

POINTS OF VIEW ON THE POSSIBILITY OF CONCLUDING A MANDATE AGREEMENT FOR THE PERFORMANCE OF THE ACTIVITIES OF THE OWNERS' ASSOCIATIONS AND ITS EFFECTS

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Abstract

Law no. 230 of July 6th, 2007 on the set up, organization and operation of the owners' associations, as well as its enforcement guidelines of December 19th, 2007 for the implementation of Law no. 230/2007, although they seem quite broadly regulated, they are not clear enough, not even to this moment of implementation, regarding some issues emerging in practice, generating ambiguities in the application of their provisions especially regarding the assessment of the manner of remuneration of the persons carrying out activities in those associations. Or, even more since the entering into effect of the new Civil Code in October 2011, there is the issue of finding and understanding which the best solutions are for the owners' associations regarding the remuneration received by their members, as well as the consequences of concluding a certain type of agreement over another.

Keywords: owners' association, chairman, executive committee, mandate agreement, remuneration.

JEL Classification: K12

Foreword

An owners' association is a type of association regulated by Law no. 230 of July 6th, 2007² and by the Enforcement Guideline of December 19th, 2007 for the implementation of Law no. 230/2007³, which has its own autonomy, own method of set up and organization and it represents the common interests of the owners of a condominium.

Thus, the owners' association is a non-profit legal entity, which has as main activity the administration and management of the common property which entails certain rights and obligations for all the owners.⁴

The current legislation in this area, although it seems broadly regulated, it is not clear enough, not even to this moment of implementation, regarding some issues emerging in practice, generating ambiguities in the application of its provisions especially regarding the assessment of the manner of remuneration of the persons carrying out activities in those associations. Considering the fact that as of October 2011 the new Civil Code entered into effect, there is the pressing need to understand, which the best solutions are for the owners' associations regarding the remuneration received by their members, as well as, the consequences of concluding a certain type of agreement over another.

Thus, this paper aims to highlight the possibility, but especially the importance, of concluding a mandate agreement for the performance of the activities of the owners' associations, and shall analyze the following aspects:

1. General overview of the manner of set-up of the owners' association;
2. The possibility of concluding of a mandate agreement within the owners' associations;

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² Published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010

³ Published in the Romanian Official Journal no. 43 of January 18th, 2008

⁴ Vasile Moroşan, Raul Moroşan, *Asociația de proprietari. Ghid practic. Legea 230/2007. Norme privind organizarea și funcționarea asociațiilor de proprietari. Legea locuinței. Reabilitarea termică. Fiscalitate. Contabilitate. Jurisprudență*, Nicora-Moroşan Publishing House, Bucharest, 2010, p. 155

3. Conclusions.

1. General overview of the manner of set-up of the owners' association

As already mentioned, the aim of the owners' association is the administration and management of the common property that, in addition to rights, also entails obligations for all the owners.⁵ The owners' association is set up under the written approval of at least half plus one of the number of owners of apartments and other non-residential spaces, within a building.⁶ In residential buildings with more than one section or entrances owners' associations there may be set up for each section or entrance only if there is no common property pertaining to the sections of entrances that cannot be assigned.

Thus, according to art. 6 of the Enforcement Guidelines of Law 230/2007, prior to the meeting of the general assembly's for set-up purposes, the owners of the buildings with several apartments may meet to decide on the set-up of an owners' association or on the transformation of the tenants' association into an owners' association. They will also decide on the natural person or legal entity responsible for drawing up the memorandum of association and of the bylaws, on their due term and on the general meeting convening date. The owners' decision shall be recorded in minutes that shall be signed by all those present. At least 10 days before the date established for the meeting of the general assembly for the setup of the association, the owners shall be convened by means of a convening notice placed in a visible location. The meeting of the general assembly for the setup of the owners' association shall be deemed legally convened if a quorum of at least half plus one of the number of owners of apartments and non-residential spaces within a building is met. If such quorum is not met, a second meeting shall be convened at least 5 days after the first meeting. If the memorandum of association cannot be concluded during the second meeting either due to a lack of quorum, a third meeting shall be convened, at least 5 days after the date of the second meeting. Finally, after the third convening of the general assembly for the association setup, the memorandum of association shall be deemed as concluded, only if at least half plus one of the owners express their association consent, consent recorded in the name table, attached as Appendix to the memorandum of association.

The application of the owners' association for obtaining the legal capacity, together with its bylaws, memorandum of association and the minutes of the setup general assembly shall be filed and registered with the local financial authority with jurisdiction over the building. The bylaws and the memorandum of association shall have to be drawn up according to the provisions of Law no. 230/2007.

Thus, according to art.6 of the law, the memorandum of association has to include the address and the individual details of each individual property, according to the ownership deed, the first and last names of all the owners, the description of the property, including the building's structure, the number of floors, the number of apartments arranged by number of rooms, the number of non-residential spaces, the surface of the land pertaining to the building, the list and description of the common property parts, as well as the undivided share each owner has of the common property.

⁵ See art. 4 par. 1 of Law no. 230/2007 on the set up, organization and operation of the owners' associations, published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010

⁶ See art. 5 par. 1 thesis 1 of Law no. 230/2007 set up, organization and operation of the owners' associations, published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010

The legal capacity of the owners' association is obtained on the basis of the conclusion of the delegate judge designated for the local financial authority by the president of the court with jurisdiction over the building, conclusion which is enforceable. The conclusion shall be subject to appeal within 5 days as of the notification.⁷ However, the approval of at least 2/3 of the number of owners of the owners' association is needed for the amendment or supplementation of the bylaws or of the memorandum of association, any amendment or supplement shall be in turn registered with the court that issued the set-up court conclusion, without the need of other formalities.

The owners members of the Owners' Association shall be entitled to participate with a right to vote in the owners' general meeting, to register their candidacy, to run for office, to elect and be elected in the organizational structure of the Owners' Association. The preliminary condition which must be met in order to benefit from the right to be elected is for the person in question to have full legal competence.⁸

During the general meeting for the set up of the Owners' Association, the owners will elect an executive committee from the attending members, committee which shall be formed of the Chairman of the Owners' Association and a censor or a censors commission and will decide upon the number of their members and the term of their mandates. If a censor or censor commission cannot be designated from the members of the Owners' Association, then the owners' general meeting members of the Owners' Association will give a mandate to the executive committee regarding the contracting of a censor outside the Owners' Association, who shall be a specialized natural person or legal entity, under an agreement or services agreement.

The censor or the members of the censors commission must have at least secondary education and must transfer, if the Owners' Association general meeting decides so, a sufficient and satisfying security in a bank account of the Owners' Association, under a security agreement concluded in this respect. Nevertheless, the law sets out a limit for the amount of the security, which cannot be smaller than the annual average of all the monthly expenses of the association.

The censor or the censors' commission has as main responsibility the monitoring of and the assurance of the compliance of the law regarding the administration of the material assets and financial funds of the Owners' Association. The censors' commission is formed of an odd number of members. The censors designated by the Owners' Association may be remunerated under a mandate agreement, according to the resolution of the owners' general meeting, on the date of the adoption of the annual incomes and expenses budget. The censor employed or contracted from outside the Owners' Association may be remunerated, according to the resolution of the owners' general meeting, on the date of the adoption of the annual incomes and expenses budget.⁹ For the failure to fulfill the duties they have the censor or censors of the Owners' Association shall be liable, individually or jointly, according to the law and before the owners for the damages and prejudice caused to the owners deliberately.

⁷ As any lawful subject, the legal entity shall be identified by certain identification details, its office being one of them. Or the fact that the claimant has failed to present the proof of the registered office of the Owners' Association, the commodatum agreement submitted as proof of the registered office being concluded without the consent of one of the co-owners, his objection not being qualified as abusive (the legal entity being entitled to chose and establish its registered office in a different location), determined the court to note that an identification detail of the legal entity was missing. (See Decision no. 777/R of October 7th, 2009 of Bacău Tribunal, in Vasile Moroșanu, Raul Moroșanu, „Asociația de proprietari. Ghid practic. Legea nr. 230/2007- Norme privind organizarea și funcționarea asociațiilor de proprietari. Legea locuinței. Asigurarea obligatorie a locuințelor împotriva cutremurelor, alunecărilor de teren și inundațiilor. Jurisprudență”, Moroșanu Publishign House, Bucharest, 2011, p. 260-263)

⁸ See art. 9 of Law no. 230/2007 on the set up, organization and operation of the owners' associations, published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010

⁹ See art. 19 par. 4 and 5 of the Enforcement Guidelines of Law 230/2007, published in the Romanian Official Journal no. 43 of January 18th, 2008

Regarding the Chairman of the Owners' Association, he/she shall be the candidate from the members of the executive committee who obtains the highest number of votes at the elections, or any other member of the executive committee chosen based on the will of the majority of the owners of the general meeting. The Chairman, in special situations, can temporarily designate, from the members of the executive committee a Vice-Chairman whom he/she can delegate its powers to. The Chairman of the Owners' Association shall represent the association during the performance of the agreements and shall undertake obligations on its behalf. He/she shall represent the Owners' Association in its relations with third parties, including in the actions initiated by the association against an owner who failed to fulfill his/her obligations towards the association or during the trials filed by an owner disputing a resolution of the Owners' General Meeting. The Chairman of the Owners' Association shall supervise and monitor the implementation of the resolutions of the general meeting, the compliance with the provisions of the bylaws and memorandum of association, as well as the implementation of the decisions of the executive committee. He/she, as the case may be, may propose to the executive committee or to the general meeting, as the case may be, measures against those who do not comply with the rules, regulations, resolutions and decisions of the Owners' Association, according to the legal and statutory provisions.

2. The possibility of concluding a mandate agreement within the Owners' Associations

Therefore, according to art. 32 par. 1 of Law no. 230/2007, the Chairman of the of the Owners' Association or the members of the executive committee may be remunerated based on a mandate agreement according to the resolution of the owners' general meeting, on the date of the adoption of the annual incomes and expenses budget. For the failure to comply with the powers they have, the members of the executive committee, including the Chairman of the Owners' Association, shall be liable, individually or jointly, as the case may be, according to the law and before the owners for the damages caused to the owners deliberately.

Furthermore the designated censor or censors of the Owners' Association can be remunerated under a mandate agreement, according to the resolution of the owners' general meeting, on the date of the adoption of the annual incomes and expenses budget. The censor or censors commission of the Owners' Association shall have the following main duties: to check the lawfulness of the papers and documents, of the resolutions, decisions, rules and regulations, to check the execution of the incomes and expenses budget, to check the financial-accounting records and to draw up and present, at least once a year, before the general meeting, reports on its activity and upon the management of the Owners' Association, proposing measures in this respect.¹⁰ For the failure to fulfill the powers they have, the censor or censors of the Owners' Association shall be liable, individually or jointly, according to the law and before the owners for the damages and prejudice caused to the owners deliberately.

But in order to establish to what extent the conclusion of a mandate agreement fore the remuneration of the representatives of an association is justified and convenient, we must first clarify its meaning from the perspective of the Civil Code.

The mandate, as defined in art. 2009 of the New Civil Code, is the "agreement by which a party, called attorney in fact, undertakes to conclude one or several legal instruments on behalf of the other party, called principal". The mandate agreement may be of two types: civil mandate,

¹⁰ See art. 33 par. 1 of Law no. 230/2007 on the set up, organization and operation of the owners' associations, published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010

namely one concluded “between two natural persons”¹¹ and a mandate concluded between legal entities.¹²

Since the attorney in fact concludes legal instruments for and on behalf of the principal, therefore as the representative of the latter, we see that the mandate is effective not only between the two parties such agreement is concluded between – namely the principal and the attorney in fact-, but also with respect to the third party with which the legal instrument contemplated by the mandate was concluded.¹³

Unlike the civil mandate (therefore the mandate concluded between two natural persons), which is an agreement which is usually free of charge, the agreement concluded between legal entities is presumably concluded for good consideration.¹⁴

For this purpose we believe that regarding the civil mandate, since the law sets out the gratuity of the mandate concluded between natural persons, the gratuitous character is not related to the materiality of the agreement but only to its nature, but the parties may set out expressly a certain remuneration for the activities to be carried out.¹⁵

But with respect to the mandate concluded between legal entities certain clarifications are in order. Thus, before the enforcement of the New Civil Code, on October 1st, 2011 the commercial mandate was regulated in detail in art. 374-404 of the Commercial Code¹⁶, but the general principles regarding the civil mandate shall continue to be applicable for it.¹⁷ For this purpose, in the former regulation, in art. 374 par. 2 of the Commercial Code it was set out that the commercial mandate is not presumed to be free of charge”. Therefore we assume that the commercial mandate agreement has an onerous character, and therefore although the agreement does not include any provision regarding the remuneration due for by the principal, this was nevertheless implicit the parties or even a court of law, if necessary, being responsible for establishing it at a later time.¹⁸

In which the current legislation is concerned¹⁹, it expressly provides in art. 2010 par. 1 that the “mandate between two natural persons is presumed to be free of charge”, while the mandate given for the exercise of a professional activity is presumed to be for good consideration. While no changes occurred regarding the civil mandate, the issue in question is if the mandate concluded between professionals can be awarded or not if the parties also set out expressly that it is awarded free of charge. Due to the character of the professional activities, namely that of operation of an enterprise by goods manufacturing, administration and alienation activities or services performance activities, the main purpose usually being that of obtaining a profit, we believe that the mandate given for the performance of professional activities should be awarded only for good consideration. The provision of par. 2 of the same articles supports this point of view by setting out that if the remuneration is not stipulated in the agreement it can be

¹¹ See art. 2010 par. 1 of the New Civil Code, published in the Romanian Official Journal no. 511 of July 24th, 2009

¹² As defined in art. 3 of the current Civil Code (“all those who operate an enterprise”) and the term explained in art. 8 par. 1 of Law no. 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code: “The term of “professional” set out by art. 3 of the Civil Code includes the categories of tradesman, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities, as such terms are defined by the law, upon the enforcement of the Civil Code.”

¹³ Francisc Deak, *Tratat de Drept civil. Contracte speciale*, Vol. II, Issue IV, Universul Juridic Publishing House, Bucharest, 2006, p. 231

¹⁴ See art. 2010 par. 2 of the New Civil Code, published in the Romanian Official Journal no. 511 of July 24th, 2009

¹⁵ Francisc Deak, *Tratat de Drept civil. Contracte speciale*, Vol. II, Issue IV, Universul Juridic Publishing House, Bucharest, 2006, p. 216

¹⁶ See the Romanian Commercial Code from 1887, published in the Romanian Official Journal no. 31 of May 10th, 1887

¹⁷ Stanciu Cărpănuș, *Drept comercial român*, issue VII reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2007, p. 494

¹⁸ Idem, p. 495

¹⁹ See art. 2009 and the following of the New Civil Code, enforced on October 1st, 2011, published in the Romanian Official Journal no. 511 of July 24th, 2009

established by complying with certain rules. Thus, the amount shall be established according to the law, practices or, if they do not exist, according to the value of the services which were performed.

The importance of the establishment of the onerous of free character of the mandate agreement is necessary in order to establish the scope of the effects of the mandate, as this aspect may give rise to new obligations for the principal.

Since the owners' association is a legal entity²⁰, capacity acquired under art. 6 par. 4 of Law no. 230/2007, under the conclusion of the delegate-judge designated by the local financial body by the Chairman of the court of law with jurisdiction over the building, we can draw the following conclusion. Starting from a general principle²¹ regarding the legal entities, the group of some can be formed of natural persons employed under an employment agreement or associations whose collective is formed of natural persons which acquire the capacity of members.

Thus, as mentioned in the doctrine,²² when we talk about and refer to the structure of the legal entity, we can have, on the one hand, natural persons who are included in the structure of the legal entity as employees of such legal entity, and therefore contractual employment relations being established between the legal entity and the respective natural persons and, on the other hand, a second hypothesis according to which the persons who are part of the management bodies of the legal entity have the capacity of members and not employees, just as it is the case with the owners; associations. Taking this into account, in the situation of the categories of association management members we cannot have a contractual employment relation, in which governing rules would have been represented by the labor legislation, but, just as the lawmaker mentions, the mandate agreement, regulated by the Civil Code in art. 2009-2071.

According to art. 32 and 33 of Law no. 230/2007, the Chairman of the Owners' Association, the members of the executive committee and the censors may be, in principle, remunerated for the activity carried out within the Owners' Association under a mandate agreement.

Nevertheless, an interesting problem regarding which the courts of law faced various problems in practice, is represented by the competence of the court of law competent to settle, from a procedural point of view, the problems occurred in connection with the claims requested for the failure to pay the remuneration under the mandate agreement.

Vâlcea Tribunal rules in this case by its Civil Section by civil ruling no. 1001 of December 10th, 2009. Thus, GE plaintiff, by the claims filed against the Owners' Association as defendant, requested that the latter be bound to pay an amount of RON 300 owed to it as remuneration under the mandate agreement concluded on April 1st, 2009, until the revoking from the Association's Committee, the annulment of Decision no. 7/2009 and court charges.

The mandate agreement was concluded on March 31st, 2009, the plaintiff acquiring at a certain point in time the capacity of committee member, and according to art. 2 of the agreement the defendant was supposed to pay the net amount of RON 500 until June 10th, 2009. Nevertheless, the Owners' Association paid to the plaintiff only RON 200, while the balance of RON 300 was not recovered although amicable efforts were made in this respect.

²⁰ See art. 2 of Law no. 230/2007 on the set up, organization and operation of the owners' associations, published in the Romanian Official Journal no. 490 of July 23rd, 2007 and amended by Law no. 175/2010, published in the Romanian Official Journal no. 502 of July 20th, 2010 and art. 2 par. 2 of the Enforcement Guidelines of Law no. 230/2007, published in the Romanian Official Journal no. 43 of January 18th, 2008

²¹ Gheorghe Beleiu, „Sfera de aplicare a regulilor de la mandat în raporturile dintre persoana juridică și cei care alcătuiesc organele sale”, Revista Română de Drept, year XXVII no. 12/1971, p. 68

²² Idem, p. 68-69

In the statement of defense, in addition to other means of defense, the defendant invoked the lack of jurisdiction of Vâlcea Tribunal based on the fact that no employment agreement existed between the parties.

For this purpose, the court ruled that since the matter referred to the performance of a mandate agreement, without any employment relations existing between the parties, the obtaining of the claimed pecuniary rights and the annulment of a decision of the management body of the Owners' Association, the court with jurisdiction for settling both counts is the county court, according to art. 1 item 1 of the civil procedure code, not the tribunal.²³

In which the Chairman of the Owners' Association is concerned, under the activity carried out by it under an agreement within an owners' association, it was recorded in practice²⁴ that it has, according to art. 147 of the Criminal Code, the capacity of clerk.²⁵ For this purpose, the court argued, his/her action of appropriation of an important amount from the money resulting from the collections of the association which the defendant failed to pay to the utilities suppliers, meets all the requirements needed for being classified as a crime of continuous embezzlement, and shall be punished according to art. 215¹ par. 1 of the Criminal Code corroborated with art. 41 par. 1 of the Criminal Code.

3. Conclusions

In conclusion, as we have already seen, it is important to know why a mandate agreement is usually concluded by the persons who will carry out management activities within the Owners' Association not only regarding the remuneration that is rightfully due to them but also regarding the produced effects. But another important reason for which it is necessary to establish the type of agreement based on which they are remunerated is because these associations are also bound to withhold and transfer to the state budget the fiscal obligations due for the amounts paid to the chairman and censor. Thus, usually, if they are remunerated based on a mandate agreement, the fiscal obligations shall be the tax and quotas (employee and employer) for the health and retirement fund.

In exchange, for the administration activity which includes technical administration, accounting and cashier activities, the owners' association may employ under an individual employment agreement natural persons authorized to carry out the job of real estate property administrator, or may conclude an administration agreement with a specialized and authorized legal entities who/which have as scope of business only the owners' associations field or who/which have as main activity the administration of real estate property under a fee or agreement. The real estate property administrators shall be subject to the provisions of art. 21 par. (2) and art. 22 of Law no. 230/2007, as further amended and supplemented.²⁶

²³ Vasile Moroșan, Raul Moroșan, *Asociația de proprietari. Ghid practic. Legea 230/2007. Norme privind organizarea și funcționarea asociațiilor de proprietari. Legea locuinței. Reabilitarea termică. Fiscalitate. Contabilitate. Jurisprudență*, Nicora-Moroșan Publishing House, Bucharest, 2010, p. 300; Tulcea Tribunal also ruled the same way, Civil Section, by Civil Ruling no. 324 of February 27th, 2009 in idem, p. 306

²⁴ Iași Court of Law, Criminal ruling no. 3708 bis of December 2nd, 2008 in idem, p. 316

²⁵ Art. 147 Criminal Code: „By “public clerk” we mean any person who exercises, permanently or temporarily, under any title, irrespective of the means by which it was vested, a task of any nature whatsoever, remunerated or not, acting for one of the units of the ones listed in art. 145. By “clerk” we understand the person mentioned in par. 1, as well as any employee who performs a certain task for a legal entity different from the one mentioned in the respective paragraph.”

²⁶ Gabriela Giorgiana Schmutzer, *Asociația de proprietari. Ghid practic. Legea nr. 230 din 06.07.2007 privind înființarea, organizarea și funcționarea asociațiilor de proprietari. Norme metodologice de aplicare a Legii nr. 230/2007. Contabilitate.*, Issue V, Nicora Publishing House, Bucharest, 2008, p. 25

Regarding other types of activities, the owners' association may conclude individual employment agreements for natural persons or may conclude civil agreements with specialized and authorized legal entities.

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11. Civil Procedure Code;
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13. Romanian Commercial Code of 1887;