CONTRACT LABOUR

German Report

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I. Introduction

The questionnaire given by the ILO raises a lot of interesting and complicated questions. For different reasons, it is difficult to answer all of them.

One consists in the fact, that 30 to 40 typewritten pages are a limited space; "contract labour" would merit a profound study, not a mere description.

One the other hand, the questionnaire mentions at different places points which cannot be separated. For instance, it is at least difficult to describe the social protection of contract workers (point 5.1) without referring to its legal treatment (especially point 6.3). In addition, the project distinguishes for good reasons between labour-only contracts and job-contracts; in 6.3 you will find as a third category "individual contracting".

As to the contents of the questions, contract labour is considered to be a given phenomenon; the process of introducing it which can create some protection for the workers seems hardly to be treated. In following the questionnaire it would not be possible to deal with the problem that outsourcing can be a transfer of a part of an undertaking which, in the EU, is governed by the acquired rights directive being able to safeguard

workers' rights to a considerable extent. The Christel-Schmidt- decision of the European Court of Justice which has created a lot of controversies in Germany (and elsewhere) shows that this should be included in a study on contract labour. The "voluntary agreements" in point 7 do not comprise this aspect nor does it point 8. They even do not mention codetermination rights which you find in Sweden (as to contracting out) and to a certain extent in Germany.

Finally, the questions raised are so numerous and detailed (and sometimes of a purely theoretical character like point 8.2. dealing with the right to direct action of contract workers), that the work to be done has nearly nothing to do with an "updating" of the 1985 paper about subcontracting of services.

The report will, therefore, not always follow the plan laid down for the study. The individual titles will however try to make clear which points are being dealt with, if necessary.

II. Contract Labour as a social phenomenon

1. The unknwon category (point 4 of the outline)

Until now, German labour law discussion does not use the concept of "contract labour"; a literal translation

as "Vertragsarbeit" would not be understood. The most similar notion is "drittbezogener Personaleinsatz" which means that workforce is sent to another enterprise than the employer's one. It does, however, not comprise the case of self-employed persons which conclude a contract with the "user firm" which is not an employement contract (Arbeitsvertrag) but a contract to supply goods or (normally) services. It would, of course, be very useful to introduce the category of contract labour into German labour law. In the following, the existing types of "contract labour" shall be described.

2. Labour-only contracting

Labour-only contracting can be found under different forms.

(1) The employee is hired for the purpose of being sent to outside firms. Normally, his or her employer is a temporary work agency.

(2) The employee is hired by a non-profit organization which will send him to its members or another group of persons who need help. This is e.g. the case when independent farmers fall ill and are temporarily replaced by such an individual.

(3) The employee is hired for being sent to different

undertakings within a group. The employment contract is concluded with one of the firms of the group, sometimes with a specialized one which only deals with recruiting and administering manpower ("Personalführungs-gesellschaft").

(4) The employee is hired by a normal commercial enterprise delivering goods or services. Occasionally he or she is sent to other undertakings to work there during a certain time in order to bring in (for instance) his or her special knowledges on the handling of a computer system.

(5) The person hired is not an employee under labour law rules but a person having a special status. He or she can be a member of a non-profit organization like the Red Cross or depend on a church like many medical nurses in Germany. These persons are hired out for instance to a hospital under public or private ownership (so-called Gestellungsverträge). Recently, there is a similar case in the context of the privatization of railways, postal services and telecommunication: As German civil servants cannot be dismissed, they continue to be civil servants but they are sent to the newly established private firms like Deutsche Bahn AG and Deutsche Post AG.

(6) A gang-leader concludes a contract that the gang is working for a certain employer. The traditional exemple

is the chief of an orchestra but there are similar forms of contracts in the building industry.

All these forms of contracts can be concluded within the national framework. In practice, there are, however, more and more transborder arrangements of this sort, except perhaps pattern number (5).

Especially in case (1) employees are as a rule less protected than those working directly for their employers. Normally, they are given a fixed-term contract; if it expires there is no protection comparable to that against unfair dismissal. In firms hiring out employees collective agreements can be found only exceptionally. Even works councils are normally not elected - the reason may be that the employees do not work together in a certain area and therefore do not know each other. In case (2) (3) and (4) there are no comparable problems whereas members of the Red Cross or collaborators of the two big churches have not the same level of remuneration as employees working directly for their employers.

3. Job-contracting

Job-contracting, too, occurs under different forms. The partner can be a normal commercial firm as well as an

individual independant worker.

(1) The legal base may be a contract for services (Dienstvertrag). The entrepreneur is contacting an advertising agency or a law firm. The object of the contract is an activity, not a certain result.

(2) The legal basis may be a contract for work (Werkvertrag). In this case, a certain result like transportation from A to B is the main part of the contract an activity as such not being sufficient.

Both forms may replace an activity which had been done before by the own employees; we call it in using the English expression "outsourcing". In many cases, this is done in a way that the "job" is no more done within the enterprise but the good or the service is bought on the market. As far as I see, this special form of restructuring of undertakings leaves the field of our study.

The social problems are obviously different in cases when the contract is concluded with another firm or when the contract is concluded with a self-employed person, i.e. an independent worker. The latter is deprived of all social security protection (except protection against accidents) and often has to accept worse conditions than an average employee (see point 5.1. of the outline; the assumptions made there are

correct).

It seems necessary to add that job-contracts are often used to disguise "labour-only contracts". As the latter are object of a sometimes detailed reglementation employers prefer job-contracts even in cases where in reality only work-force is hired out. The German courts call that phenomenon "fictitious work contracts" (Scheinwerkverträge); the legal consequences shall be described later.

4. Empirical facts

In Germany, one knows very little about the extent of contract labour. Statistical figures are available only as to workers hired out by temporary work agencies. The reason is quite simple: When the law dealing with temporary work agencies was enacted the legislator obliged the government to give a report on the experiences made by this form of employment every two years.

In June 1992, the number of employees hired out by temporary work agencies was about 140 000 people.

see Weinkopf WSI-Mitteilungen 1993, 569

As to the other forms of "labour-only-contracts" no

figures are available except for the case of the civil servants who form two groups of about 300 000 persons together.

The number of persons involved by job-contracts is completely unknown. Everybody agrees, however, that this form of work has been of growing importance since more than 15 years. The conception of "lean production" imported from Japan pushed the employers to reduce the production depth and to use still more all forms of outsourcing.

There are estimations that the number of the so-called fictitious work contracts is five to ten times higher than the number of employees hired out "officially" by temporary work agencies.

See Bundestagsdrucksache 12/3180, p. 24 ff.

As our knowledge is so limited, the question on the major characteristics of this part of the workforce (point 1.3. of the outline) cannot be answered.

The **reasons** why employers use all these forms of contract labour have been described well under point 2 of the ILO's outline to this study. The main advantage for the employer is not to take over normal employer's risks like illness of the employee, bad qualification, lack of flexibility etc. But it would be a too narrow

view to see only this aspect (as important as it may be): The growing interrelations between undertakings, the more and more sophisticated separation of work makes it inevitable that employees do their job more and more outside the premises of their employer. Contract labour is therefore not limited to certain categories of undertakings (see point 1.4. of the outline). From a legal point of view one should distinguish normal cases of outsourcing from contracts by which labour law standards are more or less circumvented.

Employers' organizations do not criticize the introduction and handling of contract labour which is considered to reduce labour costs and to improve by this way the position of German undertakings in the world-wide competition. The trade unions are not opposed to outsourcing and other means of rationalization as such but try to keep the existing social standards. They have demanded a legal prohibition of hiring out employees (which was successful only in 1981 when the legislator prohibited the hiring out of workers in the building industry) and more effective measures against the so-called fictitious contracts for work ("Scheinwerkverträge"). They did not manage to use collective agreements and the strike weapon to impose restrictions on contract labour by their own force.

III. Contract labour as a legal phenomenon

1. Legal sources (point 3. of the outline)

The German legislator has dealt with some forms of contract labour on two different levels:

The first is a quite indirect one and concerns the introduction of contract labour: the latter can fall under some general provisions dealing with works council's rights and the rules governing the transfer of parts of undertakings. In this context, contract labour is never mentioned explicitly but the courts apply some provisions to it.

The second one is the direct regulation of some forms of contract labour. The most important one is the Act on hiring out of employees which essentially deals with temporary work agencies ("Arbeitnehmerüberlassungs-gesetz"). It is confined to the case mentioned above under II 2 (1) and explicitly states that it should not be applied on hiring out within the framework of a group of undertakings (see above II 2 (3)). The hiring-out by non-profit-organizations (see above II 2 (2)) is excluded, too, but the courts nevertheless apply some of its provisions. The legal treatment of all other forms of labour-only contracts is left to the labour courts which have made some decisions.

German law has no special provisions as to job-contracts besides those you will find in the Civil Code under the headlines "Dienstvertrag" (contract for services - §§ 611 ff. Civil Code) and "Werkvertrag" (contract for work - §§ 631 ff. Civil Code). There are some court decisions dealing with the so-called fictitious contracts for work which in some cases are governed by the law on hiring out employees (Arbeitnehmerüberlassungsgesetz). In the moment, no other special rules exist.

2. The recourse to contract labour

a) The freedom of the entrepreneur

In principle the individual entrepreneur is free to choose whether to use his own workforce to perform particular jobs or whether to employ an outside firm. Equally, he is entitled to send his own employees into an outside firm in order to fulfil a contract.

Problems arise only if the recourse to the services of the outside firm or to its products makes some of the own employees redundant. Can they invoke that there is no sufficient reason to bring in the other firm? Can the works council oppose the sending of employees of the other firm to the employer's premises or in some

cases ask for a social plan? Will the labour relationships be transferred to the other firm which takes over the functions the employees have fulfilled until now? Do the employees keep their acquired rights? In the following paragraphs, these questions shall be dealt with.

There are no special problems for the employer who wants to send his employees into another enterprise: Whether he is entitled to do this, depends only on the labour contracts which can easily be modified if the employer is really interested in such "missions". Another question is whether employers specialized in offering labour-only-contracts or job-contracts have to meet certain requirements. This shall be treated under 3 and 4 because it refers not to the recourse to but to the legal status of contract labour.

b) Protection against dismissal

Labour Contracting raises no problems under Individual Labour Law if it is simply a matter of using an outside firm to fill vacancies caused by an expansion of the enterprise or by natural fluctuation like retirement of members of the undertaking's own staff.

Where this kind of "creeping" contracting-out seems not to be sufficient, the employer will try to replace employees who have done the work which is now conferred

to the outside firm. According to the judgements of the Federal Labour Court they are not entitled to question the recourse to the third firm: An entrepreneurial decision must not be evaluated and declared invalid by the Labour Courts because they are not enabled to put themselves at the place of the employer. The only exception - an extremely unreasonable or arbitrary decision - is of a purely theoretical value; there is not one judgement which has ever accepted that this condition be fulfilled.

> BAG AP Nr. 28 zu Art. 44 Truppenvertrag; BAG AP Nr. 1 zu § 1 KSchG 1969 betriebsbedingte Kündigung. For further references see Kittner-Trittin, Kündigungsschutzrecht, 2.Aufl., Köln 1995, § 1 KSchG Rn 255 ff.

The remaining question is therefore whether a dismissal can be prevented by transferring the employee to another place. If there are several comparable employees in the enterprise and if at least one of them may continue the employer has to make a selection according to social criteria (the so-called soziale Auswahl) and dismiss only those persons socially less disadvantaged. Before taking a decision the employer has to consult the works council but there is no joint-decision making: If the works council does not agree the employer may dismiss the employees nevertheless.

The details of the protection against unjustified dismissal have been outlined in the 1985 report (p. 2o - 25); there are enough books giving adequately detailed and up-dated informations even in English.

See for instance Weiss, Labour Law and Industrial Relations in the Federal Republic of Germany, Deventer-Boston 1989, p. 84 ff.; European Foundation for the Improvement of Living and Working Conditions (ed.), European Employment & Industrial Relations Glossary: Germany, London 1992

c) Rights of the works council (see point 7.1.(b) of the outline)

If the reduction in the number of jobs as a result of contracting out the work to outside firms attains a certain level it constitutes a change in the way the firm operates in the meaning of § 111 of the Works Constitution Act ("Betriebsänderung" - Substantial alteration to the establishment). The level is defined by the courts which refer to the notion of mass dismissal, fixed in § 17 of the Act against unfair dismissal. In this situation the employer is required to enter into negociations with the works council for a so-called reconciliation of interests ("Interessenausgleich") and a social compensation plan ("Sozialplan").

The reconciliation of interests concerns the measures taken by the management as such. Although they must be a subject for negociation, the final decision is up to the employer. The situation is different with the social compensation plan which is intended to compensate for or lessen the social disadvantages of the employees concerned: Should the works council in this case fail to reach an agreement, the final decision is up to the Conciliation Board. Its chairman, who is neutral, has the casting vote. Social compensation plans usually involve lump sum settlements, whose amount remains unclear for the employer until the decision of the Conciliation Board. This is an important incentive to come to a voluntary agreement.

Negociations for a reconciliation of interests and for a social plan are also necessary if the above mentioned quantity of staff reduction is not reached. It is sufficient that 5 % of the personnel are affected by the employer's measures - even if they are not dismissed but transferred to other workplaces the courts consider it to be a substantial alteration of the establishment in the sense of § 111 of the Works Constitution Act. If this threshold is not reached, the situation gets unclear. Some authors think that outsourcing reduces the output of the establishment as a technical unit and therefore constitutes a

"Betriebseinschränkung" (reducing the activity of the establishment), others means that it makes no difference if some of the components of a product are bought or produced by other firms looking only at the final output of the enterprise.

For the discussion see Däubler, in: Däubler-Kittner-Klebe-Schneider (Hrsg.), Kommentar zum Betriebsverfassungsgessetz, 5.Aufl., Köln 1995, § 111 Rn 42a; Henssler NZA 1994, 302 f.; Kreuder AiB 1994,732

Under § 99 part 2 of the Works Constitution Act the works council has the right, under certain circumstances laid down by law, to refuse approval to the recruitment of new staff. The crucial question is, whether the recourse to contract labour can be considered to be a "recruitment". Traditional thinking may identify "recruitment" and "conclusion of a labour contract", but the German legislator and German courts do not.

§ 14 of the Act on hiring out employees (Arbeitnehmerüberlassungsgesetz) provides for an analogous application of § 99 of the Works Constitution Act, if the employer hires temporary workers. The works council may therefore oppose the employer's decision if there is e.g. a concrete danger that employees of the firm are dismissed or suffer other disadvantages. If

the employers wants to realize his decision in spite of the works council's opposition he has to go to the labour court which will clarify whether there is such a danger or not.

§ 14 of the Act on hiring-out employees applies also to hiring-out by non-profit organizations

BAG AiB 1989, 222 = DB 1989, 433

and to a comparable activity within a group of enterprises.

BAG AuR 1976,152

Other forms of contract labour, especially job contracting, normally do not fall under the scope of § 99 of the Works Constitution Act. On the one hand side, the Federal Labour Court defines "recruitment" as the integration of another person into the own organization ("Eingliederung"). It has therefore applied § 99 in a case where an independent taxi-driver had been integrated into the organization by receiving his instructions from the central dispatching point although he kept his legal and economic independence.

BAG DB 1986, 2497

Later on, the Federal Labour Court has demanded a very

intensive submission to the orders of the "user" firm; if the employer who had sent his employee keeps some influence on the behaviour of the latter, a "recruitment" is denied.

BAG DB 1991, 1334

In practice, there are very few cases where job-contracting can be influenced by the works council. The situation is, of course, different, if job-contracting disguises a hiring-out of employees: The right of the works council applies, the real nature of the contract is essential and not its name.

Collective agreements which could enlarge the powers of the works council or restrict the recourse to contract labour are unknown.

d) Takeover of a part of the enterprise by the contractor?

When the contractor takes over some production means and the function they have fulfilled, everybody would consider that to be a transfer of an undertaking (or a part of it); the consequence would be that the labour relationships of the affected employees would continue with the contractor. The legal basis is § 613a of the Civil Code whose actual version is due to the EC-

directive of 1977 on acquired rights in cases of transfers and mergers of undertakings.

Normally, contractors do not take over production means; § 613a of the Civil Code has therefore played nearly no role in our context. This situation changed when the European Court of Justice stated in the Christel-Schmidt-case that the transfer of an "economic unit" is sufficient to trigger the transfer of the labour relationship.

EuGH AuR 1994, 294

Outsourcing can now lead to quite a different situation: the employees can at least legally continue with the contractor who will have often difficulties to dismiss them. The concrete consequences of the ECJ-decision are, however, still very controversial

see Wendeling-Schröder AuR 1995, 126 with references in note 1

so that it is not possible to give a well-founded estimation of the situation in one or two years.

3. The legal situation created by labour-only contracts

a) The Act on hiring out employees (Arbeitnehmer-überlassungsgesetz)

The "Arbeitnehmerüberlassungsgesetz" dates from 1972. Originally, hiring out of employees by private undertakings was prohibited because it was seen as part of the state monopoly on labour exchange (see point 6.1. of the outline). In 1967, the Federal Constitutional Court decided that this is unconstitutional as a disproportionate restriction of the freedom to choose a profession.

BVerfGE 21, 261 ff.

The legislator intervened 5 years later in order to protect job-seeking persons.

If an employer wants to hire out employees whom he does or can not employ himself he needs an authorisation which is given by the labour administration. He has to be personally reliable. Another condition is that he must be able to fulfil the normal functions of an employer, e.g. know how to calculate social security contributions.

The authorisation is necessary even if the employer has his own enterprise and considers hiring out of employees only as a supplementary activity.

According to § 11 of the Act the employer has to fulfil supplementary obligations. The main contents of the employment contract have to be laid down in written form (until now, other employers are not forced to do so), the remuneration has to be paid even if there is no concrete possiblity to hire the employee out, a fixed term contract is prohibited except for reasons derived from the person of the employee. This last condition seems to have nearly no practical importance as in 1991 52.5 % of all hired-out employees had fixed-term contracts for not more than 3 months.

See Bundestagsdrucksache 12/3180 S.9

The employee can be sent nine months to one firm; when the law was enacted, this period was three months, and in 1985 it was extended to six months.

A dismissal of the employee is considered to be void and null if the employee is hired again within three months; this rule shall prevent that in fact the employee carries the risk of lacking jobs in other firms.

The employee has no employment relationship with the owner of the undertaking where he does his job. Nevertheless, the Act provides for some legal relationships as a rule and for a full employment relationship in some cases of irregular employment.

§ 11 of the Act states that the provisions on health and safety in the "user" undertaking apply to hired out workers, too. § 14 of the Act gives the employee the right to go to the works council during his or her working time to get informations or to make a complaint. The employee may participate in the general meetings of the employees in the "user" firm which are held four times a year during working time. He has, however, no right to vote in the elections of the works council and cannot be a candidate to those elections. Agreements concluded between works council and employer are binding the hired out employees, too, as far as they concern work rules and health protection.

See Däubler, Das Arbeitsrecht 2, 10th edition, Reinbek 1995, p. 959

The owner of the "user" firm is responsible for paying social security contributions if the employer fails to do so. There is no other form of subsidiary or joint liability except the cases where the law establishes a full employment relationship to the user undertaking.

The employee has to follow the instructions given by the user firm; he or she is for some time completely integrated in its organisation.

In three cases, the Act provides for a direct

employment relationship between the employee and the user firm. The first one is, that the period of (now) nine months is not respected; an employee working a year with the other firm becomes automatically member of its staff. The second case is more important: If the hiring-out employer has no authorisation, the employee gets automatically an employment relationship with the user firm. This creates an important incentive not to make contracts with firms whose reputation is bad and who cannot show a paper on the necessary authorisation. The third one is comparable to the second one: If the employer is not able or willing to fulfil the employer's duties, he is considered to practice unauthorized employment exchange: The effect is the same, an employment relationship with the user undertaking being established by law.

The employment relationship with the user firm gives the same conditions and the same salary to the employee as if he would have been an employee of that firm from the very beginning. He or she keeps, however, a better salary his employer had promised.

b) Similar cases

The hiring out by non-profit organizations is excluded from the Act. There is, however, one important exception: If the non-profit organisation sends people

for more than nine months to another undertaking or if it cannot fulfil employer's duties, an employment relationship is established between the employee and the user enterprise.

The hiring-out within a group of enterprises is completely exempted from the Act. This solution deserves no critical remark if the employee can sue not only the company with which he has concluded his contract but also the dominating company. According to German courts, this is, however, not possible under normal circumstances; it cannot be excluded that an employee risks to have an insolvent employer without being protected by the above described Act.

If a regular employer employing all his workers in his own undertaking sends some of them for some time to another enterprise, the Act does not apply; the employee does not seem to run any inadequate risk.

If non-employees like German civil servants are send to another undertaking they keep their former status; the Act does not apply.

If a gang-leader concludes a labour contract - to mention the last case - the members of the group have no employment relationship with the partner of the gang-leader. If they work within the undertaking, the courts assume an indirect labour relationship

(mittelbares Arbeitsverhältnis) whose concrete contents go beyond the normal relationships between a hired-out employee and a "user" enterprise. As the form of employment is not quite current, details cannot be explained.

See e.g. Waas RdA 1993, 153

4. The legal situation under job-contracts

a) The general rule

If there is a genuine contract for work or services (Werk- oder Dienstvertrag), the situation is unambiguous: The employee working in the undertaking has an employment relationship only with the outside firm that sent him.

General view. See Trümner, in: Däubler-Kittner-Klebe-Schneider,aaO, § 5 Rn 72 ff.

This means that only the owner of the outside firm and his representatives have the right to give instructions. It is up to them to pay social security contributions; unlike in the Act on hired out employees there is no subsidiary liability of the undertaking in which the work is done.

The employment contract has, in German law, essentially a bi-polar structure. The social contacts within the firm where the work is carried out play no role and are not subject to any special legal regulations.

Both case law and legal literature have attempted to bridge the gap between legal norms and the close social contacts which actually exist by developing quasi-contractual obligations to protect the integrity of the persons involved. So far, the best known of these is the generally recognized schema of culpa in contrahendo, but there are other "Schutzpflichtverhältnisse".

For details s. Esser-Schmidt, Schuldrecht, Band I, Allgemeiner Teil, Teilband 2, 7.Aufl., Heidelberg 1993, § 29 I

There has hitherto been very little discussion of the practical implications of this in the context which is analysed here. It is only recognized that the employer's obligation under § 618 of the Civil Code to protect the employee's life and health does also apply when one person puts himself under another person's control by virtue of a contract for work or services.

See BGH (Federal Court of Justice) NJW 1984, 1904

On is, however, no longer on firm legal ground where other consequences are concerned. As far as one can see, the question whether employees of an outside firm can use the undertaking's social facilities, such as the canteen, is nearly not discussed and has not become a real legal issue.

> See on the one hand Herbst-Krüger AiB 1983,168, on the other hand Schüren, Arbeitnehmerüberlassungsgesetz, Kommentar, München 1994, § 14 Rn 450

Labour protection norms such as the workplace ordinance (Arbeitsordnung) or accident prevention regulations are usually based on the nature of the work rather than on whether or not the person concerned formally belongs to the undertaking. This means that they must be observed by the outside firm's employees, too. For example, if the use of respirators is prescribed for a particular job they must also be used by the outside firm's employees. Of course, the latter have to respect a prohibition to smoke, too.

It is obvious that there is no liability of the principal employer as to the employee's rights against the outside firm (Point 6.5. of the outline).

b) Circumventing the rules governing the hiring out of employees?

The rules about hiring out of employees (see above 3 a) may be regarded by some entrepreneurs as being too severe. For them it seems much more attractive to make contracts for work or services - in many cases they even do not need the approval of the works council.

As it was pointed out earlier, the entrepreneur has the right to choose between labour-only contracts and job contracts. If he chooses the latter, the employees sent by the outside firm cannot be fully integrated into the organisation of the enterprise. If the employer does it, if he treats them like his own workforce the rules on labour-only contracts apply. A "fictitious contract for work" is considered to be in reality a hiring-out contract. This has the important consequence that the Act on hiring out employees applies; as the firm normally has no authorisation under that law, an employment relationship is established between the employees and the undertaking where they work. The first problem is how to distinguish real contracts for works and services and those which disguise labour-only contracts and the second and crucial problem is how to prove the nature of the legal relationships.

The labour court have attempted with some limited success to prevent the circumvention of the law on hiring out employees.

The designation of the contract is irrelevant; it is only the actual carrying out of the contract and not what was agreed, that counts.

BAG DB 1991, 2342

The fact that the outside firm sends a team with a foreman does not deprive the entrepreneur of his management rights, provided the foreman in principle only passes on instructions.

BAG loc.cit. and Ulber AuR 1984, 352

The relevant literature has also developed a series of additional criteria such as the way the work is invoiced, the acceptance of liability for defective work and the provision of material and tools. Agreements on flat-rate amounts, acceptance of warranty claims, and work using the outside firm's own material indicate a contract for work or services. Hourly rates, exclusion of any form of warranty and work with the entrepreneur's materials are evidence of hiring out.

See LAG Köln DB 1989, 884 and Frerichs-Möller-Ulber, Leiharbeit und betriebliche Interessenvertretung, Köln 1981, p. 92 ff.

This seems to be a rather consistent system but the main problem is to implement it: This category of

employees does not sue the employer at the labour court - still less than other workers who have not been dismissed. The labour administration has not enough (man-)power to control in an effective way if there are in reality hiring-out contracts or not.

c) Circumvention of labour law rules?

Contracts for works and services can be used as a means of circumventing labour law rules. The contract meets the requirements of a correct contract for works and services, but the contractor is a "one-man-undertaking" who is economically even less independent than an employee. Can the economic situation as such justify the application of labour law rules?

Like other European legal orders, German labour law defines the employee as a person who depends personally on the instructions of the "employer" ("persönliche Abhängigkeit"; cf. "subordination" in French law or "subordinazione" in Italian law). The economic situation as such is of no importance; rich people can be employees (like the chief-doctor of a big hospital) whereas poor people like independent salesmen are not protected by labour law.

German labour law recognizes, however, the category of persons "similar to employees" ("arbeitnehmerähnliche

Personen") which can be compared e.g. to the "lavoratori parasubordinati" in Italy. At least some rules of labour law are applied to this group of persons.

Since a long time, three categories of formally self-employed persons have existed whose social and economic status is assimilated to that of an employee: home workers, free lancers and commercial agents. They are more or less free to organise their work as they wish, particularly the way in which they divide up their time, and therefore they are not employees. Homeworkers are protected by a special law which assimilates them to employees without reaching the same standard. The two other groups are less protected; only few labour law rules are applied to them. Among those rules is the law on annual leave and the law on labour courts. But there is no protection against dismissal. Collective agreements are possible but exist only in the field of free lancers working with the press and radio stations.

There have recently been accounts of new types of self-employed workers who do not belong to any of these three categories. In the building industry, there are a lot of one-man-undertakings which are integrated into the work process in much the same way as an employee but which retain their self-employed status in that they are not covered by social security or labour legislation. In 1994 and 1995, a lot of self-employed

persons from Britain came to Germany presenting an E 101-certificate that they are self-employed: Even if German labour law would treat them as employees it would not be legal to demand social security contributions.

For further details see Udo Mayer BB 1993, 1428; Däubler DB 1995, 726

There is also a growing trend in the transport sector towards transforming employees into independent haulage contractors who are individually licensed under the Road Haulage Act or who undertake trips for foreign firms.

More and more "entrepreneurs" are being employed in the distribution sector. Travelling salesmen are initially employed for a fixed term after which they are offered the possibility of exploiting the area, to which they previously made deliveries, on their own account.

See Spiekermann-Wahsner-Pfau, Befristung von Arbeitsverhältnissen, Franchise-Verträge und Arbeitnehmerschutz - Zur Scheinselbständigkeit von Verkaufsfahrern, Düsseldorf 1986

A similar arrangement is the franchise contract operated, for example, by McDonalds. The manager of the subsidiary becomes an independant entrepreneur and

receives authorisation to use the company's trademark and know-how but is, at the same time, required to operate the business in accordance with strict standards and to hand over to the franchisor such a large proportion of the turnover that he often ends up worse off than a salaried manager. In the past, contracts of this kind were most common in the case of filling-station leasees but are now clearly being extended to other areas.

If these persons depend in the execution of the work on the instructions of another person, they are considered to be employees. If they do not depend in this way, they are just "arbeitnehmerähnliche Personen" who are protected only by very few labour law rules. German law is still far from bringing satisfactory solutions in this field.