TRUSTEE SUBSTITUTION: LEGISLATIVE GAPS, DOCTRINAL CONTROVERSIES AND JURISPRUDENTIAL SOLUTIONS (I)

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Abstract: *Our study aims to bring to attention a type of contract of major importance in the field of legal relations, namely the mandate, focusing on the issue of trustee substitution, with all the consequences that derive from such an operation. Thus, in the first part of the article, we shall analyze the obligation of the trustee to personally carry out the mandate and, as a derogation from this rule, the possibility of the agent to substitute another person. We shall discuss the legal nature of this operation, differentiating it from the subcontract and the assignment of contract. Then we shall review the effects it generates on the relations between the principal and the primary trustee, between the original trustee and substitute, as well as between the contracting parties and third parties, both in the case of authorized and unauthorized substitution. We shall address the multiple facets of the relationship between the principal and the substitute agent in the second part of this article, as it has caused numerous debates, mainly related to the possibility of initiating a direct action between the parties at the "extremes" of the substitution operation, and its unilateral or reciprocal character.*
Keywords: *mandate; trustee substitution; subcontract; contract assignment*

Introduction: the trustee's obligation to personally carry out the mandate

Under the rule of the provisions of the Civil Code from 1864, doctrine (Dogaru, 2004: 552) showed that, despite the intuitu personae character of the mandate, the trustee is free to substitute another person in the execution of the mandate. This conclusion results from the per a contrario interpretation of art. 1542 of the Civil Code, which stipulated that "the trustee is liable for the one he substituted in his management." However, jurisprudence has decided that, since the commercial mandate is conferred precisely in consideration of the skills of the agent in dealing with business, the agent must personally execute the entrusted mission, unless the parties have stipulated an express clause allowing him to be substituted (Romanian Supreme Court of Justice, commercial decision no. 1245/2003, in Cucu et al., 2008: 342). The new Civil Code expressly and in detail regulates the substitution made by the trustee through the provisions of art. 2023. The current legal text develops the rules contained in the old regulation, in accordance with the evolution of doctrinal and jurisprudential concepts in this matter of replacing the trustee. Thus, paragraph (1) expresses the intuitu personae character of the mandate contract, establishing the rule of fulfilling it personally: "The trustee is required to fulfill the mandate personally, unless the principal has expressly authorized him to substitute another person in execution of the mandate in whole or in part."
Therefore, the principal can authorize the trustee to substitute another person for the execution of the mandate in whole or in part, but this authorization must be express. As an

exception, the legislator nevertheless admits substitution, "even in the absence of an express authorization" from the principal, in special situations, which cumulatively meet the following conditions, expressly provided by the legislator: the trustee is prevented from carrying out his mandate due to some "unforeseen circumstances", regarding which it is impossible for him to notify the principal, but which creates the presumption that the principal would have approved the substitution, had he known about them. In such situations, the need to achieve the principal's interests by carrying out the operation entrusted to the agent justifies the latter's right to resort to substitution even in the absence of an express and prior authorization from the principal, provided that the agent informs the principal "immediately" about the substitution (Civil Code art. 2023 para. 2-3).

As it was also shown in the specialized literature (Gârbovan et al., 2012: 383), the subsequent ratification of the substitution by the principal will not be necessary, since in the mentioned exceptional situations, the faculty of substitution is conferred by the law itself, provided that the conditions mentioned above are met. Therefore, the principal will not be able to evade the execution of the acts concluded by the substitute on his account, reasoning that he did not authorize the substitution. We consider that the legal text assimilates the situation regulated by para. (2) with the one in which the principal authorized the substitution, the legal consequences of the substitution being the same in the relations between the involved parties, with the additional obligation imposed by paragraph (3), namely that the agent immediately informs the principal about the substitution.

Regarding the responsibility of the agent for the acts concluded by the substitute, it differs depending on the existence or non-existence of the substitution authorization granted by the principal. Thus, "if the substitution was not authorized by the principal, the trustee is responsible for the acts of the person he substituted as if he had performed them himself" (art. 2023 para. 4 Civil Code). This means that the agent assumes responsibility towards the principal for the acts of the substitute, the principal being protected against potentially abusive or excessive acts performed by the substitute, as they are only opposable to him if they were performed within the limits of the mandate he conferred (Dogaru, 2004: 555).

Jurisprudence (Romanian Supreme Court of Justice, civil decision no. 60/1971, in Turianu, 1999: 188) has shown that the trustee must fulfill his mandate personally, without having the right to substitute someone else in the execution of the tasks conferred on him by the principal precisely in consideration of the trust he has in the person of the trustee. If, however, the trustee carries out the substitution, he will be responsible for the actions of the substituted just as he is responsible for his own actions. However, he will not be liable, in any case, for damages caused by a third party. In another case, the court (București County Court, civil decision no. 1201/1955, in Terzea, 2011: 936) showed that the right to substitution can only be exercised within the limits of the powers conferred by the mandate contract, so the trustee is responsible for how his substitute executes the mandate. Exceeding the limits of this mandate is not opposable to the principal, unless he ratifies it.

However, it is undoubted that the substitution itself may entail increased risks related to the ability of the substitute to perform the tasks entrusted by the principal, which may be lower than that of the appointed trustee. It is true that, regardless of whether the substitution was authorized or not, both the trustee and his substitute have a certain liability towards the principal regarding the possible damages caused to him by not properly executing the mandate. On the other hand, however, the purpose of the principal when concluding the mandate contract is not to ensure that he will be able to recover the damages generated by

the mandate, but to choose as trustee a person who inspires confidence in his ability to perform the assigned operations in an optimal manner, so that they provide the expected benefits.

If the substitution was authorized by the principal, "the principal is only responsible for the diligence with which he chose the person who substituted him and gave him the instructions regarding the execution of the mandate" (Civil Code art. 2023 para. 5). We believe that the responsibility of the trustee will be the same in those exceptional situations provided for in para. (2) of the mentioned legal text, in which the legislator allows its substitution even in the absence of express authorization from the principal. Therefore, the provisions of the new Civil Code tye the liability of the agent in such situations to his fault, either in relation to the choice of the person of the substitute (culpa in eligendo), or related to his obligation to give the substitute instructions regarding the execution of the mandate. From this point of view, the new legislative regulation differs from the one established by the Civil Code of 1864, which did not impose on the trustee the obligation to train the substitute in order to carry out the entrusted tasks; it was also considered that the trustee did not exercise the necessary diligence in choosing a suitable substitute, only when the latter was a person "known to be incapable and insolvent" (Civil Code from 1864 art. 1542 para. 1.2).

The new Civil Code no longer mentions this aspect, which means that currently the diligence shown by the trustee in choosing the substitute will have to be much increased, as he may be found guilty not only in the case of the substitute's known incapacity and insolvency, but in principle, whenever the substitute does not have the same capacity as the trustee himself to execute the mandate. This is because the mission conferred by the principal must be carried out under the same conditions, which have not changed with the substitution, the substitute merely taking over the tasks of the trustee within the same limits and contractual conditions agreed by the principal with the original trustee. Thus, for example, an experienced lawyer, chosen by clients to represent them precisely by virtue of his reputation, will not be allowed to relieve himself of too many contracted lawsuits, assigning some of them to interns or to colleagues from the office who do not have the specialization or experience necessary to be able to solve the respective tasks under the same conditions of professionalism; this obligation of loyalty also results from the special provisions included in the Statute of the lawyer profession, passed by the Decision no. 64/2011 of the National Union of Bar Associations in Romania.

Some authors (Roșu, 2008: 60-61; Gidro, 2015: 90) believe that the trustee's liability for the instructions given to the substitute should only operate in the situation where the trustee is a professional who has specialized knowledge regarding the assignments received from the principal. An interesting clarification was made by the Iaşi Court of Appeal in a case that it solved (Iaşi Court of Appeal, decision no. 128/1913, in Hamangiu et al., 1926: 23). Thus, it is stated that "when the principal grants his representative the right of substitution without limiting him and without any reservation or restriction in the choice of persons, it is certain that the trustee will be able to authorize his substitute to also substitute another, because the latter, once elected, represents the first trustee as if he were actually his own substitute; all that will follow from here will be that the trustee may be declared responsible for the choice he made, either in the person of the first substitute, or in the person of the second, but it cannot be argued that the substitution was not valid and that the acts of the substitutes may be declared null and void." We consider that the substituted trustee will

have the same faculty of substitution in those exceptional circumstances, in which the conditions mentioned by the Civil Code art. 2023 para. (2) are met, when substitution is allowed by virtue of the law, even in the absence of an express authorization from the principal, respectively the original trustee.

Trustee substitution. The legal nature of the operation

The problem of determining the legal nature of trustee substitution has not yet found an unequivocal explanation within the legal systems of various countries. European legislators are mostly reluctant to give an exact identification to this operation. As for doctrine, it is also divided in addressing this issue. This approach is complex, as the legal regime of agent substitution varies depending on the hypothesis taken into account. This attempt to disclose the juridical nature of agent substitution has led to the outlining of two opinions in the classic law doctrine: subcontract or assignment of contract. However, as we have shown in previous studies (Tulai, 2011a: 49-52; Tulai, 2011b: 53-56), we find it worthy of discussing a third hypothesis, that of a multiple, „sui generis" identity, since we consider the unitary identification of various cases of substitution to be inaccurate.

Trustee substitution and subcontract

Traditionally, legal doctrine links the substitution of the contractor with the notion of subcontract. The majority of authors thus assimilate the substitution of the agent to the notion of submandate. Thus, Mr. Ph. Pétel identifies in unequivocal terms the substitution of the agent with the subcontract, stating that it can be compared to the private subenterprise: "substitution of the agent is to the mandate what private subenterprise is to the private enterprise contract" (Pétel, 1994: 70). The modern doctrine is only following an older trend in this direction (Baudry-Lacantinerie, 1907: 578), which had been consecrated since the end of the 19th century- beginning of the 20th century, even if at that time there were also authors (Laurent, 1887: 487) who supported a nuanced qualification of this operation, which could be analyzed, as the case may be, either as a subcontract or as a contract assignment.

The jurisprudence was more reserved than the doctrine in approaching this subject, avoiding to clarify the issue in a categorical manner. Following the analysis of the French jurisprudence (Cass. com. 8 nov. 1983, B.T. 1984, n.556; Cass. com. 8 iul. 1986, Bull. IV, n.153; Cass. com. 10 oct. 1989, B.T. 1990, n.220; Cass. com. 19 mar. 1991, Bull.IV, n. 102), richer in this matter than the Romanian one, we find that the courts usually avoided even the use of the expressions "submandate", respectively "subagent", preferring to adopt a neutral terminology, derived from the word "substitution", which it is also used in the Civil Code. Jurisprudence avoided categorically clarifying this issue of the legal nature of agent substitution, focusing rather on the analysis of art. 1994 para. (2) of the French Civil Code [which corresponds to article 2023 para. (6) of the Romanian Civil Code], whose practical implications are more important.

An analysis of the doctrine (Mallet-Bricout, 2000) on this matter reveals, however, certain elements that bring the substitution of the trustee closer to the subcontract. First of all, the chronology of the concluded contracts corresponds to that of the whole consisting of the main contract and the subcontract, considering that the replacement of the trustee is always

carried out after the conclusion of the main mandate contract. The substitute has the task of carrying out in whole or in part the trustee's obligations towards the principal.
Secondly, the initial mandate provides the substitution with its object, the substitute having to fulfill, at least partially, the same mission as the one with which his co-contractor was charged by the principal. Thirdly, the initial mandate contract basically determines the duration and extent of the agent substitution. If the mandate contract becomes obsolete or void, this basically entails the correlative abolition of the substitution. In the same way, the main trustee cannot entrust the substitute with more obligations or rights than he himself had received; otherwise, the main trustee alone assumes this exceeding of the limits of his powers, being responsible for his own deed.
Another characteristic of the subcontract is the existence of a relationship between the extreme parties. Doctrine and jurisprudence agree in admitting the existence of a subcontract in the presence of a direct action between the extremes (main contractor and subcontractor). The substitution of the trustee does not contradict this rule, art. 2023 para. (6) of the Civil Code expressly providing for the possibility of the principal to act directly against the substitute. French doctrine (Demogue, 1933: 996) showed that there is a clear connection between the submandate qualification and the existence of the principal's direct action against the substitute.
On the other hand, a comparative analysis of the substitution of the trustee and the subcontract also reveals certain differentiation criteria between the two legal institutions.
First of all, there is the question of the need for an authorization given by the main contractor for the conclusion of a subcontract. What must be determined is whether or not the main contract is an intuitu personae contract, since in the first case express authorization is necessary, and in the second case the lack of an express prohibition in this sense would be sufficient. As the mandate contract is a contract concluded intuitu personae, it would mean that the substitution of the trustee, in order to be qualified as a subcontract, could only be validly concluded with the express authorization of the principal. But what really happens in the case of agent substitution? Art. 2023 para. (2) of the Civil Code provides that the trustee can designate a third party as substitute "even in the absence of express authorization [...], if: a) unforeseen circumstances prevent him from fulfilling the mandate; b) it is impossible for him to notify the principal about these circumstances in advance; c) it can be assumed that the principal would have approved the substitution had he known the circumstances justifying it." In fact, as a rule, the substitution, even in the absence of authorization from the principal, can be carried out in a valid and lawful manner, except in particular cases where it is explicitly prohibited by law. In this spirit, the French Court of Cassation even admitted the validity of the bearer mandate and of the blank mandate (Cass. civ. February 28th 1989). However, the trustee, in accordance with para. (4) art. 2023 of the Civil Code, will have to assume responsibility for the acts performed by the substitute.
We believe that another element that makes the substitution of the agent not perfectly compatible with the legal regime specific to the category of subcontracts is the liability of the initial agent towards the principal, this having specific features depending on the circumstances in which the substitution takes place, which do not always correspond to the liability of the intermediate contractor for the act of the subcontractor.
The intermediate contractor is, as a rule, responsible to the main contractor for the actions of the subcontractor. But what happens in the case of agent substitution?

The freedom of the original trustee to entrust a part of his mission to another person, even without an express authorization from the principal, does not exempt him from liability towards the principal, quite the opposite. Art. 2023 of the Civil Code clarifies this issue: "(4) If the substitution was not authorized by the principal, the trustee is responsible for the acts of the person he substituted as if he had performed them himself. (5) If the substitution was authorized, the trustee is only responsible for the diligence with which he chose the person who substituted him and gave him the instructions regarding the execution of the mandate."

Therefore, we consider that the substitution of the agent could be qualified as a subcontract only in the case where the substitution was not authorized by the principal, in which case the agent is "responsible for the acts of the person he substituted as if he had performed them himself", which corresponds to the legal regime of the intermediate contractor's liability for the act of the subcontractor. In the other cases, namely when the substitution was authorized by the principal, the main trustee is not responsible for the management of his substitute; he will answer only for his own fault in choosing the person of the substitute, as well as for the execution of the obligation to give him the instructions necessary to carry out the mandate. The liability of the main trustee in this case is based on his own fault, being therefore a liability for his own deed, not for the deed of another. Regarding the subcontract, it is governed by the principle of liability for the act of another, the intermediate contractor being held responsible for the act of the subcontractor.

As a result, we consider that the substitution of the agent implies a regime of liability of the trustee different from that of the liability of the intermediate contractor in the subcontract.

In conclusion, we believe that the substitution of the trustee does not correspond in all its aspects to the legal regime of subcontracts, appearing rather as a sui generis legal institution, with its own particularities, which differ depending on the concrete circumstances in which the substitution of the trustee takes place.

Trustee substitution and contract assignment

As we have shown, we consider that identifying trustee substitution as a subcontract is only justified in those cases in which substitution is neither explicitly authorized, nor forbidden by the principal. Therefore, we intend to clarify whether in other cases, which do not match the subcontract description, agent substitution could be identified as an assignment of contract. To support this approach, we have the regulations in the Romanian Civil Code, precisely articles 1315-1320, which establish a legal regime for the assignment of contract.

A priori, an analogy between agent substitution and assignment of contract is not contradictory. The substitution, that is to say the replacement of a person by another, seems to determine the transfer towards the substitute of the mission that the principal initially entrusted the primary trustee with. Thus, a transfer of rights and obligations occurs, just as it does in the case of the assignment of contract. Just like in the assignment, a contract (of substitution) is concluded between the primary trustee and the substitute, with the latter being bound to perform the provisions of the original (mandate) contract in their counterparty's place. Similarly, the substitute becomes the future debtor and creditor of the principal, in which concerns the liabilities derived from the original mandate contract; the principal has got the right to file a direct action in law against the substitute, in case of a

conflict. Therefore, agent substitution could match the assignment of contract, at least in some aspects of its legal status.

However, detailed analysis of the legal regime of the two notions leads to disclosure of important differences that could exclude identifying agent substitution as assignment of contract in several cases. Hereby, we can distinguish at least two problems: the nature of the legal action that the principal can file against the substitute agent, as well as the absence of the primary trustee's discharge of duties in the case of substitution (Mallet-Bricout, 2000: 411).

The action in law that the principal can file against the substitute is, as identified by article 2023, para. (6) of the Romanian Civil Code, a direct action in law. Therefore, is it possible to identify certain cases of agent substitution as assignment of contract, knowing that a direct action in law is admitted by the legislator in all cases of agent substitution? The concepts of direct action in law and assignment of contract are mutually excluded. Assignment of contract implies the existence of a contractual bond between the assigned contractor and the assignee, even though the assignor has not yet been released from their liability towards the assigned contractor; meanwhile, direct action in law is characterized precisely by the fact that it is designed to benefit a third party, which does not have a contractual bond with the party against whom they claim. Numerous authors (Larroumet, 1968: 198; Ouedraogo, 1991: 219) reveal this contradiction between direct action in law and assignment of contract in the particular case of agent substitution. On the other hand, we must address the issue of the primary trustee's disappearing from the substitution operation. One of the essential purposes of assignment of contract is obviously that of allowing the assignor to be released from their contractual duties. In the case of agent substitution, the legislator imposes upon the primary trustee to be held liable towards the principal: "(4) If the substitution was not authorized by the principal, the trustee is responsible for the acts of the person he substituted as if he had performed them himself. (5) If the substitution was authorized, the trustee is only responsible for the diligence with which he chose the person who substituted him and gave him the instructions regarding the execution of the mandate." (article 2023, paragraphs 4-5 of the Romanian Civil Code). However, in all cases of agent substitution, the primary trustee is held, in one way or another, liable towards the principal: he is either liable for the acts of the substitute, or he is responsible for his own fault that he committed in substitution (in choosing the substitute, in supervising them, in assisting them, in being responsible towards the principal or in informing them). Therefore, since the primary trustee is held liable towards the principal, one cannot consider their release from the contract , in the manner in which this happens in the assignment of contract.

In conclusion, we consider that agent substitution cannot be identified as an assignment of contract, except maybe for the case in which personal responsibility for their own acts is imposed upon the primary trustee by the law: it is the hypothesis of the substitution authorized by the principal, in which case, the primary trustee is guilty for improperly performing their “duty of care in choosing the substitute and instructing them on performing the agency contract" (art. 2023 para. 5 Civil Code). In the case in which the principal had not authorized the substitution and the primary agent would be held liable towards the principal, along with the substitute, for performing the contract, one cannot speak of the primary agent's disappearing from the operation. However, the existing

similarities between agent substitution and assignment of contract, that have been highlighted by doctrine, are justified by the resemblance of the two legal institutions.

The effects of trustee substitution

We are talking about substituting the trustee when he entrusts another person to carry out his mission, or at least a part of it. As such, the trustee himself gives a mandate to the substitute, through a new mandate contract, subsequent to the initial one. Therefore, the mechanism of substitution of the trustee implies the emergence of a mandate relationship between the initial trustee and the person chosen by him in order to carry out the respective tasks; as it was rightly pointed out in the doctrine (Pétel, 1994: 70), there is no substitution when the agent carries out his mission through a subordinate, in which case it is considered that the mandate was carried out by the agent himself, therefore he will assume full responsibility for the acts carried out towards the principal, since the principal does not have, as in the case of substitution, any direct action against the agent's subordinate.

The relationship between the principal and the primary trustee

As we have shown, the effects of the substitution with regard to the relations between the parties of the original mandate contract, more precisely the liability of the agent towards the principal, differ depending on the circumstances in which the substitution is carried out, namely whether it was authorized or not by the principal. Thus, in the case of an authorized substitution, the trustee will be relieved of responsibility for the acts carried out by the substitute, he remaining liable only for his own act, more precisely for the fault in choosing or training the substitute (art. 2023 para. 5 Civil Code). On the other hand, if the principal did not authorize the substitution, the trustee remains liable for the acts of the substitute "as if he had performed them himself" (art. 2023 para. 4 Civil Code), since he performed the substitution at his own risk, which cannot result in the reduction of his contractual responsibility.

a) authorized substitution

The authorization of substitution by the principal practically has the effect of releasing the trustee from the responsibility related to the performance of the entrusted mission: this will be transferred to the substitute, against whom the principal can take the direct action provided by the legislator (art. 2023 para. 6 Civil Code), the initial trustee remaining liable only for his own fault related to the diligence he performed in order to choose a suitable substitute and his appropriate training, which would ensure the fulfillment of the mandate under the conditions and limits agreed with the principal (art. 2023 para. 5 Civil Code). In other words, the trustee will have to choose a substitute who meets the principal's expectations in terms of the ability to carry out the mandate under conditions similar to those established by the original contract and train the substitute for this purpose. The legislator no longer limits the trustee's diligence only to choosing a substitute who is not notoriously incapable or insolvent, as established by the old Civil Code from 1864 (art. 1542 para. 1.2), which means that the trustee will be considered to have fulfilled the obligation of diligence only if the person chosen as substitute executes the mandate as well as the primary trustee. Of course, that such an assessment could also be affected by subjective factors, depending on the nature of the mission that is the subject of the mandate. It will be at the discretion of the courts to determine to what extent the trustee fulfilled with

sufficient diligence his obligation to choose a suitable substitute and train him in order to execute the mandate.
Regarding the obligation of the trustee to give the substitute "instructions regarding the execution of the mandate", the legislator does not expressly specify what it entails, but jurisprudence established that the trustee has the obligation to assist the substitute and also to supervise him in the execution of the mandate.
Thus, the obligation to assist requires providing the substitute with all the elements he owns and which are necessary for the fulfillment of the mandate under the conditions agreed with the principal; more precisely, the agent will have to make available to the substitute the instructions given by the principal, as well as the necessary information and documents or goods. Regarding the supervision obligation, it requires the trustee to ensure that the substitute complies with the instructions received with the diligence and loyalty required of any trustee, according to art. 2018 Civil Code.
As far as we are concerned, we do not consider that, in the form in which the trustee's responsibility is regulated by the Romanian legislator in the case of authorized substitution, his obligations are so extensive. In the end, the principal himself authorized the substitution and therefore the diligence in the execution of the mission is due by the substitute himself, the primary trustee only having the task to choose a person who meets the requirements of the principal, meaning that he can carry out the mandate as well as the primary agent and to communicate to this person those instructions that the principal had given in order to fulfill the mandate. We do not believe that the duty of supervision of the substitute in the effective execution of the mission rests with the trustee, since the principal himself gave credit to him, by authorizing the substitution, that he would be able to appoint another person to deal with his affairs with as much success and who will take responsibility for the operations performed on behalf of the principal.
In the doctrine, it was stated that the authorization for substitution could also be granted by the principal tacitly (Pétel, 1994: 71). Thus, it was shown that the substitution is considered implicitly authorized when the trustee is unable to carry out the mission entrusted to him, due to a material or legal impossibility, known by the principal from the very beginning. For example, it is the case of the client who gives a stock exchange order to his banker, knowing that he will not be able to execute it directly, but will have to substitute a specialized and authorized company for carrying out operations of this type. The issue is clarified by the Romanian legislator through the unequivocal provisions of art. 2023 para. (1) of the Civil Code: "the trustee is required to fulfill the mandate personally, unless the principal has expressly authorized him to substitute another person in the execution of all or part of the mandate." Therefore, the substitution, in order to be liberating for the trustee, is imperative to have been explicitly authorized by the principal.
However, the legislator regulates the possibility of substitution even in the absence of express authorization from the principal, with a liberating effect for the trustee regarding the acts of the substitute, based on the legal presumption of its authorization by the principal, had he known the circumstances justifying the substitution. However, the legislator strictly stipulates the conditions under which this legal authorization works, namely only if unforeseen circumstances intervene in the execution of the mandate, which prevent the trustee from carrying out the mandate, that he cannot communicate to the principal and that create the presumption that the principal would approved the substitution, had he known them (Civil Code art. 2023 para. 2); moreover, the trustee has the obligation

to notify the principal about the substitution as soon as this becomes possible. Therefore, the substitution which was not explicitly authorized by the principal can be carried out with a liberating effect for the trustee only if it is determined by circumstances subsequent to the conclusion of the mandate contract and which cannot be brought to the principal's attention in time, so that he can express his option regarding the substitution; if the impossibility of the agent to directly and personally carry out the mission entrusted to him is known by the principal from the moment of the authorization of the agent in this regard, we do not consider that the conclusion of the mandate contract under these conditions implies the express authorization from the principal to carry out the substitution, but in this case it would be a mandate which, from the principal's point of view, is without cause and therefore voidable, according to art. 1238 para. (1) Civil Code. Moreover, if the impossibility for the agent to carry out his mission is determined by a legal prohibition affecting him, also known by the principal, we consider that the mandate will be affected by absolute nullity, due to illegal cause (art. 1238 para. 2 Civil Code).

b) unauthorized substitution

Considering the intuitu personae character of the mandate contract, the legality of the unauthorized substitution performed by the trustee was discussed in the doctrine. The unanimous opinion is that substitution becomes illicit only when it is prohibited. Therefore, as a rule, the substitution, even in the absence of authorization from the principal, can be validly and lawfully carried out, except for particular cases where it is explicitly prohibited by law. However, the trustee, in accordance with the provisions of para. (4) art. 2023 Civil Code, will have to assume responsibility for the acts performed by the substitute. Thus, in the case of certain professional trustees, special legal regulations may provide for the prohibition of substitution, justified by the consideration of the strong intuitu personae character of the contract and the specifics of the mission itself, which calls for a specialized subject to carry it out.

However, if the prohibition of substitution does not derive from the law, but from the will of the principal, the question of its illegal nature will not arise; the contract through which the substitution is made will be valid, but the trustee will be held liable for the acts of his substitute "as if he had performed them himself" (art. 2023 para. 4 Civil Code). The legislator does not expressly regulate the hypothesis of the substitution prohibited by the principal, but, from the interpretation of art. 2023 Civil Code, we understand that it can be assimilated, from the point of view of its effects, to the one in which the substitution was simply not authorized by the principal, since, in order to relieve himself of the responsibility for the acts performed by the substitute, the trustee needs an express authorization of the substitution (art. 2023 para. 5 Civil Code). Otherwise, even the legislator makes it clear that the substitution will be valid even in the absence of authorization from the principal, but its effects will not consist in freeing the trustee from liability for the acts performed by the substitute, but he will be responsible for them "as if he had performed them himself" (art. 2023 para. 4 Civil Code); this liability coexists with that of the substitute who, in turn, can be held responsible towards the principal by the means of a direct action performed by the latter, based on the provisions of para. (6) art. 2023 Civil Code.

Moreover, the legislator himself regulates a situation in which the trustee can resort to unauthorized substitution, namely when "a) unforeseen circumstances prevent him from

fulfilling the mandate; b) it is impossible for him to notify the principal about these circumstances in advance; c) it can be assumed that the principal would have approved the substitution had he known the circumstances justifying it." (art. 2023 para. 2 Civil Code). Although the legislator does not expressly provide what the effects of such a substitution will be with regard to the liability of the agent towards the principal, we believe that, since the substitution, even unauthorized by the principal, who could not foresee the exceptional circumstances justifying it, is authorized by the legislator, it will be assimilated from the point of view of its effects to the substitution authorized by the principal. Therefore, it will release the trustee from liability for the acts performed by the substitute, he remaining liable only for his own fault in choosing the substitute or in instructing him regarding the execution of the mandate, according to para. (5) art. 2023 Civil Code. This is all the more so since the legal authorization of the substitution carried out under the conditions stated in para. (2) art. 2023 Civil Code is based on the presumption of the principal's will to authorize the substitution, had he known the circumstances justifying it.

The relationship between the primary trustee and substitute

The primary and subsequent trustees are bound by a mandate contract themselves. Therefore, the substitute will assume the usual obligations of an agent in relation to his principal, according to art. 2017-2024 Civil Code. The obligations of the substitute must be related only to the object of his mandate contract, which is not necessarily identical to that of the primary mandate contract, since the initial trustee can entrust only part of his mission to the substitute, as it happens in most cases. As far as the initial trustee is concerned, he, in turn, has the usual duties of a principal towards the substitute, as they are provided in art. 2025-2029 Civil Code, therefore owing the substitute remuneration, reimbursement of expenses and reparation of losses suffered in the execution of his mission.

The relationship between the contracting parties and third parties

With regard to the effects of the substitution on third parties who conclude a contract with the substitute, they will, in relation to the principal, be treated as if they had direct relations with the primary trustee, which means in the same manner as if the substitution had not taken place. However, in relation to the trustee, given that he was replaced in relations with third parties by the substitute, the third parties will not, in principle, be able to pay the trustee the money they owe, because he stepped away from the mandate in favor of the substitute. This position is also shared by French doctrine (Laurent, 1887: 553), who refers to the French jurisprudence of the time in this matter. The author shows that in the case of substitution, there are basically two principals: the main principal and the trustee who becomes a sub-principal, through the power of representation that he has given to the substitute. Therefore, which of the two principals will be nominated in the documents that the substitute concludes with third parties? This will depend on how the substitution was made.

Thus, a French court has established in a decision from 7 Dec. 1857 that if the trustee in charge of selling designates a substitute after he has made the sale, he no longer has any capacity to receive the price, therefore the payment made by the buyer to him does not estinguish the debt. This is a situation where the trustee, when contracting with a substitute, informed the latter of the main mandate, that he charged him to carry out. Therefore, the

substitute dealt with third parties on behalf of the original principal, who thus became a creditor or debtor of the third parties. However, if the agent personally commissions someone to do what he should have done, leaving him with the erroneous impression that he is working for himself, as the principal, only he will appear as the principal in the agreements that will be concluded between the sub-agent and third parties ; in this case, there is practically no substitution, the consequence being that the original trustee will himself be able to receive the payment from third parties, who, in good faith, believe that they are paying the true creditor, will thus be freed from the debt.

Therefore, in the case of the substitution carried out with the knowledge of the substitute about the mandate and about his capacity as substitute, the substitute will validly receive the payment made by the third party for the principal. In these conditions, moreover, the third party will not be able to free themselves from the obligation he has towards his creditor (the principal) by paying the original trustee, who practically gave up representing the principal in the respective operation, his place being taken by the substitute .

This solution was also reiterated in our jurisprudence. Thus, it was shown that in principle, for a payment to be liberating for the debtor, it must be made to the creditor or his representative. If, however, the trustee substitutes another person in his place for receiving the sums owed to the principal, without the latter having authorized the substitution, the payment made by the third party debtor to the substitute will be valid and liberating for him. The original agent will remain liable to the principal as if the payment had been made directly to him, and against the substitute, the principal will have a direct action for damages, according to para. (6) of art. 2023 Civil Code. The third-party debtor, by paying the substitute, will therefore be released from his debt, without suffering the consequences of the creditor's or his agent's negligence or lack of forethought in choosing the persons authorized to work on their behalf or in their place. Therefore, "when the court of first instance finds that the mandate given to a person to receive sums of money from debtors for the principal does not contain any restriction on substitutions, it rightfully decides that the amount received by the trustee for the principal through a substitute is validly received and releases the debtor" (Cas. III, dec. no. 100/1915, in Hamangiu et al., 1926: 23).

The relationship between the principal and the substitute, which has caused intense doctrinal discussions, especially regarding the direct action of the principal against the substitute and its possible "bilateralization", will be the subject of the second part of our article.

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