CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE PROVISIONS OF THE APPLICABLE COLLECTIVE AGREEMENT AND THE INDIVIDUAL LABOR CONTRACT

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Abstract

It is inconceivable that a contract executed by definition in time, could remain in all respects, in its original form in which the parties have concluded (in writing). Flexicurity requirements during the execution of the individual labour contract is not, in reality, only a requirement of the legislature - which translates options employer organizations - it is an objective necessity determined that occur after the conclusion of the contract a number of circumstances, situations, goals or subjective, requiring modification of.

Keywords: *collective labor agreement; individual employment contract; legislation; contractual clauses; addendum.*

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I. Introductory issues

In conducting legal labor relations appears to be imperative to be known whether the adoption of a collective agreement or amendment to possible level[2] applicable collective agreement may also raise the individual employment contract between the Contracting Parties.

Individual employment contract is governed, in terms of its effects, and the principle provisions of art. 1270 of the Civil Code that „valid contract has the force of law between the contracting parties". The foundation of binding force of the contract is the intention of the parties, bordering the law only to ensure execution of the contract, failure to enforce was penalizing.

Obviously, once completed, the individual employment contract cannot remain "*frozen*" – if, in the meantime, during the execution of its new elements or new requirements.

Adapting a gainful economic or technological developments may require modification of the individual employment contract under which the activity is performed, taking into account the intrinsic dynamism of employment.

II. Influence applicable collective agreement on individual employment contracts

A). a). The labor contract is governed by the Labour Code art. 229-230. These legal standards are supplemented by those contained in art. 127-153 of Law. 62/2011 of social dialogue.

The labor contract is in accordance with art. 229 para. 1 of the Labour Code, the convention agreed in writing between an employer or employers' organization, one hand, and employees represented by unions or otherwise provided by law, on the other, laying down clauses concerning working conditions, pay, and other rights and obligations arising from labor relations.

According to art. 1, letter i of Law. 62/2011, the collective labor agreement is an agreement concluded between the employer in writing or for employers and employee representatives, which establishes rights clauses and obligations arising from employment relationships.

The two definitions of the collective labor agreement (art. 229 para. 1 of the Labour Code and art. 1 letter i in Law no. 62/2011) are essentially similar and complementary to the (having a different degree of detailing the contents of this contract) [3].

b). The aims pursued by concluding collective agreements is to promote and defend the interests of the signatories, to prevent or limit collective labor conflicts, to ensure social peace.

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[2] See, in this regard, I.T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, third edition, revised and enlarged, Universul Juridic, Bucharest, 2014, p. 153.

[3] Ibidem, p. 153.

B). Art. 11 of the Labour Code in connection with art. 132 para. 4 of Law no. 62/2011 constancy principle that clauses of the individual employment contract may not contain provisions contrary to or rights below the minimum established by laws or by collective bargaining agreements.

Text was declared constitutional by Decision. 1302/2010[4], the Court having found that the text of the law aims to protect employees' rights in the face of possible abuses of the employer. Consequently, restricting economic freedom is justified precisely by the need to protect the rights of employees.

Based on the above principle in legal labor relations practice can outline two scenarios, namely:

- first, in time of conclusion/individual performing the contract work is not concluded a collective agreement or if there is, it is not applicable;
- Second, in the time of conclusion/individual performing the contract work there/ is done/is amended contract/collective labor contract.

In the following we report on all the situations highlighted above.

1.Where, upon the conclusion/during the execution of the individual employment contract is not concluded a collective agreement or if there is, it is not applicable[5] clauses of the individual employment contract may not contain provisions contrary to or rights below minimum established by laws (art. 11 of the Labour Code thesis).

Consequently, the terms of individual employment contract must be correlated *ab initio* or during the execution (if the regulations initiated should be modified or would have adopted other laws) only with the legal provisions applicable to the legal relations work.

Furthermore, according to art. 38 of the Labour Code, employees cannot renounce their rights recognized by law. Any transaction that seeks renunciation employees recognized by law or limit such rights is invalid.

In common law – civil law – it is estimated[6] that the legislature may intervene in contracts to dispose of the amendment clause, in order to restore the contractual balance, resulting in reconciling the interests of contracting parties; in this respect, by mandatory rules, it may proceed with the reassessment of benefits which owes the contracting parties (...)[7].

Option for such intervention is present only in exceptional cases, when jeopardize the public interest or to the protection of private interests of a broad categories (such as, for example, reducing or capping the price of products, subsidizing products food, indexation of wages, rents revision etc.)[8].

The legislative practice may be encountered and other interventions legislator contracts such as, for example: establishing the mandatory rules of the duration of contracts a certain way, inferior to that agreed by the parties; termination of an entire category of contracts. [9]

As noted, the legislature can intervene in contracts to dispose modification of a sentence is valid on the conduct of legal labor relations – based on an individual employment contract.

2. In the event that, upon conclusion/during the execution of the individual employment contract exists/is done/is amended contract/collective agreement applicable from the wording of normative acts (ie, as we have shown, art. 11 of the Labour Code in conjunction with art. 132 par. 4

[4] Published in the "Official Gazette of Romania", Part I, no. 16 of 7 January 2011.
[5] According to art. 133 para. 1 of Law no. 62/2011, collective agreements clauses take effect as follows:
a) for all employees in the unit, where collective agreements concluded at this level;
b) for all employees employed in establishments which are part of the units having concluded the collective bargaining agreement;
c) for all employees employed in the business sector units having concluded collective labor contract and employers' organizations belonging to the contract.
[6] See, in this regard, L. Pop, *Tratat de drept civil. Obligațiile, vol. II. Contractul*, Universul Juridic, Bucharest, 2009, p. 530-532.
[7] *Idem*, p. 532.
[8] *Ibidem*.
[9] *Ibidem*.

of law no. 62/2011) we can conclude that the contract basis[10] (which creates law rules[11]) does, by its terms, the parties of the individual labor contract.

Consequently, the following specifications are required:

a). The clauses inserted in the content individual employment contract must be correlated *ab initio* (from the very moment of conclusion of the legal act) with the existing wording of the collective labor agreement applicable (of course in a position where it finds evidence of a collective agreement applicable to the unit, group of units, the industry) – not allowing an individual contract of employment contain clauses that establish rights to levels below those established by legal rules on the matter (such as, for example, wages below the gross minimum wage guaranteed payment).

b). Obligation to correlate individual employment contract provisions of the applicable collective labor contract exists if, during the performance of individual work, adopted a collective bargaining agreement or amended collective labor contract.

It is a natural consequence arising, as we have noted, the legal provisions according to which clauses of the individual employment contract may not contain provisions contrary or the rights below the minimum established by laws or by collective labor agreements (art. 11 of the Labour Code in conjunction art. 132 par. 4 of Law no. 62/2011).

III. Procedural issues

Related to the above evident it must be highlighted and procedural mechanism by which individual employment contract materializes change due to adoption of a collective agreement or modification of the applicable collective labor contract.

A). The amendment of the individual employment contract due to the conclusion of a collective agreement – which thus becomes applicable – can outline two scenarios, namely:

- modifying the collective bargaining agreement draws eo ipso change individual employment contracts[12];
- the need to conclude an addendum in all situations.

In our view, we consider to be founded the second hypothesis, given that art. 17 para. 5 of the Labour Code provides that any modification to a contractual elements during the execution of the individual employment contract requires the signing of an addendum to the contract, within 20 working days from the day of the change, unless such modification It is expressly provided by law[13].

In legal doctrine[14] specialist noted that in terms of legal nature, collective agreement – without a law in the sense of art. 73 of the Constitution – is both: a bilateral legal act, a contract that flow out mutual rights and obligations, contract called solemnly, with subsequent benefits in principle commutative; a source of law which fall within the exception of legal norms negotiated. A collective agreement is, by nature, a contract basis (creator of the rule of law) [15].

Consequently, if evident above modification on any of the clauses of the individual employment contract requires the signing of an addendum (written *ad validitatem*). This provision, contained in art. 41 para. 1 of the Labour Code, is nothing but a consecration of the principle of mandatory legal act effects.

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[10] See, in this regard, I.T. Ştefănescu, *op.cit.,* p. 156.

[11] *Ibidem*.

[12] See, in this regard, Ş. Beligrădeanu, *Există incompatibilitate între durata nedeterminată a contractului individual de muncă şi durata determinată a contractului colectiv de muncă?,* „Dreptul", no. 4/1992, p. 17.

[13] Likewise are art. 4 para. 2 of H. G. no. 500/2011 on the register of employees (published in the "Official Gazette of Romania", Part I, no. 372 of 27 May 2011) according to which: "Any change of the elements referred to in art. 3 para. 2 letter a, c-g is recorded in the register not later than the business day preceding the expiration of 20 days provided for in art. 17 para. 5 of Law no. 53/2003, republished. Exceptions are situations where changes occur as a result of a judgment or by operation of law when recording a record is made on the day the employer is presumed by law to have taken note of their contents.

[14] See, in this regard, I.T. Ştefănescu, *op.cit.,* p. 155.

[15] *Ibidem*.

This addendum aims at the execution of duty by the legal norms configured to update the terms of individual employment contract – if there has been a collective labor agreement that establishes a more favorable legal regime.

Collective labor agreement governs not only individual employment contracts concluded after its application, but all of these existing contracts during execution. Moreover, individual employment contracts negotiated/signed or modified under a collective agreement remain in force – including the clauses wage – and after its termination[16].

B). Relative to signing individual employment contract due to changes in applicable collective labor contract – is the following considerations:

- pursuant to art. 149 of Law no. 62/2011, the terms of a collective bargaining agreement can be changed (written) throughout its execution under the law, whenever all parties entitled to negotiate agree. So change is possible and impossible by mutual agreement by the unilateral act of one party. Changes to the collective agreement shall be recorded in an addendum signed by all parties contracted (art. 150 par. 1 of Law no. 62/2011). The addendum shall be sent in writing to the body that was registered collective agreement and all contracting parties and take effect on the date of registration under this act or at a later date, according to the convention of the parties (art. 150 par. 2 of Law no. 62/2011).

Changing a collective agreement can relate, for example: the reformulation of provisions of articles, paragraphs, points; introducing new clauses; removal or addition of clauses etc.

- in addition to the legal status of the provisions of Law no. 62/2011 on amending the collective labor agreement, in the Decision of the Constitutional Court no. 574/20011[17] legislature recognizes the possibility to intervene on grounds of general interest, to amend certain provisions of collective bargaining agreements;

- and Î.C.C.J. recognized – in the Decision no. 574/2011[18] – the legislature can change for reasons of general interest, provisions of collective agreements, covering solution to the existing social needs at a time.

Consequently, *a fortiori*, modification of collective labor contracts, through laws enacted causes change and individual employment contracts – by signing an addendum – having regard, as we have shown that an individual employment contract not can contain clauses that establish rights at levels below those set by the applicable collective agreements.

IV. Aspects of the legal effects it produces collective agreement after its termination.

A). The actual execution of the collective labor agreement occurs during its existence.

The labor contract terminated – according to art. 151 of Law no. 62/2011:

- the expiry or on completion for which it was concluded, unless the parties agree to extend the application thereof under the law;
- the date of the dissolution or judicial liquidation of the unit;
- by agreement.

The labor contract cannot be terminated unilaterally.

B). Of particular interest where, after termination applicable collective labor agreement, the employer no longer wishes to grant rights that were enshrined only in the wording of that collective labor agreement (rights, however, are not found in the contents of individual employment contracts) – although, in terms of legal norms, individual employment contract may not contain provisions contrary to or below the minimum rights established by laws or by collective bargaining agreements.

[16] Cluj Tribunal, Department of Administrative and Fiscal mixed by Labor Disputes and Social Insurance, civil sentence no. 12993/2012, „*Revista română de dreptul muncii*" no. 9/2013, p. 55-56.
[17] Published in the "Official Gazette", Part I, no. 368 of 26 May 2011.
[18] Published in the "Official Gazette", Part I, no. 368 of 26 May 2011.

This is a matter to be known whether the rights enshrined in a collective agreement – but missed and the content of individual employment contracts – must be regarded as rights acquired by employees who continue to do the work.

In legal literature[19] were revealed: as an exception in relation to financial results (lower demand, persistent difficulties collection of receivables, etc.) on the one hand, and the objective impossibility of reducing staff (because, for example, the specific technological process), on the other hand, the employees' rights established by the collective bargaining agreement, could fall. Beyond determinations objectives (economic and financial), the conclusion follows from the principle of law[20] that "*pacta sunt servanda*" if "*rebus sic stantibus*"[21].

In those circumstances, it would have required a rigorous and clear legal clarification in the sense that you cannot start the theory of acquired rights in matters of collective labor contracts, if economic conditions changed radically negative financial effect[22]. Obviously, to avoid the abuse of employers, the law should have very concrete circumstantial limitations and conditions which, if changed, could lead to diminishing the rights acquired previously by collective bargaining agreements[23].

V. Conclusions

The aims pursued by concluding collective agreements is to promote and defend the interests of the signatories, to prevent or limit collective labor conflicts, to ensure social peace.

Consequently, as appears to be imperative rules establish the principle that the statutory "*terms of the individual employment contract may not contain provisions contrary to or rights below the minimum established by laws or by collective agreements*".

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[19] See, in this regard, I.T. Ştefănescu, *op.cit.,* p. 186.
[20] *Ibidem*.
[21] It is, in fact, about unpredictability, which, although previously the Civil Code in force, it was not expressly covered was accepted as a creative practice and legal doctrine. To be seen, L. Pop, *Teoria generală a obligaţiilor*, Lumina Lex, Bucharest, 1998.,p. 70; I.D. Terţa, *Considerente privind "impreviziunea", regula „rebus sic stantibus"*, R.D.C. no. 6/1998, p. 105 – 109; L. D. Mârza, *Intervenţia legală şi judecătorească în contracte*, "Dreptul" no. 9/2004, p. 53.
[22] See development, I.T. Ştefănescu, *Contractele colective de muncă din cadrul societăţilor comerciale, între prevederile legale, teorie şi practică*, R.D.C no. 4/1996, p. 47 – 54.
[23] See, in this regard, I.T. Ştefănescu, *op.cit.,* p. 186.