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Employment contract concluded between a company and its administrator.

Part I: Joint Stock Companies.[1]

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Successive amendments brought to Law no. 31/1990 on commercial companies ("Company Law") in 2006 and 2007 expressly limited the ability of such companies to combine the quality of their administrator(s) (or director(s), for joint stock companies) with that of employee(s) of the respective administrated company.

Although it has been almost three years from the date of the relevant changes to the problem we intend to analyze, we found, in the ongoing work that we perform, that until current time the limitations and incompatibilities introduced, for example, by Law no. 441 dated 27/11/2006 for amending and supplementing the Company Law and Law no. 26/1990 on the Trade Register ("Law 441/ 2006") and later on by the Government Emergency Ordinance no. 82 of 28.06.2006 ("GEO 82/2007") raise further problems, both to the companies to which those are applicable, as well as to individuals who administrate (manage) the activities of these companies.

The question we want to answer through this article, as well as through the article yet to be published in the next issue (of December) of *Consulting Review Magazine*, is whether or not a person can combine the quality of employee of a company with that of administrator of the same company (or director, in the case of joint stock societies administrated in a dualist system).

However, given that between the types of companies regulated by the Company Law only two, namely joint stock company (JSC) and limited liability company (Ltd) present areal interest to our readers, we will limit the analysis to these two types of companies, and in this article we will treat the case of administrators or directors in an JSC, whereas in the article to be published in the December issue of the *Consulting Review Magazine* to refer to the legal status of administrators of Ltds.

Very short history. The legal status of administrators of joint stock companies before the passing of Law 441/2006.

Previously to the changes brought to the Company Law by Law 441/2006, the question of whether an administrator in a joint stock company was legally able to act, at the same time, as an employee of that company, represented a false problem, as long as there was no express prohibition in this respect.

[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.

Therefore, although Article 72 of the Company Law (in the shape it had before the changes brought to this Law during 2006 and 2007), provides that the obligations and liability of the administrators are governed by the provisions regarding the mandate and by the particular rules provided by the Company law, the practice of concluding employment contracts between the company and its administrator was a constant one in case of joint stock companies.

Therefore, we can state without risk of mistake that, until the end of 2006, the administrators of joint stock companies were, mostly, also employees of the companies that they administered.

Terminological distinctions. "Administrator" and "Director".

According to Article 70 of the Company Law, administrators can do all the operations required to accomplish the object of activity of the company, except those restricted expressly through the Constitutive Act.

The same Article provides, in paragraph 2, that administrators are required to attend all the meetings of the shareholders, administrators' boards and other similar bodies.

In a word, the administrators are not only companies' representatives, but also those who perform the operations that enable the company to constantly achieve is business objectives.

Previously to the amendments to the Company Law through Law 441/2006, the notion of "director" of a joint-stock company was almost entirely synonymous with the job title that an employee of the company, often even one from amongst its administrators, had in a company under an employment contract.

Although the Article 143 of the Company Law can regulate the possibility to the Board of Administrators to delegate some of its powers to a Directors' Committee, composed of members chosen from administrators, showing also that the chairman of this board can be a main director, this way of managing the company's activity did not enjoy too much popularity. Therefore, the position of director-trustee was, before Law 441/2006, quasi – inexistent.

Instead, the position of "director-employee", representing the highest position in the company's chart and to whom all other positions are reporting directly or indirectly in a chain of hierarchy, virtually exists in any company.

The activity of the "director-employee" (who was often also the administrator of the company) activity that took place on the basis of an employment contract, was similar until identification to the work of the company's administrator; in other words, the employment contract of the company's director had as object the administration and management of the whole company's activity.

We believe that this particular point is important, as it comes to explain one of the essential legal provisions that we will further treat in this analysis, contained in Article V of GEO 82/2007, which we refer below.

After the entry into force of Law 441/2006, the notion of "representative director" of a joint-stock company acquired not only an independent and more powerful personality, but a dual use, depending on unitary or dualist system of administration of a joint stock company.

However, given that the purpose of this article is not intended to analyze the relationships between joint tock companies managed in a dualist system and their administrators, we will limit the analysis to the legal status of the unitary system administrators.

Currently, although the "representative-directors" (RO: administratorii-mandatari) may be appointed between the directors of the company, circumstance that permit the aggregation by the same and only person of the administrator and the "representative-director" qualities in a joint stock company, the distinction between the concepts of administrator and director of joint-stock companies managed in a unitary system is very clear.

Equally, the distinction between the notions of "representative administrator" and/or "representative director" in a joint-stock company, on one hand, and that of "director-employee" of the same company, on the other, is much easier to understand in practice, because the same person cannot cumulate the quality of representative administrator and/or representative director with that of director-employee of one and the same company – impossibility to which we will refer below.

Legal relations between joint stock companies managed unitary and their directors or managers

According to Article 152 corroborated with Article 137^1 paragraph (3) and with Articles 144^1, 144^3, 144^4, 150 and Article 153^{12} paragraph. (4) of the Company Law, the legal status of the "representative-director" of a joint-stock company given in the unitary system is assimilated, largely, to the status of administrators of the same companies. Therefore, we will refer to both categories of representatives of joint stock companies.

According to Article 137^1 paragraph (3), corroborated with Article 152 of the Company Law, during the performance of their mandate, neither the administrators, nor the directors of joint stock companies can conclude employment contracts with their company. If administrators or directors have been appointed from the company's employees, their employment contract is suspended during the mandate.

The wording chosen by the law maker for this exception from the general Labor Code rules, referring to this particular case of employment contracts suspension, is a very general but clear one, allowing no possible misinterpretations.

On the one hand, it is clear that, during their entire mandate, administrators and directors cannot conclude employment contracts with the company. The question whether this prohibition concerns only work employment contracts with the object of activity interfering with administrator's/director's duties, or if the interdiction refers to any employment contract, irrespective of the job description – like for example even to employment contracts of company's accountant, or driver, maid, etc.

The answer can only be one: prohibition concerns any contract of employment concluded by the administrator/director with the company, regardless of how that activity would be performed under that contract (regardless of the job description).

Sure, it is doubtful that the same person could serve both as administrator/director of a company and as a different position in the same company - but given that the wording of Art. 137^1 paragraph (3) removes *de plano* this possibility, any further discussion is unnecessary.

Equally, for reasoning identity, regardless of the employment contract's object of the person who is to accept the office of administrator or director of a joint stock company, on the date of acceptance of office, the employment contract is suspended.

Of course, at the time of mandate expiration, the administrator/director is going to resume his activities as an employee in the joint stock company, as the employment contract's suspension ceases at the same date and term as the administrator/director office ends.

However, GEO 82/2007 introduced an exception to the rule of suspending the individual employment contract, for a particular category of contracts, namely those based upon which the administrators/directors performed the same activities under the mandate contract (as administrators/directors).

According to Article V of GEO 82/2007, by derogation from the provisions of Article 56 of the Labor Code, the employment contracts of administrators/directors, concluded for the performance of administrator/director's office before entering into force of GEO 82/2007, cease by operation of law at the date of its entry into force or, if the mandate was accepted after the entry into force of GEO 82/2007, at the date of such acceptance.

In other words, the provision quoted above eliminates, in the case of joint stock companies, the possibility of the administrators and/or directors to cumulate this quality with that of director as employee, as their employment contracts with such object ceasing by operation of law on the date of acceptance of administrator/director's office or, if this office was already accepted at the date GEO 82/2007 entered into force, even from the very date of entry into force of GEO 82/2007.

Therefore, these individual employment contracts, already suspended following the entry into force of Law 441/2006, ceased to exist at the time of entry into force of GEO 82/2007, and as a result at the time of administrator/director's office termination these contracts will not be reactivated; for continuation of employment relationships with the company new employment contracts should be concluded by the former administrators/directors.

For reasoning identity, and given that the substantial changes introduced by Law 441/2006 on the administration of joint-stock companies were aimed to circumscribe the management of such companies only to the rules governing the commercial mandate contract, we consider that the exercise of management activities under a labor contract is not possible even without a mandate given by the company for the position of administrator and/or director.

In other words, at the entry into force of GEO 82/2007, all employment contracts whose objects were, in fact, performances of management activities for joint stock companies, have *de jure* ceased to exist, whether the employees were formally appointed administrators or directors.

Equally, we believe that all employment contracts concluded after the entry into force of GEO 82/2007 for the carrying out of administration/directorship's office for joint stock companies are null and void, in violation of the express provisions contained in the Company Law, according to which administrators/directors may only act for the company under a commercial mandate agreement (administrator's agreement or director's agreement or equivalent names).

Nevertheless, an important mention needs to be stressed: one must not make confusion between the position as "representative-director", who coordinates and manages all company's activity, and the position as director of various functional compartments/departments of the company, such as financial director, commercial director, marketing director, human resources director, IT director, etc.

For these latter positions, the Director of Department (not to be confused with the director of joint-stock company), may be legally performed under an individual employment contract. The essential difference between the Director of the company and the directors of departments (employees) is that the Directors receive, by delegation from the board of administrators, specific administration powers (under a commercial mandate agreement), while directors of departments do not receive such mandate, but are employees of the company that provide work for it.

Last but not least, we must also mention that, while directors of joint stock companies may not be employees of the company, remuneration of such directors (save the remuneration of

administrators however) shall be fiscally treated in same terms as the salary the directors of departments receive (i.e. as a salary, even if it is not a salary in the strict sense of the Labor Code).

Thus, according to Article 152 paragraph (2) of the Company Law, remuneration of directors, obtained under a director's mandate contract, is treated as a salary in terms of tax revenues and is taxed according to same legislation.

By derogation from Article 5 of Law no. 19/2000 on public pensions and other social insurance rights, paragraph (3) of Article 152 of the Company Law mentions that the remuneration obtained by directors under a mandate contract is assimilated to a salary (wage), in terms of obligations for the director and the company established in the legislation concerning: public pension and other social security rights (including the obligation to pay for insurance for work accidents and occupational diseases) unemployment insurance legislation system, and stimulation of employment, as well as health insurance legislation.

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As a conclusion, in the case of joint stock companies, neither the administrators nor the directors can cumulate the quality as administrators and/or directors with that of employees, and any employment contract concluded in breach of this interdiction shall be declared null and void.