THE CONSIGNMENT CONTRACT FROM THE PERSPECTIVES OF THE OLD AND NEW LEGISLATION

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Abstract
A form of intermediation contracts based on the mandate without representation is also the consignment agreement, 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 purpose of the paper is to underline the changes in legislation subsequently to the New Civil Code and to compare both perspectives.

Keywords: *mandate without representation, contract of commission, consignor, consignee, movable goods*

§I. INTRODUCTION, NOTION AND LEGAL FEATURES OF THE CONSIGNMENT CONTRACT

1) Notion of consignment contract

The consignment contract is a special form of intermediation contract without representation, along the contract of commission, shipment contract etc. The consignment contract is a variety of the contract of commission, in the sense that it is an intermediation contract, arising from a power of attorney granted by the principal, and as regards the actual means in which the representative acts the consignment contract is characterized by imperfect or indirect representation[1].

As a variety of the contract of commission, the consignment contract[2] distinguishes itself by a particular object, consisting of concluding with third parties particular legal documents. As per Article 2054(2) of the New Civil Code, the consignment contract is governed by the rules of the New Civil Code, expressly provides regulations for this type of contract, by means of the special law, as well as by the provisions regarding the contract of commission and contract of mandate, to the extent in which the latter forms of contract are compatible.

A definition of the consignment contract is given by the provisions in the new civil provision, under Article 2054(1) of the New Civil Code. According to these provisions, the consignment contract is a variety of the contract of commission having as object the sale of movable goods which the consignee entrusted to the consignor for this purpose.

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[1] See, further on the legal regime of the consignment contract, St. D. Cărpenaru, *Tratat de drept comercial român*, 2nd Edition, revised and supplemented, Universul Juridic Printing, Bucharest, 2011, p. 584-591; F.A. Moțiu, *Contractele comerciale de intermediere fără reprezentare*, Lumina Lex Printing, Bucharest, 2005, p. 139-170; F.A. Moțiu, *Contractele speciale – în Noul Cod civil –*,Wolters Kluwer Romania Printing, Bucharest, 2010, p. 258-263.

[2] See L. Papp, *Contractul de depozit şi consignaţie*, Cartea Românească Printing, Ploieşti, 1934.

Before the New Civil Code entered into force, the consignment contract was regulated by the provisions of Law No. 178/1934 on the regulation of the consignment contract[3].

The legal mechanism of the consignment contract presupposes a power of attorney being granted and this instrument underlies the consignee acting as intermediary in view of selling movable goods to third parties belonging to the consignor and given in consignment, in its own name, however on behalf of the consignor. The sale of movable goods is made in exchange for a price previously established by the consignor, and the effect of having executed the consignment contract consists either in the obligation to send the consignor the amounts of money received for the sold goods or, in case the goods were not sold to third parties, in the obligation to return the goods to their rightful owner.

In conclusion, the consignment contract is the legal document by means of which one party, called consignor, entrusts the other party, called consignee, certain goods, in view of being sold to third parties, in its own name, but on behalf of the consignor, at a previously established price, and the consignee is bound to deliver the obtained amounts or to return the unsold good to the consignor.

2) Legal features of the consignment contract

The consignment contract displays a series of legal features, which establish the main features of this separate legal institution, as follows:

a) The consignment contract is a consensual contract

The consignment contract is a consensual contract[4], arising from the parties simply giving their consent (Article 1174(2) of the New Civil Code). This manifestation of will which was thus articulated should not take a particular form provided by the law.

As regards the form of the consignment contract, the New Civil Code stipulates under Article 2055, that the consignment contract should be concluded in written form, which is necessary only for making proof of the contract, unless otherwise provided by the law. In this sense, Article 2 of Law No. 178/1934 also stipulates that, this contract, and also any other convention regarding the amendment, change or termination of the consignment contract, may be proven only by a written proof.

In other words, the written form of the consignment contract is requested *ad probationem*[5], and not *ad validitatem*, and the contract's validly arises from the parties freely expressing their will.

In conclusion, as a consequence to the consensual nature of the consignment contract, it should be mentioned that the goods being entrusted by the consignor to the consignee, in view of being sold, is not a condition for the valid rise of the contract[6], and it is an effect of the contract being executed. In this sense, the issue of delivering the movable goods to be sold and, correlatively, the consignee receiving them, shall be examined in the matter of the effects of the consignment contract, as reciprocal obligations of the parties.

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[3] Law No. 178/1934 on the regulation of the consignment contract was published in the Official Gazette No. 173 of 30 July 1934.

[4] F.A. Moțiu, *Contracte speciale,* p. 259.

[5] St. D. Cărpenaru, *op.cit*., p. 585.

[6] With respect to the opinion according to which the consignment contract has an *in rem* character, since it involves the handing over of some goods in the care of the consignee, see R. Petrescu, *Teoria generală a obligațiilor comerciale*, Romfel Printing, Bucharest, 1994, p. 191.

b) In principle, the consignment contract is an onerous contract

The consignment contract is onerous in nature[7], each contractual party wishes to obtain a patrimonial advantage following the execution of this legal instrument[8]. Thus, on the one hand, the consignor wishes to sell its movable goods, and on the other hand, the consignee wishes to obtain the proper remuneration in exchange for the service it rendered.

According to the provisions of the New Civil Code, under Article 2058(1) thesis I of the New Civil Code, stipulates that the onerous nature of the consignment contract is presumed, and, only if the parties expressly provide, it could also be a gratuitous contract.

As regards the gratuitous or onerous nature of the consignment contract, one should also take into consideration the provisions of Article 12 of Law No. 178/1934, according to which the rightful remuneration of the consignee is established by the parties under the contract, or by calculating the difference between the price obtained in exchange for the sold movable goods belonging to the consignor and the inferior sell price agreed by the parties, or established by a court of law. This provision also entitles to draw the conclusion that the consignment contract is onerous in nature.

c) The consignment contract is a bilateral contract (synalagmatic)

The consignment contract is bilateral[9] (synalagmatic) in nature, because it gives rise to reciprocal rights and obligations in the care of both parties.

Thus, as regards the consignment contract, it is of the kind as to give rise to reciprocal and interdependent rights and obligations in the care of both parties, as follows: the consignor is bound to hand over to the consignee the movable goods to be sold, and also to ensure that the consignee is paid for the rendered service, consisting both in the amounts agreed in the contract, and also the additional expenses which the consignee incurred for fulfilling its duties. In exchange, the consignee is bound to receive, preserve and insure the movable goods handed over in view of being sold, and also to fulfil the entrusted tasks and to account for the proper manner for fulfilment. It follows that, the consignor and the consignee, as a result of the rights and obligations in their care under the consignment contract, display, in the legal relations between them, a double quality, as lenders and debtors.

d) The consignment contract is an *intuitu personae* contract

As a variety of the contract of commission, which is nothing else but a contract of mandate without representation executed between professionals, the consignment contract takes over the *intuitu personae* nature of the contract of commission.

The consignment contract is concluded in consideration of the personal qualities of each contractual party, thus justifying the *intuitu personae*[10] nature thereof. The obligations undertaken by the consignor, as well as those undertaken by the consignee, are a direct consequence of the other party assuming the obligations and especially the reciprocal trust which they have in their capacities and for the execution with good-faith of the other party.

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[7] F.A. Moțiu, *Contracte speciale,* p. 259.

[8] With respect to the classification of legal documents in onerous legal documents and in gratuitous legal documents, see Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 11th Edition, revised and supplemented by M. Nicolae and P. Truşcă, Universul Juridic Printing, Bucharest, 2007, p. 132-133.

[9] F.A. Moțiu, *Contractele speciale,* p. 259.

[10] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 148.

Therefore, the *intuitu personae* nature of the consignment contract is based on the fact that the consignor puts its trust in the consignee's abilities and professional experience, which was entrusted with selling certain movable goods belonging to the consignor, while the consignee undertakes to fulfill the obligations under the contract, in consideration of the remuneration to which its rendered service entitled.

Under Article 2063 of the New Civil Code, the consignment contract terminates, *inter alios*, by the death, dissolution, bankruptcy, incapacitation or deregistration of the consignor or consignee. These special causes for terminating the consignment contract justify the *intuitu personae* nature of the contract, which causes the contract to terminate in case there appears a cause leading to the impossibility to carry on with the execution of the contract by the same parties and in the same original capacities.

e) The consignment contract is a nontranslative property contract

Following the execution of the consignment contract, the consignor is bound to hand over to the consignee the movable goods to be sold thereby, and also the correlative obligation of the consignee to execute the given tasks. As an effect of the movable goods being entrusted to the consignee, the ownership right over such goods is not transferred to the consignee, and it shall continue to remain in the consignor's patrimony.

Thus, the consignment contract is not a translative property contract; the consignee strictly acts as temporary holder of the consignor's goods, during the time elapsed between their being handed over and the actual sale to third parties. Consequently, as we will hereinafter show, the consignor may exert at any time its right of control over the goods in question, also being able to request their return, by rescinding the executed contract. In this sense, as per Article 2057(2) of the New Civil Code, the consignor disposes of the goods entrusted to the consignee, throughout the entire duration of the contract. It may, at any time, repossess them, even if the contract was executed for a limited duration.

§II. CONDITIONS FOR VALIDITY

1) Form of the consignment contract

As previously mentioned, the consignment contract is consensual in nature. Therefore, for it to be validly executed it is not necessary to observe any conditions of form, the simple manifestation of the parties' will leads to the valid rise of the contract.

Thus, the consignment contract may be in writing, either by drawing up a signed document not notarized or writ in authentic form, or verbally. As a variety of the contract of commission, the provisions of Article 2044 of the New Civil Code may be applied by analogy to the consignment contract, as follows: the contract of commission is executed in written form, authenticated or signed but not notarized, and, unless the law provides otherwise, the written form is only necessary for making proof of the contract. In other words, further to this provision, it may be concluded that the validity of the contract does not depend on the written or verbal form of the consignment contract, but its proof exclusively depends on executing the contract in written form.

As per Article 2055 of the New Civil Code, the consignment contract is executed in writing, and this is only necessary to prove that the contract was duly executed, unless otherwise provided by the law. In this sense, the New Civil Code is in line with the old regulation regarding the consignment contract, according to which, as per Article 2 of Law No. 178/1934, the consignment

contract, as well as any juridical legal for its amendment, change or termination, may only be proven by written evidence.

2) Proof of the consignment contract

Bearing in mind that the execution of the consignment contract may be both in written and oral form, as previously mentioned, under Article 2055 of the New Civil Code, similar to Article 2 of Law No. 178/1934, according to which the execution of the consignment contract in written form only serves as a means of making proof of the legal relation thus born, it may be said that the written form of the consignment contract is required *ad probationem*, and not *ad validitatem*.

However, the proof of the consignment contract may only be made by a written document, ascertaining the will of the parties and the main rights and obligations falling in their care. Thus, the document created as proof serves to identify the object of the executed consignment contract, consisting in the sale of movable goods belonging to the consignor, in its own name by the consignee, but on behalf of the consignor, issuer of the power of attorney, in exchange for a proper remuneration, and also helps to identify the means and limitations within which the consignee may act in relation to third parties.

Proving the consignment contract, on the one hand, envisages the consignor actually granting a power of attorney, whereby it lists the actual conditions which the sale-purchase contracts for the entrusted goods should observe; for instance, such conditions may refer to the markets on which the goods will be sold, the lowest price applicable to the sale etc. In addition, the power of attorney containing the consignor's will is also a means in which third parties may check the tasks entrusted to the consignee, and also the limits within which it may act on behalf of the consignor. This purpose which the instrument which contains the consignor's will serves exists only if it is assumed that the third parties are informed about the consignee's capacity as intermediary.

On the other hand, proving the consignment contract envisages the consignee accepting the tasks given by the consignor. By executing the contract, the consignee undertakes to take over the movable goods belonging to the consignor and to sell them in its own name to third parties, however, with the consequence of the effects of the concluded sale-purchase legal documents occurring in the consignor's patrimony, which shall receive all the amounts received for the respective goods. The proof of the consignee's acceptance is made either by the probative instrument which the parties concluded, or by the deeds for the execution of the contract, unquestionably evincing its will in the sense of performing the given tasks.

Lastly, the proof of the consignment contract may also envisage the amount of the remuneration to which the consignee is entitled for the services it rendered to the consignor, consisting either in the amount provided as such in the contract, or in the difference between the price actually obtained for the sold movable goods and the lowest price imposed by the consignor, bearing in mind the onerous nature of the contract, under which the consignor has the obligation to pay its proxy for its rendered service, as such amount shall be established by a court of law on a case to case basis, arises.

Proving the consignment contract directly influences the occurrence of the effects arising from the sale-purchase contracts concluded by the consignee in the consignor's interest. Thus, not proving the contract shall cause the sale of the movable goods not to lead to the rise in the consignor's patrimony of the right over the amounts obtained in this way, as accompanied by the consignee's obligation to forward these amounts to the grantor of the power of attorney. As regards the fact that the sale purchase contracts are concluded in its own name by the consignee, not making

proof of the contract will cause the consignee to be the creditor of the amounts representing the price of the sold goods, and the consignor to be a third party in these legal documents.

3) Substantive conditions of the consignment contract

a) Parties' capacities

A condition for the valid execution of the consignment contract is the parties meeting the requirements regarding the parties' capacity to execute the contract. Both the consignor and the consignee need to meet the requirements regarding the capacity to acquire rights and to validly assume the obligations arising from the consignment contract.

Firstly, as regards the consignor, it should have the capacity to itself conclude the legal documents for whose conclusion it grants a power of attorney to the consignee. Bearing in mind that the sale-purchase contract with respect to the movable goods belonging to the consignor are concluded and produce legal effects on its behalf, in the absence of a power of attorney granted under the contract, it should be able to conclude such documents on its own[11].

Secondly, as regards the consignee, it should have full capacity, since it concludes sale-purchase contracts with third parties in its own name (*proprio nomine*), in the relationships with third parties appearing as the true party of the respective legal relation. Usually, the consignee acts as a professional[12], a natural or legal person, concluding such type of professional operations or having the operations which are object of the consignment contract included in the company's business object[13].

The conditions regarding the parties' capacities are mandatory for the valid existence of the consignment contract, all the more since the incapacity of a party is provided as a cause of termination for the contract. And the *intuitu personae* nature of the consignment contract, loss of capacity of one of the parties may lead to the contract being terminated.

Given that the loss of the capacity necessary for the valid existence of the contract leads to its termination, all the more the failure to meet the conditions for capacity when the contract is executed does not allow its valid rise.

b) Consent

The consent which the consignment contract presupposes in order for it to validly rise implies both the manifestation of the consignor's will, and also the consignee's will.

On the one hand, the valid execution of the consignment contract presupposes the consignor expressing its will, which shall grant a power of attorney under which it transfers to the consignee the task of selling certain movable goods, in its own name, however on behalf of the consignor which is owner. Thus, the consignor's consent is expressed by the power of attorney which is being granted to the consignee.

As regards the consignor's consent being expressed by granting a power of attorney, it was admitted that the manifestation of will should be express. In this sense, for the valid execution of the contract, the power of attorney should exist and be proven in view of accurately establishing the

[11] St. D. Cărpenaru, *op.cit*., p. 585; F.A. Moțiu, *Contractele comerciale de intermediere,* p. 148.
[12] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 149.
[13] Mona-Lisa Belu-Magdo, *Contracte comerciale*, Tribuna Economică Publishing, Bucharest, 1996, p. 139.

obligations which the consignee undertakes under the contract, and also the limits of the powers granted thereto. Moreover, the power of attorney granted by the consignor should be expressly granted, should be in such a form as to allow to prove the unquestionable manifestation of the consignor's will with respect to the consignee's possibility of acting in its own name in the relations with third parties, however on behalf of the grantor of the power of attorney.

In conclusion, as regards the consignor, its manifestation of will by empowering the consignee for handling specific professional businesses, in its own name, however on behalf of the principal, should be express. This results in the *per a contrario* interpretation of Article 2012(1) of the New Civil Code, according to which, unless the context requests otherwise, the proxy represents the principal when concluding the documents for which it was empowered. Therefore, basically, the mandate implies power of representation, and assuming there are doubts as regards the power of representation conferred to the representative, the granted power of attorney shall imply representation.

On the other hand, as regards the consent expressed by the consignee when the consignment contract is executed, it was ascertained that its manifestation of will may also be tacit. In other words, the execution of the contract may be express or tacit[14], in the latter case the contract arises from the consignee performing the tasks received from the consignor.

c) Object and scope of the consignment contract

With respect to the object of the consignment contract, the New Civil Code stipulates under Article 2054(1) the following: "the consignment contract (…) has as object the sale of movable goods which the consignor entrusted the consignee for this purpose."

Thus, the consignee negotiates and concludes with third parties sale-purchase contracts having as object the goods belonging to the consignor, in view of being sold in its own name and on behalf of the grantor of the power of attorney. Legal documents object of the contract of commission are included in the businesses carried out by the consignor, entrusting the consignee with fulfilling certain professional operations.

As regards the object of the sale-purchase contracts which the consignee undertakes to conclude, the new civil regulation takes over of the old regulation which was concerned with the consignment, found under Article 1(1) of Law No. 178/1934, according to which the object of the sale-purchase contracts which the consignee shall conclude is "the movable goods or objects". Thus, the goods which the consignee is entrusted to sell on behalf of the consignor are movable goods[15].

The consignor's correlative obligation under the contract has as object the consignee being paid remuneration appropriate for its services rendered on behalf of the consignor, as shown below.

The consignment contract produces effects within the limit of the powers granted to the proxy. Thus, the scope of the contract results, and consequently, produces effects, depending on the operations which the consignor provided in the granted power of attorney, whereby it established the limits within which the consignee is entitled to act. As a result of accurately establishing the consignee's rights and obligations, the consignor shall be bound within the limit of the conferred

[14] Bucharest Tribunal, commercial section, decision No. 225/1996, in D. Lupaşcu, *Culegere de practică judiciară a Tribunalului Bucureşti 1990-1998*, All Beck Publishing, Bucharest, 1999, p. 191-193.

[15] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 151.

powers, while the legal documents concluded beyond the limits of these powers shall remain with no effects in relation with it.

In conclusion, the limits of the freedom to act are expressly provided under the granted power of attorney. In this sense, according to the provisions of the New Civil Code, under Article 2017(1) and (2), regulating the contract of mandate, however which are applied by analogy in the matter of consignment, it is stipulated in the sense that the proxy (consignee) does not exceed the limits established by mandate. Nevertheless, it may divert itself from the received instructions, if it is impossible for it to previously inform the principal (consignor) and it may be presumed that it would have consented to the diversion if it had known the surrounding circumstances.

§III. EFFECTS OF THE CONSIGNMENT CONTRACT

Bearing in mind the main features of the consignment contract, it produces specific legal effects, which differentiate it and confer it a special construction in the broad category of contracts of intermediation.

Firstly, the consignment contract produces legal effects in relation to the contracting parties, the consignor and the consignee. These effects are direct consequences of the legal relations born between the parties, and consisting in rights and obligations falling in the care of the parties. Secondly, the consignment contract produces legal effects representing the consequence of performing the contractual obligations. Thus, the consignee concludes sale-purchase legal documents, in its own name however on behalf of the consignor. Establishing a contract with third parties is also of the kind as to produce effects both in the relations between the consignee and third parties, and in the relations between the consignor and third parties.

1) Effects of the consignment contract in the relations between the consignee and the consignor

A) Consignor's obligations

a) Obligation to entrust the consignee the movable goods to be sold

Based under the power of attorney granted by the consignor, which underlies the contract that was executed by the parties, the consignor undertakes to entrust to the consignee the movable goods that shall represent the object of the sale-purchase contract to be concluded with third parties. In order for the proxy to be able to fulfil the undertaken contractual obligations, it should receive the goods that shall be sold by it.

As per Article 2057(1) of the New Civil Code, the consignor will entrust the goods to the consignee in order to perform the contract (...). The new regulation in the matter of the consignment contract is a continuation of the logical-juridical reasoning which Article 1(1) of Law No. 178/1934 implies; the article in question indicates that the object of the obligation to hand over in the care of the consignor is the movable merchandise or goods[16].

We should mention an extremely important aspect regarding the title with which the movable goods belonging to the consignor are delivered to the consignee. The goods are made available to the latter however at no time is the ownership title transferred thereto. The regulation of the New Civil

[16] As regards the means of performing the obligation to hand over the goods, Law No. 178/1934 stipulates under Article 1(2), in the sense that the goods entrusted to the consignee shall be handed over thereto, all at once or gradually, by successive notes or invoices, issued in relation to the contract.

Code indicates the fact that the ownership title over the goods object of the consignment contract, remains in the consignor's patrimony, further to it fulfilling its obligation to entrust the goods to the consignee. Thus, according to the provisions of Article 2057(2) thesis I of the New Civil Code, the consignor disposes of the goods entrusted to the consignee, throughout the entire duration of the contract.

As a consequence of the fact that subsequently to the consignee being entrusted with the movable goods, the consignor remains the owner thereof until the transfer of property to third parties occurs, and the consignor shall enjoy all the rights over the goods which were thus entrusted, including the right to dispose of them at any time, unless otherwise provided in the contract[17].

The consignor's ownership right over the movable goods is expressed by its possibility to manifest its autonomy of will, by indicating the criteria or even the person to whom the ownership over the goods will be transferred, by a request of returning the goods from the consignee's care or even by personally and actually picking the goods up. The New Civil Code provides, by Article 2057(2) thesis II, the consignor's possibility of repossessing the entrusted goods at any time, even if the contract was executed for a limited duration.

The difference as compared to the regulation of Law No. 178/1934, which the New Civil Code makes as regards the consignor's right to request the repossession of the goods from the consignee's care, consists in that, although the old regulation did not require sending a prior notice and in relation to picking up the goods, the New Civil Code conditions the repossession of the goods by giving a prior notice allowing the consignee to hand them over (Article 2057(3) of the New Civil Code).

Assuming that the consignee refuses to hand over the goods, they may be repossessed by a presidential ordinance, as per the provisions of Article 581 of the Civil Procedure Code, stipulating that, in expedite events, the court of law may order temporary measures for keeping hold of a right which would have caused damages by delay, in order to prevent an imminent loss and which could not be remedied, and also to remove any impediments which could occur on the occasion of an execution[18].

Thus, by means of the presidential ordinance, the consignor may exercise its right to pick up the goods from the consignee's care which is not the owner, to the extent in which it stands against the goods being taken over by the consignor. Moreover, the presidential ordinance may be granted also in view of the consignor picking up the goods at any moment, even in case the contract stipulates a clause regarding the obligation to give a prior notice.

The right of the consignor-owner to dispose of its goods subsequent to them being delivered to the consignee in view of performing the contract is also materialized in its recognized possibility to inspect and check the standing of the goods, at any moment, throughout the entire duration of the contract (Article 2057(1) thesis II).

[17] These conclusions are a natural consequence of keeping the ownership right over the goods in the consignor's patrimony, as Article 3(3) of Law No. 178/1934 also mentions.

[18] As per the old regulation, Article 4(3) of Law No. 178/1934 stipulates that the presidential ordinance may be given even without summoning the parties, to the extent in which the consignment contract is executed by a signed in the form of a signed document not notarized.

The consignor-owner is also acknowledged the right to unilaterally change the terms for the sale of the goods entrusted to the consignee, unless otherwise provided under the contract (provisions of Article 2056(2) of the New Civil Code). The consignee will be bound by this change, as of the moment when it is informed in this respect.

An additional consequence of the fact that the ownership over the goods is not transferred to the consignee following the goods being handed over is also the event in which, as per Article 2057(4) thesis I of the New Civil Code, in case consignor is declared bankrupt, the goods are included in its statement of assets. Therefore, since the handing over of goods does not turn the consignee in their owner, but it shall simply become their temporary holder, the solution according to which the consignor being declared bankrupt causes the goods to be included in the statement of assets of all the goods belonging thereto is justified, in other words, both the goods it actually owns but also the goods in the consignee's possession, under the consignment contract. The latter goods may be used just as well to cover the consignor-owner's debts, or may be divided following the closing of the bankruptcy procedure, to the extent in which the value of the consignor's goods exceeds the value of the debts.

Consequently, the consignee being declared bankrupt does not trigger the inclusion of the goods received in consignment in its statement of assets, and they shall be excluded from the consignee's statement of assets and shall be immediately repossessed by the consignor (Article 2057(4) thesis II of the New Civil Code).

b) The obligation to pay the consignee the rightful remuneration

The new civil regulation establishes the onerous nature of the consignment contract, based on a presumption set by the Article 2058 of the New Civil Code, according to which the consignment contract is presumed to be onerous.

The quantification of the amount which the consignor is bound to pay is made either by a contractual clause, or based on objective conditions under which the contract is performed, as shown hereinafter. In this sense, according to Article 2058 of the New Civil Code, the remuneration to which the consignee is entrusted is established by other or, in lack thereof, as the difference between the sale prices established by the consignor and the actual sale price. If the sale was made at the current price, the court of law shall establish the remuneration.

Firstly, the parties are free to establish the consignee's remuneration by a contractual clause referring to this aspect.

Secondly, to the extent in which the parties made no mention in the contract with respect to the retribution or benefit given to the consignee, it would only be entitled to the overcharges it shall obtain from the sale. In other words, the consignee may claim, as remuneration, the difference between the prices actually collected under the sale-purchase contracts that it concluded with third parties having as object the consignor's movable goods, and the sale prices provided by the consignment contract or the consignor's notes, invoices, or instructions[19]. Thus, if either by contract or based on the instructions given by the consignor certain minimum prices are established for the sale of the goods, any higher value obtained from third parties following the consignee's endeavors or qualities, could be in its benefit, as remuneration.

[19] In this sense the provisions of Article 12(1) of Law No. 178/1934 were regulated.

Thirdly, to the extent in which the remuneration to which the consignee is entitled under the consignment contract, is determined neither by contract nor by the consignor's notes, invoices or instructions, and the sale of the goods to third parties is made by the consignee at the current price, the consignee may address a court of law to establish its retribution. In view of establishing the accurate amount thereof, the court of law shall take into consideration the difficulty of the sale, the diligences the consignee makes for performing the contract and the remunerations practiced on the relevant market for similar operations (Article 2058(2) of the New Civil Code). This regulation takes over the old one, similarly stipulating under Article 12(2) of Law No. 178/1934.

In conclusion, the onerous nature of the consignment contract presupposes the consignee's right to receive a payment for its rendered service, either at the value established by the parties' consent, or at the value established by the court of law.

Bearing in mind the paragraphs above, it follows that the appropriate retribution to which the consignee is entitled is established in lump amounts, by a fixed amount, or in percentages, by reference to the price obtained for the sold goods[20].

c) Obligation to repay the consignee the expenses incurred by it on the occasion of performing the tasks

In this sense, as per Article 2059 of the New Civil Code, the consignor is bound to cover the consignee's expenses incurred for preserving and selling the goods, unless otherwise provided by the contract. Therefore, the obligation to repay the expenses made by the consignee on the occasion of the received tasks also includes the amounts made by it for the preservation and sale of the goods received in consignment, for concluding contracts with third parties, and also for protecting it against any loss incurred while performing the consignment contract. Such hypotheses, in which performing the contractual obligations causes losses to the consignee, the losses shall be covered by the grantor of the power of attorney.

Moreover, the consignee's right of being indemnified does not survive in case the consignor repossesses the goods or orders them to be removed from the consignee's possession, and also in case the consignment contract may not be performed, without any fault of the consignee. Thus, the latter is entitled to have its expenses made for performing the contract covered (Article 2059(2) of the New Civil Code). To the extent in which the consignor is bound to repossess the goods in the care of the consignee and it fails to fulfil this task, the consignor in default is held liable to pay the maintenance and storage expenses. Failure to fulfil its obligations triggers the consignor's liability for any loss suffered by the consignee on the occasion of preserving and storing the goods.

In case the contract is terminated by the consignee's renunciation, if, given the circumstances, the consignor may not promptly repossess the goods in question, the consignee shall remain liable for its obligations to keep, insure and maintain the goods until the consignor repossesses them. The consignor is bound to carry out any diligence necessary for repossessing the goods promptly after the contract is terminated, subject to the sanction of covering the costs for preservation, storage and maintenance (Article 2059(4) of the New Civil Code).

B) Consignee's obligations

a) Obligation to receive, keep and insure the goods entrusted for being sold

Based on the consignment contract, the consignor issues a power of attorney whereby it empowers the consignee to conclude with third parties sale-purchase legal documents for certain

[20] St. D. Cărpenaru, *op. cit.*, p. 586; F.A. Moțiu, *Contractele speciale,* p. 260.

goods belonging to the consignor, in its own name and on behalf of the consignor. In order to fulfil the granted tasks, the consignee should be entrusted with the goods in question, with respect to which it should fulfil certain obligations to receive, preserve and insure, throughout the entire duration in which the goods are in the consignee's possession.

This obligation to receive and preserve the goods which shall be the object of future sale-purchase contracts, is an obligation that is reciprocal and correlative to that in the consignor's care consisting of having to entrust the consignee with the goods in question.

The obligation to receive the goods object of the consignment contract, presupposes their being received by the consignee, however not limited thereto. The obligation to take over the consignor's goods is a complex obligation, which also implies the preservation of goods[21] and allowing them to be at the free disposal of the consignor-owner throughout the entire duration. Taking into consideration that the delivery of goods by the proxy does not also cause the transfer of the ownership right in the consignee's patrimony, it follows that the property, and implicitly the prerogative of disposal, remain in the consignor's benefit, which, at any moment, may amend the granted power of attorney or may give additional instructions as regards the conditions for selling its goods.

In addition, the consignor may also exercise the rights over the goods in question also by its acknowledged possibility to inspect, control and request their being repossessed at any time. Such hypotheses, in which the consignor wishes to repossess the goods, as per Article 2057(3) of the New Civil Code, the consignor is bound to send a prior notice to the consignee, with the purpose of granting him a term within which it may prepare the goods to be handed over.

Regarding the means of exercising the obligation of preserving the goods received under the consignment contract, the New Civil Code stipulates under Article 2060(1) that the consignee shall receive and shall keep the goods as an owner and shall give them to the buyer or, as the case may be, the consignor, in the standing in which it received them for being sold. In other words, on the one hand, the conclusion of sale-purchase contracts with third parties with respect to the goods entrusted in consignment, should bear in mind the standing in which the goods were received from the consignor. On the other hand, to the extent in which the goods are not sold to third parties, and returned to the consignor, they should even more be sent back in the same standing in which they were handed over, and the consignee is bound to preserve and insure them.

As regards the obligation to receive and preserve the goods in consignment, all costs for their preservation and sale of the goods entrusted in consignment, are in the consignor's care, unless otherwise provided by a contractual clause, as per Article 2059(1) of the New Civil Code.

In view of verifying the means in which the consignee fulfils the obligations assumed under the consignment contract, the consignor is acknowledged the right to control and verify, at any moment, the merchandise entrusted to the consignee, and also to proceed to an inventory thereof (Article 2057(1) of the New Civil Code). In order for it to exercise this right, the old law acknowledged the consignee's right to obtain, at any moment, upon request, the presidential ordinance (Article 8 of Law No. 178/1934).

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[21] Supreme Court of Justice, commercial section, decision No. 572/2000, in Pandectele române No. 4/2001, p. 52; Bucharest Court of Appeal, commercial section, decision No. 466/1999, in Bucharest Court of Appeal. Culegere de practică judiciară în materie comercială, 2007, volume I, Wolters Kluwer Printing, 2008, p. 88.

Another aspect which the obligation to receive established in the care of the consignee presupposes, consists in the fact that it is bound to insure the goods given in consignment. Thus, as per Article 2060 of the New Civil Code, the consignee shall insure the goods at the value established by the contractual parties of the consignment contract or, in lack thereof, at the goods' price estimate on the day when the goods are received in consignment. The consignee is bound to regularly pay these insurance premiums.

Accordingly, the purpose which this provision wishes to attain is that of procuring that all the risks to which the goods are exposed to during the period in which they are in the consignee's care, be covered by the concluded insurance, starting with when the goods are sent by the consignor.

As regards the consignee's obligation to insure the goods, correlatively to this obligation, in its care there also exists the duty to regularly pay the insurance premiums related to the insurance contract which was concluded. As long as the goods are in the consignee's care, it is also bound to insure them, so its obligation to also make the payment arising from the insurance contract is legitimate. Any insurance concluded by the consignee, with respect to the goods entrusted in consignment, are deemed as fully concluded in favour of the consignor, provided that it notifies the insurer with respect to the consignment contract, prior to paying any damage. Consequently, in order for the consignor to benefit from the insurance, the consignor is bound to inform the insurer that the goods are in the consignee's care based on a consignment contract, at any moment, until damages in case of occurrence of the ensured risk are paid.

The New Civil Code, by Article 2060(2) thesis II, provides that the consignee's liability is engaged towards the consignor for the deterioration or disappearance of the goods due to force majeure events or an action of a third party, if they were not insured upon their receipt in consignment or the insurance expired and was not renewed or the insurance company was not approved by the consignor.

To the extent in which the consignee fails to fulfil its obligation of insuring the goods object of the consignment contract, the consignor may insure the goods at the consignee's expense, in order to cover the risk of disappearance or deterioration of the goods. Such insurance is rightfully concluded in the consignor's benefit, provided that it notifies the consignment contract to the insurer prior to it paying the damages (Article 2060(3) and (4) of the New Civil Code).

As regards the consignee's obligation to receive, keep and insure the goods entrusted for being sold, it should also be mentioned, that, regarding the fact that the ownership over the goods in question is not transferred in the consignor's patrimony, in case (…) the consignee is declared bankrupt, the goods are excluded from its statement of assets and shall be repossessed promptly by the consignor (Article 2057(4) thesis II of the New Civil Code).

b) Obligation to perform the tasks given by the consignor

Under the consignment contract, the consignee undertakes the obligation to conclude with third parties sale-purchase contracts with respect to certain movable goods belonging to the consignor. Based on the power of attorney granted by the consignor, the consignee concluded legal documents with third parties, in its own name and on behalf of the grantor of the power of attorney, in other words, in this way it performs its contractual obligations.

The sale-purchase contracts are concluded under the terms and conditions indicated by the consignor, which had an interest in perfecting such operations. The consignee may sell or alienate the goods entrusted in consignment, only in the conditions provided by contract. In other words, the

consignee is bound by the consignor's instructions given under the power of attorney, and may act, in line with its capacity as intermediary without representation, only within the limits provided by the beneficiary of the business. The consignee undertakes under the consignment contract, the obligation to sell the consignor's goods, however the actual means of fulfilling its duties, meaning complying with the terms and conditions for concluding the sale-purchase contracts with third parties, the persons towards which the goods are alienated, the sale prices and the means of collecting money etc. are those imposed by the consignor.

Based on the consignor's right, as actual beneficiary of the contracts concluded by the consignee with third parties, of imposing the limits and conditions under which the proxy may act, the consignor may unilaterally change, at any time throughout the duration of the contract, the terms of the sale, unless otherwise provided by the contract. The consignor may, therefore, amend the provisions included in the power of attorney granted to the consignee, in the sense of amending any element relating to the object of the consignment contract.

Such amendments are mandatory for the consignee, since these amendments are communicated in writing. As regards the consignee's obligation to act in its client benefit, any instruction coming from the client is imperative for the intermediary, which by performing the consignment contract serves the consignor's interests. The mentioned rule was also taken over by the new civil regulation under Article 2056(2) which stipulates that subsequently to when the power of attorney is granted, the consignor may unilaterally change the established sale price, and the consignee shall be bound by this amendment since being communicated in relation thereto in writing.

In conclusion, performing the contract is the consignee's main obligation and it is bound to comply with the instructions given by the grantor of the power of attorney, the owner of the sold goods. Nevertheless, in the absence of certain express provisions referring to the terms of sale for the entrusted goods, and in the absence of written instructions coming from the consignor, the consignee may not sell the goods entrusted in consignment , unless for cash and at the market's current prices.

This rule is also taken over by the new civil regulation, which stipulates, under Article 2056(1), that the price at which the good shall be sold is the one established by the contractual parties to the consignment contract, or, in lack thereof, is the current price of the merchandise on the relevant market, at the moment when the sale is made.

In addition, it is also provided that, unless otherwise stipulated or unless the consignor instructs otherwise, the sale shall be made only by way of cash payments, by transfer or crossed cheque and only at the merchandise's current prices, as per paragraph (1) of the same article (Article 2056(3) of the New Civil Code).

Consequently, based on an express provision included in the contract, the consignee may be authorized to sell the goods on credit, also mentioning the terms of such sale. In such situation, since the sale-purchase contracts concluded with third parties are concluded on behalf of the consignor, in view of being profitable for it, the receivable for the price owed for the goods sold on credit belongs to the consignor[22]. Thus, the consignee may validly take any action on the receivable towards debtors and third parties, may receive the payment, may follow the receivable and may take any insurance measures.

[22] St. D. Cărpenaru, *op.cit*., p. 588.

Nevertheless, in case the consignee is granted the right to sell the goods on credit, unless the parties agree otherwise, it may grant the third party buyer a term within which it may pay the price of, which shall not be longer than 90 days and exclusively based on a bill of exchange or promissory note (New Civil Code, Article 2061(1)).

If the goods were sold on credit, unless otherwise provided, the consignee is jointly liable towards the consignor, for the payment on term of the price for the goods sold in this method (Article 2061(2) of the New Civil Code).

As regards the acknowledgement of the possibility of making a sale to third parties on credit, it was established that the consignor has the right to forbid the consignee to make a sale on credit to certain companies or particular persons, even if by contract the consignee was empowered to make sales on credit, with or without restrictions (Article 15 of Law No. 178/1934). This interdiction is mandatory for the consignee since being informed in writing in relation thereto.

c) Obligation to be accountable to the consignor for fulfilling the granted power of attorney

Under the consignment contract, the consignee is bound to comply with the instructions given by the consignor in view of concluding sale-purchase contracts with third parties, with respect to the consignor's goods. As an effect of assuming towards the consignor the mentioned obligations, in the consignee's care the obligation to be accountable in front of the grantor of the power of attorney for how it fulfilled the entrusted tasks shall also arise.

The obligation to be accountable has not been taken over by the new civil regulation however with respect to the consignee's capacity as intermediary without representation acting on behalf of the consignor we believe it is necessary to maintain such obligation in the consignee's care. This examination is made by reference to the old provisions of Law No. 178/1934.

The obligation of accountability is a complex obligation, which, on the one hand, gives rise to duties in the consignee's care, and on the other hand, to correlative rights in the consignor's benefit.

Thus, as regards the first aspect which the obligation of accountability presupposes, namely, that of the consignee being bound to regularly inform the consignor on the manner in which the power of attorney is fulfilled, it should be mentioned that in its capacity of intermediary without representation, the consignee shall inform the consignor on any action taken in relation to its goods, received in consignment, which could mean an act in the sense of performing the contract, and just as well a ground for causing incapacity or hindering the contract being performed.

As per Article 18(1) and (2) of Law No. 178/1934, the consignee is bound to inform the consignor, at the terms stipulated in the contract, on all the sales it made that had as object the goods which were entrusted in consignment by the consignor. The notice sent to the consignor shall have to precisely indicate the goods sold in exchange for cash and the goods sold on credit, indicating, in the case of the latter goods, the name and full address of each debtor, the owed amount based on the sale-purchase contracts, the granted payment term, and also the received bills of exchange or guarantees. In case the contract contains no such provision relating to the consignee being bound to inform, at the latest, at the end of each week the consignee is bound to inform the consignor on any operations relating to the week in question.

As regards the consignee's obligation to be accountable to the consignor for the manner in which it fulfilled the received tasks, an additional aspect which this duty presupposes consists in the

fact that, as per Article 17(1)-(3) of Law No. 178/1934, the consignee is bound to account for all the operations relating to the goods entrusted to him in consignment, so that their control and verification may be easily made.

In this sense, by its clauses the consignment contract may stipulate that the consignee is bound to keep one or more special registries in which it shall record the operations relating to the goods entrusted in consignment. In case the contract provides that the consignee should keep special registries, it shall be bound to present these registries, upon the consignor's first request. In order to proceed to the examination and verification of the special consignment registries, the consignor is entitled to obtain a presidential ordinance, as per Article 4 of this Law.

2) Consignee's right of lien

As previously mentioned, the consignment contract is an onerous contract, which gives rise in the care of the consignor to the obligation to remunerate the consignee for the rendered service. A right of receivable over the amounts to which it is entitled for the rendered service in the consignor's interest is acknowledged in favour of the consignee.

The consignment contract is a variety of the contract of commission, meaning that certain provisions setting out the legal regime of the contract of commission are applicable to it, to the extent in which they are compatible. Thus, as regards the contract of commission, the old regulation acknowledged for the consignee, by analogically applying the provisions relating to the contract of mandate with representation, a special privilege[23], with the purpose of covering all amounts which are owed to it based on or as a result of performing the contract of commission[24], the consignment contract contains different provisions. In the case of the contract of commission, the special privilege established in favor of the consignee envisages covering, on the one hand, the commission owed to it for the rendered service in the principal's interest, and on the other hand, any other expenses for fulfilling the power of attorney, or the losses incurred while performing the contract. The special privilege of the commission agent is exerted over all of the principal's goods, object of the contract of commission and which are in the commission agent's care or disposal.

The issue of the consignee's special privilege over the consignor's goods is taken over in the new civil regulation which stipulates under Article 2062, that, unless otherwise provided, the consignee has no right of lien over the goods received in consignment and the amounts to which the consignor is entitled, for its receivables in it. Unlike the provisions of Law No. 178/1934, the New Civil Code acknowledges the consignee's possibility to exert a right of lien over the consignor's goods, to the extent in which the parties agree by a contractual clause in this respect.

Even if assuming that the right of lien was exercised, the consignee's obligations regarding the maintenance of goods still remain valid, however the storage costs fall on the consignor, if the exercise of the right of lien proves substantiated.

Absence of the consignee's right of lien over the consignor's goods, as regulated by the New Civil Code, falls in line with the provisions of Law No. 178/1934. Hence, unlike the regulation included in the contract of commission and although the consignment contract is a variety of the contract of commission, as far as the consignment contract is concerned, according to Article 20 of

[23] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 93-97.

[24] With respect to the commission agent's right of lien over the principal's goods, see Ioana-Nelly Militaru, *Privilegiul dreptului de retenție al comisionarului*, in Revista de drept comercial No. 1/2008, p. 65 et seq.

Law No. 178/1934, the consignee may not exercise towards the consignor any right of lien, and neither on the goods entrusted to it in consignment, nor on the amounts or the amounts obtained from selling these goods. In other words, certain receivables belonging to the consignee against the consignor as a result of performing the contract do not entitle the consignee to exert a right of lien over its movable goods or over the amounts collected from third parties after sale-purchase contracts were concluded.

This special regulation does not display a logical justification, of the kind to explain the difference in the legal regimes between the contract of mandate and the contract of commission, on the one hand, and the consignment contract, on the other.

3) Effects of performing the consignment contract

a) Relations between the consignee and third parties

As shown above under the consignment contract the consignor shall grant a power of attorney, whereby it shall empower the consignee to conclude sale-purchase contracts for certain movable goods belonging to the consignor with third parties, in the consignee's own name, however on behalf of the grantor of the power of attorney.

Hence, performing the consignment contract, under the terms established by the parties, leads to direct legal relations between the consignee and third parties, in the virtue of which it shall transfer the ownership right over the goods in question to third parties, acting in its own name, as if it were the real owner of the goods. Therefore, the effect of performing the consignment contract consists in creating direct legal relations between the consignee, as seller, and third parties, as buyers. These relations are governed by rules applicable in the matter of sale-purchase contracts.

Bearing in mind that the sale of the goods is made by the consignee in its own name, this makes the third party buyers have the benefit of a direct action against the consignee, whereby its liability towards third parties for failure to fulfil any obligation undertaken under the concluded sale-purchase contract is triggered.

In addition, the consignee may take action against third parties, resorting to any action which the seller has, as per the law, for performing the sale-purchase contract and for the price being paid.

b) Relations between the consignor and third parties

Based on the consignment contract, the consignor acts as beneficiary of the operations of intermediation without representation which the consignee exercises, being the actual owner of the affairs concluded by its proxy. Hence, the sale-purchase contracts for the goods belonging to the consignor and entrusted in consignment, although are concluded in the consignee's own name, they are in the consignor's benefit. On the one hand, the latter is the actual owner of the sold goods, and, on the other hand, the creditor of the amounts representing the value of the goods.

In other words, although between the consignee acting as seller in its own name, and third party buyers, direct legal relations are created which are particular to sale-purchase contracts, nevertheless, the consignee is not the actual owner of the goods thus alienated. Accordingly, bearing in mind that these contracts are concluded based on a power of attorney granted by the consignor and on its behalf[25], the right over the price obtained by the consignee in exchange for the sold movable goods belongs to the consignor.

[25] Supreme Court of Justice, commercial section, decision No. 4311/2002, loc. cit., p. 115.

Moreover, the transfer of the real rights over the sold movable goods and the risks relating to the goods operates directly between the consignor and third parties[26]. The direct transfer of the ownership from the consignor's patrimony to that of third parties' is the logical consequence of the fact that the ownership over the goods entrusted in consignment does not consecutively pass through the consignee's patrimony. The latter is being handed over the goods as simple temporary holder in charge of certain obligations however the ownership and disposal right still remain in the patrimony of the consignor, until being sold to the third parties[27].

Hence, as regards the effects of performing the consignment contract, no direct legal relation is established between the consignor and third party buyers.

Nevertheless, bearing in mind the consignee's simple capacity of intermediary, even though it would have undertaken certain obligations in its relation with third parties by the concluded sale-purchase contracts, for instance, guaranteeing hidden vices of the goods, such obligations in question fall in the duty of the consignor[28].

In case the goods given in consignment are sold on credit, the receivable for the owed price belongs to the consignor[29], as actual owner of the affair.

As per Article 2061(2) of the New Civil Code, unless the consignment contract provides otherwise, the consignee is jointly liable together with the buyer towards the consignor for the payment of the price in exchange for the merchandise sold on credit.

Towards debtors and third parties, the consignee may validly take any action over the respective receivable and, especially, shall be able to receive the payment, and follow the payment being collected and may take any insurance measures[30]. This conclusion is justified by the fact that, at least apparently, the consignee acts as seller-owner of the goods, thus being acknowledged any actions for satisfying its receivable and the proper performance of the third parties' obligations.

4) Consequences of non-observance of obligations

Under the consignment contract, both the consignor and the consignee, undertake a number of mutual obligations, which are the body of the contract, as previously examined. Failure to observe any such obligations, from the part of any party, triggers the liability of the party in default. As per

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[26] In this sence, see, Brasov County Tribunal, civil decision No. 1214/1975, in Revista română de drept No. 4/1976, p. 52.

[27] F.A. Moțiu, *Contractele speciale,* p. 263.

[28] In this sense, please see, Cristina Popa Nistorescu, *Contractul de consignație,* in Revista de drept comercial No. 11/2009, p. 115.

[29] R.I. Motica, L. Bercea, *Drept comercial român şi drept bancar*, volume I, Lumina Lex Printing, Bucharest, 2001, p. 364.

[30] In this sense the old regulation applicable to the consignment contract made stipulations under Article 13(2) of Law No. 178/1934. Nevertheless, upon the consignor's first request, the consignee is bound to notify the debtor the source and the nature of the receivable. In other words, the consignee is bound to exceed its capacity of a simple intermediary, to the extent requested by the consignor. As of the moment the consignee delivers the notification, it will no longer be able to take any valid action with respect to the receivable in question, the rights hereinafter exclusively belonging to the consignor (Article 13(3) of Law No. 178/1934). Prior to the notification or in case the consignee refuses to send the notification, the consignor may seize at any moment the amounts owed in the debtors' hands, without any bail (Article 13(4) of Law No. 178/1934).

the legal provisions in the matter of the consignment contract, such liability may be, as the case may be, civil or criminal.

a) Civil liability

As per the legal provisions relating to the consignment contract which were previously examined, signing the contract presupposes the rise of legal relations between the consignor and consignee, based on which the parties acquire rights and assume reciprocal obligations, appropriate to the quality in which they act under the contract.

The consignment contract is a variety of the contract of commission, hence, as regards the rights and obligations between the consignor and consignee, by analogy, the rules in the matter of the contract of commission shall apply; according to these rules between the principal and consignee there are the same rights and obligations as between the principal and proxy. Accordingly, the relations between the parties to the consignment contract are similar to those specific for the contract of mandate.

Thus, any party's failure to observe the contractual obligations, triggers the contractual liability of the party in default, under the legal terms provided for the contract of mandate[31].

b) Criminal liability

The provisions regarding the criminal liability under the consignment contract found in Law No. 178/1934, which was abrogated since the New Civil Code entered into force, were not taken over by the latter.

§IV. TERMINATION OF THE CONSIGNMENT CONTRACT

1) Cases of termination of the consignment contract

A) General causes for terminating the consignment contract

Termination of the consignment contract may be due to any of the general causes for extinguishing the contractual obligations. Hence, the consignment contract terminates, by the consignee fulfilling the tasks given by the consignor, by the lapse of the term for which the contract was concluded and within which the consignee was bound to fulfil the undertaken tasks, by meeting the resolutive condition affecting the contract, or by fortuitous incapacity of fulfilment, for instance, due to the loss of the movable goods entrusted to the consignee in view of being sold and being object of the contract etc.

B) Main causes for terminating the consignment contract

As regards the main cases for terminating the consignment contract, as per Article 2063 of the New Civil Code, it may be terminated by the consignor rescinding the contract, the consignee renouncing to it, for any of the causes indicated under the contract, and also in case of death, dissolution, bankruptcy, incapacitation or de-registration of the consignor or consignee.

a) Rescindment of the power of attorney granted by the consignor

The consignment contract terminates as a result of the power of attorney granted by the consignor being rescinded. Taking into consideration that the consignor grants the power of attorney, in view of the consignee concluding sale-purchase contracts with respect to the consignor's movable goods given in consignment, it follows that the main interest in entering into contracts with third parties belongs to the grantor of the power of attorney. Thus, although the sale is concluded in its

[31] St. D. Cărpenaru, *op.cit*., p. 590.

own name by the consignee, the patrimonial advantages it presupposes are reflected on the consignor, as true owner of the affair.

Consequently, if the consignor's interest in selling its goods via an intermediary disappears, the consignor is acknowledged the right to revoke the granted power of attorney, which fact leads to the termination of the contract. The consignment contract may not continue if the party interested in performing it or not revokes the right to produce effects in its patrimony by contracting, on its behalf with third parties. This solution is rightful even more since the effects of the contracts with third parties, consisting in the transfer the ownership right over the sold movable goods, consist in transferring the ownership right over the sold movable goods, directly affecting the consignor.

As regards the termination of the contract after the consignor rescinds it, along the arguments relating to the appropriateness of the contract, the right to revoke the power of attorney is also justified by the *intuitu personae* nature of the legal document. The consignment contract is especially executed based on the consignor's trust in the consignee's experience and professional conduct. Assuming that throughout the contract, this trust is lost,[32], to maintain the contract is no longer justified[33].

The consignment contract, as shown above, displays an onerous nature. This feature may also give rise to the consignee's right to claim damages for the losses suffered as a result of the unexpected or abusive rescindment. The action for damages is the sole right acknowledged to the consignee in case an unexpected or abusive rescindment, the repossession action is not permitted.

The provisions of the New Civil Code expressly establish, as previously mentioned, that the consignor revoking the power of attorney leads to the termination of the contract (Article 2063 of the New Civil Code). A similar conclusion may also be derived from Article 2057(2) thesis II, according to which the consignor may repossess the movable goods entrusted in consignment, at any time, even if the contract was executed for a limited duration.

b) The consignee renouncing the contract

The consignment contract terminates as a result of the consignee renouncing the contract. Equally to the possibility acknowledged to the consignor to revoke the granted power of attorney, the consignee's right to renounce to perform the contract is likewise admitted; this fact leads to the impossibility of continuing with the contract under the terms in which it was initially concluded and consequently, to its termination. The consignee may renounce to the granted power of attorney at any time, subject to the consignor being notified, in order to avoid causing it any losses.

This cause for terminating the consignment contract is expressly regulated by Article 2063 of the New Civil Code, and is motivated by the *intuitu personae* nature of the contract, which in the absence of the consent from one of the contractual parties to terminate or continue with the contract shall cause the contract to terminate. The consequence of terminating the contract following the consignee's renunciation is that the consignor is bound to promptly repossess the goods entrusted in consignment.

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[32] For additional explanations, see Claudia Roşu, *Contractele de mandat şi efectele lor,* p. 103.

[33] In this sense, as per Article 3(2) of Law No. 178/1934, the consignment contract, and more specifically the power of attorney underlying the consignee's possibility to act on behalf of the consignor may be revoked by the consignor at any time after granting it, even if the contract was concluded for a limited period, unless otherwise provided. Thus, irrespective whether the execution of the contract was agreed for a limited or unlimited period, the possibility to revoke the power of attorney is free, may occur at any time, being motivated by the very fact that the execution of the contract directly depends on the consignor's interests, which should come first.

As per Article 2059 of the New Civil Code, if, given the circumstances, the consignor may not promptly repossesses the goods, in case the contract terminates by renunciation from the consignee, it shall remain bound by its obligations to keep, insure and maintain the goods until the consignor is able to repossesses them. Thus, as long as the goods are in the consignee's care, the latter is bound to preserve, insure and maintain them, if for objective reasons the consignor may not repossess the goods.

Nevertheless, the consignor is bound to take any necessary diligence to repossess the goods promptly after the contract is terminated, subject to covering the costs for preservation, storage and maintenance.

c) Death, dissolution, bankruptcy, incapacitation or de-registration of the consignor or consignee

Death, dissolution or de-registration of the consignor or consignee cause the termination of the contract, based on its *intuitu personae* nature. The consignment contract is executed in consideration of the consignee's experience and capacity to serve the consignor's interests by concluding with third parties sale-purchase contracts regarding its goods, and also in consideration of the consignor's possibilities to satisfy its obligations for paying the remuneration undertaken by contract. In case the other party dies or disappears, the premises which were taken into consideration when the contract was executed disappear.

The consignee is entitled to be remunerated for its rendered services until the consignor's death, pro rata with what has been owed to it for fully performing the granted power of attorney. This rule is also applicable as regards partial remuneration in case of the consignor's death, which shall be made by its inheritors.

The consignment contract terminates also as a result of bankruptcy or adjudication of incapacity applied to any party[34]. The motive is that the contractual parties should be legally competent – the consignor should be itself able to conclude the sale-purchase contracts for which it grants a power of attorney to the consignee, while the consignee should be fully legally competent, since, in performing the contract, it concludes legal documents in its own name. Loss of this competence causes inability to maintain the contract.

2) Effects of terminating the consignment contract

Termination of the consignment contract results in the parties' obligations being extinguished. On the one hand, the undertaken obligations consisting in concluding with third parties sale-purchase contracts with respect to the consignor's goods should no longer be performed. In addition, the consignee, after the contract is terminated, should return the consignor the movable goods entrusted in consignment, or should hand over the amounts received in exchange for the sold goods. Further, the consignee should account to the consignor for the manner in which it chose to fulfil the given tasks.

[34] Based on the old regulation, as per Article 21 of Law No. 178/1934, in case the consignee is bankrupt, the consignor may reclaim the entrusted goods or their price. Since the movable goods entrusted in consignment do not successively pass in the consignee's patrimony, the goods in question or price obtained by being sold to third parties, are not included in the consignee's statement of assets.

On the other hand, the consignor is bound to take the necessary measures to recover the unsold goods from the care of the consignee, also taking along the amounts or values obtained by it in exchange for the sold goods. The consignee is bound to pay the consignee the remuneration appropriate for the part of the contract which was performed until it was terminated, and also to indemnify it for all the expenses or losses suffered as result of the undertaken tasks.

As per Article 2057(4) thesis I of the New Civil Code, in case the termination of the consignment contract occurs as a result of the consignor being declared bankrupt, the goods entrusted to the consignee in consignment are included in the consignor's statement of assets. In other words, these goods should be returned and may be followed by the consignor's creditors. This provision is a consequence of the fact that the goods entrusted in consignment are not successively passed in the consignee's patrimony, since they are handed over to it as simple temporary holder, while the ownership continues to remain in the consignor's patrimony.

Assuming otherwise, that the termination of the contract occurs as a result of the consignee being declared bankrupt, the goods entrusted in consignment are excluded from the statement of assets and shall be promptly repossessed by the consignor. Accordingly, the consignee's creditor shall not be able to follow these goods for satisfying their receivables, and the goods should be returned to the consignor. The explanation resides in the fact that the property over the goods remains in the consignor's patrimony, and the consignee is a simple temporary holder until they are sold to third parties or being returned in the care of their actual owner.

In the same sense, Law No. 178/1934 also stipulates under Article 21, as follows: in case the consignee is bankrupt, the consignor may reclaim the goods entrusted in consignment or their price which was not paid by money, or otherwise.

CONCLUSIONS

The consignment contract is therefore a species of mandate without representation which has as representative the contract of commission. Therefore the contract of consignment derives from the contract of commission.

But the consignment contract is a special contract, used mainly by entrepreneurs, found on a very large scale in both internal and external commercial relationships. Thru it a faster unloading of goods is possible, mainly because the consignees have their own network used to unload and deliver the goods on the market. also, this type of contract favors cost reductions of the consignee prices regarding the launch, advertising, direct sale of a large quantity of goods, making them more accessible to the consumer. Therefore many producers of goods sell by means of a consignee, usually a specialized company already known on the determined market territory.

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