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**The Relationship between the Employment Contract and other Civil
Contracts**

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Abstract: The employment relationship is a contractual one and as such must have all the basic elements of an enforceable contract to make it legally binding. In strict contractual terms, the offer is made by the employer and formally accepted by the employee. Once the acceptance has taken place, there is a legally binding agreement and an action will lie against the party who breaches that agreement, even though it may only just have come into existence. An employment contract, however, is unlike most other contracts. Although the parties will have negotiated the main terms, we shall see that a large number of terms will be implied into the agreement from all sorts of different sources and will not have been individually negotiated by the parties at all. This is what makes an employment contract so different from other contracts. We think this article is an important step in the disclosure of the problem raised by these two concepts.

Keywords: civil contract; mediation; volunteer; solidarity agreement

A. The relationship between the individual employment contract and the service provision civil contract

Both in the specialty literature² and, especially, in practice, occurs the question related to the possibility to still conclude civil contracts for the provision of certain activities, in the conditions in which the present Civil Code no longer refers to the service provision civil contract, as the old Code did in art.1470 para.1 and art.1413.

Still, we consider that it continues to be possible to conclude service provision civil contracts, for certain activities, especially with occasional character and excluding the subordination relationship between the provider and the beneficiary of the work, on the grounds of the regulations in civil law (and not based on the Labour Code), relying on the following arguments:

- the civil contract is one of the basic institutions of civil law, representing the common root for other types of contracts;
- the current Civil Code allows the existence of unnamed contracts (art.1168), and then, the listing of certain types of contracts is not exhaustive (art.1171-1177 and art.1650-2278);

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² See (Țiclea, 2014, pp. 356-358)

- also the Civil Code in art.1277 states: *the contract concluded for undetermined period can be unilaterally denounced by either party, with the observance of a reasonable prior notice term; any contrary clause or the stipulation of a provision in exchange for denouncing the contract is considered to not be written;*
- there continues to exist a series of normative acts that establish the provision of work on the basis of civil agreements, respectively:
 - o art.10 para.3 of Accounting Law no. 82/1991¹ specifies – accounting can be organized and managed on the basis of service provision civil contracts, concluded with authorized individuals or legal entities;
 - o Law no. 51/1995 for the organizing and exercising the profession of attorney² establishes the possibility that in the individual cabinets, as well as in the professional civil societies, collaborating attorneys are able to perform their activity on the grounds of collaboration civil contracts (art.5 para.2 and 5);
 - o Art.14 para.2 of Law no. 69/2000 of physical education and sports³ establishes the fact that the athlete must conclude with the sports structure, in written form, an individual employment contract or a civil agreement, in the conditions of the Civil Code;
 - o Art.12 of Law no. 195/2000 regarding the establishment and organizing of the military clergy⁴ stipulates the fact that in order to cover religious assistance needs in the structures of the armed forces there can be employed clergymen from the cult units, on the basis of service provision civil agreements;
 - o Art.12 para.3 of Government Ordinance no. 21/2007 regarding the public institutions of shows and concerts⁵ establishes that, in order to execute artistic productions, these institutions can use technical and administrative staff remunerated on the basis of service provision civil agreements, according to the dispositions in the Civil Code.
 - o Art.8 para 1 and 2 of Government Expedite Ordinance no. 9/2001 regarding certain measures in the field of culture and art, cults, cinematography and copyright⁶ establishes that the members of the National Commission for Historical Monuments, of the National Commission for Museums and Collections, of the National Archeology Commission, of the Council of the National Cultural Fund, of the Consultative College of the National Centre for Cinematography, as well as of other specialty commissions established attached to the Culture Ministry, have the position of collaborator and can perform their activity by concluding civil agreements, in the conditions of the law, these agreements being concluded for the term for which the members are appointed to the specialty commissions, but not more than one year, with the possibility to extend them;
 - o Art.4 of Government Decision no. 34/1999 regarding the establishment of the Romanian Language Institute⁷ stipulates that the members of the institute's coordination council will be paid on the basis of service provision civil agreements;

¹ Republished in the Official Gazette no. 454 of 18 June 2008, with the subsequent modifications;

² Republished in the Official Gazette no. 98 of 7 February 2011, with the subsequent modifications;

³ Published in the Official Gazette no. 200 of 9 May 2000, with the subsequent modifications;

⁴ Published in the Official Gazette no. 561 of 13 November 2000;

⁵ Published in the Official Gazette no. 82 of 2 February 2007, with the subsequent modifications;

⁶ Published in the Official Gazette no. 35 of 19 January 2001, with the subsequent modifications;

⁷ Published in the Official Gazette no. 30 of 27 January 1999, with the subsequent modifications (including Government Decision no. 1411/2009, Published in the Official Gazette no. 830 of 3 December 2009).

- On the basis of Law no. 8/1996 regarding copyright and connected rights¹ - all authors.

In the specialty literature², there was expressed the opinion according to which "it is possible, with personal title and not only for certain professions/functions indicated in special laws, to conclude a service provision civil agreement instead of an individual employment contract, even though such a regulation is no longer legally established, expressly, as an exception from the rule of employment only on the grounds of an individual employment contract or on the basis of another labour legal relation".

In practice, there is a series of similarities, but there are also differences between the individual employment contract and the service provision civil agreement.

The similarities are the following:

- both contracts are bilateral, respectively employee – employer or provider– beneficiary;
- both contracts presuppose the performance of an activity (labour), which represents the object of the contract;
- the labour is performed by an individual, called either employee or provider;
- labour is remunerated, in both cases, by the employer, respectively beneficiary;
- in all cases, the employee/provider puts his work capacity to the disposal of the employer/beneficiary;
- the income tax is withheld and transferred for both types of contracts.

The differences are the following:

- only the individual employment contract confers the capacity of employee to the person providing the work, with all its consequences: only that person will benefit of a wage, while the provider will benefit of an indemnity (remuneration), of work seniority and will be in a subordination relationship with respect to his employer, while in the case of the service provision civil agreement the two parties are on equal positions;
- the employee's liability is disciplinary or patrimonial, while the service provider's liability is civil;
- the social security contributions, except the health contribution, are usually owed only for individual employment contracts.

In practice, it was noticed that in very many situations, the employers prefer to conclude service provision civil contracts or copyright assignment contracts (art. 39 of Law no. 8/1996), on the one hand, because in this way they will not be obliged to ensure the social protection conferred to an employee through the individual employment contract, on the other hand, due to the advantages of a fiscal nature that a civil contract entails.

Indeed, the income tax will be withheld and transferred for any type of contract (civil or employment), but the social security contributions, except the health contribution, are usually paid only in case of the individual employment contract. Still, according to the fiscal regulations, there is a possibility that, in the situation when the fiscal or labour inspection authorities establish that a service provision civil contract or a copyright assignment contract disguises, in reality, a labour legal relation, the activity being provided regularly, being a matter of successive, remunerated performances, the contract will be re-qualified as an individual employment contract.

¹ Published in the Official Gazette no. 60 of 26 March 1996, with the subsequent modifications (including Law no. 255/2013 Published in the Official Gazette no. 515 of 14 August 2013).

² See (Beligrădeanu, 2013, p. 249)

B. The relation between the individual employment contract and the volunteering contract

The basis of the matter is represented by Law no. 195/2001 which establishes the possibility for the interested persons to conclude a volunteering contract¹.

According to art. 2 of Law no. 195/2001, volunteering is the public interest activity performed out of one's own initiative, by any individual, to the benefit of others, without receiving in return a material counter-performance; the public interest activity can be performed in the following fields: social assistance and services, human rights protection, medico-sanitary, cultural, artistic, educative, teaching, scientific, humanitarian, religious, philanthropic, sportive, environmental protection, social and communitarian etc.

The principles at the basis of volunteering are listed in art. 3 of Law no. 19/2001, respectively:

- participation as volunteer, on the basis of freely expressed consent;
- exclusion of any material compensation from the beneficiary;
- participation to the volunteering activities is done on the basis of equal chances, without any kind of discrimination;

Also, any volunteer activity performed isolated, rarely, for reasons of family, friendship or good neighbor spirit does not make the object of this regulation.

We must take into account a very important aspect of the volunteering contract, such as it cannot be concluded for the purpose of avoiding the conclusion of an individual employment contract or of a service provision civil agreement or of any other type of onerous contract (in this case, the volunteering contract falls under the provisions of absolute nullity).

According to art. 9 of Law no. 195/2001, the volunteer has, on the one hand, the following rights:

- to perform the activity according to his/her availability and capacity;
- to have ensured by the host organization of the activity the legal labour protection conditions; any damage suffered by the volunteer during the running of the volunteering activity is fully incurred by the host organization, if it was not determined by the volunteer's fault;
- the issuance by the host organization of the nominal certificate which recognizes the performance of the volunteering activity, as well as the experience gained;
- depending on the agreement between the host organization and the volunteer, it may be agreed that, in the conditions agreed in the contract, the host organization may reimburse the expenses incurred for the performance of the activity.

At the same time, he/she has, on the other hand, a series of obligations, respectively:

- to fulfil the duties received from the host organization;
- to keep the confidentiality of the information he/she has access to during the volunteering activity;
- to attend the training courses organized, initiated or proposed by the host organization for a better performance of the activity;
- to be liable for the moral or material damages caused to the host organization during the volunteering activity, due to his/her fault (art. 10).

¹ See (Naubauer, 2007, pp. 118-124)

Also, the liability for not executing or for the improper execution of the volunteering contract will be incurred on the basis of the provisions of the Civil Code, while the unilateral contract termination is possible, by either party, and will be done only in written form, with the indication of the reasons. The prior notice term is 30 days (art. 16).

Between the individual employment contract and the volunteering contract there are a series of similarities and, especially, differences, which we shall indicate hereinafter.

Similarities:

- both types of contract are named;
- both contracts are bilateral,
- both contracts are *intuitu personae*;
- the employee, respectively the volunteer, performs a certain activity (performs a labour) in favour of an employer/beneficiary;
- it is noticed the fact that both the employee is subordinated to the employer within the labour relation and the volunteers is subordinated to the management of the legal entity with which he/she concluded the contract (art. 9);
- the labour is performed within a work schedule;
- in both contracts must be observed the labour security and health regulations, in order to avoid work accidents and professional illnesses;
- even though it is not expressly regulated, the volunteer will benefit of a meal break, as any other employee within the organization.

The main differences between the two contracts are the following¹:

- while the individual employment contract is an onerous contract, the volunteering contract is a free-title contract;
- for the work provided, the volunteer does not benefit of seniority on the job, social security rights, rest leave etc.;
- liability in case of the volunteering contract is based on the Civil Code rules, while liability in case of the individual employment contract is based on the Labour Code.

C. The relation between the individual employment contract and the mandate contract²

According to Government Expedite Ordinance no. 82/2007 for the modification and completion of Law no. 31/1990 regarding trading companies and to other relevant normative acts³, it was established *by derogation from the provisions of art. 56 of Law no. 53/2003, the Labour Code, as modified and completed, the employment contracts of the administrators/directors, concluded for the fulfillment of the mandate of administrator/director prior to the entry into effect of this expedite ordinance, end of full right on the date of entering into effect of the expedite ordinance or, in case the mandate was accepted subsequently to the entering into effect of this ordinance, from the date of accepting the mandate” (art. V).*

Thus, the company administrators and directors, the directors of the formerly state-owned companies, of the national companies, as well as of other economic operators perform their activity on the basis of the mandate contract. According to art. 137¹ para. 3 of Law no. 31/1990, it is expressly stated that *throughout the fulfillment of the mandate, the administrators cannot conclude*

¹ See (Țiclea, 2014, p. 360).

² See (Ciochină, 2012, pp. 238-253).

³ Published in the Official Gazette no. 446 of 29 June 2007.

an individual employment contract with the company. In the contrary case, that individual employment contract will fall under absolute nullity¹.

Between the individual employment contract and the mandate contract there are a series of similarities and differences. Thus, the similarities refer to:

- both contracts presuppose the performance of certain work for a beneficiary (employer);
- the work is provided with the observance of a work schedule;
- both contracts are with onerous character, presupposing either the payment of a salary, in case of the individual employment contract, or the payment of a remuneration, in case of the mandate contract;
- the work performed represents seniority on the job and contribution time to the social security system.

The differences are the following:

- while the individual employment contract is the result of the agreement of will between the employee and the employer, the mandate contract has as basis an agreement between the administrator/director and the general assembly/board of directors of the economic operator;
- the individual employment contract presupposes, in all cases, a subordination relation between the parties, the employee being the subordinate of his/her employer, while within the mandate contract the parties are, formally, on equal positions, the administrator/director having the liberty to act as he/she deems fit, in order to fulfill the mandate;
- the individual employment contract is usually concluded for undetermined time, the mandate contract is concluded for a determined period – 4 years;
- the individual employment contract may end in the cases strictly regulated by the law, while the mandate contract may be terminated by unilateral revocation by the organization or by the resignation of the administrator/director, without the need to motivate his/her decision.

D. The relation between the individual employment contract and the solidarity contract

The solidarity contract is regulated through Law no. 116/2002 regarding the prevention and combating of social marginalization².

The parties to this contract are:

- on the one hand, the National Agency for the Labour Force Occupation;
- on the other hand, the youngsters with ages between 16 and 25, in situations of difficulty and confronted with the risk of professional exclusion (art. 5);

The object of the solidarity contract is represented by the integration in labour of the youngsters and the facilitation of their access to a work place with an employer approved by the agency.

Thus, on the one hand, the labour force occupation territorial agency provides professional counseling services and identifies, respectively, places the beneficiary in a job according to his/her professional

¹ See (Țiclea, 2014, p. 352)

² Published in the Official Gazette no. 193 of 21 March 2002, modified through Law no. 250/2013, Published in the Official Gazette no. 457 of 24 July 2013.

training, and, on the other hand, the beneficiary has the obligation to attend the professional counseling services and to accept the agency's job offers.

According to art. 6 para.2 of Law no. 116/2002, the contract term is determined, minimum 1 year, maximum 2 years.

The main effect of the solidarity contract is the fact that the employer, individual or legal entity, will conclude with the respective youngster an individual employment contract for determined time, equal to the duration of the solidarity contract. On the basis of the agreement concluded with the territorial agency, the respective employer will receive monthly the basic salary set on the date of employing the youngster, but no more than 75% of the net average salary in the economy, communicated by the National Statistics Institute. If on the date of the end of the solidarity contract the employer wishes to keep the youngster, he/she/it will be able to employ him/her, on the basis of an individual employment contract for undetermined time and will benefit, on the basis of the same agreement, of the monthly reimbursement of an amount, at the level of 50% of the unemployment aid that the youngster would have received if he/she would have been dismissed on that date. This amount will be granted to the employer for a period of maximum 2 years, until the employee reaches the age of 25 (art. 8).

In the specialty literature the question appeared with respect to the legal nature of the solidarity contract. In a first opinion¹, it was considered that it would be a **social security contract**. In another opinion², it is claimed that this type of contract "should be called differently, namely **employment contract for determined time** concluded between the insertion employer and the respective youngster". In a third perspective³, this contract was considered to be a "*sui-generis* contract, regulated by social security law, which presents a series of traits pertaining to the service provision civil contract".

From our point of view, the solidarity contract is a **contract specific to the social security law**, since it is neither an individual employment contract of a special type special, the parties not being in a subordination relation, nor a service provision civil contract because it does not presuppose, in itself, the payment of an amount of money.

E. The relation between the individual employment contract and the management contract

➤ **The management contract in case of culture public institutions**

The basis of the matter is represented by Government Expedite ordinance no. 189/2008 regarding the management of culture public institutions⁴, approved through Law no. 269/2009⁵.

According to art. 2 letter b, by manager is understood *the individual who won the management competition and concluded a management contract with the public authority; he/she is not a public servant, is not employed with an individual employment contract and has no status of public authority function*.

Even though the lawmaker chose to show, expressly, that this type of contract is not an employment contract, hence it is not subjected to labour legislation, in reality, it has all composing elements of an individual employment contract concluded for determined time.

➤ **The management contract in case of sanitary public units**

¹ See (Țop, 2002, pp. 47-48)

² See (Ținca, 2004, p. 126)

³ See (Țiclea, 2014, p. 363)

⁴ Published in the Official Gazette no. 817 of 5 December 2008, with the subsequent modifications;

⁵ Published in the Official Gazette no. 413 of 14 July 2009;

The basis of the matter is represented by Law no. 95/2006 regarding the reform in the field of health¹. According to it, the managers, individuals or legal entities, conclude management contracts with the Ministry of Health for a period of maximum 3 years, with the possibility to extend for a period of 3 months, maximum twice.

Conclusion

Throughout the entire duration of the management contract the individual employment contracts, both in case of managers and in case of the members of the board of directors, who are employed within those sanitary units, are suspended.

Still, the medical specialty staff that occupies a management position will be able to perform freely the medical activity, on the basis of the management contract.

Even though, in case of this type of management contract, the lawmaker targeted to remove it from the area of the labour law, in reality, this is a special type of individual employment contract, specific elements being found in its content, respectively:

- the salary, including bonuses, additions, as well as the date on which the salary will be paid;
- the work schedule; including the possibility of changing it, in the conditions of the applicable collective employment contract;
- overtime;
- the rest leave;
- observance of labour security and health;
- the right to professional training;
- the right to equal chances and treatment;
- the fidelity obligation.

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¹ Published in the Official Gazette no. 372 of 28 April 2006, with the subsequent modifications.