

VOLUNTARY EMPLOYMENT TERMINATIONS

Challenges of Entering into Mutual Termination Agreements in Gabon

With oil prices slowly rising over recent months, increased instability in the Middle East, and African Nations scrambling to review their oil and gas investment frameworks to attract oil companies back to their shores, the whole Continent is hoping for an increase in the hiring of oilfield workers. Employees of exploration and production companies and of their goods and service providers were for over a decade an important part of African oil producing countries' economies. Earning higher salaries than average, their spending was often a catalyst for other sectors of the economy.

However, as companies often painfully learned during the downturn, reducing their workforce is not an easy task in most African jurisdictions. Although laying-off workers is often crucial to avoid bankruptcy and adapt to a low oil price (and consequently lower activity) environment, local legislation, regulatory bodies and the courts typically show zero sympathy to the pains of oil companies and contractors.

This reality means, in practice, that before increased hiring of employees commences, employers will be keen to understand the risks behind their foreseen employment strategy, as well as the exit strategies available should the industry hit upon hard times once again.

Managing employment relationships and handling labor conflicts is quite often a challenge in Africa, not only in the oil and gas industry but for businesses in general. The strength and influence of trade unions varies across the Continent, but both the law and the entities which enforce it – courts and government departments – are widely perceived as mostly “employee friendly”. When a labor dispute erupts, the playing field may not be completely leveled, as the general tendency is almost always to favorably consider employees' claims, even if based on weak merits and grounds. Gabon is no exception to this widespread trend.

“

When a labor dispute erupts, the playing field may not be completely leveled, as the general tendency is almost always to favorably consider employees' claims, even if based on weak merits and grounds. Gabon is no exception to this widespread trend.

”

The “Mutual Agreement” Solution

In this context, trying to amicably settle labor conflicts appears to be the natural and rational option to navigate through a hostile legal environment. As we will see, though, this may not necessarily be as easy as it appears and termination of employment contracts by mutual agreement is not without legal risks.

Termination by mutual agreement may be defined as the act by which employer and employee jointly and voluntarily agree to terminate the contractual relationship they have created.

As this form of termination is not expressly foreseen in the Gabonese Labor Code, one must therefore resort to the general provisions of the Civil Code relating to the termination of contracts to frame the legal regime governing termination of employment contracts.

Labor law can and does borrow civil law techniques when necessary. The lack of a specific legal regime for this form of termination leads nonetheless to increased risks, as although the principle of contractual freedom allows the parties to agree on the termination of their contractual relationship, they do not have complete freedom as regards the context in which this termination can occur.

Article 1134 of the old French Civil Code (1961 edition, which is still applicable in Gabon) provides that legally formed agreements may be revoked by mutual consent. The amicable act of termination thus presumes a perfect agreement resulting from the common will of the parties to end the legal link that binds them.

In the absence of any specific labor regulation for this form of termination, Gabonese case law, which is essentially based on French case law and doctrine, has crafted the conditions under which the consent to terminate must be given: the amicable termination of any employment contract shall imply the existence of an unambiguous and definite will of each of the parties – employee and employer – to terminate the contract.

However, if the civil law principle is to consider that the parties to a contract are on equal terms both when the agreement is formed and at the time of its termination, in labor law, this equality is questionable. Since the employee is seen as being in a situation of subordination



Source: Unsplash

vis-a-vis his/her employer, his/her free consent to terminate the employment contract will be more difficult to prove in the event of a dispute.

When Mutual Agreement Leads to Disagreement

This concept of “unbalanced relationship” is the argument most likely to be raised by employees (and accepted by the courts) to challenge the validity of termination by mutual consent. The question which pops up time and again is “if the employee is in such a situation of dependence towards his/her employer, how can one possibly prove the existence of a clear and unequivocal will to terminate his/her employment contract?”

In effect, termination agreements are very often challenged by employees. To this end, employees typically claim that there was a lack of true consent. The employees will argue that they consented to the termination of their employment contract in order to avoid being dismissed. Or they may also allege that they suffered psychological pressure

from the employer to consent to an amicable termination of the employment contract.

It then becomes the courts’ job to assess the conditions under which the employee has given consent to amicably terminate the employment contract. And here is where all difficulties lie, since the burden of proof of the employee’s clear and unambiguous will to terminate is strangely considered to fall upon the employer. Employers must thus build a strong basis for the amicable termination procedure by preparing complete and thorough files, which may include minutes of meetings and the presence of witnesses.

Another aspect that should be emphasized is that it is often not advisable to proceed with the amicable termination of an employment contract in the event of a pre-existing dispute. In effect, if there is an ongoing conflict between the employer and the employee, it is almost certain that the conclusion of a termination agreement will be further challenged



Unlike Gabon, amicable termination is expressly regulated in Congo by the Labor Code which foresees the possibility thereof, and also by a regulatory act which sets forth the procedure for such termination.



by the employee before the Labor Inspectorate. In such a case, if the employer wishes to terminate the employment contract at all costs, the formal contentious dismissal procedure is likely to be the best solution to consider.

The Settlement Agreement

Once the parties agree to terminate their employment relationship, it is advisable to enter into a settlement agreement (*actetransactionnelle*). The legal regime of the “transaction” in Gabon – which can be loosely translated as settlement agreement – is provided for in articles 2044 et seq. of the Civil Code. Article 2044 states that “the transaction is a contract by which the parties terminate an existing conflict, or prevent a future dispute.” The settlement agreement assumes the existence of reciprocal concessions, thus ensuring the conciliation of the interests of each of the parties. This is where the monetary aspect of the agreement comes into play. In effect, the employee concedes to terminate the employment contract against payment of compensation, typically a cash payment. In practical terms, an “extra” sum is paid in addition to the amounts to which the employee would be entitled by law in case of dismissal, notably compensation for dismissal (*indemnité de licenciement*), compensation in lieu of prior notice, and payments in lieu of any accrued but untaken days of leave. The amount of the “extra” payment varies depending on the employee’s position, seniority and salary, and on the employer’s financial capacity. However, it is worth noting that employees tend to accept the package only when the compensation conditions are more appealing than those that would be due in the event of other forms of termination (notably, dismissal).

The settlement agreement allows the employer, in principle, to secure the amicable termination. However, it does not prevent the risk of being further challenged before the courts. In fact, the parties may agree in advance on the settlement of a dispute that may arise in the future as a result of the breach of the contract, but may not, through the agreement, terminate a dispute that subsists at the time of the termination. In such case, there is a risk that the validity of the termination by mutual agreement may be challenged by the employee, in particular by resorting to Article 10 of the Labor Code, according to which “any waiver, limitation or termination by agreement or other of the rights granted to employees by this Code is null and void.”

Local Practice

As a matter of practice, the parties usually request the Labor Inspector to recognize and acknowledge the existence of the termination agreement by stamping a copy thereof – a kind of a confirmation (homologation) act. This procedure is not expressly foreseen in the Labor Code and its usefulness may be arguable. Indeed, and the “homologation” of the agreement by the Labor Inspectorate seems to be of little value and has in the past not been properly considered by the courts insofar as

the Labor Inspectors have argued that their intervention consisted in a mere acknowledgement of the existence of the agreement, but not necessarily in an actual validation of its terms and conditions. This argument, as bizarre as it may seem, is often entertained by the courts. The homologation by a Labor Inspector will not therefore prevent the employee from further challenging the agreement before the Labor Courts during what we see as an excessive statute of limitation of 30 years.

Example of Neighbor, Republic of Congo

Unlike Gabon, amicable termination is expressly regulated in Congo by the Labor Code which foresees the possibility thereof, and also by a regulatory act which sets forth the procedure for such termination. According to these statutes, termination by mutual agreement is lawful when the employee expresses his/her consent in writing and the Labor Inspector certifies that the employee has not been pressured and that his/her consent is lawful and free. In addition, the agreement is subject to the relevant court’s homologation.

This legal framework protects termination by mutual agreement as in effect, once the Labor Inspector confirms the employee’s consent by means of a report, the latter no longer has the opportunity to challenge his/her consent to the termination of the respective employment contract. In addition, the approval of the settlement agreement by the court also prevents the employee from further challenging its terms.

Our experience has shown us that there are very few cases pending before the courts relating to amicable termination of employment contracts, which is a sign that the Congolese framework has acted as intended.

Our Conclusion

The above shows us that the amicable termination of an employment contract, even if backed by – and documented in – a settlement agreement, is still a risky form of termination. The lack of legal regulation leads to insecurity regarding the negotiation of the termination and validation thereof by the courts if and when needed. Express and specific labor law regulations for this type of termination would, in our opinion, be greatly beneficial for the Gabonese working environment, by creating secure and stable ground rules to solve labor conflicts and thus avoiding the systematic resort to courts and the unsustainable accumulation of cases that we witness every day.

A revision of the Gabonese Labor Code thus seems urgent, especially with regard to this aspect and would surely be welcomed by the oil industry that, as we all know, can be significantly affected by oil price crashes. 

About the Authors

Nuno is Co-Head of Employment at Miranda & Associados’ Lisbon headquarters and frequently advises companies in the oil & gas and other sectors on the labor and immigration implications of carrying out their operations in various African jurisdictions, including in labor disputes. Silvia is an associate and a member of the Employment Practice Group. She has been involved in energy projects, notably in what concerns employment matters, in various francophone African jurisdictions throughout the years. Nuno and Silvia may be contacted at Nuno.Gouveia@Mirandalawfirm.com and Silvia.Carvalho@Mirandalawfirm.com.