CONSIDERATIONS REGARDING THE DEFINITION AND CLASSIFICATION OF COMMERCIAL INTERMEDIATION

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Abstract

The commercial intermediation is a complex juridical operation which includes a different number of juridical relationships that takes place between contractual partners either on a national or international level. These partners bare different naming due to their different set of rights and obligations set forth by the law or by the parties, and it is from this that the classification of the intermediation can be set forth. The commercial intermediation represents the activity that one person executes either in the name and on behalf of another person, or using its own name but on behalf of another person, or, finally, using its own name but on behalf of acting towards a common goal with the person who mandated her (the principal), in relation with who it is either a proxy or an independent intermediary, only negotiating or both negotiating and binding the principal. The purpose of the paper is to strictly define and set in order the various variations of the juridical operation that is the commercial intermediation, presented both in the light of the actual legal framework and also by reference to the New Civil Code. Also, the purpose is to highlight and systematize the contractual relationships from which the parties involved in a commercial intermediary operation may choose and the rights and obligations specific to each contract.

Keywords: *commercial intermediation, contract of mandate, contract of commission, agency contract, brokerage contract, franchise contract, exclusive distribution contract*

1. Introduction. The notion of commercial intermediation.

a) Intermediation – complex commercial operation

Commercial intermediation is a complex operation, which includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either inland or internationally.

Participants to legal relations arising out of intermediation contracts bear various names, depending on the actual contractual relation to which they participate, the capacities in which they act may range from that of mandator and mandatary (in the case of the contract of mandate), to that of principal and commission agent (in the case of the contract of commission), of consignor and consignee (in the case of the consignment contract), principal (client) and sender or shipper (in the case of the shipment contract), principal and agent (in the case of the agency contract), client and broker (in the case of the brokerage contract) etc.

Independently from the legal nature of each intermediation contract, a common feature of all forms of intermediation may be discovered. This discovered feature, common to all forms of intermediation, consists of the object of the intermediation, namely, in that the intermediary, by means of the rendered activity under a specific commercial intermediation contract, acts as an

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agent for particular commercial affairs between particular partners or on behalf of another person (client), in exchange for payment. This particularity gives the contracts, based on legal relations of commercial intermediation, an onerous feature[1].

Generically, intermediation contracts are contracts for services, the intermediation activity carried out under such contracts favour, especially commercially speaking, the exchange of goods and in general economic development.

b) Origin of commercial intermediation

The origin of commercial intermediation is to be found in the Middle Ages, when it was used every day for carrying out commerce practised at distance. In the 10th and 12th centuries in Italy and in Northern Europe drafts similar to those of the nowadays contract of commission appeared. Commerce at distance carried out on a daily basis by frequent exchanges occurring in European medieval fairs, represented the premise for the first forms of intermediation.

The fast-paced development of commercial transactions, occurring throughout Renaissance, lead to the necessity of adapting commercial transactions, in view of traders cooperating and improving the actual means of exchanging goods.

It was during this period that the commercial mandate was born[2]. However, along with it, as an expression of the expansion of the principle of free commerce, especially international commerce[3], other types of intermediation were encountered more and more often, similar to the nowadays commission and agency contracts.

Indeed, the ever higher complexity of the concluded operations and the obstacles, given the large geographical areas in which such commercial relations arose, along with the language and culture barriers and the significant differences in terms of laws, lead throughout time to the necessity of discovering some advantageous methods for traders to enter and expand in markets from other states, in order to conclude international contracts under easy terms and to maintain durable economic connections[4]. One method which was frequently resorted to as a result of international commerce developing was the execution of intermediation contracts namely contracts of commission.

Once with the development of international commerce, a tradesman entering a foreign market in which he could sell his goods had to be done, via persons they knew on the local market, who had earned their trust and were prestigious, thus procuring the popularization and personal guarantee of their products[5]. The persons in question, who became the intermediaries under the conventions they executed with foreign tradesmen, carried out the required precedent operations and effectively executed commercial contracts in their own name or on behalf of clients; the effects of such contracts reflected upon foreign tradesmen.

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[1] See R. Munteanu, *Intermediation contracts in Romanian foreign commerce* (*Contracte de intermediere în comerţul exterior al României*), Printing House of the Academy of the Romanian Socialist Republic, 1984, p. 138.

[2] See F.A. Moţiu, Commercial intermediation contracts without representation (*Contractele comerciale de intermediere fără reprezentare*), Lumina Lex Printing House, Bucharest, 2005, p. 24-25.

[3] For a more detailed analysis of the principle of free commerce, see Dragoş A. Sitaru, International Commerce Law. Treaty. General Part (*Dreptul comerţului internaţional. Tratat. Partea generală*), Universul Juridic Printing House, Bucharest, 2008, p. 20-24.

[4] V. Anghelescu, Al. Deteşanu, E. Hutira, International Commercial Contracts (*Contracte comerciale internaţionale*), Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1980, p. 106-113.

[5] See R. Petrescu, General theory of commercial obligations. General Part (*Teoria generală a obligaţiilor comerciale. Partea generală*), Romfel Printing House, Bucharest, 1994, p. 185.

c) Sense and definition of the notion of intermediation

The notion of intermediation[6] had an historical evolution, in the traditional sense of the notion, up to the modern concept of our days.

In the traditional sense, the notion of intermediation is based on the idea of representation, in the sense of technical and juridical procedure whereby a person, named representative (in Romanian *reprezentant*), executes a legal deed in the name and on behalf of another person, called the principal (in Romanian called *reprezentat*), and the effects of the executed legal deed will directly and immediately produce over the principal[7].

It follows that the institution of intermediation is based, in Romanian law, on the contract of mandate; however it may not be restricted to this type of contract.

In commercial law, the notion of intermediation, as that of representation, underlying the former, has a wider range, referring to the situation in which the mandatary acts on behalf of the mandator (in Romanian *mandant*), either in his own name, or in the principals name.

Therefore, according to the principles of the Romanist law system, to which Romanian law belongs, there is a difference between activities in one's own name and on behalf of mandator, in the form of the contract of mandate with representation, or in ones own name by a mandatary however on behalf of the mandator, under the form of a contract of mandate without representation (commission, consignment etc.).

From this respect, a distinction may be noted between the vision of the Romanist law and the Anglo-Saxon one. As far as the Anglo-Saxon system[8] believes the distinction between the mandate with representation and that without representation does not exist, both types of intermediation take the form of the „*agency*"[9] institution. Consequently, intermediaries, no matter if they act as mandataries or consignees the Romanist law system, are both included by the wide term "*agents*"[10]. Agency is characterized in the Anglo-Saxon law system by the multiple possibilities of adapting to the requirements and the nature of the business object of the intermediation, and also by pragmatism and flexibility[11].

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[6] For a general presentation of intermediation in international commerce, see O. Căpăţînă, B. Ştefănescu, Treaty on international commerce law, vol. II, (*Tratat de drept al comerţului internaţional, vol. II*) Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1987, p. 138-140; B. Ştefănescu, I. Rucăreanu, International Commerce Law, (*Dreptul comerţului internaţional*) Didactic and Pedagogical Printing House, Bucharest, 1983, p. 142-144; T.R. Popescu, International Commerce Law, (*Dreptul comerţului internaţional*) Didactic and Pedagogical Printing House, Bucharest, 1976, p. 326-330; Sofia Ţămbălaru, *Some aspects regarding intermediation in international commerce law*, in Commercial Law Magazine No. 6/1999, p. 75-82 (Unele aspecte privind intermedierea în dreptul comerţului internaţional, în Revista de drept commercial, Nr. 6/1999, p. 75-82) .

[7] In this sense, see Gh. Beleiu, *Romanian civil law. Introduction in civil law. Subjects of civil law, (Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil)* ninth Edition, reviewed and supplemented by M. Nicolae, P. Truşcă, Universul Juridic Printing House, Bucharest, 2007, p. 210; G. Boroi, *Civil Law. General Part. Persons*, (*Drept civil. Partea generală. Persoanele*) third Edition, reviewed and supplemented, Hamangiu Printing House, Bucharest, 2008, p. 291-294.

[8] F.A. Moţiu, *Commercial intermediation contracts without representation*, (*Contractele comerciale de intermediere fără reprezentare*) p. 17-23; Dragoş A. Sitaru, Ş.A. Stănescu, Intermediation contracts in international commerce *(I)*, in Commercial law Magazine No. 11/2005, p. 26-43 (Contractele de intermediere în comerţul internaţional (I), în Revista de drept comercial nr. 11/2005, p. 26-43) .

[9] Clive M. Schmitthoff, *Schmitthoff's Export Trade, The Law & Practice of International trade*, ninth edition, London, Stevens & Sons, 1990 p. 278-316; Ewan Mckendrick, *Contract Law*, sixth edition, Palgrave Macmillan Law Masters, 2005, p. 163-164; R. Munteanu, *op. cit*., p. 25-30.

[10] For a presentation of the characteristic features of the agency contract, see D. Florescu, L.N. Pîrvu, *International commerce contracts*, (*Contractele de comerţ internaţional*) second edition reviewed ans supplemented, Universul Juridic Printing House, Bucharest, 2009, p. 205-213.

[11] F.A. Moţiu, *Agency contract*, (*Contractul de agency*) in the Annals of Timişoara West University, compilation Case Law, No. 1-2/2001, p. 73-83.

In the modern sense of the notion of intermediation, it may not however be limited to traditional contracts, contracts of mandate and commission, and it has so developed that it currently comprises a series of contracts – such as shipment, agency, brokerage, franchise, exclusive distribution, etc. -, in which the institution of representation has either suffered transformations arising from practical reasons, or it is missing.

In the case of contracts in which the institution of mandate (with or without representation) is not met, the intermediary establishes contracts third parties in his own name and on his own behalf, and not on behalf of the principal. Nevertheless the contract is still an intermediation one, due to the fact that certain effects arising from the legal deeds executed by the intermediary with third parties are reflected upon the principal. This is justified by the common interest both the representative and the principal have in executing the intermediation contract, which particular interest is served by the intermediary, through contracting third parties[12].

As regards what has been shown above, we believe that nowadays for the institution of intermediation the idea of mandate or representation is less significant, than in particular the intermediary carrying out an activity in/and for the benefit of another person[13].

It follows that **intermediation may be defined** as being an activity which a person (the intermediary) performs on behalf of another person (the principal), either in the name of the principal (in a legal relation of a mandate with representation), or in his own name (in a legal relation of a mandate without representation), or in his own name and on his own behalf however for achieving a common interest with the principal, activity in which the intermediary is the prepositive of the mediated parties or is independent therefrom, as the case may be, and which solely consists of negotiating or of negotiating and concluding legal deeds with third parties.

Thus, intermediation is the activity carried out by another person other than the actual beneficiary of the economic interest (the principal), on behalf of the latter, either in his own name, or in the name of the beneficiary of the interest in question, or in their own name and on their own behalf however in the context of a professional collaboration with the principal.

Specific to the intermediation contracts is the fact that, based on the powers granted to the intermediary by the principal, the intermediary acts in the sense of perfecting civil or commercial operations whose effects exclusively reflect upon the principal.

2. Classification of legal relations of commercial intermediation

Depending on the criterion of the powers granted to the intermediary, we find four types of commercial intermediation contracts [14], to which we refer hereinafter.

2.1. Intermediation contracts in which the intermediary acts in relation to third parties as the holder of a mandate of representation

The intermediation contracts to which we refer to presuppose the fact that the intermediary, when concluding legal deeds with third parties, acts in the name and on behalf of the person wherefrom the powers follow. Therefore, the intermediary discloses (exhibits) to third parties his capacity as representative (*i.e.* the fact that he is acting *nomine alieno*), third parties are thus

[12] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *International commerce law. Treaty, Special Part*, (*Dreptul comerţului internaţional. Tratat. Partea specială*) Universul Juridic Printing House, Bucharest, 2008, p. 305-306.
[13] Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation contracts in international commerce (I)*, (*Contractele de intermediere în comerţul internaţional (I)*) *op.cit,* p. 21.
[14] For a similar opinion, but with some highlights, see Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306-308.

informed as regards the fact that the effects arising from the concluded legal deed will reflect not upon the person that handled the execution of the deed, but in the account of the beneficiary of the economic interest, the issuer of the proxy.

The contract of mandate with representation is the highlight of this category of intermediation contracts. The Civil Code in force regulates the mandate under Articles 1532-1559. The new Civil Code[15] dedicates Articles 2013 – 2038 to the mandate of representation.

The commercial mandate is regulated by the provisions of Articles 374-391 of the Commercial Code[16].

The general principles of the contract of mandate from the civil law[17] are applied to the commercial contract of mandate, its juridical outline is supplemented by the characteristic features of the commercial mandate, arising from the nature of this operation, that of mediating commercial affairs[18].

According to Article 374 of the Commercial Code, "The commercial mandate deals with handling commercial affairs on behalf and on the account of the mandator. The commercial mandate is not supposed to be free of charge".

This legal provision allows us to note the essential features of the commercial mandate institution, which we will briefly reveal hereinafter.

Therefore, the commercial mandate is that particular contract under which a person called the mandatary undertakes to conclude particular legal deeds in the name and on behalf of another person who gave the proxy, called the mandator, which legal deeds are facts of commerce for the mandator[19].

The entering into and execution of the contract of mandate, by the mandatary handling commercial affairs with third parties, in the name and on behalf of the mandator, lead to specific effects, consisting of creating direct legal relations between the mandator and the co-contracted third party. The essential condition for the effects of the legal deeds perfected by the mandatary with the third party producing, directly in the mandator is that the mandatary acted within the limits and under the powers received in his capacity as representative, since the mandate may not be employed and held for the execution of other obligations other than in which the will of participating to the legal deeds generating rights and obligations, via the mandatary, was validly expressed.

The capacity of the mandatary of acting in the name and on behalf of the mandator causes the existence, in principle, of a subordination relation, in the sense that the mandatary is a prepositive of the mandator.

The said provisions of Article 374 of the Commercial Code, according to which the commercial mandate is not presupposed to be a free of charge contract, the concept of the commercial law maker is inferred according to which the commercial mandate is in its nature an contract in exchange for a consideration, in the sense that usually the mandatary is paid for his activity of concluding legal deeds in the name and on behalf of the mandator. The same idea is conveyed by Article 2010 of the N.Civ.C., which states the following "the mandate given for acts

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[15] We will hereinafter also use the abbreviation N.Civ.C.

[16] As regards the notion and the characteristic features of the mandate contract in domestic commercial law, see St. Cărpenaru, Treaty on Romanian commercial law, (*Tratat de drept comercial român*) Universul Juridic Printing House, Bucharest, 2009, p. 539-548, and for an analysis of the mandate contract in international commerce law, see R. Munteanu, *op. cit*., p. 34-47.

[17] See C. Popa Nistoreanu, *Representation and mandate in private law*, All Beck Printing House, Bucharest, 2004; Cl. Roşu, *Mandate contract in domestic private law*, (*Reprezentarea şi mandatul în dreptul privat*) C.H. Beck, Bucharest, 2008.

[18] R. Munteanu, *op. cit*., p. 34-38.

[19] St. Cărpenaru, *op. cit*., p. 540.

of exercising a professional activity is presumed to be in exchange of a consideration", this provision is common for the mandate with and without representation.

Under the commercial contract of mandate, the mandatary benefits from powers higher than the mandatary in a civil contract of mandate. The reason behind this is that in the commercial mandate, the mandatary may fulfil all the operations required by trading.

2.2. Intermediation contracts in which the intermediary acts in relation to third parties as mandatary without representation

Contracts of mandate without representation are mainly characterized by the fact that the mandatary (the intermediary) concludes legal deeds in his own name, however on behalf of the represented person (the principal).

The New Romanian Civil code defines this type of mandate under Article 2039. According to its text, the mandate without representation is the contract under which a party, called the mandatary, concludes legal deeds in his own name (*nomine proprio*) however on behalf of the other party, called mandator, and in relation to third parties undertakes the obligations arising from these deeds, even if the third parties were aware of the mandate.

In the eyes of the new code, the mandate without representation is *genus proximus* for three types of contracts, namely the commission, consignment and shipment contracts, whose main features we will present hereinafter. However such contracts do not exhaust the list of contracts based on this legal institution. Other types of mandate without representation, which are actually forms of commission, maybe encountered in various sectors of commerce, especially international one, such as terminal benefits contracts, applicable in matters of international shipment of goods[20].

a) Contract of commission

The contract of commission is typical for intermediation contracts based on a mandate of representation[21].

Pursuant to Article 405 of the Commercial Code "The commission deals with the commission agent handling commercial affairs on behalf of the principal".

The New Code defines the contract of commission as being the mandate having as object the purchase and sale of goods or services being rendered on behalf of the principal and in the name of the commission agent, acting professionally, in exchange for a payment called commission (Article 2043).

Commercial doctrine defines the contract of commission as being the will by which one of the parties, called commission agent, undertakes based on a proxy issued by the other party, to conclude certain commercial actions, in its own name, however on behalf of the principal, in exchange for a payment, called commission[22].

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[20] See, for terminal benefits contract, especially, O. Căpățînă, *Transports law. Contract of expedition for goods*, *(Dreptul transporturilor. Contractul de expediție a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 138 - 160; A.T. Stoica, *Contractual liability of the operator in terminal benefits contract*, in the Commercial law Magazine No. 4/2000, p. 134-143 (*Răspunderea contractuală a operatorului în contractul de prestații terminale, în Revista de drept comercial nr. 4/2000, p. 134-143*) ; Gh. Piperea, *Transports law*, (*Dreptul transporturilor*) second edition, All Beck Printing House, Bucharest, 2006, p. 87 - 91.

[21] For a more detailed analysis of the contract of commission in Romanian commercial law, see St. Cărpenaru, *op. cit*., p. 559-568, and as regards the features of the contract of commission in international commerce law, see R. Munteanu, *op. cit*., p. 48-70.

[22] See, St. Cărpenaru, *op. cit.*, p. 560.

It follows from what has been mentioned above that this agreement is the technical and legal procedure by which the legal deeds concluded between certain parties produce effects in favour of another person. Therefore, the contract is an original mechanism of intermediation, created to allow a tradesman to conclude commercial operations, benefiting from the services of another tradesman.

The contract of commission is one of the most frequent applications of intermediation contracts, in domestic commerce and also especially in international commerce,[23] this type of contract fulfilling some clear necessities.

The contract of commission appeared as a solution to the limitations presupposed by the commercial mandate, whose use requires some specific conditions, such as that of informing third parties with which they establish contracts on the person of the mandator and the limits of their powers granted under the proxy.

The frequency with which commission is applied in commerce is of course due to the advantages it brings to the contractual parties. Thus, the contract of commission deals with commercial operations occurring over large geographical areas and is based on a legal mechanism favourable to both parties. On the one hand the principal is relieved from having to supervise and control the stages of the operations whose execution and carrying out are delegated to the commission agent, and his entire attention and resources are turned to the main activity it carries out, at the same time benefiting from the experience and prestige of the commission agent it has on the relevant market in which it is active[24]. On the other hand, the commission agent in its turn gets benefits from intermediation operations, properly developing its commercial reputation, nevertheless holding on to its independence from the principal who contracted it. It is not only the parties who benefit from this type of contract, but also the third parties with which commercial operations on behalf of the principal are concluded. The third parties in question have the advantage to directly deal with the commission agent, who is undertaking in its capacity as co-contractor and from which they can easily recover debts, unlike the situation in which the legal relations had been established directly with the principal, whom they do not know or is in another state other than the one where the business is perfected.

Given the features specific to the legal regime of the contract of commission, and also the fact that it is a variety of the commercial mandate, a number of similarities and differences may be observed which we will hereinafter present in terms of their essential elements.

The main similarity is the fact that the legal deeds are concluded with third parties by the mandatary "on behalf" of another person, who has given the proxy (the mandator). This similarity is clearly shown by Article 2009 of the N.Civ.C., that defines the mandate as mentioned, in general (with or without representation).

Also, the two commercial agreements are similar in terms of their object, namely "handling commercial affairs". Pursuant to Article 405(2) of the Commercial Code "between the principal and the commission agent there are the same rights and obligations as between the mandator and mandatary" along with the differences established under the Code.

The fact that the commercial mandate is a paid one, as shown above, and the commission is always paid - Article 2043 of the New Civil Code includes this feature in the definition – also brings closer these two forms of contracts of intermediation. The abovementioned Article 2010 of the N.Civ.C. in a common provision for both types of mandate, establishes the same idea.

The main difference between a commission and a commercial mandate resides in the fact that the individual empowered as commission agent acts in its own name, however on behalf of the

[23] D. Florescu, L.N. Pîrvu, *op.cit.*, p. 204.
[24] See M.L. Belu-Magdo, *Special contracts*, (*Contracte comerciale*) Tribuna Economică Printing House, Bucharest, 1996, p. 116-117.

principal, whereas the mandatary has a right of representation and handles commercial affairs in the name and on behalf of its mandator. It is from here that the defining trait of the commission follows - that of being qualified as a mandate without representation.

Therefore, the commission agent concluding *nomine proprio* legal deeds personally undertakes towards them, and thus direct legal relations arise between third parties and the commission agent, and their effects will however reflect upon the principal. The principal, on whose behalf the commission agent acts, may remain unknown to third parties, who acquire and undertake obligations solely in their relation with the commission agent. This trait specific to the contract of commission is expressly regulated by the provisions of Article 406(1) of the Commercial Code, according to which "the commission agent is directly bound by the person with which it established a contract, as if the affair were its own". Consequently, „the principal may hold no action against the persons contracted by the commission agent and such persons may hold no action against the principal" (Article 406(2) of the Commercial Code), since they established no contractual relations.

As a difference between the mandate and the commission one may also note particular facts, consisting of the actual transparency of one party related to the opacity of the other party. The mandate presupposes representation, arising from the presentation of the mandatary in front of third parties as a simple spokesman of the mandating-tradesman, whereas the commission is characterized by trading commercial affairs in the commission agent's own name, however on behalf of the principal, irrespective whether the principal is acknowledged or not to third parties.

Unlike the mandatary, who is usually a prepositive of the mandator, the principal acts "professionally" (Article 2042 of the N.Civ.c.), that means that the latter is organized under the form of an enterprise.

b) Consignment contract

A form of intermediation contracts based on the mandate without representation is also the consignment agreement[25], a variety of the contract of commission.

The consignment contract is lawfully established by Law No. 178/1934 for the regulation of the consignment contract. The New Civil Code, under Article 2054, limits to providing that this agreement is a variety of the contract of commission having as object the sale of some immovable goods which the consignor entrusted to the consignee for this purpose.

The consignment agreement may be defined as the consent, by which a party, called consignor, entrusts the other party, called consignee, certain goods in view of being sold in its own name, but on behalf of the consignor, at a price established by the parties, in exchange for a payment. The consignee is bound to deliver the obtained price or, as the case may be, return the unsold good.

The similarity with the contract of commission resides in the fact that the object of the consignment contract is represented by handling a commercial affair, in its own name, but on behalf of the consignor. The particularity of this type of contract and, at the same time, the distinction in relation to the commission, is the actual object of the operations perfected by the consignee, namely, the execution of sale-purchase contracts for movable goods belonging to the consignor.

[25] For a more detailed analysis of the consignment agreement in Romanian commercial law, see St. Cărpenaru, *op. cit*., p. 569 - 576. Also see, V. Anghelescu, Al. Deteşanu, E. Hutira, *op. cit.*, p. 113.

c) Shipment contract

In the matter of transport activities, the contract of commission is materialized in the shipment contract. In terms of legal nature, the shipment of goods is an intermediation operation which, according to some standardized conventional norms, it oftentimes also bears the name „contract of commission for transport"[26].

The New Code defines the shipment contract as a variety of the contract of commission by which the sender undertakes to execute, in its own name and on behalf of the principal, a transport contract and to fulfil the related operations (Article 2064).

According to doctrine, the shipment contract is the willing consent between the client / principal (supplier or seller of goods) and shipper (sender), whereby the latter undertakes, in exchange for a payment to execute in its name, however on behalf of the principal, the required agreements with third parties for the shipment of the cargo, and also to fulfil the preliminary acts and things (cargo handling, loading the cargo in the transport means) and the cooperation necessary in view of performing the delivery[27].

The shipment contract is commercial in nature for the shipper (carrier), fulfilling a professional activity of intermediation, enterprise-specific.

The similarity of the shipment contract with the contract of commission consists of the representative concluding commercial operations in its own name, however on behalf of the client, the particularity arising from the specific sector where the shipment contract applies – transport activities – and from the specialized object of the commercial contracts perfected by the shipper – the transport contract of the goods and the services related to the shipment.

2.3. Intermediation contracts in which the intermediary acts as an independent professional tradesman, for business negotiation with third parties or for the negotiation and the conclusion of business with third parties

The category of intermediation contracts we refer to is firstly characterised by certain elements pertaining to the legal regime of the intermediary, as follows:

- the intermediary acts on a sustained and professional basis, and is organised under the form of an enterprise, and is not acting as an occasional intermediary, as it usually happens in the case of a commercial mandate;
- the intermediary runs his activity as an independent intermediary, specialised in that particular area, without being subordinated to the principal (client).
- the intermediary acts on the basis of a common interest with the principal, which means that a complex co-operation relation will be formed between them, by means of a contract.

Secondly, these contracts are particularized by the extent of the proxy granted by the principal (client) to the intermediary. Thus, the intermediary might be empowered, either to only negotiate commercial deals with third parties (which is the rule in practice), or to negotiate and conclude such deals in the name and on behalf of the principal.

Within the category of contracts we refer to; the following contracts are especially included: the agency contract, intermediation contracts (occasional) and the brokerage contract.

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[26] See for an analysis of this contract, especially, O. Căpăţînă, *Transport law. Shipment contracts for goods*, (*Dreptul transporturilor. Contractul de expediţie a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 13 - 137; Gh. Piperea, *op.cit.*, p. 65 - 87.

[27] See Gh. Piperea, *op. cit.*, p. 67-69.

a) Agency contract

The agency contract is a contract of Anglo-Saxon origin, where the complex juridical institution of "agency", practically refers to all the range of agreements by which a person (the agent) acts on behalf of another person (the principal), as previously shown. Therefore, in the Anglo-Saxon conception, the agent may be empowered either to only to negotiate commercial deals with third parties or to negotiate and conclude such deals in the name and on behalf of the principal.

In Romanian law[28], the agency contract is generally defined, in the specialised literature, as that agreements concluded between two independent tradesmen, by which one person (the agent) undertakes to promote the business of the other person (the principal or the client) within a certain area, through business negotiation and/or the conclusion of business contracts by the agent, on behalf of the principal, in all cases, in exchange for a commission, without there being any subordination relation between the agent and the principal[29].

The institution of the commercial agent is regulated in the Romanian Law No. 509/2002 on permanent commercial agents.

In the New Civil code, the notion of "civil contract" means that agreement by which the principal unfailingly empowers the agent either to negotiate or to negotiate and to conclude contracts, in the name and on behalf of the principal, in exchange for remuneration in one or more determined regions. The New Code adds the provision that the agent is an independent intermediary who acts on a professional basis, and he cannot be the prepositive of the principal at the same time. (Article 2072)

Therefore, according to the Romanian Law, the parties in the agency contract are independent tradesmen, and the agent is not economically dependent or dependent for executive decisions, on the principal. At the same time the agent acts as a professional, meaning it is organised as an enterprise. The agent, as an enterprise, has as main activity business intermediation, and the client (the principal) resorts to his experience as a result of a good professional reputation. The commercial agent is entrusted with dealing with the business of a client on a determined clientele (usually a geographic area), and the legal relations that arise from the agency contract are long lasting.

From the point of view of the scope of the proxy, meaning the extent of the mandate the agent receives from the client (the principal), the agency contract is, of two kinds, as follows:

Firstly, the agent may be granted a proxy solely for the purpose of negotiating the client's affairs, when he is granted by the client a mandate without representation. Under this mandate, the agent negotiates the conditions of future contracts, with third parties, contracts which will be concluded directly between the client and the third parties. Therefore, in this case, the proxy is limited to the procurement of orders/offers from third parties, thus to finding contractual partners for the client. This situation is presumed, in case the contract does not grant explicit powers of representation to the agent.

Secondly, the proxy (explicit) granted to the agent may be for the purpose of negotiating and concluding affairs in the name and on behalf of the client. In this case, the mandate granted to the agent in a mandate with representation.

For a better understanding of the juridical outline of the agency contract, a short comparative overview is mandatory, between the agency contract and the contract of commission and the commercial mandate with representation.

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[28] See, for a detailed analysis of the agency contract, especially, St. Cărpenaru, *op. cit.*, p. 548-559; V. Anghelescu, Al. Deteşanu, E. Hutira, *op. cit.*, p. 109-110; 113-114; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in international commerce (I)*, (*Contractele de intermediere în comerțul internațional (I)*) *op.cit.*, p. 19-43.

[29] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 312-313; D. Florescu, L.N. Pîrvu, *op. cit.,* p. 205-213.

Therefore, there is a difference between the agency contract and the contract of commission, which primarily consists in the fact that the commission agent is empowered by the contract of commission, to conclude in his name, but on behalf of the principal, one or several specific legal deeds; the contract ceases to be in force after the obligation of the intermediary is fulfilled. As regards the agency contract, it is concluded for a determined or non-determined period of time throughout which the agent is bound to conclude commercial contracts on behalf of the client, with a pre-established scope, within the envisaged territory (generally with an exclusivity clause). Therefore, the commission agent usually concludes one or more determined legal deeds, whereas the agent concludes an undetermined number of legal deeds for his client.

Unlike the commercial mandate with representation, the intermediation activity in the case of the agency contract is long lasting and professional in nature, not occasional. Moreover, unlike this commercial mandate where the intermediation activity predominantly unfolds in the principal's interest, the agency contract is characterised by the fact that the intermediation activity is based on the mutual interest of the agent and of the principal to conclude and execute the intermediation activity. Thus, the interest of the principal to capitalize his products and render the services which make the object of its commercial activity is doubled by the agent's interest to negotiate or to negotiate and conclude in the name of and on behalf of the principal as many commercial contracts, thus justifying the right of the agent to be paid[30].

For the situation when the agent is strictly empowered to obtain offers and negotiate contracts, and not with the power to conclude legal deeds, there is an even more clear distinction between the agency contract on one hand, and the contract of commission and the mandate without representation, on the other hand. This distinction resides in the existence of a different scope, such as the conclusion of legal deeds by the commission agent or the mandatary with representation, respectively the execution of pre-contractual commercial operations (of negotiation) by the agent.

To conclude, given the above mentioned particularities, the agency contract represents a special form of intermediation contracts, and not a particular case of mandate or contract of commission.

b) Intermediary contract (occasional)

The New Romanian Civil Code provides for the intermediary contract under Article 2096 - 2102. As per Article 2096, the intermediary contract is defined as the contract by which the intermediary undertakes, in relation to the client, to put him in contact with a third party, for the purpose of concluding a contract. The intermediary is not the prepositive of the intermediated parties and is independent in relation to them in the execution of his obligations.

For the use of the participants to the international commerce, the International Chamber of Commerce in Paris drafted a model for the occasional intermediary contract, entitled ICC Occasional Intermediary Contract –ICC Publication No. 619-2000.[31] The scope of the contract essentially consists of, for the intermediary (agent) obtaining information for the principal about potential clients or about a particular business and, as the case may be, of the assistance offered for the negotiation of a contract, and for the principal, of the payment he is bound to pay to the intermediary for his services rendered. Unless otherwise provided in the contract, the intermediary is not empowered to contract third parties in his capacity as mandatary (with or without representation) of the principal.

[30] St. Cărpenaru, *op. cit.,* p. 550.
[31] See also, for analysis, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 324 - 328.

Therefore, in principle, the intermediary in this type of contract is empowered by the principal (client) only for pre-contractual operations, acting as a mandatary without representation.

c) Brokerage contract

The brokerage contract[32] is defined in the specialised literature as a contract by which one person, named a broker, undertakes to find for the person from whom he received the task to contract, named client, a contractual partner for carrying out a commercial deal (a co-contractor) in exchange for a payment named brokerage.[33].

The brokerage contract, hardly distinguishes from the intermediary contract (occasional), both resembles and presents important differences from the contracts of mandate with representation, mandate without representation (commission) and agency contract.

The most important difference between the brokerage contract and the contracts of mandate with representation is the fact that in the case of the brokerage contract the mandate is granted without representation. The broker, unlike this mandatary, professionally performs the activity of intermediation, which constitutes the scope of the contract, without participating to the conclusion of the contract. The broker limits himself to making the connection between the persons who want to contract, facilitating and mediating the conclusion of commercial transactions. While the scope of the contract of mandate is the conclusion of legal deeds by the mandatary, in the name and on behalf of the mandator, the broker simply searches for a co-contractor for the client.

The brokerage contract resembles the contract of commission[34] especially because both of them have as scope independently performed intermediation activities. The commission agent distinguishes from the broker through the fact that he concludes in his name the legal deeds he was empowered to perform. The broker limits himself to making the connection between the persons who resorted to his services, without intervening in the conclusion of the contract. Thus, the broker, even if he receives a special mandate, does not act in his own name, but in the name of the mandatary, on the basis of a mandate without representation. Also, the broker does not have any privileges for the guarantee of debts against the client, unlike the commission agent, whose debts are secured under a special privilege, provided by the law.

The brokerage contract is essentially close in form to that of the agency contract in which the agent is entrusted only to negotiate deals with third parties, meaning the situation where the principal grants the agent a mandate without representation.

2.4. Intermediation contracts in which the intermediary acts in his own name and on his own behalf, in the relations with third parties, but having a mutual legal and economical interest with the principal

As it was justly noted in the specialised literature[35], in the modern sense, the intermediation is no longer restricted to the contracts of mandate and to the contract of commission, which presume a direct or indirect representation, but knows a series of other contractual forms in which the institution of representation, even an indirect one, is no longer found. In the case of these contracts, the intermediary enters into contractual relations with third parties in his name and on

[32] F.A. Moțiu, *Commercial Contracts of intermediation without representation*, (*Contractele comerciale de intermediere fără reprezentare*) *op.cit.,* p. 218-264.
[33] L. Săuleanu, A. Calotă, *The brokerage contract,* in Commercial Law Magazine No. 7-8/1999 (*Contractul de curtaj, în Revista de drept comercial nr. 7-8/1999*), Lumina Lex Printing House, Bucharest, 1999, p. 210.
[34] Gh. Stancu, *Intermediaries in commerce. The Contract of commission and the brokerage contract*, published in Law, no. 10/2007, (*Contractul de comision şi contractul de curtaj, publicat în Dreptul nr. 10/2007*) p. 129-145.
[35] See, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306.

his behalf, and not as a mandatary with or a without representation (commission agent). Nevertheless, the activity performed by the intermediary is also in the interest of the co-contractor party to the intermediary contract, for whom it ensures a more efficient sale of merchandise or rendered services. Consequently, at the moment, the intermediation criterion is based less on the idea of mandate (with or without representation), and more on the intermediary performing an activity and in the interest of another person.

Therefore, the contracts to which we refer come under the institution of intermediation because the principal and the intermediary both act for the realisation of a mutual economical and legal interest, similar to that which characterises the agency contract. As a result of this, relations of professional co-operation between the intermediary and the principal are established, and this puts the intermediary in a mixed position, one of independence, but also in a position of economical interdependence on the principal. These contracts are essentially different from the agency contract, when the agent acts in the name and on behalf of the principal (client), as seen above.

We now give a short description of the main categories of contracts, which in our opinion, fall under this category of intermediation.

a) Franchise contract (franchising)

The franchise contract, known in the international commerce under the Anglo-Saxon name of franchising,[36] means the contract by which a person, named franchiser, allows the exploitation of a trademark or a production brand or of rendered services by an independent person, manufacturer or one who provides services, named franchisee, and of the know-how, the use of his trademark and sometimes the related supply, which the beneficiary should exploit according to the convention, in exchange for a remuneration[37].

In the specialised literature, the franchise contract was defined as representing the system of commercialisation based on a continual collaboration between natural persons or legal persons, financially independent, by which a person, named franchiser, grants another person, named beneficiary, the right to exploit or to develop a business, a product, a technology or a service[38].

In the domestic law, the franchise contract is regulated by the provisions of Government Ordinance No. 52/1997 on the legal regime of the franchise.

In international commerce, tradesmen most often use, as a model for the franchise contract, the codification of usage drafted by the International Chamber of Commerce in Paris, namely ICC

[36] For a general analysis of this contract see especially St. Cărpenaru, *op. cit.*, p. 605 - 616; I. Bălan, *Franchising contractual techniques*, in Commercial Law Magazine no. 3/2000, p. 23 (*Tehnici contractuale ale francizei, în Revista de drept comercial nr. 3/2000, p. 23*) ; M.C. Costin, *Franchising contract*, în Commercial Law Magazine no. 11/1998, p. 132 (*Contractul de franchising, în Revista de drept comercial nr. 11/1998, p. 132*) ; Gh. Gheorghiu, G.N. Turcu, *Franchising operations*, (*Operaţiunile de franciză*) Lumina Lex Printing House, Bucharest, 2002; Dan Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007; M. Mocanu, *Franchising contract*, (*Contractul de franciză*) C.H. Beck Printing house, Bucharest, 2008; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (II)*, in Commercial Law magazine no. 12/2005, p. 49-61 (*Contractele de intermediere în comerţul internaţional (II), în Revista de drept comercial nr. 12/2005, p. 49-61*). For a presentation of characteristic features of the agency contract, please see also D. Florescu, L.N. Pîrvu, *op.cit*, p. 213-214.

[37] Dan - Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007, p. 33.

[38] St. Cărpenaru, *op. cit*., p. 607.

Model International Franchising Contract – ICC Publication No. 557-2000. This document provides a summary of commercial practice related to this domain[39].

b) Exclusive distribution contract

The exclusive distribution contract[40] is the commercial contract, concluded for a long term, under of which a party, named supplier, undertakes to deliver to the other party, named distributor, under terms of exclusivity, certain quantities of merchandise, according to the received requirements, which the latter will resell to his clients, using the supplier's trademark, on a market already determined in the contract, in exchange for a remuneration, which consists of the difference between the purchase price and the re-sell price.

Given the lack of special regulations in the Romanian domestic law, the contract to which we refer is included, for usage in international commerce, in the model contract drafted by the International Chamber of Commerce in Paris, entitled ICC Model Distributorship Contract (Sole Importer-Distributor) – ICC Publication No. 646-2002[41] - which has the advantage of representing a summary the commercial practice, representing a codification of usages related to this domain.

The exclusive distribution contract may not be reduced to a contract of mandate (with representation) or to an agency contract, because the deeds to re-sell performed by the distributor are not made in the name and on behalf of the supplier. At the same time, the exclusive distribution contract is not a form of the contract of commission, although the distributor acts, just as the commission agent, in his own name, in relation with third parties. Nonetheless, the distributor, unlike the commission agent, acts in his name and on his behalf.

The exclusive distribution contract is significantly close though to the agency contract, because it presumes that a permanent professional co-operation relation is established between parties, as a consequence of the fact that both parties act for the purpose of achieving a common interest, which is the commercialisation of merchandise and the provision of services which make the scope of the contract.

Conclusions

The concept of commercial intermediation has not been seen as a whole but usually it has been analyzed by the doctrine and confirmed by the courts practice in specific, referring only to the contracts that include the representation of another party. There is no doubt that the commercial intermediation is a complex operation, one that includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either under the domestic commercial law or under the provisions of the international commercial laws, and the history of the development of the concept shows also the same.

Probably the most important new improvement that this paper brings is that it separates the traditional concept in the sense that the commercial intermediation is based only on the idea of representation. But the notion of intermediation is not only expressed in the contract of mandate, the entire legal nature of the other contracts that have a link to the notions, which we thoroughly

[39] See for the the analysis of this model Contract of ICC, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 328 - 341.

[40] R. Munteanu, *op. cit,*. p. 71-96; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (III)*, in Commercial Law magazine no. 1/2006, p. 32-45 (*Contractele de intermediere în comerţul internaţional (III), în Revista de drept comercial nr. 1/2006, p. 32-45*) .

[41] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 341 - 353.

presented in the paper, shows that the perspective should be much wider. From this the definition of the commercial intermediation had been extracted.

It must be noted also, that the implications of the New Civil Code are mostly as regards the classification of the concept. This is because after the New Civil Code has institutionalized a new conception regarding the regulating system for civil and commercial legal relations. By doing so it redefined the characteristics of mostly every contract that refers to the commercial intermediation. Also, it settles more clearly the criterion of the powers granted to the intermediary, by which we find the four types of commercial intermediation contracts, to which we referred in the paper.

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