

QUID JURIS ?

SEPTEMBER 2017


**THE EMPLOYMENT CONTRACT
FOR A DETERMINED WORK:
AN INTRUDER IN MOROCCAN
LABOR LAW**

Well known to all, the fixed-term work agreement (“FWA”) and the permanent contract (“PC”) hold no longer any secrets for followers and patricians of our social Moroccan law. Left behind, the contract concluded for a determined work (“CDW”) is still a third ghostly option which is widely practiced in our society. Nonetheless, needless to say that to be present in our law, a particular attention deserves to be focus on it.

1. The legal background

A work agreement may be concluded “for an indefinite period, for a fixed term, or in order to accomplish a specific task” (article 16 of the Labor Code, enacted by the Dahir of 11th September 2003).

The common regime defines rules that apply to all type of contract, this is the case for the working time, vacations, or the employer’s obligations.

In support of its objection, specific aspects keep to be only to their regime, for instance the formation and termination of the employment contracts. The Labor Code reveals to be incomplete for the CDW, and for good reasons there is no specific legal provisions related to it.

What consequences did it have in the end?

As a first consequence, we can raise that there is a fear of a judicial reclassification into a FWA. This relegates it today to an unfavorable place in our Labor Moroccan law. The CDT is not used to its fair Value, while it is the most appropriated contract for the public works, the public markets, or other infrastructural projects.

2. A specific regime diverted from the common law.

To understand this exotic regime of CTW, let's go back on the legal basis of the FWA and PC.

First regarding to the situation on which each contracts are the most adapted.

Indeed, the undetermined contract distinguishes itself with the other type of contract by applying a *fortiori*.

On its part, the FWA can be used only for three restrictive outlined situations, which are:

- The replacement of an employee in case of suspension of its work agreement for a reason other than a strike ;
- The temporary increase of the business activity ; or
- When it concerns a seasonal work.

Second, regarding to their probationary period (article 14 of the Labor Code)

In permanent contract's cases the probationary period cannot last longer more than three months for the employees and managers, one month and a half for the employees, and fifteen days for the workers.

Whereas for the FTW, the maximal duration is established according to the implementation period of work. According to this point, we have:

- One day for one week of work,
- Two weeks maximal for a period of time inferior to six-month ; or
- One month for a period superior of six-month.

Finally, regarding to their termination condition.

The FTW may only be executed for a maximal duration of one year renewable once, it has a specific legal framework with regards to dismissal. Thus, the termination before term can only occur in case of serious misconduct, or in case of force majeure. If so, the termination would be unjustified, and will generate the payment of dismissal indemnities by the employer. This dismissal indemnities are representing the total amount of the salaries that should have been paid between the layoff date and the end of contract.

The contract executed for a temporary employment.

On its part, the PC may be unilaterally terminated by each party, in accordance with the prohibition principle of perpetual commitments. Some conditions must be respected, including form's requirements and the planned notices periods. Moreover, in case of unilateral termination of a PC by the employer, the employee benefits from indemnities which are calculated on a pro rata basis depending on his/her seniority.

In addition to these two main contracts, we can notice the existence of the temporary employment contract ("TCE"). The TCE is executed with temporary employment agencies and it imposes a legal requirement of a written contract including certain information.

In the TCE cases, a company can use the services of an employee for performing a determined task. These remedies are authorized in the same conditions that the FTW. This contract can be executed for a maximum and non-renewable period of six months, or for the duration of suspension of the employment agreement of a substituted employee.

3. The hybrid characteristic of the CDT.

The contract executed for a determinate task seems to be close with the FTW, due to the limited duration common to both contracts. Furthermore, in case of termination of the CDT, the severance payments will be calculated by referenced to the employee's seniority. But it does not take into account the remaining time until the expiration of the contract. This reflects the practice hold in case have a similar object with the FTW and with the characteristic of a limited duration resembling to that of the FTW.

These examples reflect the hybrid aspect of this particular contract.

Besides the temporal aspect of the CDT, the regime tends to be closer to the PC. Indeed, its duration, related to the time of work to accomplish, is not predetermined by the work contract. Unlike the FTW, the work duration of the CDT can exceed the effective period of one year. It may even be possible to execute such contracts for a duration of more than ten years. The reason is that the CDT is referred to a big scale projects (development of significant infrastructural projects) and offers a relative continuity and fall in the field of the PC legal regime. However, this distinguish it from the FTW and the TCE which are characterized by the temporal limits.

Thus, the CDT moves away from the vision of a precarious contract, to which the characteristics of a limited period of time are often attached to. CTD's regime has to determine the object and the nature of the work to accomplish.

The bound of this kind of contract rests on the respect of the prohibition of perpetual commitment, the work shall not be ad vitam aeternam.

The Moroccan Labor Code is open to criticism, indeed many aspects are not sufficiently developed by the Code. Due to this lack of specific applicable provisions, a teleological interpretation would lead to the application of the rules governing the PC.

4. Practical overview of the CDT: the risks of reclassification

Provisions of the article 18 of the Labor Code do not requires special formality for the contract conclusion, the same would not apply for the CTD.

It is necessary that the contract must be establish by writing and that it defines different elements, among which the policy's term and determined tasks for the one the agreement was concluding. Otherwise, an important risk of reclassification by the judge of the CDT into a FTW is incurred.

This reclassification will have for consequence, an obligation for the employer to pay dismissal indemnities once the project has been developed. However, CDT's legal regime allows for the termination of the contract without damages at its maturity date. Considering that it could have extremely long duration periods of more than ten years, the loss of such beneficial legal regime under the CDT represents a significant financial burden for the employer.

Other aspects, linked to the legal uncertainty concerning the CDT's legal regime are likely to be problematic in case of the execution of such a contract, specifically with regards to the probation period. Although the termination notice of the probation period is submitted to a regime that is common to all types of contract. The duration of this notice is, on the other hand, different depending on whether the contract is a FTW or PC, without any specifications as to the CDT.

To remedy this issue, it is possible to use the mechanism of the commitment letter. This letter will serve as a support to a contractual relationship established for a limited time. Furthermore, it will have for purpose, just like the probationary period, the evaluation by the employer of its employee's competences. If successful, a CDT could be executed without a probationary period. Thus, this contractual wording will avoid any risks of further reclassification of the CDT in an PC.

5. A foreign approach

French Law also applies to a contract which, due to its longer duration to that of the FTW, uses a hybrid regime.

Established by Law of 20 December 2014 the “fixed-term employment agreement with a determined purpose” possesses several similarities with the Moroccan CDT.

Although different and distinct conditions are applied like less flexible duration to that of the Moroccan CDT, as it must be executed for a period between eighteen (18) and thirty-six (36) months.

However, it still allows for the execution of a determined task. Moreover, its purpose, as defined by article L.1242-2 of the French Labor Code, is to enable an answer adapted to the economic necessities, as it is the case for the Moroccan CDT.

The termination of the contract by mutual agreement of the parties is indeed possible. However, this termination is subject to some conditions:

- The termination must be done for real and serious motivation by each party at the maturity of an eighteen-month period, and at each anniversary date of the contract.
- A notification delay of at least two months must be respected, as it could be provided that the termination of the contract is the completion of the work without referring to any specific date.

- It is also indicated that any employee, subject to this type of contract, will have the priority in obtaining a permanent contract within the company.

Moreover, article L. 1242-12-1 of the French labor code imposes compulsory statement acknowledging the employment agreement such as:

- The exact title of the contract,
- A description of the project and the tasks to be performed,
- The event marking the end of the contractual relationship, as well as any conditions that could result in early termination of the contract.

The French labor law provides numerous provisions specifying the applicable regime.

What then should be retained ?

The spirit, that the legislator intended to dedicate to this contract executed for a specific task, has for main aim to answer to the needs of the instigator of significant project. Unfortunately, this contract is not used in its full value, therefore it cannot perform its function well.

Beside all this, it also does not obtain the desired success, due to the legal insecurity of this type of contract.

However, it is indeed possible to avoid any contract reclassification for a specific task performed, when the contract in question is well drafted which can become an important legal tool for employers in Morocco.

Hajji & Associés
Association d'Avocats

28, Bd Moulay Youssef
CASABLANCA 20 000 - MAROC

Phone : (SB) + 212 (0) 22 48 74 74

Facsimile : + 212 (0) 22 48 74 75 + 212
(0) 22 43 00 45

Email : partners@ahlo.ma
Site Web: www.ahlo.ma

Note :

The contained information in the hereby information letter Quid Juris provided by Hajji & Associés law firm does not constitute a legal advice on any of the above mentioned subjects and it cannot commit the liability of any of the firm lawyers .

Author : Amin Hajji and Caroline Keime

