ROMANIA

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1. General regulations of labor law

1.1 Implementation of international legislation into domestic law

Romanian Labour Law, a branch of national law whose object of regulation consists of labour social relations, comprises legal norms originating from different sources: the Constitution of Romania, the Labour Code of 2003, statutory laws, other legal acts having power of law (Government ordinances, emergency ordinances and decisions), supranational regulations, collective labour contracts. Jurisprudence is not a source of law.

The labour legislation was substantially modified in the first half of 2011. The most important amendments concerned the legislation on social partners, collective labour contracts/agreements, and collective labour conflicts (including strike action). To this effect, the Social Dialogue Law No. 62/2011[1] repealed all previous, rather disparate regulations in this field.

According to the provisions of the Constitution of Romania,[2] European legislation (with regard to EU directives), as well as International Labour Organization standards are transposed/incorporated within the National System by law (articles 11.2 and 148). Collective contracts have no part to this effect.

The necessity to harmonize national labour legislation with international and European law is provided for by article 276 of the Labour Code (Law No. 53/2003), which states: «According to the international obligations undertook by Romania, the labour legislation will be constantly harmonized with the standards of the European Union, the conventions and recommendations of the International Labour Organization, and the standards of the international labour law».

The implementation of EU Law within the National Model started along with the conclusion of the European Agreement of Association Between the European Communities and Romania of 1993. The national legislation adopted afterwards displayed reflections of European Community Law.

Nowadays, we may affirm that the Romanian labour legislation is the result of EU regulations and directives, considering also that Romania is a EU member since January 1st, 2007.

The implementation of ILO standards began in the year 1921, when Romania, as a founder member of this organization, ratified the first international conventions. Despite having ratified 55 conventions, Romania observes in reality the other international standards as well, and the most important ones are integrated within the national law.

1.2 Formation of union representation in order to subscribe collective agreements

The law does not provide for the means of establishing (designating) the trade union delegation that shall represent the employees on the negotiation and signing of collective labour contracts. This is an internal matter of trade unions, as an expression of their freedom, which may be provided for in the statute of each trade union, or even decided *ad hoc* (on a case by case basis). As a rule, the delegation is designated by the leading body of the respective trade union, and consists in the members of this body. The delegation may be completed with various specialists (jurists, economists, experts, etc.) that are meant to support the collective bargaining action, whether or not they are trade union members.

In practice, the trade union representatives mandated to participate in the collective bargaining are also empowered to subscribe the collective contract. Therefore, the subscription of collective contracts is usually the task of the union leaders participating in the collective bargaining.

1.3 Trade union representation and activity in the workplace

Not all trade unions are equal with respect to their capacity to represent their members in collective actions. Under Romanian Labour Law, the representativeness of trade unions is established as a condition for trade union organizations to negotiate and pass collective labour contracts or agreements, to declare conflicts of interests and call strikes, to participate in various tripartite organisms (for instance, in the Economic and Social Council).

The representativeness of trade unions is regulated by the Social Dialogue Law (article 51), and is centred mainly on the number of their members.

a) At national level, in the case of confederations, two main conditions must be met:

– the component trade union organizations, which are comprised in the structure of the confederation, must have a number of members of *at least 5%* of the employed workforce in the national (State) economy;

- the respective confederation must have territorial structures in at least a half plus one of the counties of Romania, including the Municipality of Bucharest.

b) At activity sector or group of units level, in the case of federations, the law

states that the member organizations of the respective federation must have a number of members of *at least 7%* of the employed workforce in the respective activity sector or group of units.

c) At unit level (specific company/establishment), the essential condition which must be observed is that the number of members of the trade union must *represent at least a half plus one* of the unit's number of employees.
In opposition to the former regulation, under the new Social Dialogue Law of 2011, *only one trade union may be representative* at the level of a certain unit.
There are approximately 5 500 000 workers, of which 4 500 000 are employed under individual employment contracts, and the rest are civil servants. Therefore, the degree of unionization can be approximated around the value of 40%.
The activities of trade unions in workplaces are provided for by law and/or by their statutes. Under the Labour Code, trade unions have the *right* to represent their members in case of employment conflicts (article 219).

1.4 Discipline/Regulation of the collective agreement

A. *The normative framework*. The Constitution of Romania employs the expression «collective conventions», stating: «The right to collective bargaining and the binding force of collective conventions shall be guaranteed» (article 41.5).
The Labour Code defines the *collective labour contract* and establishes the principles of collective bargaining, as well as the binding force of this contract – as a law between the parties.
The special normative framework on the regulation of collective contracts consists in the *Social Dialogue Law No. 62/2011*, which incorporates a special title (VII) entitled «*Collective Labour Bargaining Negotiations»*.
In the case of *civil servants*,[3] the legislator uses the expression *collective agreements* (Law No. 188/1999 on the Civil Service Statute). The Government Decision No. 833/2007 represents the special legal framework for this category of workers.

B. *The levels of negotiation*. According to article 128 of the Social Dialogue Law, collective contracts may be negotiated at the following levels: unit,[4] groups of units and activity sectors.
After the entry into force of the Law No. 40/2011[5] (which radically modified the Labour Code) and of the Social Dialogue Law, the Romanian labour legislation does not provide any longer for the national level as bargaining level of collective labour contracts. Therefore, under the present regulation, we construe that the conclusion of a new collective labour contract at national level is not henceforth possible.

In any case, the previous Collective Labour Contract at National Level, which was regulated within the period 1991-2010, was suppressed.

C. *The compulsory and optional character of collective bargaining*. According to article 229.2 of the Labour Code and to article 129.1 of the Social Dialogue Law, collective bargaining is *compulsory* only at the level of units where there are over 20 employees.
Therefore, collective bargaining is *optional* for small units (having less than 21 employees), and also at the upper levels: groups of units and activity sectors.
D. *Content of collective contracts/agreements*. In essence, collective labour contracts contain clauses regarding wage and working conditions, working time duration and work schedule.
On the other hand, the content of collective agreements is limited; they cannot contain clauses regarding civil servant rights that are established by law (wages, rest time, etc.).
Collective contracts/agreements are subordinated to law; their terms may only be established within the limits and conditions provided by law, and on their conclusion the legal provisions regarding employees' rights have a minimal character.
The rule is valid also with regard to the hierarchical structure of these contracts; the provisions of any upper-level collective contract are considered minimal levels at which the collective bargaining of lower-level contracts commences.
Collective contracts/agreements are placed in a pyramidal hierarchy; there are as many hierarchies (pyramids) as activity sectors in which this type of contracts/agreements are passed.
At the top of this variety of hierarchies (pyramids) stands the collective contract/agreement passed at the activity sector level; next there are the contracts/agreements passed at the level of groups of units that are constituted in this sector; and at the base of the pyramid stand the units existing in the respective sector.
The contract/agreement placed at the top of the hierarchy constitutes a source of law for the subsequent contracts, mainly for those passed at the level of groups of units, and these latter, in their turn, for those passed at the level of units.
Contract clauses that do not observe the abovementioned rule – as constantly decided by the judicial practice – are null in law and replaced with the more favourable rights provided by law or by the upper-level applicable contract. If the employer does not accept this mechanism, he shall be compelled to this effect by the court of law.[6] Article 132. 4 of the Social Dialogue Law provides: *individual employment contracts may not include terms establishing rights at inferior levels to those established by the applicable collective labour contracts*.

The relationship between a current collective contract/agreement and the following is governed by the principle according to which the new contract replaces the preceding. As a rule, in practice, the theory of gained rights is applied, and thus the rights established in a contract must be considered as gained rights on the bargaining of the future (new) contract. In the worst-case situation, previous rights must be recognized in the same amount in the future as well. Only as an exception, when the economic and financial results decrease, and the benefits diminish accordingly, the rule is no longer valid. It is considered that the principle of *pacta sunt servanda* is applicable as long as the situation is at least the same (*rebus sic stantibus*).

E. *Legal effects of collective contracts or agreements*. As we pointed out, according to the provisions of the Social Dialogue Law, any collective contract constitutes a source of law and produces effects towards the employers and employees whom it refers to. This extension operates whether or not these employees are trade union members, and whether or not they have the quality of employees at the time of the conclusion of the contract. There is also a duty of social partners to include within collective contracts/agreements, which are passed at the levels of group of units and activity sectors, the units in which these contracts/agreements apply.

1.5 Reflection on the Viking and Laval judgments

A. *Preliminary considerations*. To develop this point, we must consider the following:
a) In the *Viking*[7] and *Laval*[8] cases, the reasoning of the European Court of Justice was based upon the confirmation of a hierarchy of norms, in which market freedoms are placed on the highest level, and collective bargaining and action on a lower level. Indeed, the right to take collective action was considered by the European Court of Justice «a fundamental right which forms an integral part of the general principles of Community law».9
It seems, after the entry into force of the Treaty of Lisbon,10 that the circumstances have somewhat changed. Henceforth, in a Union that «shall work for the sustainable development of Europe based on [...] a highly competitive social market economy»,[11] the Charter of Fundamental Rights «shall have the same legal value as the Treaties»[12] (our underlining).
In other words, as far as this report is concerned, the Charter, which sets out the right of collective bargaining and action, including strike (article 28), acquired the same legal value as the Treaties, which establish the market freedoms. Consequently, the right of collective bargaining and action, beforehand only a fundamental right making integral part of the general principles of EC law, is now a fundamental right included in European Primary Law, so as the

market freedoms.
We might be therefore tempted to affirm that, in general, the hierarchy of norms confirmed by the European Court of Justice in the *Viking* and *Laval* cases does not exist any longer. Certainly, we must take also into consideration the two relative exceptions: the United Kingdom and Poland, given their partial *opt-out* from the Charter.
With the future perspective provided by article 6.2 of the Treaty on European Union, regarding the accession of the EU to the European Convention on Human Rights, we must point out that the European Court of Human Rights ruled that the right to collectively bargain with an employer in principle is one of the essential elements of the right to form and join trade unions, guaranteed under article 11 of the European Convention on Human Rights.[13] Furthermore, the Court upheld that this same article precludes a «blanket ban» on the right to strike.[14] Not to mention that all State members of the EU have ratified the European Convention on Human Rights.
Whatever the case may be, given *the programmatic nature of the Charter's provisions*, an answer from the European Court of Justice is necessary. To this effect, taking into account that there are new applicable legal grounds, while observing the two *opt-outs*, a change in jurisprudence towards an «equal» confrontation
9 Par. 44 of the judgement in *Viking*; par. 91 of the judgement in *Laval*.
10 On December 1st, 2009, therefore after the ECJ passed its judgements in *Viking* and *Laval*.
between the right to collective bargaining/action and the market freedoms, with the first prevailing over the latter, should not surprise.
b) There is a series of national particularities worth retaining:
– Romania is at the bottom of the European Union ranking in terms of monthly wages: the minimum wage is approximately 160 €, while the average wage is approximately 300 €;
– under national law, strike is possible only if the negotiations related to the conclusion of the collective contract fail, and afterwards the trade union initiates a collective conflict, which is not settled on the occasion of conciliation and mediation procedures, as the case may be;
– any collective contract or agreement is a source of law and *applies to all employees of the respective level, whether or not they are trade union members*.

B. *Regarding the Viking case*, a Romanian trade union whose members form the crew of a vessel could protest against the intention of the owner that would aim to register the vessel under a foreign flag. However, the trade union could not legally call a strike, taking into consideration that between the two parties there is no collective conflict generated by disagreements related to the terms of the new collective contract that shall be passed between them. And even if such a

strike were called under these circumstances (or similar ones), we would already know the outcome from the decision of the Court of Justice of the European Communities: the employer's freedom of establishment has pre-eminence (article 49 of the Treaty on the Functioning of the EU and Regulation EEC No. 4055/86), unless, of course, a change in the Court's jurisprudence.

C. *Regarding the Laval case*, as we have previously pointed out, Romania has transposed within the national law the Directive No. 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services by the Law No. 344/2006. Under article 6 of this normative act, «posted workers of other Member States enjoy the working conditions established by Romanian law and/or by the collective labour contract at national level and at branch level». Being an imperative provision, it imposes *de jure* to the foreign employer that posts workers in Romania; therefore, no national trade union action is necessary in order to apply the collective contract.
However, the law of the host Member State does not apply to posted workers when it only ensures them a social protection at a lower level than the one they enjoy under the law of the Member State of origin. To this effect, having in view that the pay level in Romania is amongst the lowest in Europe, it is the law of the State of origin that shall apply in most cases.
Certainly, regarding other working conditions (health and safety at work, working and rest time, protection of pregnant women, of young persons and children), if these are favourable to posted workers, Romanian law shall be applied (including the applicable collective contract).

1.6 Means of protection in case of violation of the collective agreement
Article 148 of the Social Dialogue Law provides that the execution of collective contracts is mandatory for the parties, and that the failure to comply with the duties assumed by this contract engages the liability of the party at fault.[15] The generic use of the term *liability* leads to the conclusion that, in relation with the civil wrong (tort), any form of liability provided by law may be engaged.[16] The party at fault may bear criminal liability, if the wrongful act meets the material element of an offence, liability to disciplinary action, or pecuniary liability, provided the existence of a prejudice, etc. For the damages caused to the trade union, the employer bears civil liability, as do the trade unions for the damages caused to the employer. Failure to observe the clauses of the collective contract by one ore more employees engages their pecuniary liability.[17]
The employer too bears, in his turn, an employment law pecuniary liability (article 253 of the Labour Code,[18] regarding the damages caused to each employee).

It has been held, for instance, that the existence or non-existence of financial resources is irrelevant for the establishment or recognition of payment rights provided by the collective labour contract.[19]

1.7.Consultation of workers for signing the collective agreement or for the strike call

A. As we pointed out in pt. 1.2, as a rule, the trade union representatives in the negotiation and subscription of collective contracts are not designated by the totality of members of the trade union, but by its governing body. Therefore, the participants in the collective bargaining are usually the same that sign the collective contract.

[15] To this effect there is also article 28.1 of the Government Decision No. 833/2007 regarding collective agreements.

[16] The Labour Code regulates the following forms of legal liability: disciplinary (articles 247 to 252); pecuniary (articles 253 to 259); contraventional (article 260); criminal (articles 261 to 265).

[17] Under article 254 of the Labour Code, employees bear pecuniary liability for the material damages caused to the employer by their guilt and in connection with their work.

[18] Under article 253.1 of the Labour Code, the employer shall compensate the employee, in the situation in which the latter suffered, by the guilt of the employer, a material or moral prejudice while fulfilling work or work-related duties.

[19] The Court of Appeal of Bucharest, 8th civil division, for causes regarding labour disputes and social welfare litigation, Civil Decision No. 535/R/2007.

B. On the other hand, the calling of a strike is decided by the vote of trade union members, and of workers respectively, the necessary quorum being different depending on the quality of strike organizers. To this effect, article 183 of the Social Dialogue Law provides that, as the case may be, the decision to call a strike is taken:

– by the representative trade unions participating in the collective labour conflict, with the written agreement of at least one half of the number of members of the respective trade union;

– by the representatives of the employees with the written agreement of at least one quarter of the number of employees of the unit or, as the case may be, of the subunit or compartment.

2. Regulation of the right to strike

2.1 The right to strike as a fundamental right

The right to strike is established by the Constitution of Romania within Section II, which is entitled «Fundamental Rights, Freedoms and Duties». According to the constitutional text (article 43.1), «Employees have the right to strike in the defence of their occupational, economic and social interests». Under article 181 of the Social Dialogue Law, strike is defined as «any form of collective and voluntary cessation of work in a unit».

2.2 Sources

Aside from the Constitution, the right to strike is established by the Labour Code (article 233), which reproduces article 43. 1 of the fundamental law. The method of exercising the right to strike, the organization, the calling and the carrying out of a strike, the preliminary procedures to calling a strike, its suspension and cessation are regulated by the Social Dialogue Law.

In the case of civil servants, the right to strike is provided for in article 30 of the Law No. 188/1999 regarding the Civil Service Statute, as well as in article 35. 2 of the Law No. 7/2006 regarding the Parliamentary Civil Service Statute.

2.3 Persons authorized to proclaim a strike (legal ownership)

According to national law, the right to strike is an individual right held by workers (employees, civil servants). However, it may only be exercised collectively, since a strike consists in the collective cessation of work (article 234.1 of the Labour Code). One worker only cannot call a strike; he must legally and necessary be joined by a group of workers.

Under article 27 of the Social Dialogue Law, the right to strike is held also by trade unions. As a consequence, representative trade unions are entitled to organize strikes. Only *in the absence of such unions*, the right to strike is held by the representatives of the employees (article 187).

2.4 Procedures and proclamations

The lawfulness of a strike is founded upon the existence of a collective deliberations act: the decision to call a strike, taken by striking workers with the quorum (proportion) provided by law.

This decision must be taken during the existence of a declared collective labour conflict that arose following the refusal of the employer to negotiate the collective contract/agreement or to accept workers' claims, as well as in the situation in which the parties did not reach an agreement concerning the conclusion of the collective contract/agreement within the established period of time (article 161 of the Social Dialogue Law).

The lawfulness of a strike is also conditioned by the compulsory procedure of conciliation between parties, which is carried out with the support of the delegate of the Ministry of Labour, Family and Social Protection (articles 166 to 174).

2.5 Limitations on the right to strike

The right to strike is prohibited to: judges, prosecutors, military personnel, and special status personnel of the public order body (article 202 of the Social Dialogue Law).

Furthermore, it is restricted for the personnel of any type of transportation, and for the personnel of essential services, namely those provided by establishments

of health and social assistance, of telecommunications, of public radio and television, respectively by rail transport establishments, by establishments that ensure common transportation and public sanitation, as well as the provisioning of the population with gas, heat, power and water. Strike is allowed in these services with the condition of ensuring the functioning of at least one third of the normal activity (article 205).

2.6 The exercise of the right to strike in different sectors and categories of workers

Romanian Law, in principle, does not establish any differences between the categories of subordinated workers (employees and civil servants) regarding the right to strike. It does not make any reference however as to the self-employed on this matter. The solution is well expected, as long as these latter are not subordinated to an employer, and their work is individual, not collective.

At the same time, there are no differences between public system employees and private system employees. For instance, article 207 of the Social Dialogue Law provides that civil servants declare collective labour conflicts following the procedure provided by this law for employees.

Nonetheless, as we previously showed (pt. 2.5), the law provides for certain interdictions regarding this right (article 202), as well as limitations related to its exercise (articles 203 to 206).

3. Trade union and strike

3.1 Reasons for the strike

The purpose of strike action is clearly defined by the legislator: *the defence of occupational, economic, and social interests of employees* (article 43.1 of the Constitution and article 233 of the Labour Code). A strike that has in view other aims, for instance political, is illegal and therefore prohibited (article 190.2 of the Social Dialogue Law). For a strike to be legal, all conditions provided by law (that we mentioned at pt. 2.4) must be observed. Otherwise, the strike is illegal.

3.1.1 Political strike

Article 190.2 of the Social Dialogue Law states that a strike cannot follow political aims. Consequently, a strike that follows such aims is illegal.

However, a purely political strike is possible only in theory. In reality, there are encountered strikes offering a combination of occupational and political aims. Indeed, sometimes, political measures affect the occupational interests of workers, and this justifies the allegation of certain political claims on the occasion of strike action.

The major strikes that took place in Romania, starting with the year 1990, implied also political claims, as long as the strikers demanded, among others,

«the stoppage of the fraudulent bankruptcy of industry and agriculture», they criticized the «economic policy» of the State, they demanded the resignation of the Government, of the Prime-Minister, and even of the President.

3.1.2 Solidarity strike

Sympathy strikes are possible, in the purpose of supporting the claims laid down by employees of other units pertaining to the same group or activity sector.

Such strikes are regulated as a strictly trade-union means of action; they may be called by a representative trade union, affiliated to a federation or confederation of which makes part as well the trade union that organizes the initial, supported strike.

Sympathy strikes have a limited duration, of one business day at most, and must be notified in writing to the employer at *least two business days in advance of the work stoppage date*.

3.2 Methods of the strike

Romanian law on the settlement of collective labour conflicts is strict as to the methods of carrying out a strike and their typology. Certainly, the legal provisions in question have in view the carrying out of legal strike actions, and not of illegal ones.

The participation in a legal strike is free; no one may be compelled to participate or to refuse to participate (article 191.1. of the Social Dialogue Law and article 234.2 of the Labour Code).

Moreover, such participation does not represent a breach of work duties.

3.2.1 Anomalous forms of striking

Under article 184 of the Social Dialogue Law, there are three categories of strikes: token (or warning) strikes, regular strikes, and sympathy (solidarity) strikes.

Other forms of strike – hiccup, chessboard, etc. – are neither regulated, nor they have been encountered thus far. Consequently, as long as they are not a part of the national legal scheme, these forms of strike action are not allowed.

To this effect, in the judicial practice it is held that: «The law does not incorporate provisions regarding other categories of strike, such as go-slow strikes, work-to-rule strikes, selective strikes, or hunger strikes». Such strikes «cannot be deemed licit under Romanian law inasmuch as they do not imply the collective cessation of work». It follows that «they subscribe to the notion of improper execution of employment contracts, and thus the employer may dispose disciplinary measures depending on the gravity of the deed».[20]

Still, in Romanian practice have been encountered a number of peculiar

strike actions, not regulated by an act of law: Japanese strikes and work-to-rule strikes.

3.2.2 Forms of collective action different from the strike

Article 27 of the Social Dialogue Law lists the specific means that trade unions have the right to use with a view to achieving the purpose for which they have been set up. Among these specific means are: petition, protest picketing, march, meeting and demonstration.

We could add here the complaints that Romanian trade union confederations file with the international authorities, especially with the International Labour Organisation, concerning several measures and actions of the Romanian Government that affect workers' rights.

Romanian law does not contain regulations as to go-slow (slow down) strikes, sit-in strikes, the possession/retention of the employer's goods, etc. As a consequence, if such means were used in trade union practice, they would have an illegal character.

3.2.3 Virtual strikes

Virtual Strikes do not make part of the national legal scheme and have not been encountered in practice thus far.

3.3 Unlawful strikes

A strike is deemed unlawful when it is called or carried out with the nonobservance of the legal provisions, or when it is continued after it was suspended or declared illegal. In other words, any stoppage of work that does not meet the conditions set forth by an act of law constitutes an illegal strike, and will be sanctioned as such.

For instance, under Romanian law, the following strikes are illegal[21]:

– wildcat (unofficial, unorganized, spontaneous) strikes;

– strikes called by the decision of a smaller number of workers than required by law;

– strikes organized without exhausting the possibilities of settling the collective conflict;

– strikes called without prior noticing the employer (two business days in advance)[22];

– strikes called by workers that do not hold the right to strike;

– strikes called by resorting to threats or violence against the participants, etc.

3.4 Sanctions in the collective conflict

The Social Dialogue Law of regulates three forms of legal liability:

a) civil (reparative) liability in the purpose of covering the damage caused to the employer due to the collective cessation of work by the participants and the

organizers of the illegal strike;
b) contraventional (administrative) liability consisting in a fine of 5000 to 10000 LEI (approximately 1200 to 2400 €), imposed to those that obstruct the employer to continue its activity with the employees that do not participate in the strike;

c) criminal liability, consisting in prison of 6 months to 2 years or a fine of 20000 to 50000 LEI (approximately 5000 to 12000 €), for those that, by threats or violence, obstruct or force an employee or a group of employees to participate in a strike or to work during a strike.
These forms of legal liability do not exclude the liability to disciplinary action of those that commit a disciplinary offence related to the strike, thus breaching work duties and not observing job description tasks.

4. Adhesion to the strike

4.1 Modalities of adhesion
There are two main modalities of participation in a strike. The first takes place when workers participate in a strike after they voted the adoption of the decision to call the strike. The second occurs when, even they did not participate at the adoption of the mentioned decision, some workers join the strike, uniting with those that had (collectively) stopped work.

4.2 Effects of the lawful strikes on the employment relationship
According to the Labour Code, the participation in a strike, as well as its organization, under the law, does not constitute a breach of employees' work duties (article 235). During a strike, the employment relationship is suspended *de jure*, in law (article 51.f of the Labour Code and article 195.1 of the Social Dialogue law). As a consequence, strikers' rights (including wage rights) are also suspended, with the exception of health insurance rights.

4.3 Consequences of the unlawful strike
In the case of an unlawful strike, the situation is totally different. The cessation of work is a wrongful act, a breach of work duties. Therefore, the employer may punish the guilty persons by initiating disciplinary procedures, which may also lead to their dismissal for cause. These persons may also be bound to cover the damage caused to the unit due to the collective cessation of work.

4.4 Wildcat strikes and strikes called by occasionally organized workers
Such unorganized strikes have been encountered in practice, but in a totally isolated manner, in units of small importance, with a stoppage of work on short

periods of time (a few hours a day). Employees protested using this approach due to, for instance, the delays in the payment of wages or the unjustified lowering of wages, the non granting of food vouchers, or the replacement of persons holding managing functions (for example headteachers), etc.

5. Employers during the strike

5.1 Anti-union conduct

During a strike, the employer has the right to continue the activity with the employees who do not stop the work, to claim the protection of his goods by the strikers, and to ensure the continuous operation of machinery and equipment whose interruption might endanger the life and health of the people (articles 193.1 and 194.1 of the Social Dialogue Law).

However, the employer is forbidden from hiring other employees to replace those on strike.

No anti-union conduct of the employer is allowed. To this effect, article 218.2 of the Labour Code prohibits «any encroachment act of the employer or employer organizations, directly or through their representatives or members», not only on the establishment of trade unions, but also on the exercise of their rights. Following the same reasoning, it is provided that «the exercise of the employee right to unionize is recognized at the level of all employers» (article 220 of the Labour Code), and also that trade union organizations are independent of employer organizations.

5.2 Lock-out

The national legislator has not regulated the right of the employer to temporary close the unit, as a retort against the employees' strike. Therefore, the employer could not resort to lockout, as long as Romanian law does not provide for this form of industrial action.

In the legal doctrine[23] it is also held the opinion that the employer might resort to lockout in serious situations, which cannot be overcome other than by proceeding so, and namely:

– in situations when it is necessary to ensure the units' order and security, which are endangered by a strike that, if it were to continue, might entail the legal liability of the employer;

– when the employer, due to the strike, cannot ensure the functioning of its unit.

A lockout would also be justified as a means of counteracting an illegal strike.[24]

5.3 Consequence of the strike on no-striking workers

The workers that do not participate in a strike may continue their activity, if possible; in this case, they obviously have the right to payment. If such a possibility does not exist, they are entitled to receive – on the grounds of article 53.1 of the Labour Code – 75% of their wage, since there is a temporary stoppage of the employer's activity.

6. External elements linked to the effectiveness of the strike

6.1 External elements impeding the strike

It has been noticed that the lack or shortage of financial resources acquired as «strike fund» makes more difficult the exercise of the right to strike, but does not impede it. However, financial resources allow the development of a strike having increased chances of success.

The majority of known domestic strike actions have gained the public's sympathy. However, when it manifests, public disapproval may constitute an inhibitory factor for a strike. Generally, these situations have occurred following the stoppage/reduction of public services activity (for instance, at the national railways and the subway), and if the reasons of the strike action have not been brought and thoroughly explained on time to the public opinion.

6.2 External elements supporting the strike

Trade union leaders consider that media reports influence and facilitate the exercise of the right to strike. Nonetheless, it has been noticed that strikes and other actions of protest have not been reflected starting from the determining causes. The press is more interested whether there are any incidents, if the announced actions lead to disturbances, or to speculate the «gaucheries» or communication difficulties of action participants.

6.3 Forms of international support for union activity

Between national and international (European or world level) trade unions there is permanent dialogue, communication and information.

Thus, in 2003, the National Trade Union Bloc (BNS) participated with 60 members at the Rome Euro-manifestation for the social dimension of the future Constitution of the European Union. In 2005, all trade union Europe and the International Trade Union Confederation (ITUC) joined Romanians at the first battle for the defence of the Labour Code. In 2007, there were protests against the Bolkenstein Directive, and on December 2009, in Strasbourg, BNS joined the European trade union family for a protest against the project of modifying the Directive on working time.

At the end of 2010, Romanian trade unions lodged complaints with the International Labour Organization, the NETLEX Organization, and the European

Trade Union Confederation (ETUC), expecting that these institutions join their efforts to convince the Romanian Government that the approach of deregulating the labour legislation is counterproductive. The complaint had left with no effect, as long as afterwards the Labour Code was modified, with all the opposition of trade unions.

7. Alternative means of dispute resolution

The Romanian legislator is preoccupied with avoiding strikes. Besides the imposed restrictions and limitations, he regulates the conciliation of collective labour conflicts, as a compulsory procedure. In the absence of this conciliation, an eventually called strike is illegal.

He also established two optional procedures – mediation and arbitration – that may be used by the parties in the same purpose: avoiding the collective cessation of work by calling the strike.

Conciliation is a compulsory procedure, prior to calling a strike, provided by the Social Dialogue Law (articles 166 to 174). Conciliation gives satisfaction to the principle of tripartism, inasmuch as it is carried out between the parties in conflict, but with the participation of the delegate of the Employment Inspection, and respectively of the Ministry of Labour.

This representative (delegate), after being informed by the strike organizers (as a rule, the representative trade union), calls the parties for conciliation, occasion on which he guides and supports them towards settling the conflict by common agreement.

These represent amiable methods of settling collective labour conflicts, which are thus decided by consensus of the social partners. Mediation and arbitration are compulsory if the parties, by common agreement, decided so before calling or during the strike.

A. Mediation

According to article 1 of the Law No. 192/2006 on Mediation and Organizing the Profession of Mediator, restrictively applicable also in the settlement of collective labour conflicts (under article 178.2 of the Social Dialogue Law), «mediation represents an amiably settlement modality of disputes, with the support of a third person specialized as a mediator, under neutrality, impartiality and confidentiality conditions, and based on the free consent of the involved parties».

The mediator's part consists in acting in all diligence so that the parties reach a reasonable mutual agreement, within a reasonable time. For that matter, the carrying out of mediation is possible only based on the parties' cooperation.

If, following the mediation procedure, the parties reach an agreement, the conflict ends and the strike action is avoided.

B. Arbitration

Art. 179 of the new Social Dialogue Law provides that on the entire duration of a collective labour conflict, the parties in conflict may decide by consensus to submit the disagreements between them to the arbitration of the Collective Labour Conflicts Mediation and Arbitration Office, an institution within the framework of the Ministry of Labour, Family and Social Protection.

The decisions that shall be adopted to this effect are mandatory for the parties; they complete the collective labour contracts, and become executory from the moment of their adoption.

Consequently, if the parties resorted to arbitration, calling a strike is no longer possible, inasmuch as the collective labour conflict ended by arbitral decision.

Notes

(V. la versione inglese)