THE EFFECTS OF THE COLLECTIVE LABOR CONTRACT

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Abstract
The modifications operated on the first part of year 2011 over the work legislation (by Law no 40/2011 for the modification and completion of Law no 53/2003 – Labor Code, and by Law no 62/2011 of the social dialogue) assumed interventions over some regulation solutions which, in time, had shaped as constants of the specific standardization. Concurrently, new institutions received a legal commitment, whose validity shall be confirmed or, on the contrary, infirmed by the practice of the individual reports and of the working collectives. Not at last, there is to be remarked also the taking over – with minor changing, most of the times of terminological nature – of previous solutions, which proved their utility within the practice of the working juridical reports.

Keywords: *social dialogue; labor collective contract, effects of the contract, extension of the labor contract's effects, collective agreements, opposability of the collective labor contracts*

Introduction

One of the most important juridical institution in the field of the labor law is the social dialogue. The framework of the collaboration between the social partners is the same both international and national level. Since 1919, when International Labor Organization (ILO) was founded, the dialogue between workers representatives, employers' representatives and Governments were a constant concern in order to keep – or restore – the social peace.

Social dialogue is possible only when certain conditions are fulfilled[1]:

- Strong independent workers' and employers' organizations with the technical capacity to access relevant information for participating in social dialogue;

In article 3 paragraph 5 of the ILO Constitution there is a reference to organizations which are "most representative". Also Article 3 (a) of the Collective Bargaining Recommendation 1981 (No 163) enumerates "the recognition of the representative" employers' and workers' organizations as a mean of promoting collective bargaining. Consequently, social dialogue is only possible between strong partners. An employer would be unlikely to consider negotiation otherwise.

- Political will and commitment to engage in social dialogue on behalf of all the parties; social dialogue is only possible if the parties are, to some extent, willing to sit around the table;
- Respect for the human rights of freedom of association and collective bargaining; freedom of association and collective bargaining are the two cornerstones of social dialogue;
- Appropriate institutional support.

Social dialogue assumes interferences on behalf of the authorities. Even if they did not participate in social dialogue, "measures appropriate to national conditions (should) be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements" – Article 4 of ILO Convention No 98.

The base of the social dialogue – at the national level – is the relation between the (individual) employer and its workers. The content of the social dialogue at this level implies the consultation, the information, the negotiation and the agreement between the parts.

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[1] See Mark Rigaux, Jean Rombouts (eds.), *The Essence of Social Dialogue in (South East) Europe. A primary comparative legal survey*, Intersentia, Antwerpen – Oxford, 2006, p. 3-4.

1. A. Law no 62/2011 of the social dialogue[2] regulates under the title of „the effects of the collective labor contracts" (name of Chapter II of the 7th Title – "Work collective negotiations") the means of applying the clauses of the collective labor contract in terms of the ending level. Hence, according to the article 133 paragraph (1) from the law: „The clauses of the collective labor contracts produce effects as following:

a) for all the employees within the unit, in case of the collective labor contracts concluded at that level;

b) for all the employees hired in the units that belong to the group of units for which the present collective labor contract has been concluded;

c) for all the employees hired within units belonging to the field of activity for which the collective labor contract was concluded and who belong to the employer's organizations, subscribers of the contract".

We mention that *the collective negotiation within the enterprise is compulsory*, except when the enterprise has less than 21 employees. The employer's refusal to negotiate may lead to a collective labor conflict. When the employer does not initiate negotiation, this takes place at the request of the union or the employees' representatives, within 15 days from the date of submitting the request. In Romania, as in most European States (except United Kingdom), negotiation at the enterprise level is used to complement the collective agreements concluded for the sector as a hole[3].

But, the employer's obligation to negotiate does not mean that the conclusion of the collective contract is a mandatory effect of the negotiation. The parts could agree to conclude a contract or not to conclude a contract (to postpone the negotiation for at most 12 month). If they do not agree, a collective labor conflict could be started.

Collective negotiation at the sector level[4] *at the level of groups of enterprises* is carried out between the representative trade unions and the representative employers' organizations. Whilst quantitative matters (wages and hours) are still regulated mainly by way of collective labor agreement at enterprise level, there is a tendency to shift to agreements at sector level.

B. Analyzing the legal text – article 133 paragraph (1) –, it results that there cannot be any interpretation and application problems regarding the opposability *erga omnes* of the effects of the collective labor contract concluded at the unit's level: the clauses of this contract are applicable to all the employees from that particular unit, including to those who:

- having the statute of employee of the unit at the moment of negotiation and conclusion of the collective labor contract, were not represented by the specific representation forms [the representative syndicate or the representatives of the employees, or the syndicate federation representatives where the non representative syndicate is affiliated to *together* with the representatives of the employees – art. 134 point B letter a) correlated with art. 135 paragraph (1) letter a) from Law no 62/2011];

- acquire the statute of employee of the units, subsequent of the conclusion of the collective labor contract, anytime during its validity term [presently, determined by art. 141 paragraph (1) and (2) from the law][5].

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[2] Published within the Romanian Official Monitor, part I, no 322 from May 10th 2011.

[3] See Mark Rigaux, Jean Rombouts (eds.), *op. cit.*, p. 208. 933 from December 29th 2011.

[4] The sectors of activity were regulated by the Government Decision no 1260/2011, published within the Romanian Official Monitor, part I, no.

[5] See I.T. Ştefănescu, *Theoretical and practical paper for labor law,* Universul Juridic Editor, Bucharest, 2010, p. 173.

C. Still, regarding the effects of the clauses of the collective labor contracts concluded at higher levels, it is necessary, in our opinion, in order to establish a correct area of manifestation of the opposability of the collective contractual clauses, the correlation of letters b) and c) of article 133 paragraph (1), on one hand, with the dispositions of art. 143 paragraph (4) and paragraph (5) and of art. 136 paragraph (2) from the law, on the other hand.

Art. 143 paragraph (4) from law no 62/2011 establishes as an express request that, for the collective labor contracts concluded at the units group's level and, respectively, area of activity, the file made by the parties in order to register the contract within the Ministry of Labor, Family and Social Protection, must also comprise "the list of the units for which the contract is applied..."[6]. It results, *per a contrario*, that it is accepted the existence, either within the group of units, or within the area, of the activity of some units – the employers – to whom the clauses of the collective labor contract concluded at that level, are not opposable. The effects of the collective labor contract would be limited, as applicability, only for the employees of the units highlighted on the list found within the file made for the registration[7].

In case the collective labor contract concluded at the level of the sector of activity, the solution we highlighted is confirmed also by the option of the legislator expressed in 143 paragraph (5) from the law (text on which we have developed a number of ideas *infra*, point 3 of the present material). To the extent that the effects of the collective labor contract concluded at the activity sector level, it would presume the application of clauses of the contract of all units from that respective sector and their employees; it would have no procedure justification for the extension of the contract by ordinance of the ministry of labor, family and social protection. But, as a result of this extension – operated administratively and normatively – the collective labor contract concluded at the level of the activity sector acquires *ope legis* a character of opposability *erga omnes*.

For the hypothesis of the collective labor contract concluded at group level of units, the highlight of the group units to whom that contract applies is justified only in case the group was *not* made only for the negotiation (and conclusion) of the contract at this level. The solution comes from the interpretation *per a contrario* of art 143 paragraph (2) letter d) from Law no 62/2011, in which it is expressly highlighted the situation of constituting the group of units „only for negotiating a collective labor contract at this level". Hence, the group of units:

- can be constituted into one of the modalities mentioned in art. 128 paragraph (3) the second thesis from the law (voluntarily, the cause of the constituting agreement being the negotiation of the collective labor contract itself);

- can be constituted independently of the manifestation for a negotiation intention for the collective contract, this manifestation of the group being achieved, at a certain point, during its existence (for example, we highlight in this second category the association mentioned by art 41 from the Emergency Ordinance of the Government no 34/2006 regarding the attribution of public acquisition contracts, of the concession contracts for public works and services concession contracts).

Within this last situation, it is possible that one or more units from the group wish not to participate at the collective negotiation. The collective labor contract concluded following the getting through the negotiation step, *shall not apply* within those units [which did not give express mandate to the representatives art 136 paragraph (1) from the law refers at].

We underline that, no matter the manifested situation – from those presented above – if the member unit of the group or found within the domain of activity is highlighted on the list found

[6] See A. Ţiclea, *Paper on labor law*, 5th edition, revised, Universul Juridic Editor, Bucharest, 2011, p. 251.

[7] We highlight that under the action of the previous regulation – art. 13 from Law no 130/1996 – the solution was the same: the collective labor contracts concluded at the level of the field of activity were applicable in the units mentioned in the contract, respectively in the component units of the established field and mentioned by the parties negotiating the contract (at branch level).

within the file made in order to be registered, the effects of the contract shall produce for all the employees of the respective unit.

2. As a particular expression of the principle *pacta sunt servanda*, regulated as a common norm rule by art. 1270 paragraph (1) Civil Code, article 148 paragraph (1) from Law no 62/2011 stipulates that the execution of the collective labor contract is compulsory for the parties. According to the paragraph (2) of the same article, "the lack of fulfillment of the obligations assumed by the collective labor contract attracts the liability of the parties which are to be blamed for it".

The compulsory effects of the contract, which assume a specific conduit of its parties in executing the obligations that come up, lead to the contractual liability of the party who fails to fulfill its duties.

If this party is the employer himself, we believe that the other party – *the employees as a collective* (article 134 from the law) – can act in front of any Court requesting the obligation of the unit to respect the contractual frame.

Even if the legislator suppressed any reference to what under the rule of the previous regulation (Law no 168/1999 regarding the solution of the working conflicts) constituted in *collective right conflict*, we believe that art. 148 paragraph (2) from Law no 62/2011 bases the procedural approach of the *employees* (represented or not by the syndicate or in other form of representation) to act this way.

In our opinion, it is not justified the option found in practice to disjoint such a cause in so many files as the number of the employees having the quality of complainants, especially given that the obligation of the employer – expressing, correlatively, the subjective right of the employees – it has as a single source the collective contract (not being "disseminated" in the individual labor contracts).

3. Article 143 paragraph (5) from Law no 62/2011 decides:

„In case it is fulfilled the condition mentioned in paragraph (3), the application of the collective labor contract registered at the level of all units from the sector, by ordinance of the ministry of labor, family and social protection, with the approval of the Tripartite National College, on the basis of a request addressed to it by the subscribers of the collective labor contract at sectorial level".

Regarding this text, the following ideas can be expressed:

- the approach of the extension belongs *solely* to the subscribers of the collective labor contract; we believe that the request should be submitted to the ministry by *all the signatories of the contract*, and not by *one part* of them;

- the approval of the Tripartite National College represents a *letter of conformity*; it represents a condition of legality (validity) of the expansion paper, being necessary – even if the text does not distinguish – its expression previous to the issue of the ministry's ordinance;

- the expansion document is, from the juridical point of view, an administrative normative paper, which can be contested during the procedure regulated by Law no 554/2004 of the contentious administrative; the active standing in such a cause belongs, hypothetically, to any unit *over which* the expansion is being done;

- the extension cannot be achieved for the collective labor contract concluded at the level of units.

4. Although it is not aimed at the factual effects of the collective labor contracts, we appreciate that it presents interest, within a larger context of the analysis of the effects provided by the collective conventions, and article 153 from Law no 62/2011 that rules:

„According to the principle of mutual recognition, any trade union organization legally constituted can conclude with an employer or with an employer's organization any types of

agreements, conventions or understandings, in written, that represent the law of the parties and whose provisions are applicable only for the members of the signatory organizations".

The quoted norm raises the problem of identification of the elements of content of such agreements, conventions or understandings which – from the perspective of the effects they produce – are totally governed by the principle of relativity of the contract's effects (article 1280 Civil Code), unlike the effects of the contracts or of the collective labor agreements. So to say, is it possible that by means of such juridical papers to be established certain elements of content common with the ones of the labor collective contracts or agreements ("*clauses regarding the rights and obligations that come up from the labor relations*"), or it must be delimited the content of the collective contracts or agreements from those of the juridical documents it was made reference to by means of art. 153 from Law no 62/2011?

We believe that the second solution is the correct one. We start our argumentation from the premise that a superposition would not be justified – logically and juridical – even a partial one, between the content of the contract or from the collective labor contract and those of the juridical documents named in article 153 from the law. The latest have a distinct content, negotiating and elements of agreement being able to be determined *analytically* by reporting to the attributions of the syndicate attributions, regulated by article 25 and art 27 – 31 from Law no 62/2011, other than those which target the labor relationships of the employees and of the employers.

There can be, hence, determined – without the enumeration to be exhaustive - the following domains of negotiation and agreement which bring content to the juridical papers mentioned by article 153 from the law:

- the material support of the syndicate members in exercising the profession, to which, hypothetically, the employer participates too;
- the setting up of aid houses for the syndicate members, to which the employer contributes;
- commonly editing and printing own publications;
- setting up and administration, in common, within the legal conditions, for the benefit of the syndicate members, of social, culture, study and request units in the domain of syndicate activity, commercial companies, insurance companies as well as the bank;
- setting up of funds for helping the syndicate members, with the participation of the employer;
- organizing and support for the material and financial issue in common of the cultural – artistic activity;
- organizing and developing, in common, of preparation courses for professional qualification, in the conditions of the law;
- drawing up/or promoting in common of certain legislation proposals.

Synthetically, the content of the agreements, conventions or understandings evoked by article no 153 from Law no 62/2011 can be determined as following: according to the principle of contractual liberty, the syndicate organizations can conclude with the employer or with an employer's organization, a juridical bilateral document by which it is established – in full compliance with the principle of the specialization of the usage capacity of the juridical person – clauses related to any area of activity except those related to the labor relationships of the employees and employers.

5. A collective labor agreement has similar binding effect to a law, at the level at which it was concluded, for its parts, and the lower levels. At the ground level, as a rule, it is therefore compulsory not only for those that signed it, but for all employees working for that employer.

The general binding nature represents a significant exception from the principle of agreements, relativity of common right, as well as from the principle of freedom of will. That is why criticism was sometimes formulated with regard to the doctrine postulating that if a collective labor

agreement has not been concluded at a certain level, the provisions of the labor law should become directly applicable.

The actual regulation having object the effect of the collective labor contract and other collective agreements has the merit that clarify – as we already have presented – some issues occurred while the previous regulations were applied. But, there are some parts which still need some clarification, because the practice of the collective labor relations has to activate on a clear legislative framework. We are referring especially to the institution of the extension of the collective labor contracts' effects – concluded at the sector level of activity – to all the employers activating in that sector.

Conclusion

The legal framework of the social dialogue implies specific rules of law. It is mandatory for such regulations to be as close as possible to the social partners, in order not to make more difficult the social dialogue.

De lege lata, it is clear that the effects of the labor contract are general at the employer's level. At the level of group of units and activity sector, the effects occurring only the parts of the contracts.

Another important aspect is the elimination of the collective labor contract at the national level.

The trade unions can conclude with the employer or with an employer's organization, any juridical bilateral document by which it is established. Its clauses are related to any area of activity except those related to the labor relationships of the employees and employers. The effects are produced only to the parts of the accord.

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