

THE MODIFICATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT ASSUMING UNPREDICTABILITY

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Abstract

Adapting a gainful occupation to technological or economical development may require the amendment of individual labor contract under which the activity is performed, taking into account the intrinsic dynamics of employment. If the parties, by agreement, determine the content of the individual labor contract, all in agreement, may agree at any time to amend it according to art. 41 para. 1 of the Labour Code. And through the provisions of civil law – common law for the employment law – are established legal the review of the effects of the legal act due because of the breakage contractual balance due to change in the circumstances envisaged by the parties in the moment of conclusion of the legal act (the so-called theory of unpredictability, rebus sic stantibus) – exception to the principle "pacta sunt servanda". Recourse to the legal document review because its effects are other than the parties agreed to establish and be binding in the moment of conclusion of that agreement. In the present paper we will refer to administrative contracts, given the subject of this paper – namely that the common law for individual employment contract is the civil law rules applicable to civil contracts. So in this paper does not refer to former commercial contracts, since the new Civil Code was achieved unification of private law matter – giving up the commercial contracts.

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A) a). Labor mobility – with the resultant main migration – manifests a great impact on the development of the labor market.

Both the European Union and the International Labour Organization² requires Member States to formulate and implement, as a key objective, an active policy to promote full employment of labor in order to stimulate growth and economic development, raising living standards, to labor needs and to tackle unemployment.

b). The Individual employment contract is governed, in terms of its effects, and the principle provisions of art. 1270³ of the Civil Code, according to which "validly concluded contract has the force of law between the contracting parties."

The principle of "*pacta sunt servanda*", based on respect for moral demands of his word and the need for legal certainty imposed by society, finds its place especially in labor law⁴. Application requires that, whenever possible, the parties agree to maintain throughout the contract performance clauses originally planned.

Obviously, once completed, the individual labor contract can not remain "*frozen*" if, in the meantime, during its execution elements or new requirements arise.

Adapting a gainful occupation to technological or economic change may require individual employment contract under which the activity is performed, taking into account the intrinsic dynamics of employment. If the parties, by agreement, determine the content of the individual employment contract, all in agreement, may agree at any time to amend it according to art. 41 para. 1 of the Labour Code.

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² Art. 3 of the Lisbon Treaty on European Union ILO Convention. 122/1964 – acts that promote the idea of full employment of labor – as a desirable policy objective and economically affordable.

³ Reprinted in "*Official Gazette of Romania*", Part I, no. 505 of 15 July 2011.

⁴ Raluca Dimitriu, *Individual Labor Contract. Present and Prospects*, Economic Tribune Publishing House, Bucharest, 2005, p.21.

During the execution of the individual labor contract, amendment of any of its terms is usually done by agreement, ending an addendum⁵ (written *ad validitatem* – requirement imposed by the amendments to art. 16 of the Labour Code). This provision, contained in art. 41 para. 1 of the Labour Code, no more than a consecration of the principle of compulsory legal act effects.

According to art. 41 para. 3 of the Labour Code, the individual labor contract modification means any of the following: duration of the contract, place of work, type of work, working conditions, wages, working time and rest time. In reality, however, as discussed in legal doctrine⁶, all terms (even unnamed) parties have the force of law, they can not be modified, usually only by their consent.

Exceptionally, the employer⁷ may have legal⁸ unilaterally change the place and/or the type of work⁹ in the following cases:

- delegation (but only in the first period of up to 60 days in 12 months, since the measure is necessary to extend the employee's consent, according to art. 44 par. 1 of the Labour Code);
- posting (but only for the first period of 1 year extension of the measure may be submitted only with the employee, according to art. 46 para. 1 and 2 of the Labour Code);
- in the event of force majeure, even if it was not expressly provided for by the Labour Code, all would have such an effect in the general rules;
- as a disciplinary sanction;
- to safeguard the employee (according to art. 48 of the Labour Code).

The modification of the individual labor contract can unilaterally occur in cases in which the question passing employee to another job¹⁰.

Even if the individual labor contract modification follows a unilateral act of the employer, such an amendment is based on general consent given by the employee prior to the conclusion of the contract.

By changing the individual labor contract must not bring any curtailment of workers' rights are protected by mandatory provisions of law and, as such, exclude any transaction, withdrawal or limitation (according to art. 38 of the Labour Code).

B). The provisions of civil law – common law for employment law – the legal act establishes legal review of the effects¹¹ due to breakage contractual balance due to change in the

⁵ The modification of the individual labor contract can be achieved through certain contractual clauses – which is the content of the contract *ab initio*. Able to incorporate individual employment contract other terms than those covered by regulations is uncertain, arising from the principle of freedom of will, a flexible view on the regulation of labor relations (see, to that effect, Ion Traian Ștefănescu, *Treaty theory and practice of employment law*, ed. II, revised and enlarged, Legal Universe Publishing, Bucharest, 2012, p. 336). A clause has the effect of modifying individual employment contract is the index that consists of regular salary increase commitment (quarterly, annual or other period) at least inflation index (see, to that effect, Ion Traian Ștefănescu, *op.cit.*, p. 345). Consequently, wages are automatically increased in correlation with the cost of living. Indexing can be legal – social protection of employees using a system of wage indexation base percentage to be applied regularly by law, in consultation with trade unions and employers (see, to that effect, Ion Traian Ștefănescu, cited work, p. 596).

⁶ See, in this regard, Ion Traian Ștefănescu, *Treaty theoretical and practical labor law*, ed. II, revised and enlarged, Legal Universe Publishing, Bucharest, 2012, p. 503; Nicolae Voiculescu, *Community labor law*, Wolters Kluwer Publishing, Bucharest, 2009, p. 359.

⁷ Of all labor laws show that the employee may not modify, in any event, unilaterally, individual employment contract, in any of its essential elements. This impossibility is explained by the Labor Code which provides in art. 39. 2 letter b and let. c that employee's obligation to observe labor discipline.

⁸ Șerban Beligrădeanu, "*Limits the right unit to have permanent change of employment through her act unilaterally*", "Romanian Journal of Law", no. 9-12/1989, p. 49-56.

⁹ Moreover, in previous legal practice Labour Code of 2003 shall appreciate in principle, that the change in the individual labor contract on the initiative drive, option subject to restrictive legal regulations, not contrary to the contractual nature of the legal work. See, in this respect, the Court of Appeal Târgu-Mures, sec. civ., dec. no. 610 / A of 26 august 1999.

¹⁰ Ion Traian Ștefănescu, cited work, p. 370-374.

¹¹ Which is a mutually binding contract, for consideration, commutative and sequential execution.

circumstances envisaged by the parties at the conclusion of the legal act (the so-called theory of unpredictability, *rebus sic stantibus*¹²) – exception to the principle "*pacta sunt servanda*".

The parties are required – according to art. 1271 par. 1 of the Civil Code – to perform its obligations, even if their performance has become more onerous or performance of its obligations due to increased costs or the decrease in value of the consideration.

Recourse to the legal document review because its effects are other than the parties agreed to establish and be binding in the moment of conclusion that agreement. The contractual balance must be, first, at the contracting stage and subsequently during its execution.

If the value is obvious disproportion at the moment of conclusion of the legal act are currently lesion – an imbalance original contract¹³. Conversely, when there original contractual equilibrium was initially, but broke after the conclusion of the convention, it is the unpredictability¹⁴.

Article 1271 para. 2 of the Civil Code establishes otherwise legal hearings to review the contract, stating that if performance of the contract has become excessively onerous – thanks to an exceptional change of circumstances which would manifestly unjust debtor ordered the execution of duty – court may order :

- to adapt the contract to distribute evenly between the parties losses and benefits resulting from changing circumstances;
- the end of the contract at the time and under conditions to be determined.

C). We consider that the review of the effects of the legal act is applicable in labor law¹⁵, but only under the following conditions¹⁶:

- changing circumstances have occurred after the the individual labor contract;
- changing circumstances and their scope was not nor have been considered by the debtor reasonably, the moment of conclusion the individual labor contract;
- the debtor does not have risked changing circumstances or can not reasonably be considered that would have taken that risk;
- debtor to be tried within a reasonable and good faith negotiating fair and reasonable adjustment to the individual labor contract.

Review legal effects can occur during the execution of the individual labor contract in the following forms:

a). Labor Code itself contains an exception, a provision which is the application of the rule *rebus sic stantibus*¹⁷, such as art. 23 para. 2 of the Labor Code, upon notification by the employee or territorial labor inspectorate competent court may undermine the non-compete clause. Text not illegal for a clause hypothesis (such as, for example, an indemnity clause) but rather a legal clause, however, due to changes in the facts, has become excessively burdensome for the employee¹⁸.

¹² In the past, in accordance with a decision of the supreme court, unpredictability clauses were deemed inadmissible, considering that they would contravene art. 1085 of the Civil Code that "the debtor does not respond than the damages that were provided or could be provided for the creation of the contract, the failure of his willful misconduct does not come from" (SC, s.com., dec. no. 591/1994, in the "Jurisprudence – 1994", p. 243); see, in this respect, Gabriel Boroï, *Civil Law. General part. People*, All Beck Publishing House, Bucharest, 2001, p. 207.

¹³ Liviu Pop, *Treaty elementary civil law. Obligations under the new Civil Code*, Legal Universe Publishing, Bucharest, p. 154.

¹⁴ *Ibidem*.

¹⁵ Ion Traian Ștefănescu, Șerban Beligrădeanu, "Analytical Overview of correlation between the New Civil Code and the Labour Code", "The Right", no. 12/2009, p. 43.

¹⁶ Expressly provided in civil contracts for art. 1271 par. 3 of the Civil Code.

¹⁷ Raluca Dimitriu, cited work, p. 211-212.

¹⁸ *Idem*, p. 212.

Are now united judicial review if the individual labor contract for unpredictability - that may occur in other situations set of practice.

b). Adapting the contracts new economic reality and money aiming at the restoration of the contractual balance is available to the contracting parties¹⁹. They can do so in advance – as a precaution – the clause expressly stipulated in the employment contract. Such clauses are called index – fully valid, if not violate public order and morality²⁰.

Thus, the parties may agree in its collective agreement applicable and/or the content of the individual labor contract wage indexation clause – which appears as a possible response to unpredictable or imbalance that can occur between contractual benefits due price increases²¹.

c). The legislator may interfere in contracts to dispose modification of terms – in order to restore equilibrium contract.

In this respect, mandatory rules may be proceed to reassessment benefits which owes parties, including their indexing unpredictable²².

Social protection of employees, under inflation, using an indexing system based on the percentage of salary²³ that can be applied to time by legislation, in consultation with trade unions and employers²⁴.

When it comes to indexing measures, they are binding only for employees paid from public funds – otherwise, indexation is granted or not based on financial and under union or employee representatives dialogue – employer²⁵.

The protection of employees with increasing prices and rates can be achieved and the way the salary income tax reduction²⁶.

d). In addition to indexing terms, contracting parties may agree ab initio to stipulate individual employment contracts so called review clause²⁷ - which the parties undertake to review the employment contract if you break the contract balance due to objective factors such as economic and monetary.

The review clauses differ by the indexation clauses, the latter operates automatically by operation of law without any further formality, while, conversely, review clauses have the effect of only the obligation of the parties to review the contract terms to do – then when conditions are met – the reassessment contract²⁸.

e). In the absence of indexation clauses and review, the parties of the individual labor contract are able to carry out rehabilitation work for the unpredictability with their consent. Thus, changing any contractual elements can not be decided unilaterally by one party or the court²⁹.

Bibliography

¹⁹ Ion Albu, “Current issues regarding judicial reassessment of claims, conventional indexing and indexing pecuniary interest obligations”, “The Right”, no. 1/1994, p. 49-53.

²⁰ Liviu Pop, cited work, p. 155.

²¹ Ion Traian Ștefănescu, cited work, p. 596; Eugen Chelaru, “The Binding force contract theory, unpredictability and the competence in the courts ” The Right”, no. 9/2003, p. 49-50.

²² Liviu Pop, cited work, p. 152.

²³ In addition to indexing was used as a lever for social protection and individual wage compensation was, like process in regular award by the Government of a fixed amount each employee; see Ion Traian Ștefănescu, cited work, p. 596, note 2.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ Ion Albu, cited work, p. 44-54.

²⁸ Liviu Pop, cited work, p. 155.

²⁹ Raluca Dimitriu, cited work, p. 212.

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