SPECIFIC CLAUSES IN THE INDIVIDUAL EMPLOYMENT CONTRACT

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ABSTRACT: *This study aims to analyze the conventional part of the individual employment contract, respectively the clauses that the parties involved in this contract can negotiate and include. The optional clauses regulated in the Labor Code will be subject to analysis, but also the unregulated clauses as well as those types of clauses that cannot be included in the individual employment contract, being prohibited. The analysis of these clauses will be prepared in the light of the current doctrine and jurisprudence*.

KEY WORDS: *Labor code; individual employment contract; specific clauses; optional clauses*.
JEL Code: *K 31*

The individual employment contract involves a legal part, containing the essential clauses provided in Article 17 of the Labor Code, but also a conventional part, consisting of specific clauses.

The following are considered specific clauses as provided by the Labor Code although without limiting the enumeration: the training clause, the non-compete clause, the mobility clause and the confidentiality clause.

1. THE SPECIFIC CLAUSES PROVIDED BY THE LABOR CODE

1.1. The clause regarding training:

The forms of achieving professional training[1] are established by the provisions of Article 193 of the Labor Code, as follows:

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[1] The purposes of professional training are provided by Article 192 of the Labor Code: „a) adaptation of the employee to the job requirements or to workplace; b) obtaining a professional qualification; c) updating knowledge and skills specific to the job and the place of work and the improvement of the professional training for the basic occupation; d) professional conversion determined by socio-economic restructuring; e) the acquirement of advanced knowledge, of some modern methods and procedures, necessary for the fulfillment of the professional activities; f) prevention of unemployment risk; g) promotion in work and professional career development. ”

a) participation in courses organized by the employer or by the providers of professional training services in the country or abroad;

b) internships for professional adaptation to the requirements of the job and place of employment;

c) internships and specialization in the country and abroad;

d) organized apprenticeship at work;

e) individualized training;

f) other forms of training agreed between the employer and the employee.

Participation in trainings may take place at the initiative of the employer or at the initiative of the employee.

The training clause will include the actual way of training, the rights and obligations of the parties, the duration of the training, as well as any other aspects related to the training, including the contractual obligations of the employee in relation to the employer who bore the training costs. The agreement of the parties will be the subject of an Addendum to the employment contract, another form of regulation of these aspects, such as a separate contract or job description not being inadmissible.

Employees who have benefited from a training course or professional traineeship, at the initiative of the employer, may not request the termination of the individual employment contract for a period established by the Addendum. The duration of the employee's obligation to perform work in favor of the employer who bore the expenses incurred by the professional training, as well as any other aspects related to the employee's obligations, subsequent to the professional training, are established by an Addendum to the individual employment contract. If the employee has the initiative to terminate the individual employment contract before the period established by the Addendum, this situation determines the obligation of the employee to bear all expenses incurred by his professional training, proportional to the unworked period of the period established by the Addendum to the individual employment contract.

1.2. Non-competition clause:

The non-competition clause has an exceptional feature as it restricts freedom of employment and, consequently, the applicable regulations must be interpreted restrictively. In the jurisprudence of the Constitutional Court[2] it was noted *that the inclusion of a non-competition clause in the individual employment contract is a protection measure taken by the employer to prevent possible unfair competition in his field of activity.*

The non-competition clause is the clause contained in the individual employment contract or in an Addendum to this contract, by which the employee is obliged not to perform, after the termination of the contract, in his own interest or in the interest of a third party, an activity that is in competition with that provided to his employer, in exchange for a monthly non-competition allowance which the employer agreed to pay for the entire period of non-competition.

[2] Decision of the Constitutional Court no. 1277/2010 regarding the rejection of the constitutional challenge of the provisions of Article 21-24 of Law no. 53/2003 - Labor Code.

In order to produce effects within the individual employment contract or the Addendum related, it must practically provide: the activities that are prohibited to the employee as of termination of the contract, the amount of the monthly non-competition allowance, the period for which the non-competition clause takes effect, third parties in favor of which the performance of the activity is prohibited (these third parties can be established and listed either in individually or by fields of activity) as well as the geographical area where the employee can be in real competition with the employer.

The monthly non-competition indemnity due to the employee is not of a salary nature, it is negotiated and it is at least 50% of the average gross salary income of the employee in the last 6 months prior to the termination of the individual employment contract or, in case the duration of the individual employment contract was less than 6 months, from the average gross monthly salary due to him throughout the ongoing the contract.

The non-competition indemnity represents an expense made by the employer, it is deductible when calculating the taxable profit being taxed at the beneficiary natural person, according to the law.

The non-competition clause may take effect for a maximum period of 2 years from the date of termination of the individual employment contract. These provisions are not applicable in cases where the termination of the individual employment contract occurred by law[3], or occurred at the initiative of the employer for reasons not related to the employee.

This clause cannot have the effect of absolutely prohibiting the exercise of the employee's profession or of the specialization he holds, otherwise it would affect the principle of freedom of labor. Upon notification to the employee or the territorial labor inspectorate, the court of competent jurisdiction may reduce the effects of the non-competition clause.

In case of non-compliance with the non-competition clause, with guilt, the employee may be obliged to reimburse the indemnity and, as the case may be, to damages corresponding to the damage caused to the employer. In case of non-compliance by the employer with the non-competition clause, such a situation may incur the patrimonial liability of the employer.

Given that this clause is the result of the agreement of the parties, it cannot be denounced unilaterally by only one of the parties.

However, it was shown, that "… the employer may insert in the non-competition clause a right of choice, for the purpose of its activation or not, once the termination of employment relationship. Thus, the activation of the clause would occur only if the

[3] For the assumptions under which the death of the employee or of the employer as natural person occurs, in case of dissolution of the employer as legal person; upon the final judgment of the court decision declaring the death or interdiction of the employee or employer as natural person; as a result of the acknowledged absolute nullity of the individual employment contract, from the date on which the nullity was ascertained by the agreement of the parties or by a final court decision; as a result of the prohibition of exercising a profession or a function, as a safety measure or a complementary punishment, from the date of the final judgment of the court decision by which the interdiction was ordered.

former employee, through the skills and knowledge gained, would constitute, considering the competition, a threat to the former employer."[4]

1.3. Mobility clause: the parties in the individual employment contract establish that, considering the specifics of the job, the execution of the job tasks by the employee is not performed in a stable place of work.

The mobility clause can be inserted in the situation where the employee's place of work is not fixed, the specifics of the job implying frequent travels to different places.

The employee's travels can take place only during certain periods of the execution of the individual employment contract or during the entire duration of the contract.

Even if a mobility clause is inserted in the contract, it does not entitle the employer to amend other elements of the employment contract.

In this case, the employee benefits from additional benefits in cash or in kind.

The amount of the additional cash benefits or the modalities of the additional benefits in kind are specified in the individual employment contract. For example: transportation expenses, accommodation, meals, salary increases, additional rest days, etc.

Failure by the employee to comply with this clause may result in disciplinary liability or, as the case may be, patrimonial liability while in case the employer violates his obligations this situation may lead to his patrimonial liability or resignation of the employee without notice.

1.4. The confidentiality clause – regarding this clause, the parties agree that, for the duration of the individual employment contract and after its termination, they will not disclose data or information of which they became aware during the execution of the contract, under the conditions established in the internal regulations, collective labor agreements or in individual employment contracts.

The confidentiality clause is bilateral in nature, and can be negotiated and inserted in the contract by both parties.

There is no obligation to remunerate the employee, in the event of assuming this clause, however such a hypothesis is not excluded.

Certainly, based on certain regulatory acts, there is a legal obligation to maintain confidentiality regarding certain information[5]. In case there are such legal obligations, the confidentiality clause is unnecessary. In the event that the employee violates this clause, his patrimonial liability and disciplinary liability may be incurred. If the employer violates this clause he may be obliged to pay damages.

1.5. The probationary period clause is regulated by Article 31, para. 1 of the Labor Code. Thus, in order to verify the employee's skills, upon the conclusion of the individual employment contract, a probationary period of no more than 90 calendar days

[4] Decision of the Constitutional Court no. 1277/2010 published in the Official Gazette of Romania no. 52 of 20 January 2011.

[5] Thus, according to Article 163C, the employer has the obligation to take all measures in order to keep the secret regarding the salary; pursuant to Article 8 of the G.E.O. no. 96/2003 on maternity protection in the workplace, the employer has the obligation to maintain the confidentiality of the employee's pregnancy and to keep it secret from the other employees except with the written consent of the employee, and only in the interest of good work, when the state of pregnancy is not visible.

for the executive positions and a maximum of 120 calendar days for the management positions may be established. Verification of the employee's skills in this way has multiple advantages for both contracting parties, who may, during or at the end of the probationary period, request the termination of the individual employment contract exclusively by written notice, without notice and without the need to motivate it.

The legal literature (Ioniță, 2019) concluded that there is no obligation to insert in the individual employment contract a clause regarding the probationary period, the parties being free to negotiate and to decide in this regard.

2. OTHER CLAUSES THAT CAN BE NEGOTIATED BY THE PARTIES AND INCLUDED IN THE INDIVIDUAL EMPLOYMENT CONTRACT:

2.1. The target clause requires the employee to achieve a specific result, such as a certain quantity of products, or to complete a certain work, to cash or collect an amount of money, etc. (Țiclea, 2015). The employee's obligation must comply with the conditions resulting from the provisions of Article 1226 and of Article 1227 of the Civil Code, respectively to be determined and possible.

2.2. The conscience clause is the clause by which the employee is entitled to refuse an order even a legal one, of the employer, if the order contradicts his conscience. This clause was assimilated to a contractual disclaimer, the reasons being religious, moral, and scientific (Țiclea, 2015). The doctrine emphasized that a conscience clause must have full clarity, analytical and practical feature, it should exclude the abuse of law (Ștefănescu , 2010) and it should not allow subjective interpretations.

2.3. The free time restriction clause by which the parties establish a certain period of the employee's free time in which he has the obligation to remain at home or to inform on the place where he can be reached in order to be able, at the request of the employer, to perform operatively a certain job. In return for such an obligation, the employer may offer certain benefits to the employee.

3. CLAUSES PROHIBITED IN THE INDIVIDUAL EMPLOYMENT CONTRACT

3.1. Exclusivity clause: by this clause, the employer requires the employee not to be employed by another employer in his free time. Such a clause would violate the provisions of Article 35 of the Labor Code[6] but also the provisions of Article 41 of the Romanian Constitution[7]. Article 9 of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparency and predictability of working conditions in the European Union states that *Member States shall ensure that an*

[6] Article 35. - (1) Every employee has the right to work for different employers or for the same employer, based on individual employment contracts, with the benefit of the corresponding salary for each of them.
(2) Exceptions from the provisions of para. (1) are the situations in which incompatibilities for the cumulation of certain functions are provided by law.

[7] The right to work cannot be restricted. The choice of profession, trade or occupation, as well as the place of work is unconfined.

employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.

However, given the employee's obligation of fidelity to the employer, regulated by Article 39, para. 2, letter d of the Labor Code, the employee may not perform in favor of a third party an activity that is in competition with that performed for his employer. For this situation, however, it is not necessary to insert a special clause in the individual employment contract, because the obligation of fidelity is a main obligation of the employee towards the employer resulting from the law.

3.2. The clause preventing the employee from the right to trade union association

This clause is illegal because it contradicts the provisions of Article 40, para. 1 of the Romanian Constitution, which stipulates that *Citizens may freely associate in political parties, trade unions, employers' associations and other forms of association.*

3.3. The clause prohibiting the right to participate in a strike

The right to strike of the employees for the protection of professional, economic and social interests is guaranteed by Article 43 of the Romanian Constitution. For this reason, such a clause is prohibited.

3.4. The criminal clause is the one by which the parties stipulate that the debtor undertakes certain performances in case of non-execution of the main obligation[8].

In practice, the stipulation of the criminal clause is very useful because it avoids the difficulties of judicial assessment of damages and also has a strong threatening effect, being a means of pressure for the debtor who, knowing that he is threatened with payment of a lump sum, will do its best to perform exactly the benefits due (Pop, et al., 2012).

By the High Court of Cassation and Justice Decision no. 19/2019 it was ruled that, in the interpretation and application of the provisions of Article 10, Article 38, Article 57, Article 134 para. (1) and Article 254 para. (3) and (4) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, stipulating the criminal clause in the individual employment contract or in an Addendum thereof, which assesses the damage caused to the employer by the employee through fault and in connection with his work, is prohibited and is sanctioned with the nullity of the clause thus negotiated.

The content of this decision showed that, establishing a legal right of the employee, he cannot waive it, according to Article 38 of the Labor Code. The criminal clause stipulated in the individual employment contract or in an Addendum to it has such a meaning, of implicit waiver of the employee's right to be held liable only in court, based on a judicial assessment of the damage, being prohibited under Article 10 of the Labor Code and, consequently, declared null and void, pursuant to Article 57 of the same Code, a legal sanction that can be found by way of action or by way of exception.

Last but not least, it should be noted that the stipulation of the criminal clause within the individual employment contract for non-performance, late or improper performance

[8] Article 1538, para. 1 of the Civil Code.

of a main obligation in the contract has a strong threatening effect, creating a means of pressure on the employee who, under the threat with the payment of a large lump sum, he is determined to give up his other fundamental rights, such as the right to choose a job, the right to further negotiations, etc.

In the legal literature (Boisteanu, 2019) it has been debated on the possibility for the employer to include a criminal clause when a clause on vocational training is inserted in the individual employment contract. Such a clause can be strictly regulated within the limits set by the legislator with regard to the training clause.

The debate (Țiclea, 2019) was also on the admissibility of inserting a criminal clause by which the employee's liability would be diminished.

e. Those clauses that contain contrary provisions or rights below the minimum level established by normative acts or by collective labor contracts, as provided by Article 11 of the Labor Code are forbidden and moreover they can't be included in the contents of the individual employment contract.

In such a situation, the provisions of Article 57, para. 4 of the Labor Code which provides that, if a clause is affected by nullity, as it establishes rights or obligations for employees, which contravene to mandatory legal rules or applicable collective labor contracts, this clause is replaced by law with the applicable legal or conventional provisions, the employee being entitled to compensation.

These provisions establish a legal regime different from the one applicable to nullity in general, according to the provisions of Article 1254 of the Civil Code, in the sense that the nullity is partial and remediable.

4. CONCLUSIONS

The specific clauses in the individual employment contract aim to protect the employee, who is considered the vulnerable party within the individual employment contract. For this reason, the clauses with practical applicability have been regulated by the legislator in detail, being also clauses which, although frequently included in other types of contracts, they are not permissible in the individual employment contract. However, some of them could be regulated and adapted to the specifics of employment relationships so as not to create an imbalance in the relationship between employee and employer. Thus, subject to certain requirements in order to specify exactly the cases and conditions in which it may operate, the individual employment contracts could also contain criminal clauses that assess in advance the damage that may be caused by the employee in the performance of contractual obligations. Such clauses would, of course, have a pressure effect on the employee, but the same effect results also from the regulation at the employer level of disciplinary sanctions. The main advantage would be the relief of the courts from certain categories of disputes, respectively the reduction of the duration of their settlement.

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