
***DISCUSSION ON THE INSERTION OF AN ARBITRATION CLAUSE IN INDIVIDUAL
LABOUR CONTRACT***

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Abstract: Many optional clauses, although are not covered by the Labour Code and labour law as special provisions they may be used in practice.

On those terms, in the context of relieving the courts, is of a real interest the discussion if it is possible an arbitration clause (arbitration) that the individual labour contract parties undertake to settle by arbitration disputes which may arise between them.

However, we believe that we can not exclude de plano the existence of an arbitration clause in individual employment contract provided that they do not seek the waiver of a right by the employee, such as for clarifying the meaning of some clauses of the individual labour contract and not by the employer, which may give, for example, of a claim for compensation from his employees. It requires that the legislature, restricting the scope of art. 38 of the Labour Code to the rights established by law, and not those recognized by law, as currently - to govern by a rule of principle, contained in the Labour Code, possibility of solving any individual labour dispute by alternative means such as arbitration as it does on collective labor disputes .

Keywords: arbitration clause, individual labour contract, individual labour dispute.

1. Introduction

Any employment contract contains¹ two types of terms: essential clauses which are included in all contracts and covenants, the latter forming the conventional left to the agreement of the parties, but with legal compliance, of the collective agreement, public order and morality.

The insertion of such clauses in individual employment contract content "is not legally possible, penalty that comes being the nullity of the contract either wholly or that clause," for example², the clause that would prohibit law parties to address the court³.

But many optional clauses⁴, although not covered by the Labour Code and Labour Law as special provisions may be used in practice.

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¹ Dan Țop *Employment Law - Social Security Law*, second edition, Bibliotheca Publishing House, Târgoviște, 2013, p 121

² D. Moțiu, *Individual law of labour*, Bucharest, CH Beck Publishing House, 2011, p. 143

³ Radu Popescu *Labour Law. University Course*, Universul Juridic Publishing House, Bucharest, 2011 p 83

⁴ Alexandru Țiclea, *Treaty of Labour law*, Universul Juridic Publishing House, Bucharest, 2012., p. 419.

On those terms, in the context of relieving the courts, the discussion if possible an arbitration clause is important(arbitration) that the individual labour contract parties undertake to settle by arbitration disputes which may arise between them.

2. The arbitration agreement effects

The main effect of the arbitration agreement is the exclusion of jurisdiction of the court which would be, in the absence of the arbitration clause, jurisdiction to resolve the dispute between the parties. It must be stressed however that this is not a definite exclusion of the jurisdiction of state courts, because to admit otherwise it would be a violation of free access to justice.

There are exempted, to be subject to the arbitration clause, according to Art. 542 para. 1 of the Civil Procedure Code, disputes concerning rights which the parties may not dispose. It might say that, given the provisions of art. 38 para. 2 of the Labour Code, according to which, the employees can not waive their rights which are recognized by law. Any transaction that seeks waiver of rights recognized by law or limit these rights is invalid ", an arbitration clause is inadmissible, at the conclusion of the individual labor contract negotiations and its subsequent insertion through an addendum in such a contract, according to art. 549 of the Code of Civil Procedure.

In legal literature it was noted that, unlike the collective labour conflicts, individual labour disputes can not be resolved by arbitration"⁵ court intervention to ensure balance between the mutual benefits of the parties⁶, being the only way of resolving conflicts between parts of the individual employment contract.

However, we believe that we can not exclude de plano the existence of an arbitration clause in individual employment contract provided that they do not seek the waiver of a right by the employee, such as for clarifying the meaning of clauses of the individual labor contract and not by the employer⁷, which may be waived, for example, that a claim for compensation to his employees.

An arbitration clause may produce legal effects in the event of a finding of invalidity of the individual employment contract; Possible situation given that art. 57 para. 6 of the Labour Code provides, nullity and establishing, by law, its effects by mutual consent "⁸.

They could not understand how it would be possible conflict mediation of the rights the parties may have to resolve labour disputes, according to art. 73 para. 2 of Law no. 192/2006 on mediation and the mediator profession⁹ and an arbitration same thing tends to be inadmissible.

Extraprocesual mediation agreement obtained can be subjected to scrutiny by the court as art. 59 paragraph 2 of Law no. 192/2006, shows that the parties may appear before the court to ask them to make a decision to sanction the deal. Since it can resolve an individual

⁵ Onica Chipea Lavinia, *Legal regime of individual labour conflicts*, Universul Juridic Publishing House, Bucharest, 2012, p 99

⁶ Raluca Dumitriu, *Perspectives on the subject of labour and its delimitation from other branches of law*, in Dreptul no. 3/2014, p 105-119

⁷ Onica Chipea Lavinia, p 114

⁸ Dan Țop *Employment Law- Social Security Law*, first edition, Bibliotheca Publishing House, Targoviste, 2012, p 152.

⁹ Published in the Official Gazette, Part I, no. 831 of December 3, 2009

labour conflict, of course not involving legal rights through an alternative route such as mediation, it can not be seen why such a conflict resolution can not be subject to an alternative route namely arbitration.

It should be noted that unlike the conflicts of rights, collective labor conflicts can be resolved by alternative pathways regulated by art. 166-180 of Law. 62/2011, social dialogue¹⁰, among them being and arbitration.

3. The arbitration procedure

The arbitration procedure is a special procedure, rules governing it having a strict interpretation and application, the Arbitral Tribunal is notified by the claimant, which means it can not be seized by the declination of jurisdiction by a court. „ Only when in the arbitration clause, as special procedure it is not passed the arbitration court incompetence material can not be waived and therefore decline jurisdiction.”¹¹

To the extent that, in conducting the arbitration proceedings, it appears the need for regulations that lack both from the arbitration agreement and from the common law of arbitration (...), the arbitrators may draw on relevant rules of civil procedure¹².

Fixing the first hearing in the arbitration proceedings shall be after reading the written stage, better said after checking the preparation stage of the proceedings or, where applicable, after completion of the file.”¹³

The arbitral award shall be enforceable and forecloses just like a judgment, according to art. 615 of the Code of Civil Procedure

If we admit the possibility of such a clause, category permissive rules seems to be practically useless, because the Romanian private law rule, which is not prohibited is allowed without the need for a special rule governing this permission. "It is axiomatic that the current Romanian law, the law does not prohibit everything is permitted.”¹⁴ Being so well positioned employee is not prohibited by law so allowed.

In legal literature, without referring strictly to arbitration, it was expressed the view that both parties of the individual labour contract and the service of the report, so all employees and employers who do not want to settle individual labour conflict by judicial process they can settle it by themselves ...”¹⁵

¹⁰ Published in the Official Gazette, Part I, no. 322 of 10 May 2011, as amended and supplemented.

¹¹ Ploiești Court of Appeal, Civil Decision no. 61/19.01.2010, jurisprudența.com

¹² A. Severin, *Considerations on regulatory arbitrage in the New Civil Code of Procedure status, with special regard to institutional arbitration*, in Dreptul no. 1/2011, p 45

¹³ Maria Fodor, Corina Florența Popescu, *First hearing in the civil.Fixing and practical consequences* in Pandectele Romane no. 2/2014, pp. 45-62.

¹⁴ Alexandru Țiclea, *The opportunity of the employer to revoke his decision to dismiss* in Romanian Journal of employment, no. 2/2014, pp. 15-20

¹⁵ Ana Stefanescu, Laura Georgescu, Corneliu Bențe, *Some considerations on amicable negotiation in individual labour conflicts - with and without mediation* in the Romanian Magazine of Labour Law no. 2/2014

Any transaction that would establish rights below those required by law or applicable collective labor contract is absolutely void because, as expressed in the doctrine¹⁶, the legislature does not prohibit waiver of a right won, but only giving up its right given by the law, that only the minimum of a right.

On the other hand, ...as long as the law does not prohibit, it is acceptable that are allowed transactions on employer rights and the exercise of these rights."¹⁷ According to the view¹⁸ according to which some categories of issues regarding labour rights, can do, in case of conflict, the mediation subject, they can do just as well the subject to arbitration.

Arbitration can be effective in individual rights conflict concerns only rights that employees exclusively through the individual employment contract or where the dispute occurs only when an alleged violation of a right granted by the individual employee's employment as a result of individual negotiation, granting of rights covered by law or collective agreement or to establish a higher level than that established in rights in Labour law - law and collective agreement."¹⁹

For labour law, common law is civil law and consequently civil procedural law²⁰. In this respect it should be noted that Article 216 of Law no. 62/2011, social dialogue law²¹ states that its provisions on the procedure for resolving individual labour conflicts appropriately is complemented by the Code of Civil Procedure.

Finally we have to highlight the application in practice to arbitration on labour rights, for example, no.93/29.10.2007 handed down by the Court of Arbitration of the National Union of Handicraft Cooperatives - UCECOM.²²

Art. 38 of the Labour Code does not apply²³ to employee rights whose legal source (obligational) is exclusively individual employment contract, excluding the rights expressed which are the expression are those provided by collective agreement.

4. Conclusion

It requires that the legislature, restricting the scope of art. 38 of the Labour Code to the rights established by law (and not those recognized by law as currently)²⁴ - to govern by a rule of principle contained in the Labour Code, possibility of solving any individual labor dispute by alternative means such as arbitration as it does on collective labor disputes.

Also, the ferenda law courts of arbitration may be established and operated , in addition to Labour inspectorates.

¹⁶ Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Labour Code. Comment on articles*. Vol I. Articles 1-107, C. H. Beck, Publishing House, Bucharest, 2007, p 190.

¹⁷ Cristina Casian, *Mediation in labour relations* in Romanian Journal of Private Law, no. 3/2013

¹⁸ Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, op. cit., vol II, 2011, p 442.

¹⁹ Cristina Casian *art.cit. over*

²⁰ Alexandru Țiclea, *The necessity of codification of laws on labour jurisdiction* in Romanian Review of Labor Law, no.3/2012, p 24.

²¹ Republished in the Official Gazette, Part I, no. 625 of 31 August 2012.

²² Court of Appeal Bucharest, Civ. sent.No 55/2008, portal.just.ro

²³ Cristina Cassian *art.cit. over*

²⁴ Ion Traian Ștefănescu, *Theoretical and practical Treaty of Labour* Universul Juridic Publishing House, Bucharest, 2012, p 890