

Executive Summary

Social dialogue on issues of employment contracts, termination, and out sourcing is complex, diverse, and often difficult. The underlying issues, motivations and results of new practices can divert the road to consensus. The E-discussion held in advance of the Fifth Tripartite Regional Seminar on Industrial Relations in the ASEAN Region suggests as much. While there are very important changes in labour markets and labour regulations, good practices for legislative reform needs to be consolidated. Social dialogue developing good practices needs to be intensified. This paper takes a brief look at the situation, the e-discussion, and a tool that might be useful in improving the social dialogue needed to rebalance worker and employer interests in the field of employment contracts, termination, and outsourcing.

Contents

Contents	iii
Table of boxes, tables, and figures.....	iii
1. Introduction.....	1
2. Asia Pacific Industrial Relations Network (AP-IRNet).....	1
3. Background of the discussion	1
3.1. Employment contracts and the changing world of work	1
3.2. Examples of national responses	2
4. Overview of the online contributions	3
5. Remarks – Looking for consensus.....	4
5.1. Dimensions of dialogue on these matters	4
5.2. Dimension framework to help dialogue	6
5.3. Benchmarks for reference	8
6. Conclusion	9
References.....	11
Annex I: List of participants.....	12

Table of boxes, tables, and figures

Box 1: Effect of diverse views on making international standards on "contract labour"	4
Box 2: Description of the individual level of a situation of IT contract work	5
Box 3: Individualization of risk as an example of a factor in the equality dimension	5
Box 4: Expression from Indonesian employers within the managerial dimension	6
Box 5: Examples from Indonesia and Hong Kong of institutional capacity responses	6
Table 1: Dimensional assessments, call centres and short-term contracting.....	7
Table 2: Assigned quantities to dimensional assessment.....	7
Figure 1: Graphic representation of dimensional assessment	7
Box 6: A current empirical situation in lay terms.....	8
Box 7: International labour standard benchmarks	9
Box 8: An example of social dialogue contributing to regulation of new contracting methods...	9

1. Introduction

This is a report of the on-line discussion of *employment contracts, termination and outsourcing* held from 28 January to 15 February 2013, under the auspices of the Asia-Pacific Industrial Relations Network (AP-IRNet). The online discussion was moderated by David Tajgman, former Senior Specialist on International Labour Standards, currently international consultant and External Lecturer on international labour standards, comparative labour law and industrial relations at Aarhus University in Denmark.

This paper starts with a summary of the views contributed by various on-line participants¹ followed by the background paper which sets out the issues arising from current practices and developments in employment contracting, termination, and outsourcing. With a view to its usefulness as a background paper for the Fifth Tripartite Regional Seminar on Industrial Relations in the ASEAN Region “Social Dialogue and Labour Law Reform on the Legal and Regulatory Framework on the employment relationship”, to be held in Hanoi on 27 and 28 February 2013, the paper closes with a framework for social dialogue on the multi-dimensional issues typically raised by the social partners and stakeholders surrounding these matters.

2. Asia Pacific Industrial Relations Network (AP-IRNet)

The Asia-Pacific Industrial Relations Network is an online community of practice initiated by the International Labour Organization’s (ILO) Regional Office for Asia and the Pacific. This online platform, at <http://apirnet.ilo.org/>, provides a forum for committed professionals to access policy, research, and training resources, share information and experience, promote and learn of events and news on labour and employment relations, and encourage the development of joint initiatives to further regional cooperation. AP-IRNet has a focus in five technical areas: Collective bargaining, wages, procedures for dispute resolution, social dialogue, and labour law application and enforcement. AP-IRNet currently has more than 175 members from around the globe and holds a continuously expanding library of approximately 575 knowledge resources on industrial relations-related topics.

A way in which this community of practice contributes to ongoing debates and discussions is by hosting online discussions on topics of interest. This e-discussion on employment contracts, termination and subcontracting was the first for AP-IRNet.

3. Background of the discussion

A two-page Background Note, produced in an informal style, was made available in advance of the e-discussion with a view to both prompting contributions and providing a common foundation on which the discussion might proceed. Its essence is reproduced in the immediately following two sections.

3.1. Employment contracts and the changing world of work

Enforceable agreements between employer and worker setting down the terms of employment – employment contracts – have existed ever since one person's physical or mental efforts have been placed in subordination, or at the disposal, of another. They have served to give both parties certainty over expectations, rights and obligations. They have helped formalize relationships, minimize disputes, and incentivize performance. In time, governments set minimum standards for their use, content and termination, and prohibited terms or practices judged unfair. Regulation struck a balance between the employer's need to be able to adjust his or her workforce – both in quantity and quality – to meet product market demands, and the interest of the worker in a stable job with decent working conditions. Knowingly or not, the balance reached impacted on the nation’s development. The manner in which the country’s human resources are used, as guided by patterns of employment contracting, influences the vitality and depth of its economy; its educational and financial institutions; the form, structure and quality of its labour and product markets; and the texture of its social institutions.

¹ To read the actual online discussion thread, see <http://apirnet.ilo.org/discussions/discussion-on-employment-contracts-termination-and-outsourcing> (accessed 22 February 2013).

Yet the employment contract in the world today has come under substantial pressure. Product markets have changed dramatically in the past 20 years. Financial liberalization, technological innovation and proliferation, along with lightning-speed global communications have turned the markets in which even smaller employers operate into volatile, ever evolving globally competitive arenas. A relatively small number of workers whose functions are highly valued by the employing enterprise enjoy relatively secure employment and decent working conditions, while other workers enter into and fall out of jobs of short term duration. Unlike ever before, working conditions are under pressure by tight, internationally competitive labour markets. Employers can respond to these market demands and opportunities by offering jobs of shorter duration or with non-core production done under subcontracted arrangements. These arrangements can teeter on the edge of legality as defined by employment contracting regulations crafted in another era. An additional consideration is that large and growing proportions of economically active populations are engaged in work for others without any noticeable employment contract at all. The disruptive results of this fact alone on the rule and credibility of law warrant attention. In many places in the region and around the world the incongruities between regulatory frameworks for employment contracting and actual practice is growing. The stage is set for disharmony, with the governments and the social partners looking to find appropriate and effective ways of retuning employment contract regulations.

3.2. Examples of national responses

Countries have begun to deal with these types of situations. Reforms have been made in some places and are under discussion in others. In some places, senses of injustice are felt and given expression, pushing the social partners toward responsive action. The vista of recent national developments and reforms is quite diverse; reports, studies and analysis in scholarly journals are so numerous as to make impossible any selection claiming to be representative. To usefully refresh recent recollections, we can rapidly paint an impressionistic picture using a few regional examples.

Substantial *Indonesian* worker protests were seen over the issue of outsourcing in late October 2012. APINDO, the Indonesian Employers' Association, cites that outsourcing accounts for an estimated 40% of Indonesia's workforce. The complaint is that outsourcing involves the movement of work from permanent hire workers of one enterprise to workers employed under lower employment conditions by another. APINDO acknowledges that employment contract regulations that set a high bar for lawful contract termination are only one motivation for outsourcing, alongside enterprise interest in focusing on core competencies. In any case, the call has been put out for reform.

In *Vietnam*, the Labour Code adopted in 2012 lays down detailed requirements for a job of more than 3 months to be under a signed labour contract. Labour leasing or triangular employment relationships are authorized by the Labour Code; a provision is made that the leased employee shall "be paid with salary not less than that of a normal employee in the enterprise who has the same skill and participates in the same job or job of equal value."

In *Malaysia*, labour legislation dates back to the 1950's and 60's, with amendments having been made piecemeal. The country has become a recipient of foreign labour, placing some stress on existing regulation.

In the *Philippines*, the Department of Labor and Employment issued Order 18-A in 2011 with an aim, among other things, to put an end to repeated employment of workers on below-protection-threshold contracts of 5 months' duration. The Order prohibits labour-only contracting, but otherwise recognizes triangular employment relationships and sub-contracting relations.

In *Australia*, as a result of a change of government, the Fair Work Act 2009 reversed a "100-employee" threshold for employment termination protections that had effectively removed 56% of the working population from protections against unfair termination. Particular, substantially less stringent rules are nevertheless set out in a Small Business Fair Dismissal Code for employers of less than 15 persons, promulgated on the argument that small enterprises needed to be covered by the law, but that account need to be taken of the administrative and operation constraints they might face, thus dampening the willingness to engage workers.

In *Cambodia*, subcontracting in the garment industry has taken the spotlight, with accusations being made that practices result in avoiding labour standards assuring assessments. A regulatory Prakas issued by government in June

2011 requires the disclosure of subcontracting arrangements by garment exporters in order to expand compliance inspection. Market pressures from international buyers have affected the regulatory framework, perhaps with further results in actual contracting practices.

With this background, IR-APNet set off on its first e-discussion, on this important subject of employment contracts, termination, and outsourcing.

4. Overview of the online contributions

The online discussion generated comments from 5 participants from India, Indonesia, Korea, Nigeria and Switzerland. This number may seem somewhat incongruous with the often-impassioned debates known to be happening away from cyberspace, in the real world. The following is a synthesis of the key issues raised by participants.

There is a link between labour costs and resort to subcontracting. The situation in Indonesia, noted by AD Wahid, was that a new increase in minimum wage levels had prompted employers to offer short-term contracts to new workers, pending observation of the actual impact of the wages increases on their businesses. AD Wahid noted that some employers even renegotiating short-term contracts for existing workers with this motivation. The relationship between the cost of labour and resort to subcontracting surely is not an automatic one. Nor do employers react in a uniform manner. Cost savings is nevertheless almost universally noted as a factor that motivates the use of short-term employment contracts.

Angelika Muller, ILO Labour Law Officer, observed that the Indonesian labour law provides that "a work agreement for a specified time cannot be made for jobs that are permanent by nature" and that therefore, in principle, employers are not entitled to impose short-term (or fixed-term) contracts to all workers. This raises the issue of employer compliance with regulations intended to limit the use of fixed term contracts. The problem of circumvention through "disguised employment relationships" that avoid employment contracting all together is a related compliance issue seen in many countries. Ms. Muller recalled that reform of regulation of termination of employment, contracts of employment and temporary work agencies are among the most frequent in labour law reforms, in Asian, and elsewhere in the world. She brought our attention to the ILO Employment Protection Legislation database, EPLex, found at <http://www.ilo.org/dyn/terminate/termmain.home>.

Adeyemi Dawodu from Nigeria opined that termination and outsourcing pose a serious threat to smooth employment relationship globally particularly the third world nations. This raises the institutional aspect of the discussion by implying the regularizing or normalizing effect of employment relationships, most likely of a traditional character, although this was not specified.

Partha Sarkar, of the Department of Business Administration, The University of Burdwan, Burdwan, West Bengal, India, observed that although the unorganised or informal sector in India dominates the economy, unorganized workers are deprived of some of the basic rights for livelihood and quality of work life. Sarkar noted that workers in this sector have negligible legal protections as against workers in the organised sector whose employment is covered by numerous laws. He reported that some of the aspects of employment in the unorganised sector include unwritten forms of employment, inadequate pay and employment relations. The hardship is more severe in case of the daily wage-earners and the contractual workers since very little social security coverage is available and the workers are deprived of the social security coverage and some other benefits which are provided to the permanent workers. He concluded that there is need to focus on workers belonging to the category of daily wage-earners and contractual workers within the unorganised sector.² Sarkar's comment highlights the connection between informality and employment contracting, going further to indicate other related indecencies in the work of the masses in India. In response to a follow up observation by Tajgman, Sarkar reiterated the theme of

² These ideas are elaborated in SARKAR, Partha, The University of Burdwan, India, *Organizing the Unorganized: Trade Union Response Vis-à-vis the Unorganized Sector in India* (2012), available at: <http://ilera2012.wharton.upenn.edu/RefereedPapers/SarkarPartha%20AmirJafar%20AmitavaGhosh%20ILERA.pdf> (accessed 15 February 2013).

economic motivation for engaging in short term contracting, urging that "these approaches need to be considered in the right perspective" calling for regulation of contractual employment with the aim of making the work decent.

Kim Dong Won from Korea observed the impact of contracting arrangements on widening income inequality, "which has been at least partially caused by worsening economic situations of contingent workers compared with those of regular workers". The contribution observed that the President-elect Park geun-hye promised that her administration would take extensive labor market policies to improve the situation, and that included raising the minimum wage, reducing of the number of contingent workers in both public and private sectors, and making the legal criteria of legitimate employment termination more difficult than before. Kim Dong Won closed by observing that "without doubt, the employment issue is one of the most challenging agendas before [the President-elect] at this time."

5. Remarks – Looking for consensus

The diversity of contributions found in the e-discussion underscores the multi-dimensional character of issues surrounding employment contracting, employment termination, and out-sourcing. These dimensions are many and varied. Discussants in debates on these subjects see matters from different vantage points, sometimes with very different perspectives. This can make it difficult to find a common focus for social dialogue and hinders possibilities for consensus.

Box 1: Effect of diverse views on making international standards on "contract labour"

The ILO placed the subject of contract labour – the matter of "different ways of employing workers otherwise than under a normal employment contract between the workers concerned and the enterprise for which they work"³ – on the agenda of the 1997 International Labour Conference (ILC). According to plan and usual procedure, the subject was discussed during two consecutive sessions of the ILC. However after the second discussion in 1998 the members of the tripartite Committee set up to discuss the matter had failed to agree on an international standard. This was highly unusual for the system of international labour standards setting. The Chairperson of the Committee, Mr. Mishra (Government Delegate, India), summarized the polarized positions of the social partners in his remarks to the ILC sitting in plenary:

"While the distinguished Vice-Chairperson from the Employers' side considers contract labour as a subject not suitable for standard setting by the ILO, the distinguished Vice-Chairperson from the Workers' side has articulated several concerns with a lot of empathy and sensitivity about the increasing plight and predicament of a growing contract labour force in the wake of shrinkage of the regular workforce and recourse to subcontracting or outsourcing."

It was instead agreed and resolved in 1998 that issues identified during the discussions on contract labour be taken up again with a view to standards setting within 4 years' time. The ILO Governing Body agreed to extend that period and in the end, in 2006, Recommendation No. 198 on the Employment Relationship was adopted by the ILC. Non-binding Recommendation No. 198 calls on ILO member States to "formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship."

Despite divergent views, social dialogue and consensus is needed for realistic and practicable solutions. We look below at a tool that might be used to frame the dimensions of these divergent positions, to help improve social dialogue by sharpening its focus.

5.1. Dimensions of dialogue on these matters

Level is the first important dimension. It has to do with the scope of practices under discussion at, for example, industry or enterprise level at one extreme or at the level of the individual at the other. A discussion of the implications of an industry-wide development of, for example, out-sourcing telephonic customer support services, or large enterprise level janitorial or canteen services is not the same as that involving the reconstitution of individual indefinite employment relations of clerical or production personnel to short term or triangular employment relations. A high level may imply, for example, potentially important employment generating effects, or institutional capacities that can help in ameliorating negative effects of new contracting practices. A low level where individual workers are

³ ILO: *Contract Labour*, Report VI(1), International Labour Conference, 85th Session, Geneva 1997, p. 1.

more vulnerable may imply exacerbating effects. Social partners ought to be clear and agreed on the level of the practice or practices at issue.

Box 2: Description of the individual level of a situation of IT contract work

Niharika Chaturvedi, a Senior Consultant (IT Banking Contract division) at Robert Walters, a professional recruitment consultancy,⁴ argues the advantages of contract jobs for IT professionals in Singapore in an article entitled *Say Yes to Contracting*.

"Before the global IT revolution, the working culture in Asia has generally been skewed towards job longevity and stability, thus resulting in the contracting option being a less popular method of hiring or working in Asia. In comparison with current dynamics revolving from what was once the famous Japanese working style of "one company, one career, one life" in older times, to the current infamous software engineers in India following a "one year, one company" lifestyle, Asia has seen a complete turnaround to the other side of the coin.

Contracting offers a middle path solution for the budding software professional who is hungry for exposure to new projects, more attractive compensation packages and new environments, as well as the employer on the lookout for expert talents to take on high-profile projects without having to commit to progressive career growth or an investment in long-term permanent headcount.

The challenge in Asia, however, seems to come from both sides.

Employers in the banking world are attracted to Asia in terms of its lower labour cost and are thus not encouraged to pay a premium to hire a contractor. As a result, many organisations are not entirely open to adopting the contracting resource option as it brings about the uncertainty of income and employment beyond the contractual period. A person who is employed on a contract could constantly be on the lookout for his/her next assignment and/or a permanent job. In actual fact, there is a high percentage of people preferring to switch jobs approximately every couple of years given the current buoyant job market facing a limited supply of skilled labour."

Social dialogue on possible regulation of fixed term employment contracts for these types of professionals might take account of this description of circumstances, operating at the level of the individual within one – the IT – industry, giving it appropriate weight accordingly.

The *equitable* dimension is perhaps the most subjective. Individuals judge fairness and decency differently, but when judgements are aggregated they can make the call on the social partners to negotiate a solution more urgent. That solution will accommodate, as done in the past, the interest of enterprises in organizing their productive human resources, and workers' interests in stable, adequately remunerated decent work. Low equity situations are those where there is broad agreement of basic unfairness.

Box 3: Individualization of risk as an example of a factor in the equality dimension

Mike Rafferty and Serena Yu's report *Shifting Risk: Work and working life in Australia*⁵ posits that the global financial crisis "has exposed how people are now required to absorb more and more financial, social and economic risks". Short-term contracting, the threat of work previously done "inside" being outsourced, and lost protections against unjustified termination resulting from the "service contracting" of workers' tasks are consistent with this assessment and could be the basis for calls of "unfairness" and demands for effective methods for moderation.

Research shows that fixed-term workers in France and west Germany earn 10% and 9% less, respectively, than similarly situated ("matched") permanent workers; the gap is more extreme for women in France. Wage inequality for fixed-term workers may be contrary to public policy, argued to be unfair, and an appropriate grounds for agreed remedial action.⁶

The *managerial* dimension involves the issues of productivity, effectiveness, and efficiency argued by enterprises as a driver of employment contracting, termination and outsourcing decisions. Arguments, of course run in both directions, it being found more and more often today that the human and economic costs involved in shorter term or outsourced arrangements may, in fact, outweigh the benefits in the medium to long term. A high management dimension implies proven benefits for the enterprise in productivity, efficiency and effectiveness.

⁴ As at 5 August 2010, according to the article appearing at <http://sg.jobsonline.com/SG/EN/Resources/JobSeekerArticle/Career%20Guide?ID=414> (accessed 22 February 2013).

⁵ Cited in AP-IRNet at <http://apirnet.ilo.org/resources/shifting-risk-2013-work-and-working-life-in-australia> (accessed 22 February 2013).

⁶ Gash, V. and McGinnity, F. (2006).

Box 4: Expression from Indonesian employers within the managerial dimension

The Asosiasi Pengusaha Indonesia (APINDO - The Employers' Association of Indonesia) has made a statement about outsourcing. Part of it enlists managerial or operational considerations, positions that would be called forth in social dialogue of the managerial dimension.⁷

"Firstly, it is necessary to understand why some jobs are outsourced to third parties which includes advantages such as improved efficiency and enabling a company to focus on its core business. This method is already a global trend as it provides solutions for dynamic, fast moving businesses. In countries such as India and China business outsourcing is a common practice; the Philippines is ranked the first provider of outsourced employment worldwide. In Indonesia, outsourcing has only been implemented on a small scale but it provides significant opportunities to secure work from overseas. The key is therefore for responsible bodies such as the relevant ambassador and chamber of commerce officials to seek out work that can be carried out in Indonesia such as within data input, information technology and administrative processes."

A final dimension is *institutional*. It involves the broad gamut of institutional actors' roles and capacities implicated in employment contracting, termination and out-sourcing decisions. This would include, to mention a few, public and private social security institutions whose funding base is potentially compromised by the restructuring of employment relationships; the capacity of private employment agencies to engage in triangular employment relationships within regulatory frameworks; the ability of public labour inspection authorities to monitor compliance; and the ability of vocational training and educational institutions to keep pace in an appropriate manner with the demands of a labour market that has become ever more volatile as a result of employment practices. A high institutional dimension would mean that institutions are well adapted and capable of dealing with non-traditional employment contracts, terminations, and outsourcing.

Box 5: Examples from Indonesia and Hong Kong of institutional capacity responses

In April, 2011, the Labour Relations Division of the Labour Department in Hong Kong published a brochure "Know your Identity and Rights" as part of a campaign to reinforce workers' getting what they are due according to their *bona fide* identity as employee, contractor, or self-employed person.

AKATIGA, a non-governmental organization that focuses its activities on the development of social research on various conditions and issues of rural and urban areas in terms of agriculture, labour, small and micro businesses, published in 2010 advocacy material on outsourcing as part of their Pocketbook Series.

These developments, both reported in AP-IRNet,⁸ are intended to have an effect in the institutional dimension insofar as it is hoped they may improve the ability of workers concerned to claim the rights they are entitled to and improve their understanding of employment relationship-making at hand. They might be taken into consideration in assessing the institutional dimension of local outsourcing developments, and the need for further action.

5.2. Dimension framework to help dialogue

Thus dialogue might be helped along by organizing the account to be taken of these dimensions in concrete circumstances. We could look at and compare two sets of simultaneously occurring circumstances in the same hypothetical country, for example. The first is an observed demand for outsourced customer services – the creation of "call centres" that take advantage of advances in communication technology that make it possible to tap into large supplies of qualified labour located away from the outsourcing enterprise. The second would be transformation of employment to short-term contracts of production personnel in manufacturing enterprises, responding to volatile demand for product and squeezed profit margin; this could be in garment production enterprises, automobile assembly plants, or even call centres themselves.

Through social dialogue amongst key stakeholders, the follow conclusions might be drawn:

⁷ http://www.gbgindonesia.com/en/main/partners_updates/apindo/solutions_for_the_outsourcing_system_in_indonesia.php (accessed 16 February 2013).

⁸ Hong Kong: <http://apirnet.ilo.org/resources/fact-sheet-employee-contractor-self-employed-person?searchterm=hong+kong+fact+sheet> ; Indonesia: <http://apirnet.ilo.org/resources/more-concern-on-contract-labour-and-outsourcing-in-indonesia> (accessed 22 February 2013).

Table 1: Dimensional assessments, call centres and short-term contracting

	Increased work that is outsourced to call centres	Short-term contracting of production personnel
Level	<ul style="list-style-type: none"> High-level Opportunity for industry coordination 	<ul style="list-style-type: none"> Low-level Indications of indiscriminate application; no coordination
Equity	<ul style="list-style-type: none"> Neutral New employment opportunities, albeit vulnerable to termination of <i>bona fide</i> business-to-business service agreements 	<ul style="list-style-type: none"> Motivations are not seen as very equitable; promotes income inequality Indications of discriminatory applications (gender, age, trade union affiliation) Long term employees made contingent
Management	<ul style="list-style-type: none"> Challenge for management to coordinate human resource with demand Need to train labour force New call centre jobs add to existing ones 	<ul style="list-style-type: none"> Short term flexibility realized Increased employee turn-over and related retraining costs for the enterprise
Institutional	<ul style="list-style-type: none"> Compliance institutions challenged with uptake of new workers 	<ul style="list-style-type: none"> Contributions to social security funds are compromised; workers fall outside of safety net Workers unable to improve skills because training institutions do not make offerings that fit new employment patterns Trade unions are unable to represent short term workers

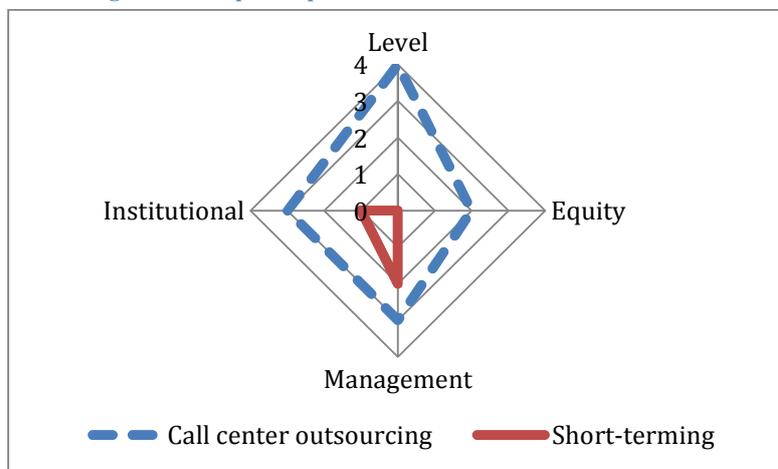
If the social partners are asked to rank each dimension on a 1 to 4 scale, they might conclude as follows.

Table 2: Assigned quantities to dimensional assessment

	Increased work that is outsourced to call centres	Short-term contracting of production personnel
Level	4	0
Equity	2	0
Management	3	2
Institutional	3	1

And a diagram of the result might appear as follows.

Figure 1: Graphic representation of dimensional assessment



This diagramme could be thought of as a way of targeting for correction the dimensions falling close to the centre. Corrective action could involve such things as reformed regulation, industry concertation, or institutional reform decided through social dialogue.

5.3. Benchmarks for reference

Benchmarks are the final element to be brought into this consensus-building tool. Benchmarks are references that can be used in discussion of the issues within dimensions. Two referencing benchmarks – *empirical* and *standards* references – are immediately apparent.

The first is *empirical* evidence tending to show a value that should be attached to a dimension. A vast amount of research is continuing to be developed on ideas linked to new contracting practices such as the effects of labour contract law on employment creation;⁹ health consequences associated with fixed term employment;¹⁰ risk management – "job security risk", risk of fixed labour cost", "hiring risk" and "depleting risk" – motivating increasing resort to fixed term contracts;¹¹ hypothesis of fixed term contracts being "stepping stones" to indefinite employment contracts, methods for screening workers for permanent employment or a method for subsidizing permanent job search;¹² inequality in working conditions associated with non-traditional forms of employment;¹³ just to name a few randomly selected areas relevant for policy formation. Empirical evidence in related fields can also be called into place. For example, studies have been done showing the efficiency benefits of outsourcing functions comprising airport operations.¹⁴ These would be a relevant reference point for discussion in the management dimension of the privatization and subsequent segmentation and outsourcing of functions within a national airport administration. A study co-relating outsourcing with negative exercise for freedom of association rights would be useful for an equity ranking, just as a study of the effects of extensive short-term contracting on eligibility for unemployment benefits within an existing scheme would be relevant to the institution dimension.¹⁵

Box 6: A current empirical situation in lay terms

In its timely 19 January 2013 Special Report entitled *Outsourcing and Offshoring*, the *Economist* magazine presents its view of the current global situation,

... "examine(ing) the changing economics of offshoring in the corporate world, ... show[ing] that offshoring in its traditional sense, in search of cheaper labour anywhere on the globe, is maturing, tailing off and to some extent being reversed. Multinationals will ... distribute their activities more evenly and selectively around the world, taking heed of a far broader range of variables than labour costs alone. ... countries will have to compete hard on factors beyond labour costs. The most important of these are world-class skills and training, along with flexibility and motivation of workers, extensive clusters of suppliers and sensible regulation."

The interesting factual situations described in that report, the studies it cites and developments it reports could be used as references for the dimensional assessment of employment contracting law and practice made from a particular national vantage point. The argument and example of the fact that low labour costs are no longer sufficient to attract work and investment is an important reference for management and institutional dimensions.

The second benchmark is current *standards*. These standards could be international labour standards, national laws and regulation, collective bargaining agreements, or even entrenched industry practice, depending on the dialogue taking place. They can be those of the country in question, or standards used elsewhere. Standards are useful references insofar as they are often the product of social dialogue and established wisdom. As such, a standard (or part of a standard) could be referenced in either a positive or negative light; the argument may be made that a particular standard is functional and useful, or that it is not. A standard may be referenced as an imperative, for example as in the case of a binding collective agreement, arbitral award, international treaty or trade agreement. In this sense, standards benchmarks

⁹ Yu-Fu, C. and Funke M. (2008).

¹⁰ Kim, I., Khang, Y., Cho, S, Chun, H, and Muntaner, C. (2011).

¹¹ Arai and Watanabe (2009).

¹² Baranowska, A., Gebel, M., Kotowska, I.E (2011).

¹³ Gash, V. and McGinnity, F. (2006).

¹⁴ Adler, N., Liebert, V., Yazhensky, E. (2013).

¹⁵ World Solidarity, pp. 14, 9 (2009).

are fundamentally different from empirical ones insofar as they are useful after the dimensions have been assessed and the need for regulatory or other corrective intervention has been broadly decided on. Standards benchmarks give essential reference points for potential corrective action.

Dimensional assessments complement and do not replace standards used as a guide to action. Dimension analysis takes into account a broader range of considerations that are indeed often needed to implement standards that are more flexible than the situation requires. We look to the standards for the regulatory solution to the assessment of the dimensions, which establish the need and the basis for the need in the first place. Notice also that the consensus on dimensions could point to particular type of regulatory solution.

Box 7: International labour standard benchmarks

Three ILO standards are must-have references for use with dimensional assessment. They are:

The **Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982** calls for termination of employment at the initiative of the employer to be based only on considerations of worker capacity, conduct or operational requirements of the enterprise. Fixed term contracts should not be used to circumvent these requirements and safeguards should be put in place to prevent this from occurring. The instruments set certain procedural requirements and require recourse to appeal from termination.

The **Private Employment Agencies Convention, (No. 181) and Recommendation (No. 188), 1997** are based both on recognition of the role that private employment agencies may play in a well-functioning labour market, and the need to protect workers against risks of abuses. The Convention sets the general parameters for the regulation, placement and employment of workers by these agencies in direct as well as triangular employment relationships, and calls on ILO member States to establish clear policies, legislation and implementing mechanisms for the effective registration and licensing of private employment agencies.¹⁶

The **Employment Relationship Recommendation, 2006 (No. 189)** suggests that ILO member States (1) formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship; (2) determine – via a listing of pertinent criteria - the existence of an employment relationship, relying on the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement that may have been agreed between the parties; and (3) establish an appropriate mechanism - or use an existing one - for monitoring developments in the labour market and the organization of work so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship.¹⁷

Other ILS benchmarks may also be relevant to given situations.

6. Conclusion

Social dialogue on issues of employment contracts, termination, and out sourcing is complex, diverse, and often difficult. It can also be diffused, with discussants approaching matters from different points of departure. So much has been suggested by the e-discussion held in AP-IRNet. It is hoped that social dialogue might be helped along with a graphic representation of the dimensions to these issues.

Box 8: An example of social dialogue contributing to regulation of new contracting methods

The private employment agency industry is one of the largest private employers in Europe. In 2006, 3.3 million agency workers were employed daily in full-time equivalent jobs. On average, the industry accounts for 1.8% of the European total employment. Private employment agencies facilitate non-tradition forms of employment contracting, in particular triangular employment relations and temporary work contracts (*management dimension*). The industry experienced significant growth in the late 1980's and 1990's, amid calls for regulation to stem practices seen as abusive (*equity dimension*). Many countries engaged in reform, and in 1997, the ILO adopted Convention No. 181, revising the Fee-charging Employment Agencies Convention, 1949 (No. 96), and effectively abandoning a restrictive policy approach toward private employment agencies (*standards benchmark*). The sector has grown steadily since then and this is likely to continue although annual changes are highly responsive to business cycles.

Activists called for European level regulation after the adoption of C. 181, with a view to harmonising all European country regulations (*level dimension*). Relying on European treaty rules authorising them to do so, the social partners at the European level – Union Network International and European Confederation of Private Employment Agencies

¹⁶ See also, ILO, *Guide to Private Employment Agencies: Regulation, monitoring and enforcement* (Geneva, 2007).

¹⁷ See also, ILO, *The Employment Relationship: An annotated guide to ILO Recommendation No. 198* (Geneva, 2007).

(EUROCIEET) – engaged in social dialogue from 1996, culminating in 2001, attempting to agree a regulation that the governmental European Commission and Parliament would then enact as a directive on temporary work agencies binding on all EU member States (*institutional dimension*). Their negotiations failed to produce an complete agreement, so the European Commission and Parliament proceeded to develop a Directive. Between 2001 and 2008 the social partners nevertheless were able to agree on joint declarations addressed to the European Commission designed to influence the approach taken in drafting a directive. The European Parliament adopted the Temporary Agency Work Directive in 2008. Social dialogue at the European temporary agency work sector continues, influencing the implementation of the Directive.¹⁸

¹⁸ See <http://www.worker-participation.eu/EU-Social-Dialogue/Sectoral-ESD/Temporary-agency-work/Outcomes> , <http://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPagId=75> (accessed 22 February 2013).

References

- Adler, N., Liebert, V., Yazhensky, E. Benchmarking airports from a managerial perspective, *OMEGA - The International Journal of Management Science*, 41 (2013) 442–458.
- Arai, E. and Watanabe, Y., An Interview Survey on Fixed-Term Contracts for Workers and Employment Management: Companies' Current Application of Fixed-Term Employment Contracts and Related Policy Issues, *Japan Industrial and Labour Policy and Training Research Report No. 126* (Sep. 2010).
- Baranowska, A., Gebel, M., Kotowska, I.E. The role of fixed-term contracts at labour market entry in Poland: stepping stones, screening devices, traps or search subsidies, *Work Employment Society* (2011), Vol. 25:777.
- Burgoon, B. and Dekker, F., Flexible employment, economic insecurity and social policy preferences in *Europe Journal of European Social Policy*, May 2010 20: 126-141.
- Gash, V. and McGinnity, F., Fixed-term contracts—the new European inequality? Comparing men and women in West Germany and France, *Socio-Economic Review* (2007) 5, 467–496.
- Gebel, M. and Giesecke, J., Labor Market Flexibility and Inequality: The Changing Skill-Based Temporary Employment and Unemployment Risks in Europe, *Social Forces* (2011) 90(1): 17-39.
- Il-Ho Kim, Young-Ho Khang, Sung-Il Cho, Heeran Chun, and Carles Muntaner, Gender, Professional and Non-Professional Work, and the Changing Pattern of Employment-Related Inequality in Poor Self-Rated Health, 1995-2006 in South Korea, *J Prev Med Public Health*. 2011 Jan; 44(1): 22-31.
- Yu-Fu, C. and Funke, M. China's new labour contract law: No harm to employment? Bank of Finland Institute for Economies in Transition Discussion Paper 29 (2008).
- World Solidary Movement, *Policy Paper on Short-term Contracting in the Asian Garment Industry*, Thematic Report from Asia No. 1 (2009).

Annex I: List of participants

Moderator:

David Tajgman, independent consultant, former ILO Senior Specialist on International Labour Standards, External Lecturer in International and Comparative Labour Law and Industrial Relations.

External Participants:

AD Wahid, Indonesia

Adeyemi Dawodu , Nigeria

Partha Sarkar, of the Department of Business Administration, The University of Burdwan, Burdwan, West Bengal, India

Kim Dong-won Kim, Korea

ILO Participants:

Angelika Muller, ILO Labour Law Officer, DIALOGUE, Geneva

AP-IRNet Facilitator:

Mr Michael Karimian, ILO Regional Office for Asia and the Pacific, Bangkok, Thailand