

## ISSUES REGARDING THE REPRESENTATION MANDATE CONTRACT

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### Abstract

*The present study is dedicated to the representation mandate, given that by the coming into force of the new Civil Code and according to the monist conception adopted by the lawmaker, the representation mandate is the common law which applies to both people and companies, thus being widely applied in legal life.*

**Keywords:** *mandate with representation, mandate without representation, proof of mandate, extent of mandate, validity conditions.*

### 1. Introductory issues regarding the mandate contract

Before discussing the mandate contract, we must mention that the civil legal act<sup>1</sup> represents the manifestation of will or the agreement between two people's will with the intent of causing legal effects, namely to create, change or end a specific civil relation. The definition of the civil legal act suggests that it causes legal effects for the parties who concluded the act. There are certain situations when the legal act causes effects in regard to the people who were not present when the act was concluded, namely when the act is concluded by representation<sup>2</sup>. Such is the case of the mandate contract, which we will analyze in the present study. Thus, according to article 2009 of the Civil Code, the mandate is that specific contract by which a party, called a representative, agrees to conclude one or more legal acts for the other party, called a principal.

This definition suggests the fact that the effects of the manifestation of will of the representative will cause effects for the principal even if he was not present when the contract was concluded. According to article 2011 of the Civil Code, the mandate is either with or without representation. In the present study, we will

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<sup>1</sup> G.Boroi, C.A.Anghelescu, Civil law course, The general part. Second revised and completed edition, Hamangiu Publishing House, Bucharest, 2012, page 109.

<sup>2</sup> Representation in contracts is regulated by the provisions of articles 1.295-1.314 of the Civil Code.

exclusively analyze the mandate with representation, which is common law in regard to mandate contracts, whereas mandate without representation is the species; we will however point out a few aspects regarding the mandate without representation. As specific means of applying the mandate without representation the Civil Code regulates the commission contract, the consignment contract and the expedition contract<sup>3</sup>. According to article 2010 first alignment thesis I of the Civil Code, the mandate is either free or onerous. This classification regards the interest of the representative.

We must also mention that the provisions of articles 2009-2012 of the Civil Code represent common provisions for all types of mandates.

## 2. The mandate with representation

### 2.1. *The definition, form and acceptance of the mandate with representation. Delimitation of representation mandate from the non representation mandate*

The representation mandate represents that certain contract by which one party (representative) concludes legal acts for another person (principal), according to the empowerment<sup>4</sup> provided by the principal.

According to article 2013 of the Civil Code, the mandate contract can be concluded in writing, in authentic form or signed by the parties and also in a verbal manner. Acceptance of the mandate can result from the execution of the mandate by the representative.

The mandate provided for the conclusion of a legal act which is, according to the law, subject to a certain form, must respect that certain form, under the sanction which applies to the act itself. The provision is not applied when the form is necessary only for the opposability of the act in regard to third parties, if the law does not state otherwise.

This legal text emphasizes the conclusion that the mandate must be concluded in writing (authentic form or signed by the parties), as well as in a verbal manner. The empowerment, as *negotium*, represents a unilateral legal act as it expresses the will of the representative, and as an *instrumentum*, being the document which lists the legal acts which will be fulfilled by the representative in the name of the principal<sup>5</sup>.

In regard to the acceptance of the mandate, the same legal text states that the acceptance of the mandate can be express or tacit. Tacit acceptance results from the execution of the mandate by the representative. In this context, we must mention that the text of article 2014 of the Civil Code regulates a special case of tacit

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<sup>3</sup> These applications of the non representation mandate are regulated in Romanian law in the Civil Code, whereas in other states these provisions are regulated in commercial codes.

<sup>4</sup> Empowerment for representation or the document of empowerment is called a power of attorney (article 2012 second alignment of the Civil Code)

<sup>5</sup> Fr.Deak, *Civil law treaty. Special contracts*, Actami Publishing House, Bucharest, 1996, page 270.

acceptance. Thus, in the absence of a timely refusal, the mandate is considered to be accepted if it regards acts which are subject of the mandate or for which the representative publicly offered his services or offered his services directly to the principal.

In enforcing the previously mentioned provisions, according to article 2 second alignment of the Civil Code, the habits and the current practice of the parties will be considered along with the legal provisions.

We wish to point out the differentiating elements between the representation mandate and the non representation one, which entails that we first define the non representation mandate. Thus, the non representation mandate is that contract according to which one party, called a representative, concludes legal acts in his name, but with effects for another party, called a principal, and assumes the obligations which derive from these acts in relation to third parties, even if third parties were aware of the mandate<sup>6</sup>. The differentiation element between the representation mandate and the non representation mandate resides in the power of representation. Thus, in case of the representation mandate, the representative concludes legal acts in the name of the principal; in case of the non representation mandate, the legal acts are concluded by the representative in his own name, but with effects for the principal, which means that the effects of the acts will indirectly produce on the patrimony of the representative<sup>7</sup>. As stated by doctrine<sup>8</sup>, in case of the representation mandate, in relation with contracting third parties, the principal is considered to be irrelevant, as third parties have no relation with the principal, but with the representative. In case of the non representation mandate, the relations between the representative and the principal are governed by the rules which apply to the representation mandate. According to article 2039 first alignment of the Civil Code, in relation to third parties, the representative personally assumes obligations, even in the hypothesis in which the third party was aware of the mandate.

## *2.2. The legal characteristics of the representation mandate.*

As a general rule, mandate is a consensual contract, namely it occurs by the simple manifestation of will of the parties and no special form is required<sup>9</sup>. However, in certain cases, the law requires a certain form, namely for the mandate given for the conclusion of a legal act which is subject to a certain form, in which

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<sup>6</sup> Article 2039 first alignment of the Civil Code

<sup>7</sup> G.Boroi, I.Nicolae în G.Boroi, M.M.Pivinceru, C.A.Angheliescu, B.Nazat, I.Nicolae, T.V.Rădulescu, Civil law charts, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 637.

<sup>8</sup> A.T.Stănescu/Ș.A.Stănescu/Gh.Piperea in the New Civil Code. Comments by articles (coordinators F.A.Baias, E.Chelaru, R.Constantinovici, I.Macovei), CH Beck Publishing House, Bucharest, 2012, page 2016.

<sup>9</sup> See the provisions of article 2.013 of the Civil Code, which we will analyze in the resent study.

case the mandate must be drafted in the same form, under the sanction which applies to the act itself.

The mandate contract is either free or onerous<sup>10</sup>. The mandate between two people is presumed to be free.

The mandate provided for exercising professional acts is considered to be onerous<sup>11</sup>. If the mandate is onerous and the payment was not established by contract, according to article 2010 second and third alignment, the price to be paid it will be established according to the law, the habit or in lack of, according to the value of the services rendered. Both the free and the onerous character represent relative presumptions, which can be overturned by contrary evidence.

The right to file a complaint for establishing the payment of the mandate contract is subject to the statute of limitation at the same time as the action for requesting payment for the onerous mandate.

The mandate contract is an *intuitu personae* contract, as it is based on the trust of the principal when empowering the representative to conclude certain legal acts. As stated by doctrine, the contract is concluded by considering the person of the representative and certain characteristics of this person, thus the principal empowers the representative to conclude legal acts in his name<sup>12</sup>.

Mandate is a unilateral or mutual act. If the mandate is free, the mandate contracts is unilateral as only the representative has obligations which derive from the contract; in case the mandate is onerous, both contracting parties have interdependent rights and obligations which derive from the contract.

### 2.3. *The duration and extent of the representation mandate*

Mandate can be concluded for a determined or undetermined period of time. If the mandate is of undetermined duration, the provisions of article 2015 of the Civil Code will be applied, which regulate the duration of the mandate. Thus, if the parties did not state a specific term, the mandate contract ends three years after it was concluded.

In regard to the extent of the mandate, the text of article 2016 of the Civil Code, states the following:

- general mandate authorizes the representative to perform only conservation and administration acts

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<sup>10</sup> See article 2.010 of the Civil Code

<sup>11</sup> Gratuity and the onerous character of the mandate in the stated cases are regulated in article 2010 first alignment of the Civil Code. In regard to the notion of professional activity, see the content of article 3 third alignment of the Civil Code. Thus, the systematic exercise of an activity of exploitation of a facility by one or more people, thus producing, administering or estranging goods, regardless of whether the purpose of this activity is lucrative or not is considered to be a professional activity.

<sup>12</sup> F. Moțiu, Special contracts, sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 234.

- in order to conclude estrangement or encumbrance acts, transactions or compromises, payments instruments or in order to file complaints in courts of law, the representative must be expressly empowered to act.

- mandate extends to all acts necessary for its execution, even if they are not expressly stated.

By synthesizing the above mentioned provisions, we must mention that, in case of the general mandate, the representative is authorized to perform only administration and conservation acts. This means that based on a general mandate, the representative will not be able to conclude disposition acts. However, in case of special mandate, the representative is empowered to conclude legal acts which are expressly determined. The text of article 2016 second alignment states the legal acts which always require express mandate, as follows: estrangement of encumbrance acts, transactions or compromises, signing payment instruments, filing complaints before the court of law, as well as any other disposition acts. Special mandate can be given for expressly determined legal acts, which are not considered to be disposition acts<sup>13</sup>. However, as stated by article 2016 second alignment of the Civil Code, special mandate can be given for the conclusion of any other disposition acts. According to the third alignment of the same legal text, special mandate extends to all acts which are necessary for the execution of the mandate, but are not expressly stated.

We must also mention that the representative must conclude acts within the limits of his powers of representation<sup>14</sup>. In this context, we must state the provisions of article 1309 of the Civil Code. Thus, the contract concluded with the person who acts as representative without empowerment or by surpassing the powers provided by the mandate, does not cause effects between the representative and the third party. However, if by his behavior, the representative determined the third party to believe the he is acting within the limits of his powers of representation, the representative can't invoke lack of power of representation in relation to the third party. The person who concludes a contract as a representative, without having special empowerment to do so or by surpassing the limits of his representation is liable for all damage caused to the contracting third party which was of good faith when concluding the contract<sup>15</sup>.

#### *2.4. Proof of representation mandate*

Mandate is a consensual contract, this is why law does not require a special form; as a rule, empowerment provided for the representative is made in writing,

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<sup>13</sup> G.Boroi, I.Nicolae în G.Boroi, M.M.Pivinceru, C.A.Angheliescu, B.Nazat, I.Nicolae, T.V.Rădulescu, Civil law charts, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 630.

<sup>14</sup> L.Stănculescu, Civil law course, Contracts. Second revised and completed edition, Hamangiu Publishing House, Bucharest, 2014, page 371.

<sup>15</sup> Article 1.310 of the Civil Code

in the designated act. Thus, we must mention the provisions of article 1301 of the Civil Code, according to which empowerment does not cause effect unless it is provided with the respect of the forms required by law. Also, according to article 1302 of the Civil Code, the contracting party can always demand the representative proof of the powers he was given by the principal and if representation was made in written form, he can also request a copy of the document, signed for conformity.

If the act which is to be concluded must be of a certain form, the rule of symmetry of forms is applied<sup>16</sup>, which means that when the mandate is given for the conclusion of a legal act for which the law requires a certain form, the mandate, in its turn, must respect that certain form under the sanction which applies to the act itself, as stated in article 2013 second alignment first thesis of the Civil Code<sup>17</sup>. There is a certain exception from this rule, the one deriving from the provisions of article 2013 second alignment second thesis of the Civil Code, namely this provision is not applied when a special form is required only for opposability to third parties, if the law does not state otherwise. Thus, the parties can agree to conclude the act in authentic form, although the law does not require this form for the act of will which is about to be concluded.

In regard to the proof of mandate, as for the express mandate, it will be made by providing the authentic document or the signed one, according to the general rules which apply in this matter. In case of tacit mandate, proof will be made by the parties by any means available. As a common rule in regard to proof of mandate, both for the express and the tacit one, acceptance of mandate can derive from its execution by the representative, as stated by the provisions of article 2013 first alignment of the Civil Code.

### *2.5. Validity conditions of the mandate contract with representation*

In regard to the validity conditions of the representation mandate, we will present only those aspects which are different from common law.

In regard to capacity, we must mention that no special conditions are stated, as the common law provisions apply. However, some clarification is needed. Thus, according to article 1298 of the civil Code, in case of conventional representation, both the representative and principal must have full capacity to conclude the act for which representation was given. This means that the capacity of the principal will be appreciated in regard to the nature of the act concluded through representative, thus distinguishing whether the act is an administration act, a conservation act or a disposition act. The principal must have full capacity to conclude the act for which representation was given.

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<sup>16</sup> As the mandate forms an indivisible whole with the act for which it was provided. Fr.Deak, Civil law treaty. Special contracts, Actami Publishing House, Bucharest, 1996, page 270.

<sup>17</sup> The mandate provided for the conclusion of a legal act which is, according to the law, subject to a certain form, must respect the same form, under the sanction which applies to the act itself.

In case of a disposition act, the principal must have full exercise capacity, whereas in case of administration acts, this condition is not necessary to be met. In regard to the representative, the legal text requires that he has the capacity to conclude the act for which representation was given. For example, in case of a disposition act, both the representative and the principal must have full exercise capacity. This condition is justified by the fact that the principal must express his valid consent<sup>18</sup>. The capacity of the parties of the mandate contract is appreciated at the date the act was concluded; the capacity of the act which is presumed to be concluded by representation will be appreciated at the time the contract will be concluded<sup>19</sup>.

In regard to the consent of the parties, it must meet the validity conditions for any contract<sup>20</sup>. However, the Civil Code states a special rule. According to article 1299 of the Civil Code, the contract can be annulled when the representative's consent is affected by vices. If the vice which affects consent regards certain elements established by the representative, the contract will be annulled only if the will of the latter was viced. In the same context, we must state that according to article 1304 of the Civil Code, the contract concluded by the representative in his own name is subject to annulment on the request of the representative, except for the case in which the representative was expressly empowered or the contract contains such provisions as to exclude the possibility of a conflict of interests. The above mentioned provisions also apply in case of double representation.

In regard to the cause of the mandate contract, it must meet the general validity conditions regulated for any contract<sup>21</sup>.

The object of the mandate contract must meet the general validity conditions stated for any contract<sup>22</sup>.

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<sup>18</sup> For the same opinion see F.Moțiu, *Special contracts*, sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 240.

<sup>19</sup> See R.Dincă, *Special civil contracts in the new Civil Code*, Universul Juridic Publishing House, Bucharest, 2013, page 229.

<sup>20</sup> G.Boroi, C.A.Anghelescu, *Civil law course, The general part*. Second revised and completed edition, Hamangiu Publishing House, Bucharest, 2012, page 138. Consent, in order to be valid, must meet the following conditions:

- it must be knowingly expressed, thus it must come from a person with reason
- it must be serious, expressed with the intent of causing legal effects
- it must be free, namely not altered by any consent vices.

<sup>21</sup> According to article 1.236 first alignment of the Civil Code, (1) The cause must exist, it must be licit and moral

(2) The cause is illicit when it is contrary to the law and public order.

(3) The cause is immoral when it is contrary to good morals.

<sup>22</sup> According to article 1225 second alignment of the Civil Code, the object of the contract must be determined and licit, under the sanction of absolute annulment; according to article 1226 second alignment of the Civil Code, the object must be determined or at least determinable and licit under the sanction of annulment.

In regard to the object of the mandate contract, we must state that only legal acts can be subject to the mandate contract and not material deeds. However, certain material acts can have an accessory character in regard to the legal acts concluded through a representative, even if the text of article 2016 third alignment states the mandate extends to all acts needed for its execution, even if they are not expressly stated.

Thus, the object of the representation mandate is the conclusion of legal acts by the representative, in the name of the principal.

There are certain legal acts which can't be concluded by representative, such as marriage, engagement, acknowledgment of a child, will. In these cases, we are discussing strictly personal legal acts in regard to which representation is not allowed. Also, the material courier acts or the turning over of goods can't be subject of the mandate contract<sup>23</sup>.

### 3. Conclusions

The widely used mandate contract, between people but also between professionals challenged us to study the representation mandate; thus, we have defined the representation mandate, differentiated it from the non representation mandate, stated the form of the contract, analyzed the acceptance of the mandate, its duration and extent; in the end of our study, we described the specifics it presents in regard to validity conditions.

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<sup>23</sup> G.Boroi, I.Nicolae în G.Boroi, M.M.Pivinceru, C.A.Angheliescu, B.Nazat, I.Nicolae, T.V.Radulescu Civil law charts, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 629.