THE 15TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

An Appeal Against a Judgment of the Court of Appeal - Labor Disputes and Social Security Section is Admissible?

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Abstract: The purpose of this approach is to identify an answer to the following question: it is admissible, in the conditions expressed in the art. 483 par. 2 Code of Civil Procedure, a recourse against a decision that has been pronounced in the Court of Appeal - Labor disputes and social security section? The foray into civil procedural matters is not only theoretically valuable, it is in fact generated by a concrete cause, and the answer to this question is still under discussion – and tends towards a negative aspect in the practice of the ICCJ - it should, in our opinion, be circumstantiated, taking into account the nature of conflict/dispute/settled by the Court of Appeal; thereof an appeal against the judgment of the Court of Appeal - Labor and Social Security Section should be considered admissible, if the conflict (dispute) resolved by this section is not a dispute (conflict) of labor and social security nature.

Keywords: Legality of the appeal; admissibility of the appeal; nature of the dispute; principle of legal certainty; right of access to the court

A. Question of law Under Discussion

This approach aims to identify an answer to the following question: an appeal against a decision rendered in appeal by the Court of Appeal - Labor Disputes and Social Security Section may be admissible under the express provision of art. 483 para. (2) Code of Civil Procedure?

The digression into civil procedural matters circumscribed to this matter of law has not only theoretical connotations, but it is generated, in fact, by a certain cause, and the answer to this question - which tends to be negative in the practice of the High Court of Cassation and Justice – should, in our view, be circumstantial, with the consideration of the nature of the conflict / dispute / settled by the Court of Appeal.

B. Relevant Factual Circumstances

In order to argue this point of view, it is essential to state the circumstances of the case as follows:

I. By the application for summons registered on February 23, 2017 before Galati Court, - Civil Division I, under file no. xxxxx, the plaintiff X, joint stock company whose sole shareholder is G Local Council, requested an order against the defendants A, B, C, ... (15 defendants) be jointly and severally liable to pay the amount of 1,300. 783.41 LEI.

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In the applicant's view, this amount represents the damage caused by the unlawful reduction of fees and charges for the provision of services related to the local public transport service, a reduction whose illegality was found by Decision no. 13 of 20.03.2014 issued by the Court of Accounts of Romania - Chamber of Accounts G.

The applicant further stated that, although the Local Council, as the sole shareholder, had set certain tariffs for the use of the poles, the applicant's Board of Directors together with the GMS representative had established a lower tariff by MB Decision no. 25/2009 and MB Decision no. 9/2012 and, on the basis of these decisions, contracts for the use of poles at a reduced tariff were concluded with the companies providing electronic communications networks.

In its opinion, **the members of the Board of Directors / the representative of the General Meeting of Shareholders** who adopted the mentioned decisions, **as well as the employees** of the plaintiff who, in one way or another, participated **in signing the contracts** (with third parties) with **the reduced tariff**, are guilty of causing the damage i.e. the Contracts no. 2766 from 07.03.2012, 9553 from 16.09.2012 and 9990 from 27.10.2010.

De jure, they invoked the provisions of the Code of Civil Procedure[1], Law no. 62/2011 on the social dialogue[2], art. 254, 255, 268 and 272 of the Labor Code[3], art. 1357 at seq. of the new Civil Code[4], art. 155 and et seq. of Law no. 31/1990[5] on trading companies have been invoked.

By the Civil Sentence no. 1362/20.12.2017, Galati Court declared admissible the exception to the statute of limitation invoked by the defendants and rejected the request made by the plaintiff Company X S.A., the court holding that the notification has been made after the general limitation period of 3 years. In order to deliver its decision, the First Instance Court held that the statute of limitation to recover the damages caused by the unlawful reduction of fees and tariffs for the purpose of carrying out services related to local public transport service exists from the date on which the damage occurred, respectively the date of the conclusion of the contracts for the use of poles with the companies providing electronic communications networks, and not from the time of the conclusion of the report of the Court of Accounts, which only finds the existence of damage..

[1] Law no. 134/2010 on the Code of Civil Procedure was published in the Official Gazette under the number 247 of April 10, 2015. Law no. 134/2010 was republished in the Official Gazette of Romania, Part I, no. 545 of 3 August 2012, and was subsequently amended and supplemented by:
- Government Emergency Ordinance no. 44/2012 on the amendment of art. 81 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 606 of August 23, 2012, approved by Law no. 206/2012, published in the Official Gazette of Romania, Part I, no. 762 of November 13, 2012;
- Government Emergency Ordinance no. 4/2013 on the amendment of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, as well as for the amendment and completion of some related normative acts, published in the Official Gazette of Romania, Part I, no. 68 of January 31, 2013, approved with amendments and completions by Law no. 214/2013, published in the Official Gazette of Romania, Part I, no. 388 of June 28, 2013;
- Law no. 72/2013 on measures designed to combat late payment of obligations resulting from contracts concluded between undertakings or between undertakings and contracting authorities, published in the Official Gazette of Romania, Part I, no. 182 of April 2, 2013.
Law no. 134/2010 was republished pursuant to art. XIV of Law no. 138/2014 for the amendment and completion of Law no. 134/2010 on the Civil Procedure Code, as well as for the amendment and completion of some related normative acts, published in the Official Gazette of Romania, Part I, no. 753 of October 16, 2014, giving the texts a new numbering.
[2] Published in the Official Gazette of Romania, Part I, no. 322 of May 10, 2011, and subsequently republished in the Official Gazette of Romania, Part I, no. 625 of August 31, 2012.
[3] Law no. 53/2003 was published in the Official Gazette of Romania, Part I, no. 72 of February 5, 2003, republished in the Official Gazette of Romania, Part I, no. 345 of May 18, 2011.
[4] Law no. 287/2009 on the Civil Code was published in the Official Gazette of Romania, Part I, no. 409 of June 10, 2011, the Civil Code entering into force on October 1, 2011.
[5] Law no. 31/1990 was published in the Official Gazette of Romania, Part I, no. 126 - 127 of November 17, 1990 and was republished in the Official Gazette of Romania, Part I, no. 1066 of November 17, 2004.

The plaintiff X appealed against this sentence. By Civil Decision no. 586/2018, **in the majority opinion - the case being settled by a three-judge panel** - they decided to admit the appeal declared by the appellant X SA, the civil sentence was partially annulled and **the case was sent for reconsideration in respect of some of the defendants** (i.e. 8 of them), while the other provisions of the judgment under appeal were upheld (...). The appeal was dismissed as unfounded by a **dissenting opinion**.

In its reasoning in the judgment, Galati Court of Appeal held that, for a part of the defendants (which are subject to the provisions of labor law), the statute of limitation was applicable, the Court holding that the scope of art. 211 para. (1) letter c) of Law no. 62/2011 on the social dialogue[1]*, "and for the other defendants, who are not subject to the provisions of the Labor Code, as they were not employees, but members of the Management Board/GMS representative the statute of limitation is not applicable."*

The Appellate Court held during the deliberation that, even the joint and several liability of all the defendants was requested, the Court was seized with requests of a distinct legal nature comprised in the same petition, substantiated on different acts and facts, which have been analyzed and settled as such, in the light of distinct rules of substantive law, namely:

- A petition based on contractual liability, in the case of the defendants - employees of the company, invoking the provisions of art. 254 and art. 255 of the Labor Code, respectively art. 1350 of the new Civil Code;

- the second petition, based on contractual liability - a majority opinion - and tort liability – a dissenting opinion-, in the case of the defendants having the position of member in the Management Board, respectively the GMS representative, invoking the provisions of art. 144 para. (1) and (2), art. 5 of Law no. 31/1990 republished, with subsequent amendments and completions, art. 1357 para (1), art. 1381 and art. 1382 of the new Civil Code.

The court states that "the fact that the plaintiff requested the joint and several obligations of the defendants did not constitute an impediment for the court to give an exact legal qualification of the acts and facts thus brought before the court".

The Court concludes that one of the actions with which it is invested[2] *has the nature of a liability claim against the administrators for damages caused to the company by dereliction of duties towards it, covered by art. 155 para. (1) and (2) of Law no. 31/1990, and, on this ground, holds that the statute of limitation is calculated according to art. 2528 of the new Civil Code (otherwise than in the case of employees), holding that the substantive right to bring actions is prescribed for the employees, but not for the members of the Management Board.*

The defendants-nonemployees lodged an appeal against this decision. They justified the admissibility of the appeal by stating that this dispute, even settled by the Labor Disputes and Social Security Section, *does not represent for them a labor dispute; pointing out that this circumstance is expressly stated in the judgment under appeal; they showed that in this case operates the principle of legality of the remedy*

[1] According to which "claims may be made... within 3 years from the date of the occurrence of the damage, when the claim concerns the payment of compensation for damages caused by employees".

[2] Despite the fact that the content of the judgment did not explicitly state that the appellate court considered itself to be vested with two claims, this is the only conclusion stemming from the reasoning. Thus, in accordance with the provisions of art. 194 Civil Procedure Code, the plaintiff is obliged to indicate ... the name and surname of the parties (paragraph (1) letter a), and, according to letter d), to mention the factual and legal reasons on which the request is based; or, if the appellate court held that the **grounds of fact** ("classification of acts and facts") and **the legal grounds** ("action based on contractual liability, attributed by the applicant to unlawful acts in connection with the performance of the warrant") are different from the factual and legal grounds alleged in relation to the defendants - employees, it appears that the court found that it is vested with two claims, although the claim is the same.

of law provided by art. 457 para. (1) Code of Civil Procedure and that the admissibility of an appeal should be examined in the light of the nature of the dispute and not solely taking into consideration the section which settled the dispute; they showed that it would be illogical, illegal, and capable of defeating their right to an effective remedy, as well as the principle of security of legal relations, and leading to the conclusion that, despite the fact that their essential defense regarding the expiry of the statute of limitation period was refused on the grounds that they are not subject to the provisions of labor law as they have not the employee status, their access to court may be refused by suppressing the appeal, precisely for the reason that they were parties to a labor dispute.

The appeal was registered with the High Court of Cassation and Justice, Civil Section II. The report on the admissibility of the appeal was drawn up on 29.01.2020, in accordance with the provisions of art.493 Civil Procedure Code (as it was in force and incidental at the time the action was brought).

This conclusion contains a de facto statement "the case brought before the Court has as object a labor dispute" and one by law, retaining the incidence of art. XVIII of Law no. 2/2013 according to which: "the provisions of art. 483 para. (2) of Law no. 134/2010 on the Code of Civil Procedure, republished, applies to lawsuits initiated starting with January 1, 2016, and according to para. (2) judgments handed down (...) in labor disputes and social security are not subject to appeal, the judgment under appeal being thus final; the report therefore concluded that the appeal was inadmissible.

C. Arguments in Support of the Admissibility of this Remedy of Law

II. The summary of this case at first reading may show that there is no subject of debate and that the appellants' approach is in its first "infancy" of the procedure doomed to failure; i.e., to appeal a decision handed down by the Labor Disputes and Social Security Section on appeal, under the conditions expressly regulated by art. XVIII of Law no. 2/2013, is configured to be an inexcusable approach, especially since the appellants benefited from specialized legal assistance (through a lawyer)

III. But we can say that things are as clear as the High Court of Cassation and Justice saw them (even if only through the eyes of the Assistant Judge who prepared the report)?

IV. Another issue closely related to the previous question that could be the backup grounds for this approach concerns the legal value of the report prepared by the Assistant Judge and whether it is indicated - or even deontological - that those that can be found in its content to be considered grounds for arguments, given that the High Court of Cassation and Justice has not yet declared the inadmissibility of the appeal.

In our opinion, as only two solutions are possible (the appeal will be either admissible or inadmissible) and considering the provisions of art. 493 para. (4) Civil Procedure Code. - in the sense that this Report has already been analyzed in the filtering panel prior to the communication to the parties - there are reasons for concern generated by the way in which the rapporteur magistrate chose to settle this issue, in a not clear at all and not very sensitive manner. Therefore, without hiding the intention to generate a discussion on the matter of law in this case, we take the risk that this approach may be qualified as premature or hasty, instead of the other higher risk - and whose effects would be irreversible – the risk of not having reported on time a problem of concerning the law interpretation and application, with the

consequence that this approach shall only represent for the litigants in question a theoretical exercise, with the same effects as the dissenting opinion of the judge from Galati Court of Appeal[1].

V. Starting from the sequence of events thus described (point I), we find that the topic proposed for the analysis is not new: in fact, it's about a discussion meant to identify the remedy of law in terms of the nature of the dispute, a matter depending on the Court's jurisdiction by reference to litigation nature, issues on which the doctrine had the occasion to take a position.

However, the way in which the issue of inadmissibility has been addressed in the content of the Report leads rather to the idea that the practice has the tendency to move towards and embrace an opinion as erroneous as it is harmful; that opinion is based on the premise that, once the jurisdiction (in this case, of the Labor Disputes and Social Security Section) has been established, the nature of the dispute can no longer be taken into account in order to establish the remedy of law to which the party is entitled.

VI. The conclusion is clearly wrong and also contradicts in equal measure some of the legal texts which, in our opinion, would be incidental (as a matter of fact, one of them referring to the content of the Report), namely:

- Provisions of art. 457 para (1) Civil Procedure Code;

- Provisions of 430 para (2) Civil Procedure Code [2];

- art.6 of the European Convention on Human Rights which guarantees the right of the parties to a fair trial, respectively the right of access to court and the principle of security of legal relations, art. 13 of the European Convention on Human Rights (the right to an effective remedy) as well as the jurisprudence of the Court, reflected (as an example) in the cases: Lungu et al. against Romania[3]*, Brumărescu against Romania*[4]*, Rozalia Avram against Romania*[5]*, Esertas against Lithuania*[6] *(...); art. 47 of the Charter of Fundamental Rights of the European Union which also regulates the right to an effective remedy of law and to a fair trial.*

VII. Returning to the content of the Report, we find that the elaboration of the rapporteur magistrate's point of view, the dispute was exclusively qualified through in the light of the section that settled the case.

The content of the report states: "*it is found that in this case, the contested decision, respectively the civil decision no. 586/2018 of October 4, 2018 delivered by Galati Court of Appeal - Labor Conflicts and Social Security Section, was handed down during the appeal trial,* ***being final*** *(...)*"

The rapporteur magistrate notes that*: "the case brought before the court has as object a labor dispute which consists in the payment of compensations to the employer (in this case, the respondent-plaintiff X S.A.) respectively the patrimonial liability of the employees (the appellant - defendant) to the employer".*

[1] Res judicata shall take into consideration the operative part and the considerations on which it relies, including those by which a dispute has been settled.
[2] Res judicata shall take into consideration the operative part and the considerations on which it relies, including those by which a dispute has been settled.
[3] Decision of October 21, 2014, application no. 25129/06, available on *http://ier.gov.ro/wp-content/uploads/cedo/Lungu-%C8%99.a.-%C3%Aempotriva-Rom%C3%A2niei.pdf.*
[4] Decision published in the Official Gazette no. 758/28 November 2001, available on http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=30585.
[5] The decision of April 5, 2016, application no. 19037/07, available on http://hudoc.echr.coe.int/eng?i=001-161943.
[6] Decision of May 31, 2012, application no. 50208/06, CE:ECHR:2012:0531JUD005020806.

(...) ***In the opinion of the rapporteur, the inadmissibility of the appeal is the expected solution, as the appeal was remitted against a final decision, which does not fall within the hypothesis regulated by art. 483 para. (1) Code of Civil Procedure.***

VIII. The linchpin of the argumentation of the inadmissibility of the appeal by the rapporteur magistrate is the reason according to which: ***"for the disputes concerning the labor disputes and social security and for the actions brought before the court after the entry into force of the New Code of Civil Procedure, the only legal remedy is the appeal (...)*** *Consequently, relating the facts of the case to the legal provisions referred to, the decision at issue in this appeal is final from its delivery and is therefore shall not be subject to appeal, in which case the principle of the appeal legality is operative as laid down under art. 457 Code of Civil Procedure*".

Although it is alleged that the Report took into consideration the "facts applying in the present case", notwithstanding the fact that the content of the Report listed the arguments concerning the admissibility of the appeal brought by the appellants-defendants, arguments put forward by them in the application for appeal, the reporting magistrate qualified the report submitted to trial between the appellants-defendants and the appellee-plaintiff X SA as a labor dispute[1].

The qualification is obviously wrong because in the appealed decision it is noted that the respondents-defendants were summoned to court as members of the Management Board / GMS representative and not as employees, moreover, this was the sole consideration for which, by the same decision, the appellants were denied the same treatment as the persons summoned to court as employees, Galati Court of Appeal invoking for the latter the statute of limitation.

Therefore, the way in which the petition was registered on the dockets of Court is not relevant for the determination of the remedy of law, but the way in which the remedy of law was qualified and judged by the court in relation to each category of defendants.

The key issue in this case is that the appellate court ruled in the judgment under appeal that the litigious legal relationship is of a different nature with regard to the capacities of the two groups of defendants (employees and members of the Management Board, respectively, the GMS representative), and the differential treatment must also subsist as regards the possibility of exercising such remedies of law.

Considering this logical and legal reasoning, deduced from the provisions of Law no. 31/1990 and strengthened by the reasoning of the court of appeal, the appeal is admissible for the defendants in their capacity as members of the Management Board, respectively, the representative of the GMS, as the dispute in which they were defendants, as far as they are concerned, was not a labor dispute, but a litigation of a distinct nature, this qualification being made by the court itself in the appealed decision.

The legal actions having as object "incurring patrimonial liability against founders, administrators, directors, respectively members of the management board and the board of supervisors, as well as the auditors or financial auditors, for damages caused by the dereliction of duty towards the company", governed by the provisions of art. 155, para. (1) and (2) of Law no. 31/1990 are not exempted from the appeal, as there is no legal provision to suppress this appeal; the provisions of art. 483 para. (2) Civil Procedure Code[2]*, thus, the final sentence is not applicable.*

[1] According to the provisions of art. 231 of the Labor Code "the labor disputes refer to the disagreements between **employees** and **employers** concerning the economic, professional or social interests or rights resulting from the conduct of employment relationship".

[2] This legal text provides: "the judgments given in the applications provided by art. 94 pt. 1 lit. a) - -j^3), in matters relating to civil navigation and port activity, labor and social security disputes, in matters of expropriation, in applications for consumer protection, insurance, and in matters arising from the application of Law no. 77/2016 regarding the payment of real estate in

IX. Assuming that the argument put forward cannot be considered sufficient to prove the rightness of the argument that an appeal is admissible in such a situation, we should identify the effects of its removal.

a. In carrying out this exercise (thus removing the argument) we find that a contrary solution would lead to the violation of the res judicata authority of the appealed decision, an authority that is also attached to the considerations, pursuant to the provisions of art. 430 para. (2) Civil Procedure Code[1]*; it cannot be held that the appellant-defendants referred the appeal to the court against a judgment given in a litigation concerning labor and social security disputes, as long as the judgment under appeal holds that the trial in which they were parties is not for them a labor and social security dispute, but an action based on contractual civil liability - respectively tort liability, in minority opinion - based on the provisions of Law no. 31/1990, with special reference to the administrator's responsibility, regulated by art. 72 in conjunction with art. 155 para. (1) of this law. Therefore, a 'non-receipt' of the appeal would constitute a 'disregard' of the considerations of the judgment of the Court of Appeal which, in the opinion expressed in the Report, is final, so it has res judicata authority from the ruling.*

b. The same violation will be observed if we refer to the right of a person to an effective remedy, regulated by art. 13 of the European Convention on Human Rights, as well as the principle of legal certainty enshrined in Article 6 of the European Convention on Human Rights, since, in view of the latter principle, it will be impossible for the litigant to understand that, although there was a labor dispute when the case was judged on appeal, the same case is still a labor dispute when the admissibility of the declared appeal[2] *is investigated. The principle of effectiveness governed by the Charter, on which the Court of Justice of the European Union has had numerous occasions to rule, has also been infringed*[3]*.*

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order to settle the obligations assumed by credit agreements. **Judgments given by the courts of appeal are not also subject to appeal in cases where the law provides that judgments of first instance are subject to appeal only.**

[1] As a rule, It is true that the invocation of res judicata for a decision presupposes another previous process in which it would have been decided contrary to those to which it tends in the pending process; in this case, referring to the res judicata authority of the judgment, we refer to the same litigation; this does not mean, however, that this effect cannot be invoked, as long as the judgment of the High Court of Cassation and Justice, taking into account the conclusion of the Report, shall acknowledge that the judgment under appeal is final, based on an argument which clearly contradicts those retained by the Galati Court of Appeal.

[2] The European Court of Human Rights, in several cases, considered that, "even in the absence of the annulment of a decision, contesting a solution adopted in a dispute by a final court decision in another judicial procedure may affect art. 6, insofar as it may make illusory the right to appeal to the court and violate the principle of legal certainty" (see the Decision of April 5, 2016, Rozalia Avram v. Romania, application no. 19037/07, available on http//hudoc.echr.coe.int/eng?i=001-161943). For developments regarding the principle of legal security, see also Deaconu Ștefan "The principle of legal security in the Romanian constitutional order" published in the Romanian Law Review no. 3/2016, available in electronic format on https://lege5.ro/Gratuit/gi3tinrxgayq/principiul-securitatii-juridice-in-ordinea-constitutiunea-romana; see also Ion Predescu, Marieta Safta, "The principle of legal security, foundation of the rule of law. Jurisprudential landmarks", available on https://ro.scribd.com/doc/113664517/PRINCIPIUL-SECURITĂŢII-JURIDICE.

[3] "In the absence of a regulation of the Union establishing the time from which it must be possible to bring an appeal, according to settled case-law, it is for the national law to establish the modalities of the judicial proceeding intended to ensure the protection of the rights conferred to litigants by the Union. **However, these procedural modalities must not be less favorable than those applicable to similar actions provided for the protection of rights based on the internal legal order (principle of effectiveness) and must not make it practically impossible or excessively difficult to exercise the rights conferred by the Union legal order - principle of effectiveness**.
(Decision of 5 April 2017, C- 391 / 15, Marina del Mediterraneo et al., EU:C: 2017: 268, para 32 with reference to Decision of 30 September 2010, Strabag et al., C 314/09, EU: C: 2010:567, para 34, Decision of 6 October 2015, Orizzonte Salute, C6 1 / 1 4, EU: C: 2015: 655, para 46, as well as Decision of 26 November 2015, Med Eval, C 166 / 14, EU: C: 2015: 779, para 32, 35 and 37). For details on the principle of effectiveness, see Mihaela Mazilu Babel HCCJ. Decision no. 45/2016. Prior release. Time limit for lodging a request for review for failure to comply with Union law. Possible non-compliance with Union law?, published in the *Jurisprudența Pandectele Romane* 4 of 2017; see also Mihaela Mazilu Babel "Jurisdictional protection of fundamental rights at national level" doctoral thesis, published in electronic format on file:///C:/Users/User/Downloads/Teza-de-doctorat-iulie-2016-Mihaela-Mazilu-Babel%20(1).pdf, especially the chapter "The right to effective judicial protection", pages 126-136.

X. As I have already shown, the conclusion of the rapporteur magistrate starts from an erroneous premise, namely that, being a dispute settled by the Labor Disputes and Social Security Section of the Galati Court of Appeal, this dispute can only represent a labor dispute; in other words, it is considered (implicitly) that the nature of the dispute is given by the jurisdiction of the court that settled the merits and, possibly, the appeal.

However, we are dealing with an inverse relationship, the court's jurisdiction is established by the nature of the dispute (Boroi & Stancu, 2015, p. 247), *but with the possibility of an erroneous established result.*

Thus, in accordance with the provisions of art. 131 Civil Procedure Code, "at the first trial term for which the parties are legally summoned before the first instance, the judge is required, ex officio, to verify and establish whether the notified court is generally, materially and territorially competent to judge the case, noting in its conclusion the legal grounds for which the jurisdiction of the seized court have been found. The conclusion has an interlocutory character".

Also, in accordance with the provisions of art. 136 para. (1) Civil Procedure Code, "the provisions of this section regarding the motion to dismiss for lack of jurisdiction and the conflict of jurisdiction shall apply by similarity in the case of specialized sections of the same court, which shall rule by conclusion".

In the event that the material and functional lack of jurisdiction of the court is not invoked, until the deadline indicated, the court shall still have the competent jurisdiction, pursuant to art. 129 para. (2) point 2 Civil Procedure Code [1]*, corroborated with art. 130 para. (2) Civil Procedure Code* [2]*, to judge the case brought before the court*[3]*, thus resulting that a case can be tried by a court that is materially and functionally incompetent, even if the rules governing this jurisdiction are of public policy.*

XI. However, the maintenance of jurisdiction by an incompetent court does not change the nature of the dispute. For example, if a dispute which is of a civil nature but remains pending before an administrative court does not mean that the legal relationship before the court must necessarily be governed by the substantive rules of law applicable to legal relations of administrative law, a fact confirmed by case-law[4]*.*

[1] *The lack of competence is of public order (...) in case of violation of the material competence, when the process is within the competence of a court of another degree or within the competence of another section or another fully specialized court formation.*

[2] (2) *The material and territorial lack of competence of public order must be invoked by the parties or by the judge at the first trial term at which the parties are legally summoned before the first instance and can draw conclusions.*

3 The judicial practice was expressed its opinion in the same sense, noting that "given that the section of the court of appeal did not analyze its jurisdiction at the first trial when the parties were legally summoned and the parties did not invoke the functional incompetence of the panel in relation to the legal nature of the dispute brought before the court, the case must be considered for settlement, invoking that the illegality of lack of jurisdiction at the second trial, in violation of the mandatory term provided by the procedural rules ". High Court of Cassation and Justice – Section I Civil, Decision no. 720 din 09.05.2017.

[4] Galati Court of Appeal, Decision no. 2250 of 07.09.2017 (unpublished), verifying the legality of a decision pronounced by Galati Court - Administrative and Fiscal Litigation Section, held that "as the defendant is no longer a civil servant, can no longer be issued a taxation decision according to Law no. 188/1999 (...) the action brought under common law is not inadmissible and the court has the jurisdiction to rule on it; as the motion of lack of jurisdiction not was not invoked in due time, (...) can no longer be discussed, the legal basis of the case remaining the common law art. 1367 Civil Code".

We mention that the Administrative and Fiscal Litigation Section of Galati Court of Appeal judged the APPEAL declared against this decision, although, according to art. 20 para. (1) of Law no. 554/2004 of the Administrative Procedure, the decision pronounced in the first instance can be appealed. We appreciate that the way in which the Court proceeded was in accordance with the above-mentioned article, because art. 20 para. (1) of Law no. 554/2004 refers to the solutions that the contentious court can pronounce, respectively those from art. 18 of the same law. However, since the solution was not limited to art. 18 and the sue petition did not comply with art. 8 of Law no. 554/2004 - with regard to the subject-matter of the action, the appeal was correctly declared by the party and tried as such by the Court.

XII. Under these circumstances, considering art. 457 para. (1) Civil Procedure Code, according to which "the judgment is subject only to the remedies provided by law, under the conditions and within the time limits set by it, regardless of the terms in its operative part[1]*, even if the judgment under appeal contains in its operative part the statement "final". The appeal declared by the persons who do not have the capacity of employees is admissible.*

XIII. Even if we have already concluded that the appeal is admissible, we are still obliged to consider the contrary view sustaining that, once the section which will settle the dispute has been established, the nature of the dispute can no longer be called into question.

In view of this circumstance, we show that a possible motion to dismiss for lack of jurisdiction would not have led to the jurisdiction declining.

Of course, it could be objections against this last argument, in the sense that, since the lack of jurisdiction is not invoked, no assessments can be made regarding the decision of the Court on this exception.

However, we point out that the legal provisions on the extension of jurisdiction (which may, in turn, be relevant, as we will show in point XIV) are not the only reasons for which this case has been settled by the Labor Disputes and Social Security Section. This situation was determined by the nature / argumentation / manner of drafting the sue petition made by the plaintiff, which requested that, by the judgment to be issued, the defendants - employees and non-employees - be jointly and severally liable to pay the amount of (...), and the parties' defenses attorneys were limited to this petition and argument.

In the view of the provisions of art. 1443 of the new Civil Code, the liability is joint and several between debtors when all are obliged to do the same service, so that each of them can be kept separate for the entire obligation, and solidarity can only be legal or conventional, in accordance with art. 1445 of the new Civil Code, and cannot be presumed.

On the other hand, in accordance with art. 1445 of the new Civil Code, solidarity between debtors is not presumed; it exists only when it is expressly stipulated by the parties or is provided by law.

But in this case, Galati Court of Appeal considered that, in fact, was vested with the authority to decide on distinct claims, holding that "the applicant's request for joint and several liability of the defendants did not constitute an impediment to the exact legal qualification of the acts and facts thus brought before the court (Chiş & Zidaru, 2015, p. 86).

Galati Court of Appeal understood to treat the summoned persons differently, omitting that a joint and several liability was expressly requested which, in no case, could have operated between persons against whom, on the one hand, it was found that there is an incidental contractual liability based on the employment contract (deriving from the quality of employee), and on the other hand, a contractual liability based on the provisions of Law no. 31/1990 for non-employees - aspect noticed by the magistrate with dissenting opinion regarding the Civil Decision no. 586/2018 of Galati Court of Appeal, establishing that the case could only be a possible tortious liability -, being impossible to have joint and several liability based on separate contracts in the content of which this solidarity is not expressly stipulated - we add.

Finally, although it would seem that this clarification took us away from the issue in question (because the analysis of the legality of the decision of Galati Court of Appeal goes beyond this endeavor, which certainly deserves a separate approach) that is actually not the case taking into consideration the manner

[1] This text was also invoked the Report concluding the inadmissibility of the appeal.

in which the court was referred and the manner in which the jurisdiction was established in favor of the Court - Civil Section, fully specialized for labor disputes and social security.

I would like to point out that, by the applicant's request **to hold the defendants jointly and severally liable**, even if the non-employed defendants had invoked the court's lack of jurisdiction, the court remained vested in this case, taking into consideration the claim' s object and the grounds of liability invoked (some of the defendants being employees).

On the other hand, there was no interest in invoking an objection of lack of jurisdiction by the non-salaried defendants, given that the solidarity does imply the possibility for one person to be prosecuted for the entire debt, but also the possibility of the person being sued to bring action against the others persons with whom he is jointly and severally liable, in order to recover the part of the damage to which would have been indebted each of them[1].

As mentioned above and having regard to the subject-matter of the claim and the fact that a certain form of liability has been claimed - in particular, a joint and several liability and not a divisible obligation, - with an indication for each of the defendants of the amount they are obliged to pay - if two separate claims had been made, (following a possible severance as a result of the invocation of the lack of material and functional competence of the court), it would have resulted in the applicant claiming the same amount twice - once for salaried defendants and once again from the defendants - members of the Management Board, respectively, the GMS representative . This is the other reason, in addition to the benefit from the right to sue from compensation against several defendants - and, to be honest, the benefit of missing the deadline within which the plaintiff could act - for which the declining jurisdiction was sought for non-employees' defendants.

XIV. However, given that these issues were not debated before the court of first instance[2]*, but were nevertheless considered by the appellate court - it could be considered that the court legally understood to extend its jurisdiction, in meaning that, initially, Galati Court- the specialized panel for labor disputes*[3] *and later, Galati Court of Appeal - Labor Disputes and Social Security Section - became the competent court to settle a case that usually does not fall within its jurisdiction, taking into account the capacity of defendants, in their capacity of members of the Management Board, respectively representative of the GMS.*

In accordance with Art. 99 para. (2) Civil Procedure Code on the legal prorogation of jurisdiction, "where several main heads of claim based on a common title or having the same or even different but closely related causes, submitted to trial by a single sue petition, the court of competent jurisdiction to settle them shall be established taking into account that claim which shall be the matter of jurisdiction of a higher court".

The doctrine (Boroi & Stancu, 2015, p. 247) *mentioned that "although the provisions of art. 99 Civil Procedure Code are comprised in the section on determining the material jurisdiction according to the value of the object of writ of summons, it results from their content that they have the vocation to be*

[1] According to art. 1456 paragraphs (1) and (2) of the new Civil Code. (1) The joint and several debtors who honored his obligation may claim from his co-debtors only the part of the debt that belongs to each of them, even if it is subrogated to the creditor's rights. The parties belonging to the joint and several debtors are presumed to be equal, unless the agreement, law or circumstances show otherwise.

[2] And, under this circumstance, the annulment of the decision and remanding the case for retrial to the court of first instance in order to clarify the procedural framework would have been, perhaps, a solution that would have complied with the provisions of art. 22 in conjunction with art. 13 and 14 of the Civil Procedure Code.

[3] However, before which such an issue regarding the need to qualify/specify de facto and de jure the introductory action, with the exact indication of the nature of the legal relations to be analyzed by the court, this qualification being made on appeal, on the occasion of deliberation.

applied in cases where the material jurisdiction is to be established according to the nature or object of the claim.

Furthermore, according to art. 123 para. (3) Civil Procedure Code, "When the court has exclusive jurisdiction for one of the parties, shall have exclusive jurisdiction for all parties".

It was thus shown that "in order to operate the legal prorogation of jurisdiction over the case, it is necessary to include therein a connection, a sufficient connection to justify this prorogation of jurisdiction. (...) This solution is justified by practical considerations, which require the settlement of dispute by a single court, even if the absolute rules of jurisdiction, such as the rules of subject-matter jurisdiction, are infringed" (Boroi & Stancu, 2015).

Therefore, even if it would be considered that an exception of functional incompetence should have been invoked and that was not the case according to art. 130 para. (2) Civil Procedure Code, the fact that the Galati Court - Labor Disputes Section was vested with authority over such a matter, respectively the fact that the appeal was judged by the same section cannot lead to the conclusion that the nature of the dispute was definitively established as a work dispute.

Moreover, according to the decision on the admission of the appeal, the partial annulment of the appealed sentence and the remanding the case for retrial to the first instance, the case would also be registered on the docket of Galati Court, fully specialized for labor and social security disputes, which will probably judge (?!) in the formation provided by art. 55 of Law no. 304/2004 on judicial organization. However, this court will be held by the legal basis of the action, as explained / divided / clarified / qualified by the appellate court.

D. Conclusion

All the arguments put forward lead to the conclusion that, while the jurisdiction of the court is determined by the nature of the dispute, the converse does not always hold as the nature of the dispute was not established definitively by the determination of jurisdiction; by verifying the admissibility of an appeal, the control authority is required to investigate whether, **in concrete terms** - and not only by reference to the legal hypothesis -, depending on the nature of the dispute/conflict/case brought before the court, there is any express legal provision prohibiting it. In the factual situation presented, our opinion, already expressed - perhaps too many times - is that the conditions for the appeal admissibility are met.

And ... one last clarification in strict reference to the content of this article, a clarification to which I feel compelled at least from a moral point of view.

I must admit that additional efforts should have been made in the analysis carried out and, perhaps, in their absence, there is a practice or doctrine which would support or deny the view here expressed and to which I would have been required to refer. However, I dare to claim that it does not exist, since the assistant magistrate did not refer to it in any way.

Under such circumstances, as well as the fact that the issue under debate is a novelty, in accordance with the provisions of art. 493 para. (3) Civil Procedure Code that recommended that the rapporteur magistrate is required to base his opinion on the jurisprudence of the Constitutional Court, the High Court of Cassation and Justice, the European Court of Human Rights and the Court of Justice of the European Union, as well as on the position of the doctrine on the matter of law raised or at least, taking into account the arguments put forward by the appellants-defendants in support of the admissibility of

the appeal. In this way, the content of the Report - whatever its conclusion was - would have had at least the result to temper the frustration of the litigants involved in this case, who cannot understand, under any circumstance, how they can be considered unpaid and employed in the same process, entering pleas unsuccessfully on appeal and with substantial chances to happen the same thing in the remedy made in compliance with art. 457 Civil Procedure Code.

References

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