Legal subordination – criterion applicable to the recurrence of legal nature of the contract (as individual labor)

Associate professor **Ana VIDAT**[1]

Abstract

The International Labor Organization adopted, in 2006, Recommendation no. 198, synthetically describing the features of a working relationship. Thus, work done in a labor relationship must meet certain requirements, namely: to be performed according to instructions and under the control of another person; to involve the integrator of the organization in the organization of an enterprise; be executed exclusively or principally for the account of another person; be personally fulfilled by the worker; to be carried out in accordance with a determined timetable and at a specific place or accepted by the beneficiary of the work; have a given (predetermined) duration and show some continuity; to assume that the worker is at the disposal of the other person; to involve the beneficiary in the provision of equipment, materials, energy, as the case may be. In its turn, the High Court of Cassation and Justice stated in Decision no. 574/2011 that – in order to qualify a contract as a work – there must be three elements, namely: performance of the work as the primary purpose of the contract; remuneration of the work done; the existence of a subordination report. In the absence of the subordination report, the contractual relations agreed by the parties are not objectively reflected in an employment relationship, but remain only in the sphere of civil law.

Keywords: *individual employment contract; legal subordination; the power to control; the power to issue legal orders; the power to sanction.*

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1. Introductory issues

In the current legislative context, the parties are free to conclude any contracts[2] and determine their content, within the limits imposed by law, public order and good morals.

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[1] Ana Vidat – Law Department of the Bucharest University of Economic Studies, Bucharest, Romania; Lawyer, member of the Bucharest Bar Association, ana.vidat@yahoo.com

[2] To be seen A. Ionaşcu, *Drept civil. Partea Generală* Publishing House Didactică şi Pedagogică, Bucharest, 1963; Tr. Ionaşcu a.o., *Tratat de drept civil, vol. I, Partea generală,* Publishing House Academiei, Bucharest, 1967; Ghe. Beleiu, *Drept civil român,* 5th edition, Publishing House „Şansa", Bucharest, 1998; R. Dimitriu, *Curs de drept civil*, Publishing House Tribuna Economică, Bucharest, 2002; G. Boroi, Drept civil. Partea generală. Persoanele, ed. 3rd, revised and added, Publishing House Hamangiu, Bucharest, 2008; L. Pop, *Tratat de drept civil. Obligaţiile, vol. II. Contractul*, Publishing House Universul Juridic, Bucharest, 2009; A.G. Atanasiu, A.P. Dimitriu, A.F. Dobre, D.N. Dumitru, A.G. Banc, R.A. Ionescu, M. Paraschiv, I. Pădurariu, M. Piperea, P. Piperea, A.Ş. Răţoi, A.I. Slijitoru, I. Sorecu, M. Şerban, A.G. Uluitu, C.M. Văduva, *Noul Cod Civil, Note·Corelaţii·Explicaţii*, Publishing House C.H. Beck, Bucharest, 2011; M. Uliescu (coord.), *Noul Cod Civil. Comentarii*, ed. 3rd, revised and added, Publishing House Universul Juridic, Bucharest, 2011.

In accordance with the provisions of art. 1206 of the Civil Code: "(1) Contracts shall be interpreted according to the concurrent will of the parties, and not according to the literal meaning of the terms. (2). In determining the concordant will, account shall be taken, inter alia, of the purpose of the contract, of the negotiations conducted by the parties, of the settled practices between them and of their conduct subsequent to the conclusion of the contract".

For the judicious development of legal employment relationships, it is imperative to create the possibility of defining in law or in another way the specific features of the existence of an individual labor contract.

In any national policy, it must ensure that disguised employment contracts are combated, recourse to contractual arrangements that disguise the real legal status between the parties and prevent the application of social protection measures. The desirability of such a legislative option must be to create levers for growth and job creation[3].

The legal interest report on labor law is characterized by two elements: economic dependence and subordination[4]. By analyzing these two indicators, it is possible to identify those legal relationships that concern labor law, that is, those which justify the protection that this branch of law (by way of derogation from the civil law rules) is likely to grant it[5].

Labor law is not interested in work in general, but only in the work done in an employment relationship – based on the valid conclusion of an individual labor contract.

Like any other convention, the individual labor contract is identified by some features that define it as a whole and by others that relate to certain stages of it.

However, apart from the features specific to the individual labor contract, it is legally relevant and the criteria legally required to re-qualify an activity as being dependent.

In the following, we will refer to those shown above.

2. Re-qualification of the activity by the fiscal control body

A). In the past the Fiscal Code defines dependent labor[6], the tax legislator now addresses these issues in another way – that is, it uses the criteria for

[3] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R198. (consulted on 15.10.2017).

[4] To be seen R. Dinitriu, D*reptul muncii. Anxietăți ale prezentului,* Publishing House Rentrop &Straton, Bucharest, 2016, p. 24-25.

[5] *Ibidem.*

[6] Art. 7 par. 1 point 2 of the 2003 Tax Code – currently a normative act repealed and replaced by the 2015 Fiscal Code – defined dependent activity as any activity performed by a natural person in an employment relationship.

Any activity could be reconsidered as a dependent activity if it fulfilled – according to art. 7 par. 1 pt. 2 subpct. 2.1 of the old Fiscal Code – at least one of the following criteria: the income beneficiary is in a relationship of subordination with the income payer – the income payer's governing bodies – and respects the working conditions imposed by the payer (such as be: the attributions and the manner of their accomplishment, the place of the activity, the work program);

identifying self-employment; with dependent work being considered the one for which these criteria are not found.

Thus, according to art. 7 (3) of the Fiscal Code[7], self-employment is any activity carried out by a natural person for the purpose of obtaining income, which fulfills at least 4 of the following criteria:

1) the individual has the freedom to choose the place and the way of doing business as well as the work schedule.

2) the individual has the freedom to conduct business for more than one client.

3) the risks inherent in the activity are assumed by the individual performing the activity.

4) the activity is accomplished by using the patrimony of the natural person who is carrying it.

5) the activity is performed by a physical person by using intellectual capacity and / or physical performance, depending on the specificity of the activity;

6) the natural person is part of a professional body/order with the role of representing, regulating and supervising the profession, according to the special normative acts regulating the organization and the exercise of the respective profession.

7) the natural person has the freedom to carry out the activity directly, with employed personnel or through collaboration with third persons, under the law.

If the parties designate the agreement concluded as a service or collaboration agreement, if it is apparent from the content of the agreement that it is in fact a dependent activity, the tax audit bodies will be able to reclassify that activity[8] – the aim of retroactive payment of contributions due to the State by the parties and the applicability of social security law[9]. This consequence stems from the fact that tax legislation has been given the role of highlighting the above criteria – not labor law.

B). In the art. 7, the Fiscal Code does not refer to the individual labor contract, but uses – in section 1 – the dependent activity as any activity carried out by a natural person in an income-generating employment relationship.

Thus, in the legal doctrine[10], it was judiciously shown that the notion of *"employment relationship"* is not defined, but it is presumed that deliberately did not use the term working relationship or employment contract to mean that the tax

in the performance of the activity, the income beneficiary only used the material basis of the payer of income (or corresponding facilities, special work or protective equipment, work tools or the like) and contributed physical or intellectual capacity, not with equity; the income payer shall bear, in the interest of the activity, the travel expenses of the beneficiary of the income (such as the allowance for secondment in the country and abroad) and other expenses of this nature; the payer shall be entitled to the allowance for rest leave and the allowance for temporary incapacity for work on behalf of the beneficiary of the income..

[7] Published in the "Official Gazette", Part I, no. 688 of September 4, 2016.

[8] To be seen R. Dinitriu, *op. cit.*, p. 38.

[9] *Ibidem.*

[10] *Ibidem.*

body does not rule on the legal nature of the contract between the parties, but only makes a qualification of the activity and of the income thus obtained.

If the parties have entered into a contract to which they have been given civil legal status, but the tax authority has reclassified that activity as dependent, the consequence is not the automatic transformation of the activity into a labor contract. Such competence lies solely with labor law courts[11].

C). In conclusion, it must be emphasized that the option of the tax legislator is not to make any express reference to the non-existence of the subordination report, which – as it is well founded in the legal doctrine[12] – defines, in essence, the independent labor relationship.

3. Qualification of the contract under which the activity is carried out – as an individual work

A). In the following, we will only refer to the need for subordination – as a specific feature of an individual labor contract.

The individual employment contract is the legal instrument generating legal employment relationships under which the reciprocal benefits of the contracting parties operate[13].

In order to combat the use of contractual arrangements that conceal the real legal status, it is necessary, as we have seen, to create the possibility of defining in law or otherwise the specific features of the existence of an individual employment contract.

In achieving this, the International Labor Organization (O.I.M.) adopted, in 2006, Recommendation no. 198[14], synthetically describing the features[15] of a working relationship.

The concept of *"employment relationship"* refers to a segment of employment relationships – ie those based on a negotiated private contract (within the legal framework) by the parties[16].

The *employment relationship* can be defined as the social relationship of legal subordination and economic dependence under which a natural person carries out work for the benefit of another natural or legal person, the latter having the obligation to remunerate and ensure the necessary conditions for carrying on the activity[17].

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[11] See, broadly, R. Dinitriu, *op. cit.*, p. 39-43.
[12] To be seen R. Dinitriu, *op. cit.*, p. 41.
[13] To be seen O. Ionescu, *Codul civil şi contractul de muncă*, Publishing House Curierul Judiciar S.A., Bucharest, 1938, p. 4.
[14] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R198 (consulted on 15.10.2017).
[15] It should be noted that for the first time these features were synthesized in a O.I.M.
[16] To be seen R. Dinitriu, *op. cit.*, p. 25.
[17] *Ibidem.*

All categories of people who have signed employment contracts or atypical contracts, similar to a labor contract, are in the employment relationship[18].

Work done in an employment relationship must meet certain requirements, namely[19]:

- be performed according to instructions and under the control of another person;
- involve the entrant's integration into the organization of an enterprise;
- be executed exclusively or principally for the account of another person;
- be personally performed by the worker;
- be conducted in accordance with a specific timetable and at a specific place or accepted by the person receiving the work;
- have a given (predetermined) duration and show some continuity;
- assume that the worker is at the disposal of the other person;
- to involve the beneficiary, equipment, materials, energy, as the case may be, to make available.

In the content of Recommendation no. 198/2006 the following aspects are also listed[20]:

- the regularity of the worker's remuneration;
- the fact that its remuneration is the sole or main source of income;
- payment in kind is made in the form of resources (for living), dwelling, transport or other;
- recognition of rights for the person who provides work, weekly rest and annual leave;
- financing of the worker's occupational movements by the beneficiary of the work;
- absence of financial risks for the worker.

Member States are also recommended to establish a legal presumption of the existence of a labor relationship whenever there is one or more indications characteristic of such a relationship[21].

Thus, from the picture depicted by O.I.M., it is clear that legal subordination is a specific feature of a working relationship.

B). And in the internal legislative context, there were concerns about establishing criteria for the qualification of a contract as work – the legal subordination being a constant one.

Thus, in the Decision no. 574/2011[22], the Supreme Court, Î.C.C.J. pointed out that – in order to qualify a contract as work – there must be three elements, namely:

- performance of work as the primary purpose of the contract;

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[18] *Ibidem.*

[19] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R198 (consulted on 15.10.2017).

[20] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R198 (consulted on 15.10.2017).

[21] *Ibidem.*

[22] Published in the „Official Gazette of Romania", part I, no. 368 of 26 May 2011.

- remuneration of the work done;
- existence of a subordination report.

C). In his motivation, through Decisions no. 494/2004[23], no. 350/2005[24], no. 461/2006[25], no. 718/2006[26] and no. 58/2007[27], the Constitutional Court held that, unlike other civil and administrative contracts, in the case of an individual employment contract, although at the time of its conclusion the parties are in a position of legal equality – specific to any branch of private law – subsequently, during the performance of the contract, the employee is legally subordinated to the employer. It is precisely this subordination that justifies the introduction of a differentiated treatment without, however, discriminating against it. In fact, in the Constitutional Court's practice it has been constantly emphasized that equality of treatment does not require uniformity, and it is possible to establish different legal treatment for different situations when it is rationally and objectively justified[28].

Employee and employee are two parts of the conflict of labor that are in opposing positions and with opposite interests, their different situation justifying in some respects the differentiated legal treatment.

Moreover, through Decisions no. 494/2004[29], no. 322/2005[30] and no. 356/2005[31], the Constitutional Court stated that, given that, as a rule, between the parties to the individual labor contract – employer and employee – there is a clear discrepancy from the point of view of the economic and financial potential in favor of the former – allows the point of view to negotiate the terms of the contract – the state is required to interfere, legally, in support of the person in a position of inferiority.

D). a). The Romanian legislator's vision – respecting the internationally established coordinates – was in the sense of conferring legal subordination the essential character of an individual labor contract. Thus, the Labor Code defines the individual labor contract – in art. 10 – as the "(...) under which a natural person, called an employee, undertakes to perform work for and under the authority of an employer, a natural or legal person, in return for a salary."

In the absence of the subordination report, the contractual relations agreed by the parties are not objectively reflected in an employment relationship, but remain only in the sphere of civil law. Instead, employees are part of the employment relationship, a report governed by either the Labor Code or the special laws governing the status of certain categories of staff.

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[23] Published in the "Official Gazette of Romania", Part I, no. 59 of 18 January 2005.
[24] Published in the "Official Gazette of Romania", Part I, no. 779 of 26 August 2005.
[25] Published in the "Official Gazette of Romania", Part I, no. 580 of July 5, 2006.
[26] Published in the "Official Gazette of Romania", Part I, no. 973 of 5 December 2006.
[27] Published in the "Official Gazette of Romania", Part I, no. 117 of 16 December 2007.
[28] See Decision no. 721/2006, published in the "Official Gazette of Romania", part I, no. 962 of November 30, 2006); Decision no. 108/2006, published in the "Official Gazette of Romania", Part I, no. 212 of 8 March 2006); Decision no. 693/2006, published in the "Official Gazette of Romania", part I, no. 915 of November 10, 2006); Decision no. 342/2002, published in the "Official Gazette of Romania", part I, no. 403 of May 10, 2006.
[29] Published in the "Official Gazette of Romania", Part I, no. 59 of 18 January 2005.
[30] Published in the "Official Gazette of Romania", Part I, no. 702 of 3 August 2005.
[31] Published in the "Official Gazette of Romania", Part I, no. 825 of September 13, 2005.

In that regard, in the judgment of 13 November 1996 the French Court of Cassation, the Social Section, held that the subordination report is characterized by the performance of a job under the authority of the employer who has the power to give orders and directives, to sanction the breaches committed by the employee.

b). Subordinating the employee to the employer essentially has the following components: the employer's right to give the employee orders and enforceable provisions (if lawful), the employer's right to control the work of his employee[32] and the disciplinary power of the employer[33]. Indeed, the subordination report shows the employee's obligation to respect the discipline of work.

Also due to the employer's legal authority over the employee, his subordination, the employee does not bear the contractual risk[34].

Art. 40 para. 1 of the Labor Code establishes the rights of the employer who give expression to its authority.

c). The legal literature has often debated whether subordination has different degrees in relation to the subject matter and conditions of performance of the employment contract.

Generally, according to modern theory in the subject, subordination exists regardless of the degree of accomplishment of some of its components, such as: control, direction[35], etc.

On the basis of this reasoning, it was concluded that, regardless of the hierarchical position of the employee or the place where he is working (including at home), subordination exists, albeit to varying degrees, to qualify the contract as a labor contract[36].

4. Conclusions

The following conclusions can be drawn from setting up the applicable legal regime in the area covered:

a). If at the conclusion of the individual labor contract the principle of the free negotiation of the clauses of the contract, negotiation based on the principle of legal equality is ensured, after this moment the legal status of the employee is completely different, being in the position of subordination[37] with the employer.

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[32] To be seen I.T. Ştefănescu, *op.cit.*, p. 222; O. Ţinca, Poziţia *angajatorului în raport cu salariatul său în cadrul contractului individual de muncă,* in „Revista Română de Dreptul Muncii", no. 2/2004, p. 48-55.

[33] The disciplinary prerogative is specific to the individual labor contract – being non-existent in any other contract.

[34] To be seen I.T. Ştefănescu, *op.cit*., p. 222.

[35] See, in this respect, Al. Athanasiu, C.A. Moarcăş, *Muncitorul şi Legea - Dreptul muncii*, vol. I, Oscar Print Publishing House, Bucharest, 1999, p. 39.

[36] To be seen L. Meugoni, *Le contract de travail en droit italien et le contract de travail dans le droit des pays*, CECA, Luxembourg, 1965, p. 446.

[37] To be seen C.L. Popescu, *Contractul civil de locaţiune a lucrărilor după intrarea în vigoare a noului Cod al muncii,* in „Revista Română de Dreptul Muncii", no. 2/2003, p. 16-21.

Therefore, if at the conclusion of the contract the parties are in a position of legal equality and possibly also economic[38], then the employee is facing the employer in a position of legal subordination.

b). This subordination should not be understood in the sense of servicing the will of the employer's employer, but in the sense of a hierarchical dependence of a disciplinary character[39].

c). However, there are professions/occupations in which subordination can not look at the professional side itself, but only the hierarchical, organizational component (such as, for example, doctors, teachers).

d). Legal subordination is a feature specific to an individual employment contract. In this context, we appreciate that, through Decision no. 2661/2016, delivered at the public hearing on May 23, 2016, the Bucharest Court of Appeal, the Seventh Sect for Causes of Labor Conflict and Social Insurance[40], wrongly stated that the existence of a relationship of subordination is not a unique feature of the contract individual work, but a certain subordination exists in any contractual relationship in which a person undertakes to perform certain activities in favor of another.

In relation to the above, we consider that it was useful to specify what is meant by the phrase *"a certain subordination"* – given that such a feature is established as being of the nature of the individual labor contract in view of the regulations deriving from the international rules of law (adopted by the International Labor Organization), from internal normative acts.

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7. R. Dinitriu, D*reptul muncii. Anxietăți ale prezentului*, Publishing House Rentrop& Straton, Bucharest, 2016;
8. Raluca Dimitriu, *Contractul individual de muncă – Prezent şi perspective*, Publishing House Tribuna Economică, Bucharest, 2005.

[38] As a rule, the parties are not economically equal at the conclusion of the individual labor contract.
[39] See, to that effect, E. Cristoforeanu, *op. cit*., p. 33.
[40] www.juridice.ro. (consulted on 15.10.2017).