CAUSES FOR THE TERMINATION OF AN AGENCY CONTRACT

Dan-Mihail DOGARU[1],
Izabela BRATILOVEANU[2]
[1]Assistant PhD., University of Craiova, Faculty of Law
[2]Research Assistant PhD., University of Craiova, Faculty of Law,
bratiloveanuisabela@yahoo.com

Abstract

The causes which may lead to the termination of an agency contract are regulated by the provisions of the New Civil Code and they refer both to the duration of the agency contract and to the successive execution thereof. Such cases include: expiration of the contract, unilateral denunciation and cancellation of the contract. This study also consists of an analysis of the causes for the termination of an agency contract according to the International Agency Contract drawn by the International Chamber of Commerce in Paris.

Key words*:* Agency contract; agent; principal

1. Introductory considerations

According to Article 2072 of the Civil Code, by the agency contract the principal steadfastly empowers the agent either to negotiate or both to negotiate and conclude contracts, on behalf and on the account of the principal, against remuneration, in one or more specified regions. It should be noted that at Community level, the agency contract has been regulated as a *sui generis* contract along with the adoption of the Council Directive from the 18th of December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, 86/653/EEC. In Romanian law, the agency contract has gained its own configuration by the adoption of Law no. 509/2002 on permanent commercial agents[11], which was repealed by Law no. 71/2011 on the implementation of Law no. 287/2009 on the Civil Code[12].

Currently, the agency contract is regulated by Article 2072-2095 of the Civil Code. Article 2095 of the Civil Code states that these provisions are complementary, to the extent that they are compatible, with those on the commission contract (if the agent was given only the empowerment to act on the account of the principal, and not on its behalf) or with those on the contract of mandate with representation (if the agent was given power of representation).

The agency contract involves an act of empowerment of the principal by the agent, which may be with representation (in which case the contract is similar

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to the mandate with representation) or without representation (in which case the contract is similar to the commission contract). But the agency contract has certain specific elements, which differentiate it both from the contract of mandate with representation and the commission contract:

a) The possibility that the mandate be given with or without representation;

b) The fact that the agent's activity is remunerated; according to Article 2073 paragraph (1) subparagraph c) of the Civil Code, the agency contract is not applicable to situations where the agent carries out an unpaid activity;

c) The agent, who shall be an independent intermediary;

d) The stability of the relationship between principal and agent; the empowerment given to the agent is not one for a single act, but a steady empowerment for the negotiation or conclusion of several acts;

e) The empowerment is given for a specified area, for one or more specified regions (Leaua 2012, 106).

In Romanian law, the causes for termination of the agency contract take into account both the duration of the agency contract and the successive execution thereof. These causes are: expiration of the duration of the contract; unilateral denunciation of the contract, and its cancellation.

2. Expiration of the duration of the agency contract

If the agency contract was concluded for a fixed term, it shall be terminated on the date of expiration of the period set within the contract (Cărpenaru 2014, 579).

An agency contract concluded for a fixed term, which continues to be executed by the parties after the expiration of the period, shall be deemed extended for an indefinite period (Article 2088 of the Civil Code).

The extension of the duration of the agency contract operates *ex lege*.

3. Unilateral denunciation of the agency contract

An agency contract concluded for an indefinite period may be unilaterally denounced by either party, by notice required.

Agency contracts concluded for a fixed term, like the contracts which were converted into contracts for an indefinite period may also be terminated by unilateral denunciation if they contain a special clause to that effect.

As a general rule, the termination of the agency contract by unilateral denunciation must be accompanied by a period of notice.

By way of exception, the agency contract may be denounced without notice in the cases specified in Article 2090 of the Civil Code.

Duration of the period of notice is of at least a month for the first year of contract, according to Article 2089 paragraph (3) of the Civil Code. If the duration of the contract is longer than one year, the minimum period of notice shall be increased by one month for each additional year begun, the maximum duration of the period being of 6 months. Thus, if it is unilaterally denounced a

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contract executed by the parties for one year and two months, the duration of the period of notice shall be at least of two months. It is worth mentioning that the parties may establish a period of notice longer than two months, but which cannot exceed six months.

The periods of notice cannot be shorter than those stipulated by law. By the agency contract, there cannot be established for the agent periods of notice longer than those established for the principal. *Per a contrario*, there can be established for the principal notice periods longer than those imposed to the agent.

According to Article 2089 paragraph (6) of the Civil Code, unless otherwise agreed by the parties, the period of notice expires at the end of a calendar month. Thus, if a period of notice is of 3 months and starts on the 5th of June, it ends on the 30th of September. The parties may agree a different time of expiration of the period, provided that they do not affect its duration. The period established by months ending on the corresponding day of the last month, in the example given on the 5th of September, the parties cannot provide a method of calculation according to which the period would end before that date.

In the case of an agency contract for a fixed term which is extended for an indefinite period it is taken into account the whole contract period, namely both the fixed term and the period during which it is concluded for an indefinite period, according to Article 2089 paragraph (7) of the Civil Code.

Article 2090 paragraph (1) of the Civil Code provides a special case of unilateral denunciation of the agency contract: the agency contract may be denounced without notice by either party, with the compensation for the damages caused to the other party, when exceptional circumstances, other than force majeure or unforeseeable circumstances, make it impossible to continue the collaboration between principal and agent. In this case, the agency contract is terminated upon the receipt of written notification of intent to denounce, without the need to show the reasons which led to the denunciation. The party who unilaterally denounced the contract is obliged to compensate for the damages suffered by the other contracting party (Cărpenaru 2014, 580).

The Romanian legal system did not know the concept of "exceptional circumstances" until the emergence of the agency contract legislation, a concept rooted in the doctrine of frustration of contract existing in British law (Dogaru 2015, 248). According to it, if an event which does not meet the conditions of force majeure or unforeseeable circumstances occurs after the parties signed the contract and without being able to reproach them with any fault, preventing the implementation or the execution of the convention in relation to clauses or issues originally stipulated, the contract may be denounced.

It is worth mentioning that between both legal systems there are important differences: in Britain, the party which does not execute its obligations is not liable, while in Romanian law, if one of the subjects of the legal relationship unilaterally denounces the contract according to exceptional circumstances, it must compensate for the damage thus caused to the other party.

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On the other hand, in Romanian law, legal liability is based on the concept of fault. But, in contradiction to this principle, the exceptional circumstances provided by Article 2090 of the Civil Code are likely to bind the liability of the party which denounces the contract based on them, without being any form of guilt in that situation.

This aspect is an additional argument in support of the idea that the exceptional circumstances described in Article 2090 paragraph (1) of the Civil Code are incompatible with the general principles of contractual liability of the Romanian legal system (Dogaru 2014, 249).

4. Cancellation of the agency contract =

A contract may be cancelled due to violation of essential obligations assumed by the parties. The conditions under which cancellation may occur are the following:

- *a)* One of the parties did not execute its contractual obligations.

In terms of cancellation the provisions of Article 1551 of the Civil Code which provides that "In the case of contracts with successive execution, the creditor is entitled to cancellation, even if the failure to execute is insignificant, but is repeated." In other words, in terms of cancellation, a failure to execute, seemingly insignificant, if it is repeated, it becomes "significant" and therefore could lead to cancellation (Oglindă 2012, 445);

- *b)* The failure to execute shall be attributable to the party who has not met its obligations;

- *c)* The debtor of the non-executed obligation had been sent a payment default notice, as provided by law.

Thus, according to Article 2092 subparagraph a) of the Civil Code, the principal cancels the contract due to breach of its obligations by the agent. Similarly, Article 2093 subparagraph b) of the Civil Code states that: "An agency contract is cancelled as a result of the principal's fault".

Upon cancellation of the agency contract, it is not required to send a payment default notice, this institution intervening "without notice", and the parties being sent by right a payment default notice, under the law.

There are authors (Schiau 2009, 474) who consider that cancellation shall have a judicial character if the agency contract does not contain any stipulation to the contrary. We cannot agree with this opinion. Cancellation implies the existence of a contractual fault of one party which is determined by the court by a judgment.

5. Causes for the termination of an agency contract according to the model contract (International Agency Contract) drawn by the International Chamber of Commerce in Paris (Publication ICC 644/2002, second edition)

Internationally, the practical utility of the analyzed contract caused the systematization of the usage developed by professionals in this field, by drawing

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up by the International Chamber of Commerce in Paris of a model agency contract – ICC International Agency Contract, ICC Publication no. 644-2000 (Baias, Chelaru, Constantinovici și Macovei 2012, 2073).

According to the publication, the agency contract is terminated in the following circumstances: A. Expiry of the contract; B. Unilateral denunciation of the contract; C. Cancellation of the contract.

A. Expiry of the contract. For the purposes of Article 18 B. of the Publication, the expiry of the contract is a cause for the termination of the convention only if the agreement between principal and agent was concluded for a fixed term. According to usage, the subjects of the contract shall provide for the automatic extension of the convention if any of them fails to send to the other a written notice of termination of the contract. This extension is usually done for successive periods of one year.

Notifications must be sent by means ensuring even the proof and date of receipt. According to the commercial practices in the field, notifications must be sent at least four months before the expiry of the contract. The period of notice is of six months, if the contract was executed over a period of five years.

B. Unilateral denunciation of the contract. Unilateral denunciation takes effect as regards the termination of the contract only if it is based on a written notification, sent by a means ensuring even the proof of receipt. The period of notice is of four months before the date of termination of the contract and if the contract lasted for five years, the period of notice is of six months. Unilateral denunciation applies to contracts concluded for an indefinite period. Unlike this regulation, Article 2089 paragraph (2) of the Civil Code provides the possibility of early unilateral denunciation of the agency contract for a fixed term which provides a special clause to that effect. This clause for the termination of the contract also applies to agency contracts concluded for a fixed term, converted into contracts for an indefinite period.

C. Cancellation of the contract. According to Article 20 of the Publication, the situations which give rise to cancellation are:

i) Substantial breach by one of the parties to the convention of its contractual obligations. Substantial breach refers to the total or partial failure to execute the contractual obligations by one party, while the other party is substantially deprived as regards the aspects to which it was entitled to expect if the contract had been implemented;

ii) Production or occurrence of some exceptional circumstances justifying the termination of the contract. These circumstances include: state of default of payment or bankruptcy, loss of capacity to execute the contract by one party, etc. The emergence of exceptional circumstances makes it unreasonable for one party to claim to the other party to continue to be liable under the contract.

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However, the subjects of the agency contract may agree by contract to strictly specify the causes or the elements they consider to be exceptional circumstances (loss of property, change of management, loss or failure to obtain necessary licences etc).

In the situation of the occurrence of the causes leading to cancellation, the contract is immediately terminated. Therefore, there is no need to deliver a judgment or an arbitration decision. In this situation, there is no longer required the period of notice of four (six) months.

In order to operate the cancellation, the party invoking it must notify it to the other party in writing and with the proof of the date of receipt of such notification.

Therefore, according to the Publication, the cancellation does not imply only the existence of a contractual fault (failure to execute obligations) from one of the parties, but also the emergence of exceptional circumstances mentioned, which do not imply the existence of a form of guilt in the development of contractual relationships.

Cancellation of the contract takes effect even if it is subsequently proved that the party invoking it was wrong. However, this party can be obliged to pay compensation for the damage caused to its co-contractor as a result of improper cancellation of the convention. The amount of compensation is equal to the average commission that the agent would have charged for the period that would have remained until the end of the contract. The exception is represented by the case in which the injured party proves a higher value of the damage.

For the purposes of Article 20.6 of the Publication, compensation may be cumulated including with the allowance to which the agent is entitled along with the termination of the contract.

6. Indemnities

Article 17, paragraph (1) of the Council Directive from the 18th of December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC) provides that after the expiry of the contract, the commercial agent is entitled to an indemnity according to paragraph (2) or to compensation for damage according to paragraph (3). There are authors (Slorach and Ellis 2007, 380) who consider that this regulation has enabled the Member States of the European Community to proceed to the choice between two alternatives with regard to compensation, namely: indemnity, if the agent has effectively contributed to developing the business of the person represented by him/her and compensation, if the agent has suffered damage following the termination of contractual agency relationship.

In Romanian law, Article 22, paragraph (3) of Law no. 509/2002 and Article 2091 paragraph (3) of the Civil Code provide that granting indemnity does not affect the agent's right to claim compensation, under the law.

At the termination of the agency contract, according to Article 2091 of

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the Civil Code, the agent is entitled to receive indemnity from the principal if he/she gained new customers for the principal or significantly increased the volume of operations with the existing customers, and the principal still gets substantial benefits from the operations with these customers.

According to the same article, the payment of such indemnity must be equitable, based on concrete circumstances, on the commissions that the agent should have received from the operations concluded by the principal with the customers in question, and also on the possible restriction of the agent's professional activity due to the insertion of the non-competition clause in the agency contract.

The amount of the indemnity (compensation) cannot be higher than the equivalent of the amount of an annual remuneration, calculated based on the annual average of remunerations received by the agent during the last five years of the contract; if the duration of the contract is less than 5 years, the annual remuneration is calculated based on the income earned in those years (Ene 2001, 38).

According to Article 2094, paragraph (4) of the Civil Code, the right to indemnity is also recognized by law upon termination of the agency contract following the agent's death. However, according to Article 2094, paragraph (5) of the Civil Code, the right to indemnity is extinguished if the agent or its heir does not send the principal a payment default notice as regards the payment of indemnity, within one year from the date of termination of the agency contract.

The concept of "termination of contractual relationships" is broadly understood by the legislator, as encompassing not only the unilateral cancellation of the contract for an indefinite period, but also the non-renewal of a contract for a fixed term or even events affecting the agent, such as its age, invalidity or disease, its death, etc. (Stancu 2007, 17).

As an exception to the rule provided in Article 2091 of the Civil Code, the agent is not entitled to indemnity in the following circumstances:

- the contract is cancelled by the principal due to the agent's breach of its obligations;
- the agent unilaterally denounces the contract, excluding cases of denunciation because of the agent's age, invalidity or disease, which prevent the agent's further activity;
- in the case of transfer of the agency contract by replacing the agent with a third party;
- unless otherwise agreed by the parties to the agency contract, in the case of novation of this contract, by replacing the agent with a third party.

There shall be no waiver to the detriment of the agent's interests from the provisions governing the entitlement to indemnity before termination of the agency contract, according to Article 2094 of the Civil Code, any contrary clause shall be considered as unwritten.

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7. Compensation

As mentioned above, according to Article 2091, paragraph (3) of the Civil Code, granting indemnity does not affect the agent's right to claim compensation, under the law.

Thus, if termination of the agency contract creates some damage to the agent, it is entitled to claim the damage to the principal, after proving it out. The agent's right to compensation does not cover the eventual damage caused as a result of the breach of the principal's contractual obligations, but it covers the compensation for the termination of the contractual relationship as a result of denunciation. In order to exploit in court the right to compensation, the commercial agent must not prove the principal's contractual fault, but bring the proof of the sudden termination of the agency contract, of the existence of damage due to this fact, and the existence of a causal relationship between the termination of the contract and the creation of damages or injuries.

According to Article 17, subparagraph (3) of Directive 86/653/EEC, the commercial agent is entitled to compensation for damage resulting, in particular, if the termination of relationships with the principal intervenes if:

- The agent was not paid the commissions it would have benefited from following the proper execution of the agency contract, whilst the principal gets substantial benefits related to the commercial agent's activity;

- The commercial agent was not allowed to amortize the costs and expenses that it had incurred for the execution of the agency contract on the principal's advice.

The analysis of Article 17, subparagraph 3, the last sentence of Directive 86/653/EEC states the question of the moment when the commercial agent can claim to the principal the payment of the amounts of money representing the costs and expenses incurred for conducting intermediation activities. Directive 86/653/EEC addresses these issues in a way somewhat unfavorable for the agent: at the moment when the professional intermediary can claim coverage, the amortization of the expenses that it has incurred under the contract coincides with the termination of contractual relationships with the person from who it was granted empowerment. Until then, the agent's opportunity to claim these amounts to the principal is questioned.

On the other hand, beyond the issues related to the non-payment of commission or the uncovering the agent's expenses related to the implementation of the contract with the principal, the question arises whether there are other forms of damage to be compensated.

The award of compensation has its origins in the French legal system, being improper to the UK legislative framework.

In France, there is the view according to which the interpretation of Article 17 of the Directive would amount to the following aspects: if the Member State chooses the compensation system, it must cover the damage consisting in depriving of the commissions that the agent could have obtained and/or the

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impossibility to cover expenses committed for the execution of the contract, on the principal's advice (Vogel 2012, 314).

In Scottish Case Douglas King v. T. Tunnock Ltd (2000 SC 424), the court was guided by French law in order to calculate the compensation for the agent.

In this case, the main elements which the court considered necessary to be taken into account were:

- Compensation is the price the principal must pay because it bought the whole part of the agent's market (goodwill) in connection with the implementation of the agency contract;

- The normal level of compensation is associated with the amounts of money representing the commission for two years.

This is different somewhat from indemnity, where there is applicable the commission principal per one year.

Another difference between compensation and indemnity is that the agent must contribute to the rise in the principal's turnover in order to receive the indemnity, while the professional intermediary must maintain this turnover of the person from who it was granted empowerment in order to receive large amounts as compensation.

In France, they have preserved and developed their own system of compensation, the regulations in this field being away from Directive 86/653/EEC and rather closer to commercial usage, legal traditions or customs.

In reality, where the Directive expressly provides for the situations where a damage is assumed to have been suffered (according to Article 17, subparagraph 3, mentioned above), the code is silent, scarcely providing that upon termination of the contract the commercial agent shall be entitled to receive compensation due to the damage suffered.

From these rules, according to Article L. 134-16 of the French Commercial Code, as in the Romanian national law, there shall be no waiver to the detriment of the agent's interests.

Another distinction is that the text provides due compensation at "the termination of the contract" and not at its end, as provided in Directive. This implies that if the period for which the contract was concluded is not extended, when the conditions are met, the right to compensation arises.

In the French legal system, compensation granted to the agent also includes the market (business) part lost by the commercial agent as part of common interest with the principal. Upon termination of the contract, the commercial agent appears as if it had suffered damage due to the loss of its possibility / ability to generate income (commissions) and also due to the inability to proceed with the transfer of the agency contract to another commercial agent. Just based on these considerations, the compensation due to the commercial agent appears as a right.

It is worth mentioning that the views expressed in French law which make the agency contract to be based on the theory of common interest mandate support

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the principal's obligation to pay damages and interest, compensation, in case when the contract is terminated for reasons not related to the agent (Benabent 2001, 435).

The applicable rule is that termination of the agency contract by the principal, unless it is justified, entitles the agent to receive compensation. As in our law, in French law the serious breach of contractual obligations by the agent is a justified case of unilateral denunciation of the contract by the principal in order to allow it avoiding payment of compensation. Any other reason is seen as unjustified and abusive. In order to protect the agents' interests, the French courts have broadly interpreted the concept of "unjustified termination of the contract".

Termination of the contract by the principal due to economic reasons, such as reorganization of business, closing down the production of goods whose sale is subject to the agent's activity are unlikely to extinguish the agent's right to compensation. An exception to the facts mentioned above is represented by situations where reorganization of business or closing down the production is caused by force majeure (which, as a matter of fact, is rarely accepted by courts).

We consider that cases of reorganization of business or closing down the production represent in Romanian law justified reasons for the termination of the contract by the principal because of the impossibility of execution regulated by Article 1557 of the Civil Code.

In French law there also appeared views according to which in the field of agency contracts, the agent's right to compensation or indemnity as a result of the common interest mandate would mainly result in restricting the freedom to break contractual relationships or not to extend contracts for a fixed term in situations where there is an objective justification (Behar-Touchais and Virassamy 1999, 171).

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