

INSURANCE INTERMEDIARIES

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Abstract

The actual Civil code regulates for the first time in the Romanian legislation the intermediation contract, until its entering into force existing multiple situations that lent themselves to this legal operation, but did not benefit of such particular legal rules. Yet, the case law has shown that the situations that arise in the activity of the legal or natural persons are much more complex, this leading, in time, to the reglementation of such particular rules. Such a case is that found in the matter of insurance contracts, the position of the insurance intermediaries being regulated especially by Law no. 32/2000, according to which they represent the natural or legal persons authorized in the conditions of the above mentioned legal document, that perform intermediation activities in the insurance field, in exchange of a remuneration, as well as the intermediaries from the EU member states that perform such an activity on the Romanian territory, in accordance with the freedom in performing services. Therefore, the present paper aims to analyze the conclusion of such insurance contracts and to underline the particular position of the insurance brokers, having the following structure: 1) Introduction; 2) The reglementation of the intermediation contract/brokerage agreement in the Romanian Law; 3) The importance of the intermediaries in the insurance contracts; 4) The conclusion of the insurance contracts; 5) Conclusions.

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1. Introduction

The intermediation activity actually includes a large number of agreements², however, in the current Civil Code, the activity regulated as “brokerage agreement” is the agreement by which an entity (intermediary) undertakes to the other party (customer) to find a third party willing to conclude an agreement.

Thus, the current Civil Code regulates, for the first time within the Romanian legislation, the brokerage agreement. Until its enforcement there were a series of situations that were associated with the legal operation of “intermediation”, but which were not subject to special legal provisions.

Actually, the situations occurring in the legal entities’ or natural persons’ activity, are much more complex, and that is why certain situations required special regulations, separate from those regulated by the Civil Code. Such a situation is the case of the insurance intermediaries, mainly regulated by Law no. 32/2000 on the insurance activity and insurances monitoring.

Hence, this paper aims to analyze the case of this distinct category of intermediaries, regulated by a special law, by reference to the provisions of the Civil Code applicable to this field, in order to understand the particularities of this category of entities and their role in the work undertaken.

2. The reglementation of the intermediation contract/brokerage agreement in the Romanian Law

Until the enforcement of the current Civil Code on October 1st, 2011, the brokerage agreement has been undefined in the Romanian legislation, not being explicitly regulated under our legislation. However, due to the multitude of economic transactions performed within various fields, but also due to the celerity of this economic activity, it is absolutely certain that the practice required the advent of entities to intermediate the cooperation activities between various business operators, facilitating thus their tasks.

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² Mandate agreement with or without representation, agency agreement, brokerage agreement.

Or, given that the natural persons or the legal entities who/which carry out intermediation activities are professionals and therefore they perform their business in an organized manner by providing services based on their acquired skills, it cannot be disputed that the initiative of the Romanian legislators to explicitly regulate the brokerage agreement is beneficial to the society, the intermediaries, as professionals in this field, having not only the role to facilitate the activities of the participants to the commercial operations, but also to guarantee their quality.

Hence, the brokerage agreement is regulated by the Romanian Civil Code, Section V, Title IX, Chapter XI.

According to art. 2096, the brokerage agreement is an agreement by which the intermediary undertakes to the customer to find a third party willing to conclude an agreement. Therefore, the intermediary is not the attorney in fact of any of the mediated parties, but an independent agent in terms of the performance of its obligations.

In return for the performed work, the intermediary is supposed to receive a fee from the customer. However, the activity carried out by the intermediary is to be paid only if the customer actually concludes the intermediated agreement with the third party. In this respect, in the accepted legal principles the obligation of the intermediary has been deemed as one of achieving a specific result, the “finding of a contractor representing the basis of the brokerage agreement”.³

Even under these conditions, the obligation of the intermediary to inform the third party of all the data required to conclude the intermediated agreement has been deemed as a diligence obligation, the only important thing being the seeming of the performance of investigations by the intermediary regarding the customer’s status.⁴ However, we cannot fully agree with these arguments, as art. 2100 of the Civil Code explicitly regulates the intermediary’s information obligation. Or, the only exemption of the law with respect to the complete fulfillment of this obligation is the culpable prejudice of the customer’s interest.

Thus, it becomes difficult to say whether the intermediary completely fulfills or not this obligation, considering that all that it can communicate to the third party is the information received from its customers. Therefore, if the data are incomplete, it cannot be argued that the one who failed to fulfill the obligations is the intermediary. Or, in such a case, the question is what type of liability is to be applied.

Concurrently, as long as the provisions of the Civil Code allow this, it is possible to have in particular cases customers requesting the introduction of a confidentiality clause in the brokerage agreement, case which would put the intermediary in an unfavorable position, due to the regulation of such conflicting provisions regarding the obligations incumbent on it.

The remuneration to which the intermediary is entitled for the activity performed as professional is, thus, owed by the customer only if the intermediated agreement is concluded as a result of the activity carried out by the intermediary. It is important to note that the remuneration is owed only by the customer, and not by the third party that is found, the reason being that no legal relation is created between the intermediary and third party which could generate such an obligation.

If the fee is established by reference to the intermediated agreement’s value or to other essential elements thereof – such as a certain payment term -, the customer is required to inform the intermediary about these aspects within no more than 15 days as of the conclusion of the intermediated agreement. At the same time, within the same time interval, the customer is also bound to inform the intermediary about the conclusion of the agreement with the third party and as of that moment the intermediary is entitled to claim the due remuneration.

Hence, in the absence of explicit provisions in this respect, the only obligation of the customer towards the intermediary would be the one of informing it about the conclusion of the intermediated agreement. Or, in such a case, the customer would be put in a clearly more favorable position compared to the one of the intermediary, whose remuneration would be strictly at the

³ Florin Aurel Moțiu – *Contractul de intermediere în Noul Cod civil*, in “Curierul Judiciar” no. 10/2011, p. 527

⁴ Idem

customer's discretion. However, while drafting the regulation, the legislators also took into account that the amount to be paid to the intermediary for the performed activity is usually not known at the time of the execution of the intermediation agreement, if the intermediary's remuneration is to be established by reference to other criteria, such as the value of the intermediated agreement. Thus, as long as the customer would not be required by law to communicate the value of the asset within the same term of 15 days⁵ as of the conclusion of the intermediated agreement, under the penalty of the doubling of the due fee, it could be construed that the customer's informing the intermediary of the conclusion of the intermediated agreement is sufficient, and in this case the latter would still not be able to know the exact amount of the due remuneration. Therefore, what the legislator successfully tried to regulate is precisely the avoidance of the abuses committed by the customers regarding the execution of the intermediation agreements.

Furthermore, according to art. 2102 of the Civil Code, the intermediary, if it has been explicitly authorized in this respect, has the possibility to represent the intermediated parties in the conclusion of the intermediated agreement or of other enforcement documents thereof. Thus, it can be observed according to the legal provision that the intermediary may also serve as representative of the parties only if it has been explicitly authorized in this respect.⁶ Under these circumstances, it can be concluded that the difference between the brokerage agreement, where the intermediary also fulfills the role of representative, and the mandate agreement is that while, generally, the attorney in fact may perform all the activities required to successfully fulfill the granted power of attorney, in the intermediation case, the intermediary may only perform the operations for which it received explicit delegation, any other actions not being able to bind the customer toward any third party.

3. The importance of the intermediaries in the insurance contracts

There are several main fields where the brokerage agreements are useful, among which we can find the special case of real estate agents, the activity of work force placement abroad or the activity of tourism agencies, which have the obligation to inform the tourists regarding the services packages they sell, as clearly as possible, and last but not least, the field of insurance agreements.

In the latter case, the applicable legislation is the one provided by the Civil Code in art. 2199-2213, as well as Law no. 32/2000 on insurance companies and insurances monitoring.

Thus, pursuant to art. 2199 of the Civil Code, by the insurance agreement, the insured party undertakes to pay a premium to the insurer, and the latter, in return, undertakes to pay, in case of the occurrence of the insured risk, an allowance to the insured or to the beneficiary of the insurance or to the prejudiced third party.

According to the Law no. 32/2000, the insurance activity is the activity conducted in or from Romania, which mainly represents the offering, intermediation, negotiation, the conclusion of insurance and reinsurance agreements, the collection of premiums, the liquidation of damages, the recourse and recovery activity, as well as the investment or capitalization of own funds and funds attracted by the conducted business. Therefore, the provisions of this law are applicable to both the Romanian insurance companies and to those incorporated in the European Union member states, as long as the latter have been duly set up in their origin countries.⁷

According to art. 2, item 55 of Law no. 32/2000, insurance intermediaries are those natural persons or legal entities who carry out insurance intermediation activities, in exchange for a fee. In order to be able to legally carry out their activity, they are required to be authorized or registered under the terms of the law and of its enforcement guidelines. Moreover, as indicated above, the intermediaries of the European Union member states, who carry out insurance intermediation

⁵ Term calculated according to the provisions of art. 2551-2556 of the Civil Code, the first and last day of the term being excluded.

⁶ If the representation power is not granted to the mediator, it shall have no obligation regarding the performance of the mediated agreement, as it is not a party to it.

⁷ Ștefan Mihăilă, Aida-Diana Dumitrescu - *Drept comercial*, C.H. Beck Publishing House, Bucharest, 2013, p. 231

activities in Romania, according to the right of establishment and the freedom of provision of services are also included in the category of insurance intermediaries.

As it may be noticed, the intermediaries are not parties to the insurance agreement, as they provide only the services offered in exchange for a fee. Thus, they never become a party to the insurance agreements as they only intermediate the agreements that are to be concluded between the insurer and the insured.

Hence, the category of insurance intermediaries is represented by two main types of professionals, namely the insurance agents and the insurance brokers.

Thus, an insurance agent is a natural person or legal entity, who/which based on the authorization of an insurer, is authorized to conclude in the name and on the behalf of the latter insurance agreements with third parties, in compliance with the terms provided in the concluded mandate agreement, without being an insurer or an insurance broker.⁸

Therefore, the law provides that any natural person or legal entity may carry out the activity of insurance agent, if they hold a valid written authorization from an insurer, called agency agreement, in order to act on its behalf.⁹ After registration, the insurers are required to issue a registration certificate to the insurance intermediaries which are legal entities and an ID card to the insurance intermediaries who are natural persons.

Under the law,¹⁰ the natural persons' insurance agents, in order to benefit from the legal provisions related to the seniority, pension funds and social security, have the possibility to register with the Labor Office under whose jurisdiction their residence is located.

However, an insurance agent, regardless if it is a natural person or legal entity, may intermediate the same classes of insurance only for one insurer. Nevertheless, when an insured entity concludes an insurance agreement through an insurance agent, the one that shall be liable to the insured for all the actions and omissions of the insurance agent shall be the insurer on whose behalf the agent acts.

In respect to the right of the agents to carry out the insurances intermediation activity in other member states of the European Union, these are required to have a third party liability insurance agreement in full force and effect and valid throughout the European Union, as well as valid in other states belonging to the European Economic Area, of the same value with the one required for insurance brokers.

The second category of intermediaries provided by the law in the insurances' field, namely the insurance brokers, is represented by the Romanian legal entities, authorized under the law, which negotiate the conclusion of insurance agreements for their natural persons or legal entities customers who are insured or prospective insured entities and provide support both prior and during the performance of the agreements, or where appropriate, in connection with the settlement of damages. At the same time, the position of insurance broker may be held by an intermediary from a member state, which carries out intermediation activities in Romania, pursuant to the right of establishment and the freedom to provide services.¹¹

The qualification of insurance broker, according to art. 33, paragraph 6 of Law no. 32/2000, is incompatible with the one of insurance agent, regardless if the entity in question is a natural person or legal entity. A legal entity may carry out insurance intermediation activities, as insurance broker, provided they hold an authorization from the Insurances Monitoring Committee.

As it may be observed, unlike the insurance agents intermediaries, the qualification of insurance broker can only be obtained by a legal entity, its designation being required to subsequently include the term insurance broker. However, in the case of insurance brokers, the law

⁸ Art. 2 item 58 of Law no. 32/2000 on insurance companies and insurances monitoring

⁹ The conditions which a natural person and a legal entity are required to fulfill prior to obtaining the insurance agent qualification, are provided in art. 34 paragraphs 2 and 3 of Law no. 32/2000;

¹⁰ Art. 34 paragraph 7 of Law no. 32/2000

¹¹ Art. 2 item 57 letter b) of Law no. 32/2000

provides that the subscribed paid-in share capital must be of no more than RON 150 million and the scope of business must include only the activity of insurance and reinsurance broker.

The incompatibility of the insurance brokers consists in the fact that they cannot be direct or indirect shareholders or directors of an insurer, reinsurer, or of an insurance or reinsurance agent. Furthermore, according to art. 35, paragraph 9¹ of Law no. 32/2000, no insurer, reinsurer, insurance or reinsurance agent, natural person or legal entity, in turn, may be direct or indirect shareholder or director of an insurance broker.

Therefore, the insurance brokers may carry out their activities only by brokerage personnel or brokerage assistants, but not by insurance agents, natural persons or legal entities.

Hence, as long as they received their authorization from the insurers, the insurance brokers are entitled to collect premiums and to pay damages on the insurers' behalf, in the currency provided in the insurance agreement, as well as to issue the insurance documents on behalf of the insurer. Nevertheless, prior to the conclusion of the brokerage mandate with the customer, the broker is required to request to the latter a document showing that it did not conclude a mandate with the same scope with one or several brokers.

4. The conclusion of the insurance contracts

According to the Civil Code, upon the conclusion of the insurance agreement, the insured, therefore the one contracting the receipt of an insurance, undertakes to pay a premium to the insurer, the latter undertaking in return to pay, in the event of the occurrence of the insured risks, damages to the insured or the insurance beneficiary or even to the prejudiced third party.

Therefore, the parties of the insurance agreement are only the insurer and the insured, the insurance agent or broker being independent of them.

By the activity carried out, the insurance intermediaries have the following obligations in order to ultimately conclude the insurance agreement.

Thus, first of all, the broker is required to choose a certain insurer as business partner, this being an important aspect, given that in case it negotiates the insured agreement with an entity that fails to completely comply with the legal provisions in the field (i.e. it is not authorized for a certain risk category), it shall be liable to the insured for the contracting entity. Nevertheless, in case of insolvency of the insurer, the insurance broker shall be liable to the insured only if such information has been concealed *mala fide*.¹²

As intermediary, the broker has the obligation to inform the insurer regarding the agreement to be concluded, to advise it, both upon the agreement's conclusion and throughout its performance, even in the event of occurrence of damages, preceded though by its obligation to perform all the required verifications related to the provisions of the insurance agreement, such as guarantee conditions, insured risks etc.

Although generally, the insurance broker has to defend its customer's interest, namely of the insured, due to the fact that its fee represents a percentage of the premium the insurer receives from the insured, called brokerage fee, the broker's obligation of loyalty to its customer may be hindered from being completely fulfilled.

In comparison, the insurance agent, natural person or legal entity, is authorized based on an authorization from the insurer to conclude in its name and on its behalf insurance agreements with third parties. Therefore, in this case the regulations provided in the mandate agreement shall be applied, the insurance agents acting within the limits of the authorization received from the insurer. Thus, although they are not a party to the insurance agreement, they are the representatives of the insurers, being remunerated by them for the concluded agreements. The insurance agents, in such circumstances, are not simple intermediaries, the legal provisions of the mandate agreement being applicable in their case as well, which means that according to art. 2102 of the Civil Code, the

¹² Irina Sferdian – *Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului civil*, C.H.Beck Publishing House, Bucharest, 2013, p. 55

intermediary may represent the intermediated parties in the conclusion of the intermediated agreement or other enforcement documents thereof only if it has been explicitly authorized in this respect.

5. Conclusions

In conclusion, the regulation of the activity of the intermediaries was required given the multitude of cases where such rules were needed and given the fact that most of the arising disputes were settled at the discretion of the courts. Thus, an explicit provision of the Civil Code not only helps tremendously in the development of the legal relations within the commercial field, relations based on the prompt conduct of business, as well as on the necessary trust in the persons to be contracted, but also helps in the case of non-professionals, who may resort to a intermediary in compliance with the legislation in force.

It is true that by the introduction of this type of agreement in the Romanian legislation several business activities found a solution, however, the practice offers many more possibilities than the ones initially considered by the legislator, time being of the essence in this case for the acknowledgement and gradual improvement of the existing provisions.

In the insurance field, however, Law no. 32/2000 on insurance companies and insurance monitoring, translated as clearly as possible up until now the provisions of the European regulations in the field, namely the Directive 77/92/EEC on the insurance intermediation, and although stirring some controversy, it succeeded in finding a better implementation within the activity carried out by the insurance companies, as well as by those that ensure the intermediation between them and the persons contracting the insurance.

Bibliography

1. Mihăilă, Ștefan, Dumitrescu, Aida-Diana- "Drept comercial", C.H. Beck Publishing House, Bucharest, 2013;
2. Moțiu, Florin Aurel - "Contractul de intermediere în Noul Cod civil", in *Curierul Judiciar* no. 10/2011;
3. Sferdian, Irina - "Asigurari. Privire speciala asupra contractului de asigurare din perspectiva Codului civil", C.H.Beck Publishing House, Bucharest, 2013;
4. Schmutzer, Rudolf- "Asigurari", Morosan Publishing House, Bucharest, 2012;
5. Sitaru, Dragoș Alexandru, Buglea, Claudiu Paul, Stănescu, Șerban Alexandru – "Dreptul comerțului internațional. Tratat. Partea specială", Universul Juridic Publishing House, Bucharest, 2008.
6. The Romanian Civil Code;
7. Law no. 32/2000 on the insurance companies and insurance monitoring;