to perform the contract, the laws provide that it will be deemed extended for an unlimited term.

Agency contracts concluded for unlimited periods will be terminated in accordance with article 2.089 of the Civil Code, by either party, based on a mandatory prior notice. The same termination method may be used for the contract for a limited period before expiry of the term or for the contract signed for a limited period that became a contract signed for an unlimited period by continuation of its performance.

During the first year, the term of notice is at least one month, and if the term of the contract exceeds one year, for each year another month is added, but without exceeding six months.

In special cases – particularly when there are exceptional circumstances, others than force majeure or acts of God –agency contracts may be unilaterally terminated without notice, and in this case they will be terminated as of the date the termination notification is received. In such cases, the party that terminated the contract will be able to indemnify the damage caused to the other party.

If an agency contract terminates, the agent is entitled to a remuneration if he/she procured new customers for the principal who gets benefits due to this and, in addition, such remuneration is equitable given the actual circumstances considering the fees that the agent should have received and the possible limitation of the agent's activity based on the non-compete clauses (article 2.091 of the Civil Code).

This remuneration will not exceed an annual remuneration and does not prejudice the agent's right to possible damages.

Agents are not entitled to remuneration in the express cases provided by article 2092 of the Civil Code: the contract is rescinded by the principal because the agent breached his/her obligations; the agent unilaterally terminates the contract for other causes than those that objectively render it impossible for him/her to proceed with the contract (illness, invalidity, age etc); when an agency contract is assigned by replacement of the agent by a third party; when the contract is novated by replacement of the agent by a third party, unless not agreed otherwise under the contract.

Conclusion

Last but not least, we emphasise that we consider the new regulation to be a step forward given the new economic reality in our country and the increasingly frequent commercial and business relations at international level. However, reality and judicial practice in this field are yet to confirm the new regulations or, quite the contrary, to impose their amendment to a larger or smaller extent.

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