Strătulă Mocanu & Asociații
Attorneys & Counselors

39 Louis Pasteur St., 1st Floor
Bucharest 5, postal code: 050534
+4 021 21 11 653
+4 021 21 11 654
+4 021 21 11 655
(fax)+4 021 21 11 656
office@stratula.com

Employment contract concluded between a company and its administrator.

Part II: Limited Liability Companies[1]

By Cosmin Mocanu (Partner)

We have referred, in the November issue of the Journal *Consulting Review*, to the possibility of concluding an individual employment contract between the joint stock companies and administrators and/or their directors.

The conclusion of our analysis was that, following the amendments to the Company Law no. 31/1990 ("Company Law"), initially brought on 2006 and 2007 through Law 441 of 27/11/2006, for amending and supplementing Law no. 31/1990 and Law no. 26/1990 concerning the Trade Register, published in the Official Gazette on 28.11.2006 (Law 441/2006) and later through the Emergency Ordinance no.82 of 28.06.2007 amending and supplementing law no. 31/1990 and other normative incident acts , published in the Official Gazette dated 29.06 2007 (GEO 82/2007), administrators/director of such companies cannot hold at the same time positions as employees.

Therefore, the prohibition of concluding an employment contract between the company and its administrator/director is stipulated by article 137^1 of the Company Law, article that is applicable only to joint-stock companies. In the case of the limited liability companies, of which particularities are regulated by the Articles 191-203 from the section VI of Title III of the Company Law, such a general ban does not exist.

Therefore, an issue has been raised concerning the possibility and extent to which the administrator of a company with limited liability may be in the same time the employee of that company, on the basis of an individual employment contract. From our point of view, although the answer seems to be a relatively simple one (based on the legal principle according to which everything that is not expressly prohibited, is allowed) for a good understanding of a legal relationship between the limited liability companies and their administrators, the analysis of several distinctions, both of terminology and background, is imposed.

We already mentioned that limiting the way the administrators and directors of a joint stock company may work, precisely exclusively under an administration/management commercial contract, and not based on an individual employment contract, do not apply to companies with limited liability. In this regard, Article 197 paragraph (4) from the Company Law expressly provides that the provisions regarding the administration of joint stock companies are not applicable to limited liability companies, whether or not they are subject to audit. Moreover, in the case of limited liability companies, the Company Law does not regulate the function of "director-attorney-in-fact", but solely that of administrator.

[1] This article does not represent, and cannot be considered as, a legal opinion rendered within a client-attorney relationship. As well, this article took into consideration the contents of the legislation dealt with, as they were in force at the date it was prepared and published within *Consulting Review Magazine* (end of 2009) and therefore some of the information contained herein might not be up to date. For updated, more detailed information and/or an attorney-client assistance, please contact us.

In the absence of express prohibition in this respect, the leadership and coordination of companies with limited liability may be the object of an individual employment contract. The function such being occupied is traditionally called “general manager or director”, the term “director” representing in this case the “employee-director”, who can only exist in the structure of limited liability companies, not in the joint stock companies (which have the notion of “director – under a management contract”.

Regarding the administration of limited liability companies, from our point of view this can be done only under a commercial mandate contract, the article 72 from the Company Law expressly stipulating that the obligations and liability of directors are governed by provisions relating to mandate, which are completed with the special ones from the Company Law. However, in parallel with the mandate/administration contract (or mandate given through the decision of the General Assembly of the shareholders or within the Constitutive Act) the administrator may have also the quality of employee of the company, either for the position of general manager, or for any other position (including, for keeping the example given in the last number, of cleaning lady).

Through the corroboration of the legal texts governing the limited liability companies’ work with general rules regarding the administration of companies, it results that the administrators of Ltds (SRLs) may be appointed from among the employees. Also, their individual employment contract shall not be suspended during their mandate, but the administrator will receive additional remuneration for duties performed in his new capacity.

However, as the company’s administration cannot be done except in compliance with the rules of the commercial mandate, if the only quality owned in the company is the one of the administrator, he will only conclude an exclusive mandate/administration contract, according to article 72 of the Company Law, mentioned above.

Finally, regarding the directors of the limited liability companies, in the absence of any legal provisions that establish the position of “director-attorney-in-fact”, and in the conditions in which the limitations and restrictions applicable to joint stock companies are not applicable to commercial companies, they will not be able to operate unless on the basis of an individual employment contract.

In conclusion, the administrators of limited liability companies conduct their activity in accordance with the provisions governing the commercial administration/mandate contract, with no ban to be in the same time employees of the companies they are administrating.