

The future of employment contracts, termination and outsourcing: What is the vision for the countries of South East Asia?

Background note for
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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.

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 significant numbers of seemingly lesser valued workers scramble for ever more insecure jobs. Unlike ever before, working conditions are potentially undercut by local jobseekers willing to work for less as well as those able to do the work on a sub-contracted basis thousands of kilometres away. Employers more and more respond to these market demands and opportunities by offering jobs of shorter duration or under subcontracted arrangements. These arrangements can teeter on the edge of legality as defined by employment contracting regulations crafted in another era. Nor can the additional fact be ignored 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 – probably most – places these incongruities between regulatory frameworks for employment contracting and actual practice is growing. The stage is set for disharmony, crying for a retuning of employment contract regulations.

What is to be done? What has been done? What could be done to address this dilemma? Is there a vision for the future of employment contracting in South East Asian countries?

Labour law reform is often an exercise in imposing the constraints of reality upon the ideals of improved working conditions, looking for provisions that have the best chance for actually being applied. This *problematique* is all the more evident in respect of the fundamental matter of employment contracting. Norm-challenging practices abound where, for example, persons working side by side, doing the same work in the same production process find themselves having employment contracts with different employers, with different employment terms; persons are offered a string of limited duration employment contracts punctuated by breaks in work that have a disqualifying effect on employment benefits and protections, undermining social security institutions; migrant workers effectively engaged over many years are bound by

employment contract and regulation to the job to which they are contracted without possibility of seeking others, hampering efficient allocation and development of human resources; work is contracted out by an enterprise to another in circumstances where the first enterprise might just have well attempted to employ directly the workers of the sub-contractor, reconstituting the managerial behaviour of both enterprises. What other issues are arising as a result of employment contracting practices in the light of current regulation?

How have these types of situations been dealt with? Where is reform in the winds? What is the nature of the proposed reforms, their underlying objectives? Are there good results to be reported, lessons to be learned?

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.¹ 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.

Reform of employment contracting, termination and outsourcing ought to be based on a sound foundation of intended policy outcomes, compliance with international obligations, and political will for enforcement. What are the desired policy outcomes? What role has social dialogue played in the past in defining these outcomes, and what role should it play in the future? Are there lessons to be learned and shared in this respect? It is almost certain that workable solutions will require both workers and employers to accept something less than their starting positions; compromises will need to be made. Can a common vision be found and agreed?

We aim in this e-discussion to explore these and other related issues and questions.

¹ http://www.gbgindonesia.com/en/main/partners_updates/solutions_for_the_outsourcing_system_in_indonesia.php (accessed 15 January 2013).