

Reflections on Management Contract in Relation to Individual Employment Contract in limited Liability Companies

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Abstract

In social relationships practice, the way work is contracted takes various forms. One of them is given by the management contract in a company with limited liability.

The definition of this contract and its precise identification attract incidence or not, as we shall see in the paper presented, of protection limits offered by labour law.

In this context, the paper aims to describe the identification of management contract in relation to individual employment contract to outline the legal nature of this contract, the legal framework applicable and how can it be distinguished from the employment contract.

In the analysis performed in the absence of express provision I started from a series of analogies and deductions in order to provide the management contract a self-contained character in relation to the individual employment contract, however respecting the desire of protecting rendered work.

Key words: Employment contract, management contract, dependent activity, qualification of contract, limited liability company

1. Introduction

Often in practice, we encounter situations where the administrator or even an individual is “committed” under a limited liability company with management contract and not under an individual employment contract. In this regard, we wonder if the limited liability companies can hire an administrator or a third party individual – which is neither part of the administration, nor in association of the company – under management contract or should have individual employment contract or the two of them can be cumulated?

In this regard, we note that at both doctrinal and jurisprudential level, there is no uniform opinion.

2. Paper content

In our legislation, we find that from the point of view of the legal regime established legally, on the one hand there are employees who concluded an individual contract of

employment, and on the other hand there are people who are self-employed¹, based on a civil contract (Gheorghe, M., 2013, pp. 225-229; Beligrădeanu, Ș., 2013, pp. 239-249).

In social relations practice completion of these categories of legal relations is frequent. Sometimes qualification of relationship nature between parties is objectively ambiguous, sometimes it is deliberately hidden (Rușioru, F., p. 19).

As a result of these problems in reality, some legal systems included in the scope of express regulation, in addition to dependent work (classical, in concluding an individual contract of employment) also self-employment, a new intermediate category that of semi-dependent work (para-subordinate) (Țiclea, T., 2010, pp. 66-102). It's about people who conclude in formal terms, a civil contract, but generates the same kind of economic dependency characterizing the employment contract. It envisages the assumption that everyone working is not found, at the contract negotiation, in equal legal relations with the beneficiary of his works because it he cannot choose between multiple customers and therefore has no economic independence that would allow free negotiation (Dmitriu, R., 2015, 78).

To qualify management contract in one of these categories in terms of work performed, we must first analyze the common and divergent aspects towards individual employment contract (prototype of dependent work).

As similarities employment contract and management contract involve doing work under a program for consideration and work performed is considered seniority.

In terms of legal features, both contracts are bilateral legal documents, reciprocal, commutative, for consideration, *intuitu personae*, successive performance and involve an obligation to do. A different legal feature of the two contracts is the consensual nature of the management contract and the solemn nature of the individual employment contract.

Previously Law no. 40/2011 amending and supplementing Law no. 53/2003 – Labour Code (published in the Official Gazette. No. 225 of 31 March 2011), according to article 16 paragraphs (1) and (2) of the Labour Code, “the individual employment contract is concluded based on consent of the parties, written in Romanian. The obligation to conclude the individual employment contract in writing belongs to the employer.” The employer – legal person, certified natural person to carry independent work and family business – were obliged to conclude, in writing, the individual employment contract prior to the start of labour relations, and “if the individual employment contract has not been concluded in writing, it shall be presumed to have been concluded for an indefinite period, and the parties can prove the contractual provisions and services provided by any other means of proof.”

Consequently, prior to April 1, 2011 we can affirm that the written form of individual employment contract was required *ad probationem* and not *ad validitatem*, the legislature recognizing explicitly the possibility that, in the absence of the document, the parties can prove

¹ Here we can include: entrepreneurs holders of an individual enterprise, members of family businesses, individuals authorized to do business (under Government Emergency Ordinance no. 44/2008 on economic activities carried by authorized individuals, sole proprietorships and family businesses, published in the “Official Gazette of Romania” part I, no. 328 of 25 April 2008, subsequently amended) or self-employed.

the existence and fulfillment of contractual provisions by any means of proof, such as interrogation of employer; other documents – certificates issued by the employer, documents made by the employee in fulfilling its incumbent duties and arising from records of employer or the third parties with which the employer had legal relations; oral evidence).²

Currently, to the above provisions, *the written form is required ad validitatem for the formation* of the parties' will and not concluding an individual employment contract in writing is equivalent to its invalidity. This conclusion is reinforced by Article 260 paragraph (1) e) and f) of the Labour Code sanctioning both the employer and the employee for not concluding an employment contract in writing.

In another contrary opinion, by introducing the current provisions of article 16 paragraph (1) of the Labour Code shall derogate from the principle of consensualism elevated to a fundamental principle by article 8 paragraph (1) of the Labour Code, which is the very negation of this principle. However, given that any contract, including the employment contract is concluded by mutual consent of parties following the manifestation of their consent, the contract in question remains a consensual contract (Țiclea, A., 2016, pp. 354-355).

In the same way acted the courts in a recent case³ covering dismissal decision appeal, retaining the consensual nature of the employment contract, without being concluded a written employment contract in the case in question. So, in question was stated that on 05.02.2013 between the parties intervened a management contract between B.C. and G.I. S.R.L., by which B.C. was appointed general manager of G.I. S.R.L. indefinitely. Based on this contract, B.C. was granted limited powers regarding the duties of the company manager. The contract was concluded in English as administrator G.I. S.R.L. is a foreigner and does not speak Romanian.

On 21.02.2013, B.C. drafted in Romanian an individual employment contract in agreement with the clauses in the management contract, signed only by B.C., and submitted to Human Resources department within G.I. S.R.L., and it was registered in the General Records of Employees (Revisal).

On 03.02.2014, following checks carried out by the management of G.I. S.R.L. at the time when G.I. S.R.L. has decided termination of the contract with BC, it was found that by error was recorded in Revisal an employment contract dated 21.02.2013 with effect as of 22.02.2013, signed only BC, and not by GI S.R.L. and do not represent the will of the latter, thus not meeting the manifestation of will of both contracting parties and was decided by the sole shareholder of G.I. S.R.L., rectification in Revisal of the error relating to registration of an employment contract not signed by the legal representative of G.I. S.R.L., respectively an invalid employment contract.

Following an address sent by G.I. S.R.L. to the Territorial Labour Inspectorate, the latter noted those specified and operated in Revisal termination of individual employment contract on the ground "invalid contract".

² Bucharest Court of Appeal, Seventh Civil Division and for cases regarding labor disputes and social insurance, Civil Decision no. 3899 of 17 June 2014, explanatory comment by judge Oana Cristina Niemesch

³ Case no. 27974/3/2014 initially registered before Bucharest Courthouse and the appeal before Bucharest Court of Appeal, not published.

On 05.02.2014 management contract was terminated unilaterally by G.I. S.R.L. in compliance with contractual terms, by notification no. 12206/05.02.2014 sent by bailiff.

On 14.08.2014 before Bucharest Courthouse was registered the application for summons of B.C. requesting nullity of the dismissal made by the defendant employer, granting the applicant's salary for the period April 1, 2014 until today under individual employment contract and receiving also reintegration at his workplace.

For motivation, applicant B.C. showed that whereas management contract could not be registered in Revisal, in fact was drawn an individual contract of employment with the same conditions as the management contract, in duplicate remaining with G.I. S.R.L. On 05.02.2014 the applicant showed he had received a notification of unilateral denunciation of management contract, without making any reference to the individual employment contract and B.C. complied with the notification, although in his view the employment contract is in force and asked the court absolute nullity of the dismissal given that it was made without conducting disciplinary investigation under the provisions of article 251 of the Labour Code.

G.I. S.R.L. enter a defence by which raised the plea of *lack of material jurisdiction of Bucharest Courthouse* reasoned that the parties had no contract of employment concluded, but a management contract and *a challenge on the grounds of late submission of complaint*, reasoning that if it considers that the notification of 05.02.2014 is a decision of dismissal, from that date until the date of the application for summons, 14.08.2014, passed more than 30 days provided for by article 268 paragraph (1) of the Labour Code, in conjunction with article 252 paragraph (5) of the Labour Code, or 45 days provided for by article 211 a) of Law 62/2011.

Bucharest Courthouse, by Preliminary Ruling dated 02.03.2015 held on the plea of *lack of material jurisdiction* of the courthouse, litigation of labour and social insurance division, that "in accordance with Article 197 paragraph (4) of Law no. 31/1990, provisions regarding the management of joint stock company are not applicable to limited liability companies, whether or not are subject to auditing. The court also notes that in the new Code of Civil Procedure, according to Article 554 paragraph (2) b), the court shall detain the trial for settlement if the arbitration agreement is invalid or inoperative. The Courthouse, having regard to the mentioned legal provisions, will reject as unfounded the plea of *lack of material jurisdiction* raised by the defendant. Regarding the other exception invoked, the Courthouse considers that the evidence should be administered and shall merge it with the merits."

By the civil sentence no. 8915/28.09.2015 delivered by the Bucharest Courthouse, the court admitted the *challenge on the grounds of late submission of complaint* invoked by the defendant and dismissed the action as brought out of time. B.C. appealed against that judgment and against the Preliminary Ruling dated 02.03.2015 of the Bucharest Courthouse appealed G.I. S.R.L.

Bucharest Court of Appeal, by Decision no. 2632/20.05.2016, dismissed both appeals as unfounded.

Appeal of G.I. S.R.L. was dismissed as unfounded on the grounds that "determining the jurisdiction of the court is following the proceedings initiated, not by what, in the opinion of the other party, should the applicant ask, the possible nature different than presented the relations of the parties as a matter of relevance on these claims on the merits, not on competence, as

long as the petition remains unchanged, in this case since it is a dismissal, of unambiguously jurisdiction of labour law court, and appeal of B.C. was rejected on the following grounds: “as he himself claims, dismissal intervened by notification in February 2014 of the refusal to receive him at work. Not apparent from any document in the file that the dismissal was disciplinary (to be shown explicitly) for the term of appeal to run from the date the decision, so for dismissal challenged in this case, absence of decision could be capitalized only on the merits to argue the invalidity of the measure for failure to comply with a formal validity condition related to the externalizing way of the will of company. But to get to the research on the main issue of the matter on trial must be checked the filing on time of the dismissal appeal, which is investigated in advance on the basis of special provisions and subsequently to Law no. 53/2003, article 211 a) of Law no. 62/2011. In this case, the dismissal decision challenged (as a manifestation of will, rather than a written document, *instrumentum*) dates from February 2014 so that the action against in August 2014 was made out of time imperative regulated, which attracts forfeiture of the right to appeal.”

In those circumstances, having regard to the reasoning of the courts, we believe that the solution offered is wrong regardless of motivation, as dismissing the plea of *lack of material jurisdiction of labour law courts*, without to have made proof in this case of the existence of a written contract of employment and settling the dispute by dismissing on the grounds that it is out of time in relation to the time limits provided by labour legislation and by reference to the unilateral termination of the management contract, the courts give the impression that in the case was concluded between the parties an individual employment contract, or, worse that the management contract would be an employment contract disguised in a civil contract.

To speak about a labour law dispute there must be a written contract. Between the parties, however, the only contract that was concluded was the management contract that G.I. S.R.L. denounced it legally, respecting the terms agreed by both parties. The other contract to which B.C. makes a reference as individual employment contract and which, as recognized, was written in Romanian and signed only by BC, is not a “contract” under the updated form of the Labour Code where the written form is required *ad validitatem*, and under the previous Law no. 40/01.04.2011 amending the Labour Code which required the agreement of the parties. Or if the legal representative of G.I. S.R.L. did not know of its existence and could become aware of any content, the act being written in Romanian, there is no agreement of the parties and correctly the Territorial Labour Inspectorate Revis made the mention in Revisal “invalid contract”.

Thus, in the absence of an employment contract in writing, we stick to the conclusion that in this case it was not a labour dispute.

Transformation of the employment contract from a consensual agreement into a solemn contract is a plus that our legislation brought, aiming to avoid circumvention of the law by employers not paying taxes to the state for contracted work and eradicate illegal labour (Cernat. C., 2014, p. 184).

From the point of view of the applicable law, individual employment contract is expressly regulated by articles 10-110, Title II of the Labour Code, unlike the management contract, which is governed only in companies where the state holds 50% of their share capital and the

autonomous administrations⁴, public institutions of culture⁵, health units⁶, coordinating directors of decentralized public services and their deputies⁷.

In connection with the management contract concluded in public institutions, some authors state that you cannot appreciate the management contract as a contract of mandate, whose purpose is primarily (according to article 2009 and following of the Civil Code) to conclude legal acts with third parties, this is not its primary obligation, performing material and intellectual acts for its employer. Regarding its legal nature, we consider that we are dealing with a civil contract, a contract of services (Top, D., 2009, p. 49).

On the contrary, in private companies, management contract has no legal provisions, but the references the laws on the matter make show it is a contract of mandate to which are applied properly the rules laid in the Civil Code.

Company Law no. 31/1990 does not specifically govern the management contract, however, the work that administrators - individuals perform within the company has the legal nature of a contract of mandate. In the same regard are also the provisions of article 72 according to which "duties and responsibilities of directors shall be governed by the provisions regarding the mandate and those specifically provided for in this law."

Within companies, the management contract is concluded between their directors or managers as well as third parties to which are delegated some or all powers of administrators.

Thus, if for joint stock companies we have express legal provisions in Law no. 31/1990, which regulate the *exclusive* conclusion of a contract of mandate (management contract) and not a contract of employment, for *limited liability companies there are no legal provisions in this regard*, which is why the general principle of law according to which all which is not prohibited by law is permitted, without an express prohibition, the conclusion of a management contract is legal also within a *limited liability company*. This conclusion is supported by the fact that, in terms of the legal relationship between civil law and other branches of law, whenever branch has no norms to regulate a legal situation, seek the rule of common law ((Cernat. C., 2014, p. 56).

The provisions of article 197 paragraph (4) of Law no. 31/1990 which states that "the provisions relating to the administration of joint stock companies are not applicable to limited liability companies, whether or not subject to auditing" appear to be misleading in the sense that only for joint stock companies administrators can conclude with the company a management contract (of mandate) and not for limited liability companies.

From our point of view, article 197 paragraph (4) of Law no. 31/1990 does not exclude the possibility of a management contract for a limited liability company, but only require that the rules relating to the management contract of Law no. 31/1990 for joint stock companies do not

⁴ Law no. 66 dated 7 October 1993 of management contract – published in the Official Gazette no. 244/13.10.1993.

⁵ GEO no. 189 dated 25 November 2008 on the Management of public cultural institutions – published in the Official Gazette no. 817/05.12.2008

⁶ Law no. 95 dated 14 April 2006 on healthcare reform – Republished – published in the Official Gazette no. 652/ 28.08.2015.

⁷ Emergency Ordinance no. 105 of 6 October 2009 on measures in the civil service, and to strengthen management capacity at decentralized public services of ministries and other government bodies of central administrative units and other public services, and for the regulation of some measures on the dignitary's cabinet of central and local government, chancery office of the prefect and local elected cabinet – published in the Official Gazette no. 668/06.10.2009 and the Decision no. 527 of 6 May 2009 approving the framework model of management contract – published in the Official Gazette no. 305/08.05.2009.

apply to limited liability companies, finding thus the enforcement of the common law – the Civil Code.

Not qualified by law the type of work done by the administrator within an limited liability company as work exclusive or mandate exclusive, we consider that both are permitted and not mutually exclusive.

Thus, in terms of the overlapping of functions, the Labour Code provides in article 35 that “any employee has the right to work for different employers or with the same employer, based on individual employment contracts, benefiting from the corresponding salary for each of them.” Therefore, in Romania legislation allows hiring a person with individual employment contract by several employers or by the same employer. A fortiori, it is permissible also concluding by the same person in the same period, an individual employment contract and a civil contract of service with the same employer or with different employers. It is noted that the vision of the legislature in this matter was one which does not restrict and which corresponds to the freedom of work (Popescu, R.R., 2014, p. 138).

Referring to limited liability companies, administrators may be also employees within the company – article 1961 paragraph (3) of Law no. 31/1990, republished, provides expressly that “the sole shareholder may be an employee of the limited liability company whose sole shareholder he is” – but may conclude with the company also a management/administration a contract, or can combine the two, complying with the maximum working time of 12 hours a day, followed by 24 hours of rest⁸.

In relation to the assertions we can see that the Companies Law provides that a person may be an administrator in several companies, with reserves required by article 197 paragraph (2) according to which “administrators cannot receive without the authorization of the shareholders’ meeting, the office of administrator in other competing companies or having the same activity or to do the same kind of trade with another competitor on their own or on behalf of another natural person or legal person, under penalty of revocation and liability for damage”, we consider that management contract is part of independent work category.

According to Law no. 31/1990 administrators, associates (prerequisite for limited partnerships, simple or by shares) or unassociated persons will provide work under the rules applicable to contract of mandate.

Under the employment contract, the employee is not usually qualified as representative. In principle, the employee may not be representative of employer and cannot be represented; he must personally perform work that was required. As an exception, the employee may be entitled to represent the employer. He may conclude as accessory acts on behalf of the employer, but its main obligations are not of mandate, but re derived from labour relations (Boroi, G.; Stănciulescu, L., 2012, p. 475).

However, the decisive factor that differentiates the management contract of employment contract is the *nature* of the work performed: individual employment contract implies a relationship of subordination between the contracting parties, while on the management contract, the trustee acts independently in fulfilling the mandate received, thus being on a relatively equal position with the principal (Ticlea, A., 2008, p. 359), deploying an

⁸ Article 115 paragraph (2) of *Labour Code*: *The daily working time of 12 hours must be followed by a rest period of 24 hours.*

administrative, organizational and management activity as delegated by contract, activities specific to administrators.

Given the nature of the work performed, the management contract can be defined as the agreement of will between the parties, whereby the person mandated meets acts or legal facts in the name and on behalf of another person, exercising an administrative activity and, where appropriate, representation or some or all duties of administrator, for consideration, of limited duration (as a rule) and may be terminated by the unilateral cancellation by the trustee without it being required to state reasons for the decision (Țiclea, A., 2008, p. 359).

Unlike contract management, individual employment contract is a contract whereby a person engaged in an activity called *work* for and under the authority of another person in return for remunerații⁹, of indefinite duration (as a rule), the work performed is one of execution in most cases and is terminated in cases expressly and exhaustively provided by law, after going through a rigorous procedure, subject to judicial review (Țiclea, A., 2008, p. 359).

In terms of the contracting parties, in both cases the employer or principal can be an individual and a legal entity, in exchange the employee is always an individual and the management contract may have as contracting party both an individual and a legal entity. From this point of view, only a management contract entered into with a natural person may be considered an individual employment contract disguised in a civil contract, and not the contract with a legal entity, which essentially remains a civil contract. Therefore, of interest to study is only to establish the legal nature of a management contract concluded with an individual.

In our law, the criteria for identifying the employment contract find their place not in labour law – as would have been natural – but in the fiscal law. The act which regulates the criteria and possibility of reframing a civil contract as an employment contract is Law no. 227 of September 8, 2015 regarding the Fiscal Code¹⁰, published in the Official Gazette under number 688 of 10 September 2015.

According to the Romanian Fiscal Code, even if the parties call the contract concluded as a service contract or a collaboration agreement, if its contents show in fact it is about “a relationship of employment”¹¹ – the tax inspectors will be able to reframe the said contract. The consequence of this reclassification will be able to establish the level of contributions paid in case of an employment contract and removing benefits that otherwise would have benefited the labour provider. Tax inspection authority will reconsider the legal relationship as dependent work, if it finds the existence of one or more of these criteria (Dimitriu, R., 2015, pp. 79-80).

However, the situation encountered if the employment relationship is disguised as civil contract has an increased legal complexity.

In the opinion of author Raluca Dimitriu, in this case, the first problem is that, according to article 16 paragraph (1) of the Labour Code, the employment contract is a solemn contract. Its conclusion is valid subject to the written form. Or, secret contract normally is not even explicitly, no word is written. Seldom, the parties clearly state that they intended to conclude

⁹ Article 10 of Labour Code

¹⁰ Law 187/2015 on article 7 sections 1, 2, 3.1-3.7 provides seven new criteria clarifying the classification of an activity to independent or dependent category

¹¹ In expressing the Fiscal Code.

what is an employment contract, they will disguise to a civil contract, but proceed directly to negotiating a civil contract. In fact, the proof of secret contract cannot be done directly, but only through the interpretation of clauses of the civil contract entered into, that can leave to assume that between the parties actually intervened an employment contract. If the worker files an action for a simulation declaration, following the acquisition of basic rights as an employee, he will face the form of secret contract. However, according to article 57 paragraph 2 of the Labour Code, “nullity of employment contract takes effect [only] for the future.” Therefore, if a legal relationship may be classified as employment relationship by applying its intrinsic criteria, it will be recognized – for the past – as a contract of employment, even against the qualification given by the parties (Beligrădeanu, Ș., 2011, p. 34).

Further, the author Raluca Dimitriu claims that in Romanian law the whole construction belongs to an act of fiscal law, and not labour law with all the consequences that result. Challenging the decision to reframe the legal report will be made before the administrative court, not before the courts for labour law. As it is natural for an act of fiscal law, there are no provisions on worker rights retroactively considered as employed. The purpose of the law is by no means to protect workers, but is fiscal, aiming only to eliminate any possibility of circumventing the provisions on payment of contributions. Reframing the contract by the tax authorities as an employment relationship is possible regardless of the form in which it will be completed, despite rules claiming the written form as a *ad validitatem* condition. Paradoxically, the solemnity of the employment contract stops reframing the contract by the court of labour law, which not only could achieve such a reframing in a more informed manner, but could do it upon request of the person providing activity and for the protection thereof.

In conclusion, the author argues that a legal relationship is civil or employment as a result of the reality of the relationship between the parties. Parties could not – or should not – be able to circumvent the rules imposed by labour law by the mere qualification of their contract as a civil contract.

In its case, High Court of Cassation and Justice through Civil Decision no. 574/2011¹² stated that “to qualify a contract as an employment contract, three elements must be brought together: work performed as a primary goal of the contract, remuneration for work and the existence of a relationship of subordination”.

Court of Justice of the European Union considered that the most important feature of an employment relationship is that “a person performs within a certain period for another person and under its direction, benefits in return for which he receives remuneration”¹³. Therefore “we must regard as a worker any person exercising effective and genuine activities, excluding activities that are not so low that they seem to be purely marginal and ancillary”¹⁴.

Given the sustained arguments, management contract could be considered an employment contract disguised in a civil contract with the consequence of its reframing, but in terms of companies, Law no. 31/1990 contains express legal provision stating that “in the

¹² Decision of HCCJ no. 574/2011 is published in the Official Gazette of Romania, Part I, no. 368 on 26 May 2011

¹³ Section 26 of the Decision dated 4 June 2009 of the CJCE in cases C-22/08 and C-23/08, in Article *Observații privind contractul individual de muncă* (Comments on individual employment contract), published by Ovidiu Ținca in „Revista Română de dreptul muncii” (Romanian Magazine of Labour Law) no. 5/2009, Wolters Kluwer Publishing House, Bucharest, 2009, p. 37

¹⁴ *Ibidem*.

performance of their mandate, the administrators [of a joint stock company] cannot conclude an employment contract with the company. If they were appointed administrators by the company employees, the individual employment contract is suspended during the mandate.”¹⁵

On the system of taxation of income of the administrators and directors of joint stock companies, Law no. 31/1990 article 152 has express provisions in that their activity is treated in terms of taxation as income from wages and is taxed according to the legislation.

In contrast, work performed by administrators or persons to whom are delegated some or all powers of administrators in companies with limited liability, Law no. 31/1990 contains no express provision, in which case we will seek legal norms in the area of taxation, which provide that manager allowance is treated as salary income¹⁶ and will be the basis for calculating contributions and income tax.

Therefore, from a fiscal perspective, there is no interest in reframing management contract as an employment contract.

Studies conclude that contract management within a limited liability company is a contract by itself, not to be confused with the employment contract, whether in terms of taxation are taxed the same, as the essence of the employment contract is the kind of work rendered and subordination of the employee to the employer, issues not identified in the management contract which continues to remain a civil contract, subject to the rules of the mandate, not being able to be qualified as an employment contract.

Thus, if the legal characteristics of the employment contract and the management contract are relatively the same, system of income tax is the same, the work done is seniority, overlapping of functions is allowed by the labour legislation, which is practically the benefit for which many limited liability companies prefer to conclude a management contract instead of an employment contract.

One of the advantages is the fact that those who enter into a management contract do not enjoy strict protection of legislation on labour law such as for example the existence of bodies authorized to conduct labour inspection to ensure compliance with the rights of those who work. The management contract is not recorded in the general records of employees (Revisal). Incidentally, the two contracts have different content depending on national legal provisions and the management contract should not contain minimum mandatory clauses stipulated by the Labour Code for the individual employment contract, such as position, work, working hours, conditions of employment, annual leave, probation, etc. Also, the Ministry of Labour and Social Solidarity has approved Order no. 64/28.02.2003¹⁷ including a standard model of employment contract whose minimum mandatory clauses are described in a concrete way, as they may be actually put on paper and signed by the parties.

Unlike the person who enters into a management contract, any employee who performs work benefits of working conditions of employment, social protection, health and safety at work, and respect of dignity and conscience, without discrimination¹⁸. Managers, unlike

¹⁵ Article 137¹ paragraph (3) of Law no. 31 dated 16 November 1990 of companies – Republished.

¹⁶ According to article 76 of Law no. 225/08.09.2015 on Fiscal Code.

¹⁷ Published in the Official Gazette of Romania no. 139 of 04.03.2003.

¹⁸ Article 6 paragraph (1) of Labour Code.

employees have no specific rights that will bother employers, such as the right to collective bargaining, the right to protection against unlawful dismissals, the right to be informed about the working conditions and elements regarding employment relationships, right to strike, etc. Also, employees cannot renounce their rights recognized by law; any transaction that seeks waiver of rights recognized by law to employees or the limitation of these rights is invalid¹⁹.

At the same time, employees benefit from special protection in the event of insolvency of legal entity. Protection of workers in case of insolvency of the employer is conferred by the Directive. 2008/94/EC of 22 October 2008 on the protection of employees in the event of employer insolvency²⁰, transposed into Romanian legislation by Law no. 200 of 22 May 2006 on the establishment and use of the Guarantee Fund for payment of wage claims²¹. Under that law, the guarantee funds shall ensure the payment of claims arising from the individual and collective employment contracts concluded with employees, where the employer is insolvent: salaries overdue, compensations owed by the employer for annual leave, outstanding severance payments, compensation for accidents at work or occupational disease and outstanding allowances for interruption of business.

However, an important element determining a legal entity to enter into a management agreement and not a contract of employment is given by the conditions in which these two contracts are terminated.

Thus, if the management contract is a civil contract, of mandate and terminated by deadline, removal from office by the principal, by renunciation of the trustee, by the death of one party, by inability or bankruptcy of one party, for employment contract cases of termination provided for by article 55 of the Labour Code are: automatically, following the agreement of the parties as a result of the unilateral will of either party, in cases and under conditions provided by law, in the latter case, with practical relevance stands dismissal.

3. Conclusions

To dismiss an employee, in practice, the employer must complete a complex procedure provided by Articles 247-252 of the Labour Code and have valid reasons. Most times, dismissals are followed by complaints and are lost either because the dismissal decision contains no minimum mandatory requirements stipulated by law, either because it demonstrates that the employee did not commit any disciplinary offense.

In terms of procedural aspect this contract shall be judged by ordinary courts and not by courts specialized in labor disputes and social insurance. Also, the procedural rules in case of dispute are different if on the individual employment contract, regardless of the procedural position of the employee, the burden of proof lies with the employer, on management

¹⁹ Article 38 of Labour Code.

²⁰ Directive no. 2008/94/EC of 22 October 2008 is a codified version of the Directive no. 80/987/EEC with the same type of regulation, which has suffered over time, substantial changes.

²¹ Article 30 of Law no. 200 dated 22 May 2006 provides: *This law transposes Council Directive no. 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of employer insolvency, published in the Official Journal of the European Communities (OJEC) no. L283 of 28 October 1980 as amended by the European Parliament and Council Directive no. 2002/74/EC, published in the Official Journal no. L270 of 8 October 2002.*

Romanian state adopted Law no. 200/2006 on the establishment and use of the Guarantee Fund for payment of wage claims, which entered into force on 1 June 2007.

contract, which is a civil contract, the rule of common law applies according to which the one complaining must make proof.

Therefore, employers prefer a simpler way by which to contract work, about which otherwise is legal, not circumvent any tax provisions and gives the possibility of contracting immediately another person to perform the same activity as the person to which the contractual relationship just ceased.

To summarize the above, a management contract is more advantageous for the employer, it is preferred conclusion of such a contract.

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