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Report V

The scope of the employment relationship

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INTRODUCTION

Since its foundation in 1919, the ILO has been engaged in promoting the protection of workers through the adoption of a wide range of instruments and policies that aim to ensure that workers, irrespective of their employment status, can work in conditions of freedom, equity, security and human dignity. The ILO Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998 recalled that all member States have an obligation to promote and to realize the principles concerning the rights contained in the ILO's fundamental Conventions.¹ The Decent Work Agenda promotes access for all to freely chosen employment, the recognition of fundamental rights at work, an income to enable people to meet their basic economic, social and family needs and responsibilities and an adequate level of social protection for the worker and family members.² The lack of protection of many workers represents a significant challenge to the achievement of this goal in many countries and regions of the world. It is clear that work cannot be considered decent if the worker is not protected against the main risks associated with it. The Decent Work Agenda therefore provides a valid and important conceptual framework for addressing the lack of protection of dependent workers within the scope of the employment relationship.

The protection of workers has many dimensions, involving a range of actors, institutions and means. It usually encompasses the provision of social security benefits to cover contingencies such as illness, disability, old age, maternity and unemployment; protection against occupational health and safety risks; equality of access to employment and protection against discrimination; and protection against job and income insecurity. Such protection may or may not be linked to an employment relationship and may change over time. The reality is that the full range of these protections is only enjoyed by a minority of the global workforce.

The general question of the protection of workers raises a wide range of issues which must be understood and addressed in the wider context of changes in the labour market and the organization of work. The nature and pace of change in the world of work have had, and continue to have, a profound impact on employment relations. Patterns of employment have changed, the range and variety of work contracts have expanded and new forms of work have proliferated, leading to both opportunities and risks. These developments impact directly on employment and labour markets and challenge traditional concepts and old certainties. Frequently, they offer new employment opportunities and more flexibility for both employers and workers. Job security and the protection built around the employment relationship are being challenged as alternative notions of independent work and different forms of self-employment become more widespread.

¹ <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>

² See ILO: *Decent work*, Report of the Director-General, International Labour Conference, 87th Session, Geneva, June 1999, at <http://www.ilo.org/public/english/standards/reim/ilc/ilc87/rep-i.htm>

Over a period of many years, laws, regulations and collective agreements linking protection of workers to the employment relationship have been adopted and enforced. The employment relationship has proven to be a valid and durable framework through which the main protections and rights are afforded to workers. Most international labour standards concerned with the protection of workers take it as their starting point. They have in turn served as the basis for national labour laws in member States, although many aspects of workers' protection lie outside the scope of the employment relationship and therefore beyond the scope of this report.

The scope of the employment relationship was included in the agenda of the 91st Session of the International Labour Conference (2003) by decision of the Governing Body of the International Labour Office in March 2001.³ By identifying the scope of the employment relationship as the reference point for this discussion, the Governing Body has focused the discussion on the labour protection of dependent workers, i.e. the rights, entitlements and obligations of dependent workers under laws, regulations or collective agreements which derive from and depend on the existence of an employment relationship. Therefore, the report does not deal with the protection of independent workers, nor does it cover civil or commercial contracts.

The employment relationship, however it is defined in a particular national context, is a universal notion which creates a legal link between a person, called the "employee" (frequently referred to as "the worker") with another person, called the "employer", to whom she or he provides labour or services under certain conditions in return for remuneration. The subject of this report is the increasingly widespread phenomenon of dependent workers who lack labour protection because of one or a combination of the following factors:

- the scope of the law is too narrow or it is too narrowly interpreted;
- the law is poorly or ambiguously formulated so that its scope is unclear;
- the employment relationship is disguised;
- the relationship is objectively ambiguous, giving rise to doubt as to whether or not an employment relationship really exists;
- the employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them; and
- lack of compliance and enforcement.

Based on the national studies undertaken for the Office (listed in Chapter I) and on other sources, there is evidence that these phenomena are on the increase and are contributing to growing insecurity and poverty. They can also adversely impact on the competitiveness and viability of enterprises. They challenge the relevance of labour law at national and international level and directly undermine the labour protection of dependent workers who are in fact employees. The protection provided by labour law, no matter how favourable, is no longer applicable when a dependent worker cannot be recognized as an employee because of the defective formulation of the law or failure to comply with or enforce its provisions.

Addressing the scope of the employment relationship raises particular issues in relation to work in the informal economy. It can be very difficult to determine whether

³ See ILO: doc. GB. 280/2, 280th Session, Geneva, March 2001, paras. 32-59, at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb280/pdf/gb-2.pdf>

or not an employment relationship exists or to establish the boundaries between dependence and independence. The lack of labour protection of dependent workers in the informal economy poses specific challenges, particularly in relation to compliance and enforcement; these were highlighted in the conclusions concerning decent work and the informal economy, adopted by the 90th Session of the International Labour Conference in 2002.⁴

It is important to note that this report does not enter into an evaluation of the merits of particular definitions of the substantive content of the employment relationship. Information is given on a range of definitions used in different countries, identifying some common elements and highlighting differences shaped by different legal systems and cultures, as well as different economic and social environments. From this and other information on the procedural and other mechanisms at national level for resolving disputes about employment status, it is clear that the employment relationship is the focus of increasing attention at national level and is an important issue for governments and employers' and workers' organizations. Responses at national level are varied and range from legislation, regulations and collective agreements to guidelines and voluntary codes of practice. Developments at national level indicate that discussion of this topic at international level is timely and appropriate and that the ILO could provide technical advice and policy guidance to member States on this matter.

The report is organized as follows. Chapter I looks at the background to the discussion of this issue in the ILO, including the resolution adopted by the 86th Session of the International Labour Conference (1998),⁵ as well as the general context and implications of the non-protection of dependent workers. Chapter II describes some of the most common situations in which dependent workers are not protected, whether because of the limited or unclear scope of law; disguised employment relationships; objectively ambiguous employment relationships; or failure to comply with and enforce the law. Chapter III deals with "triangular" employment relationships separately because of the technical complexities that these relationships may raise and the fact that the existence of an employment relationship is not normally in doubt. This is in line with the 1998 resolution mentioned above, which required that in examining which workers are in need of protection, consideration be given to the possibility of dealing separately with the various situations in which they find themselves. Chapter IV provides examples of different approaches and summarizes some recent developments at national level aimed at clarifying the scope of the employment relationship. Chapter V suggests prospects for international and national action.

⁴ ILO: *Provisional Record* No. 25, International Labour Conference, 90th Session, Geneva, 2002, at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf>

⁵ Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour, reproduced in Annex 1.

CHAPTER I

PROTECTION OF WORKERS AND THE EMPLOYMENT RELATIONSHIP

The protection of workers is one of the core objectives of the International Labour Organization and an area in which considerable progress has been made. The ILO has always been concerned with the extension of protection to the large numbers of workers who do not enjoy the benefits of labour protection. In recent years that concern has broadened to include workers who have seen their conditions of employment and work deteriorate as a result of profound changes occurring in the world of work.

The situation of these workers has, in one form or another, been on the agenda of the International Labour Conference for over a decade. This chapter reviews these discussions and describes the context in which the non-protection of dependent workers arises and its consequences for workers, employers, governments and society in general.

RECENT DEBATES ON WORKERS' PROTECTION (1990-2002)

To a significant extent, the Conference has taken the employment relationship as the reference point in examining various work relationships. The ideas expressed in those debates have guided the thinking and activities of the Office. In recent years the Conference has held discussions on self-employed workers, including those who are only apparently self-employed, or whose status is ambiguous, somewhere between dependent and independent. It has discussed migrant workers, homeworkers, private employment agency workers, child workers, and workers in cooperatives and in the informal economy. It has also addressed work relationships in the course of discussions on social security and maternity protection.

In 1998, the Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work, in which it solemnly recalled the universality of the principles and rights set out in its Constitution and the Declaration of Philadelphia, further developed in the form of specific rights and obligations in the fundamental Conventions of the ILO.¹ The Declaration does not exclude from its scope those workers who are not in an employment relationship or, to put it another way, workers who do not have an employer in the strict sense of the term.

Discussions at the International Labour Conference

In 1997 and 1998, the Conference examined an item on “contract labour”. Concern about this type of work had been expressed on several occasions in ILO industrial

¹ <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>

committees and sectoral meetings since the 1950s,² as well as by the International Labour Conference itself in its general discussion on the promotion of self-employment in 1990. On that occasion, the Conference approved important conclusions, which referred to apparently self-employed workers and recommended that “Protection of workers including the nominal self-employed against subcontracting arrangements and labour contracts leading to their exploitation should be instituted and enforced where not already the case”.³

The original intention of the Conference discussion on “contract labour”⁴ was to protect certain categories of unprotected dependent workers through the adoption of a Convention and a Recommendation. The Workers’ delegates strongly advocated the need to protect workers who were unprotected in law and in fact. This concern was expressed by the Worker Vice-Chairperson during the second discussion of the proposed instruments when he spoke of “unprotected workers”, instead of “contract workers”.⁵ This category was understood to include workers in “triangular” relationships, as well as workers who perform work or provide services to other persons within the legal framework of a civil or commercial contract, but who in fact are dependent on or integrated into the firm for which they perform the work or provide the service in question. However, the proposal to adopt a Convention and Recommendation failed. In particular, the Employers’ group opposed the adoption of instruments on the subject; they did not consider it suitable for standard-setting because of the enormous variety of national arrangements and approaches, and because they felt that the proposed instruments would interfere with commercial contracts, with adverse effects on economic activity and job creation.⁶ Even so, the Employers were interested in some aspects of the subject. From the beginning of the discussions, they were open to the possibility of regulating “disguised employment” and preventing sham arrangements, fraud or illegal practices adopted to avoid legal obligations and disadvantage workers.⁷ At the end of the second discussion, the Employers’ group recognized that

² Notably at the Fifth (1955-56) and Eighth (1973) Sessions of the Petroleum Committee and the Second Tripartite Technical Meeting for the Clothing Industry (1980). See ILO: *Contract labour*, Report VI(1), International Labour Conference, 85th Session, Geneva, 1997, Annex. Subsequently, this concern was also expressed at sectoral meetings, such as those on transport; transport equipment manufacturing; textiles, clothing, leather and footwear; hotel, catering and tourism; forestry and wood; privatization of municipal services; construction; mining; and media and entertainment.

³ Resolution concerning self-employment promotion, adopted on 27 June 1990, Conclusions, paras. 4, 8, 17(a), 21(b) and (e) and 23(b) in ILO: *Record of Proceedings*, International Labour Conference, 77th Session, Geneva, 1990. See also ILO: *The promotion of self-employment*, Report VII, International Labour Conference, 77th Session, Geneva, 1990.

⁴ For the reports of the Conference Committee on Contract Labour and the discussion of the reports in plenary, see ILO: *Record of Proceedings*, International Labour Conference, 85th Session, Geneva, 1997, Twentieth sitting, 18 June, and *Provisional Record* No. 18; and *Record of Proceedings*, International Labour Conference, 86th Session, Geneva, 1998, *Provisional Record* Nos. 16 and 21. The following documents were prepared by the Office to serve as a basis for these discussions: ILO: *Contract labour*, Reports VI(1) and (2), International Labour Conference, 85th Session, Geneva, 1997; and *Contract labour*, Reports V(1), (2A) and (2B), International Labour Conference, 86th Session, Geneva, 1998.

⁵ ILO: *Record of Proceedings*, 86th Session, op. cit., *Provisional Record* No. 16, paras. 126-127.

⁶ ILO: *Record of Proceedings*, 85th Session, op. cit., Twentieth sitting, p. 283.

⁷ *ibid.*, *Provisional Record* No. 18, para. 13.

there were certain issues associated with the subject of “contract labour” which required further attention, although they were of the view that those issues had not yet been precisely identified and there remained significant differences of opinion about which issues should be addressed and how they should be addressed.⁸ In the end, the Employers supported the resolution adopted by the Conference.⁹

Some governments and the Employers’ group also contended that the proposed Convention would create a third and ill-defined category of workers, somewhere between dependent and self-employed workers. Government delegates objected mainly to the inferior and discriminatory conditions that would be offered to workers in that category, and the risk that many dependent workers would fall into the new category, to the detriment of their rights. The Employers were concerned that such workers would receive many of the benefits of employee status without formally being employees.

The divergences of opinion on this subject were exacerbated by terminological and conceptual difficulties. The term “contract labour” immediately sparked off lengthy debates. Although it is widely used, this expression does not have a precise generic meaning, much less the legal breadth to encompass the diverse labour situations with which the Conference Committee was concerned. Faced with this problem of terminology, the Committee decided to delete the terms “contract labour” and “contract worker” throughout the text of the proposed Convention, as can be seen in the only Article that was considered.

It appears, however, that despite the terminological and conceptual difficulties, the Conference delegates had some common understanding of the subject under discussion and, in particular, of the workers whose situation the proposed instrument sought to regulate, that is to say, dependent workers who lacked labour protection. Many delegates referred to workers recruited through intermediaries, and to those who worked for a subcontractor and whose status was unclear, including certain workers classified as “self-employed”. Some delegates distinguished between dependent and independent contractors. Others spoke of self-employed workers who were economically dependent on one client, those in disguised employment relationships, those in objectively ambiguous employment relationships and those working for a user enterprise with which they did not have an employment relationship. Some delegates referred to workers in a grey area or on the fringe of the classic employment relationship.

Thus, despite the lack of clarity and consensus, the Conference Committee was able to focus the theme for the future on the situation of dependent workers who lacked labour protection, subject to the Employers’ reservation that only disguised employment relationships should be discussed.

It is noteworthy that in the various debates mentioned above, delegates from all regions repeatedly alluded to the *employment relationship*, in its various forms and with different meanings, as a concept familiar to all.

⁸ ILO: *Record of Proceedings*, 86th Session, op. cit, *Provisional Record* No. 21, p. 21/3.

⁹ Reproduced in Annex 1 of this report.

From national studies to the Meeting of Experts

In view of the lack of clarity in the debates on “contract labour” and the impossibility of adopting a regulatory instrument, and prompted by the desire to discuss the subject again in a future meeting, the Conference adopted the resolution mentioned above, requesting the Office, with the assistance of Experts, to examine which workers needed protection in the situations that the Committee had begun to identify.¹⁰

In response to that request, national studies were undertaken,¹¹ informal regional meetings organized and a tripartite Meeting of Experts on Workers in Situations Needing Protection was held in May 2000.¹² The Experts participating in the meeting adopted a common statement.¹³

The objective of the national studies was to help identify and describe the principal situations in which workers lacked adequate protection, as well as the problems caused by the absence or inadequacy of protection, and to suggest measures to remedy such situations.

To prevent ambiguities arising from the proliferation of terms¹⁴ used to refer to the different situations that occur, the authors of the national studies tried to avoid the use

¹⁰ Reproduced in Annex 1 of this report.

¹¹ A first set of studies on worker protection was carried out in 1999 for the following 29 countries (with the name of the author or authors in brackets): *Argentina* (Adrián Goldín and Silvio Feldman); *Australia* (Alan Clayton and Richard Mitchel); *Brazil* (José Francisco Siqueira Neto); *Cameroon* (Paul Gérard Pougoué); *Chile* (María Ester Feres, Helia Henríquez, José Luis Ugarte); *Czech Republic* (Marcela Kubínová); *France* (Françoise Larré and Vincent Wauquier); *Germany* (Rolf Wank); *Hungary* (Lajos Héthy); *India* (Rajasi Clerck and B.B. Patel); *Islamic Republic of Iran* (Kgeshavad Monshizadeh); *Italy* (Stefano Liebman); *Japan* (Mutsuko Asakura); *Republic of Korea* (Park Jong-Hee); *Mexico* (Carlos Reynoso Castillo); *Morocco* (Mohamed Korri Youssoufi); *Nigeria* (Femi Falana); *Pakistan* (Iftikhar Ahmad and Nausheen Ahmad); *Peru* (Marta Vieira and Alfredo Villavicencio); *Philippines* (Bach Macaraya); *Poland* (Marek Pliszkiwicz); *Russian Federation* (Janna Gorbatcheva); *Slovenia* (Polonca Končar); *South Africa* (Halton Cheadle and Marlea Clarke); *Trinidad and Tobago* (Roodal Moonilal); *United Kingdom* (Mark Freedland); *United States* (Alan Hyde); *Uruguay* (Antonio Grzetic and Hugo Fernández); and *Venezuela* (Oscar Hernández Alvarez and Jaqueline Richter Duprat). When the item was placed on the agenda for a general discussion, the following new studies were carried out in 2000-01: *Bulgaria* (Ivan Neykov); *Costa Rica* (Fernando Bolaños Céspedes); *El Salvador* (Carolina Quinteros and Dulceamor Navarrete); *Finland* (Mari Leisti, in collaboration with Heli Ahokas and Jorma Saloheimo); *Ireland* (Ivana Bacik); *Jamaica* (Orville W. Taylor); *Panama* (Rolando Murgas Torrazza and Vasco Torres de León); *South Africa* (Marlea Clarke, with Shane Godfrey and Jan Theron); *Sri Lanka* (R.K. Suresh Chandra); and *Thailand* (Charit Meesit). Most of the national studies may be consulted at <http://www.ilo.org/public/english/dialogue/ifpdial/ll/wp.htm>. In this report, these studies will be referred to indicating the name of the country in italics. The second report on South Africa will be referred to as *South Africa 2002*.

¹² The Office prepared the following document as the basis for discussions at the Meeting: ILO: *Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope)*, basic technical document (Geneva, 2000), doc. MEWNP/2000, at <http://www.ilo.org/public/english/dialogue/ifpdial/publ/mewnp/index.htm>. The report of the Meeting is contained in ILO: *Report of the Meeting of Experts on Workers in Situations Needing Protection*, doc. MEWNP/2000/4(Rev.), appended to doc. GB.279/2, 279th Session, Geneva, Nov. 2000, at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-2.pdf>

¹³ Reproduced in Annex 2 of this report.

¹⁴ The specialist literature frequently uses expressions and terms such as atypical, precarious or flexible employment; new forms of employment; non-conventional forms of employment; contracting out, externalization, outsourcing, or temporary workers, but not in the traditional sense meaning persons who work for a limited time, but specifically those recruited through a temporary employment agency.

of such terms and concentrated on describing each situation in law and in practice and reflecting the trends.¹⁵ Difficulties arose in determining the scale and patterns of these situations, because of the limited statistical information available.¹⁶ However, most of the authors had access to a variety of authoritative sources in support of their analyses and conclusions.

Workers in the informal economy

The studies did not address workers in the informal economy as a separate and specific category. However, several of them contain valuable information in this respect. It was assumed from the outset, and confirmed by subsequent research and the discussions during the 90th Session of the International Labour Conference (2002), that situations of dependent work and self-employment also occur in that area, shaped by the peculiarities of an especially precarious economy. As the Conference stated, “workers in the informal economy are not recognized, registered, regulated or protected under labour legislation and social protection, for example when their employment status is ambiguous, and are therefore not able to enjoy, exercise or defend their fundamental rights”.¹⁷ It further pointed out that “labour legislation often does not take into account the realities of modern organization of work. Inappropriate definitions of employees and workers may have the adverse effect of treating a worker as self-employed and outside the protection of labour legislation”.¹⁸ In many countries, the vast scale of the informal economy has contributed to the realization that some enterprises cannot afford the economic cost of legality – which to some extent helps relativize the common finding that informal enterprises are among those which violate labour law most often, in the sense that, for many of them, full compliance with the law is simply beyond their capacity. Hence the need to support these enterprises and workplaces to enable them gradually to be in a position to fulfil their obligations to their workers.

¹⁵ The studies drew a distinction between the following four types of situation, which were also referred to in the discussions on “contract labour”: subordinate work, “triangular relationships”, self-employment, and self-employment under conditions of dependency (economic or other). Particular reference was made to specific cases in which workers frequently lack protection, such as those of truck drivers in transport enterprises, certain workers in department stores, and construction workers.

¹⁶ In 1993 the Fifteenth International Conference of Labour Statisticians (ICLS) adopted a Resolution concerning the International Classification of Status in Employment (ICSE), which provides improved guidelines for the production of statistics on the different contractual situations of workers, to reflect the different types of economic risk and authority they have in their jobs in more detail than is reflected in a rough distinction between paid employment and self-employment. In 1998, the Sixteenth ICLS discussed a report on national practices in the production of such statistics, which showed that very little work had been done to provide better statistics on these issues. The Sixteenth ICLS concluded that more work was needed both in national statistical offices and by the ILO to improve the situation (see ILO: *Report of the Conference*, Sixteenth ICLS, Geneva, 6-15 Oct. 1998, doc. ICLS/16/1998/V, appended to doc. GB.273/STM/7, 273rd Session, Geneva, Nov. 1998). However, only limited work has been possible in the ILO, and the situation seems to have been similar in national statistical offices. There is no discussion of this issue scheduled for the Seventeenth ICLS, which will meet on 24 Nov.-3 Dec. 2003.

¹⁷ Resolution concerning decent work and the informal economy, International Labour Conference, 90th Session, Geneva, 2002 (Conclusions, para. 9).

¹⁸ *ibid.*, para. 16.

Women workers

The situation of women workers was given particular emphasis in some of the studies. From the data collected, it is obvious that the problems typically faced by women workers are exacerbated in situations such as those under consideration and that the concentration of women in unprotected situations can be high. All the indicators tend to show that there is a significant gender dimension to the problem.

Self-employed workers

Although the focus of this report is the labour protection of dependent workers, some references to self-employment are unavoidable, given the growing interrelationship between the two forms of work. There are many workers who move occasionally or fairly regularly from one form of work to the other, hence the need to ease this transition and to provide mechanisms for preserving rights, especially to social security.

WORKERS' PROTECTION IN QUESTION

Labour law is seen as society's response to a situation of inequality in the legal relationship between a person providing a service or performing work (the worker) and the recipient (the employer). The existence of international labour standards reflects a high degree of convergence on this issue in broad terms among countries with different legal systems.

Labour law affects the way societies function. It has brought about major gains for workers; at the same time it has been a factor in regulating competition between enterprises; and, despite shortcomings in its application in many countries, it has been an instrument for the orderly development of society and the State. The failure to adapt labour laws, however, can result in the perpetuation of complex regulations that are ill-suited to the new realities of the labour market.¹⁹

The Meeting of Experts in May 2000 confirmed that changes in the nature of work have resulted in situations in which the legal scope of the employment relationship does not accord with the realities of working relationships. According to the Experts, this has resulted in a tendency whereby workers who should be protected by labour and employment law are not receiving that protection in fact or in law (although the extent of this tendency was questioned by the employers participating in the Meeting).²⁰ Bearing this trend in mind, it is important to identify specific aspects of the *context* in which this problem has emerged and mention some of the *repercussions* that it has had, as shown by some of the national studies commissioned by the Office.

¹⁹ "In my view labour law has to show a greater capacity of adaptation if it wants to continue to play a significant role in the new social and economic environment. The changed environment is challenging the very essence of the classic model: namely the idea that national law – and similarly collective bargaining – can regulate with 'imperative' effects and through unitary rules all the major contents of labour relations. Flexibility is the key word, which goes against imperative and rigid labour law", T. Treu: "*Labour law and social change*", public lecture, Geneva, International Labour Office, Nov. 2002.

²⁰ Common statement of the Experts in Annex 2 of this report, para. 2.

Context of the lack of protection

The context in which this lack of protection has arisen varies considerably from one region to another, but in all cases it is linked to significant changes in employment relationships caused by different factors.²¹

Some of these factors are linked to globalization,²² technological change and transformations in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment. Their impact is very uneven in terms of the degree to which they benefit countries and enterprises.²³ In many countries these factors have energized labour markets, contributing to significant growth in employment and to the generation of new forms of work.²⁴ This contrasts with increasing inequalities and job losses in other countries. In February 2002, the ILO established the World Commission on the Social Dimension of Globalization to respond to the needs of people as they cope with the unprecedented changes brought about by globalization.²⁵

Changes in workers' status and mass redundancies, especially in developing countries or those in transition, are frequently linked to major financial crises,²⁶ external debt, structural adjustment programmes and privatization.²⁷ These realities have been

²¹ See *Bulgaria* (p. 1), *Chile* (pp. 3-5) and *France* (p. 1).

²² Here, "globalization" means "a process of rapid economic integration among countries driven by the liberalization of trade, investment and capital flows, as well as rapid technological change", as defined in ILO: *Country studies on the social impact of globalization: Final report*, Working Party on the Social Dimensions of the Liberalization of International Trade, doc. GB.276/WP/SDL/1, 276th Session, Geneva, Nov. 1999, para. 2. This document contains the results of a survey carried out in seven countries to collect information on the effects of globalization and trade liberalization on the attainment of the ILO's social objectives.

²³ On the different regional impact of these changes, see ILO: *Strategic policy framework, 2002-05, and preview of the Programme and Budget proposals for 2002-03*, doc. GB.279/PFA/6, 279th Session, Geneva, Nov. 2000, para. 8. See also D. Dollar and A. Kraay: *Trade, growth, and poverty*, World Bank Policy Research Department Working Paper No. 2615 (Washington, DC, 2001); K. Watkins: "Making globalization work for the poor", in *Finance and Development* (Washington, DC), Vol. 39, No. 1, Mar. 2002; P. Warr: *Poverty incidence and sectoral growth: Evidence from Southeast Asia*, WIDER Discussion Paper No. 2002/20 (Helsinki, United Nations University, World Institute for Development Economics Research, Feb. 2002); E. Lee: *The Asian financial crisis: The challenge for social policy* (Geneva, ILO, 1998); T. Ademola Oyejide: "Globalisation and its economic impact: An African perspective", in J. Semboja; J. Mwapachu; E. Jansen, eds.: *Local perspectives on globalisation: The African case* (Dar es Salaam, Mkuki na Nyota Publishers, 2002); S. da Silva: *Is globalization the reason for national socio-economic problems?* (Geneva, ILO, 2001).

²⁴ See J. Somavia: *Perspectives on decent work, Statements by the ILO Director-General* (Geneva, ILO, 2001), p. 20.

²⁵ <http://www.ilo.org/public/english/wcsdg/index.htm>

²⁶ Particularly serious crises occurred in Argentina in Dec. 2001 and in South-East Asia in 1997, affecting Thailand in particular. After a period of outstanding economic growth and industrial development since 1987, fed by substantial foreign investment, the 1997 crisis, with the devaluation of the baht and the flight of foreign capital, brought unemployment, enterprise restructuring and changes in the pattern of employment, characterized by new, short-term forms of employment, development of subcontracting chains, home work and growth of the informal economy. See *Thailand* (p. 2).

²⁷ In *Bulgaria* (pp. 1-2), the last decade has seen the restructuring of branches of activity and plants, privatization, winding up of inefficient plants and the creation of new activities. In 1999, there were about a million fewer people employed than in 1990 and, in 2000, unemployment was at 18 per cent, with an average of 64 applicants for every job. In the *Czech Republic* (p. 1), there has been a considerable shift of

reflected in a drastic reduction in countries' financial capacity and a deterioration in conditions of employment and work. In this context, the growth of the informal economy²⁸ and undeclared employment has been especially significant.²⁹

Linked to these factors, changes in the structure of the workforce have been accentuated by migration from one country to another or from one sector of the economy to another. Other factors include a strong shift to services, greater participation of women, higher skill levels of young people in certain countries and deskilling of workers in others.³⁰ These changes inevitably influence workers' attitudes and the way in which they cope with the problem of finding and keeping a job.

Many enterprises, for their part, have organized their activities so as to utilize labour in increasingly diversified and selective ways, including various kinds of contracts, the decentralization of activities to subcontractors or self-employed workers, or the use of temporary employment agencies.³¹ These arrangements are encouraged by rapid developments in technology and new management systems in response to the growing demands of competition. This kind of flexibility has frequently been preceded or accompanied by legislative and institutional reforms to enhance the effects of labour supply and demand or to promote self-employment with the aim of stimulating job creation.³²

workers from large state enterprises to small and medium-sized enterprises, mass privatization, profound changes in the public administration and the emergence of non-governmental organizations. In *Hungary* (p. 5), since the changes in 1989-90, almost 1.5 million jobs have been lost and restructuring gave the private sector 60 per cent of employment by 1997. The large organizations that had existed previously gave way to 697,000 enterprises, of which 97 per cent were micro-enterprises. In *Poland* (p. 4), public sector employment fell from 52.1 per cent in 1990 to 30.9 per cent in 1998, while in the private sector it rose from 47.9 to 69.1 per cent over the same period.

²⁸ See, for example, *Bulgaria* (pp. 9-10), *El Salvador* (pp. 2, 3, 26), *South Africa 2002* (p. 18).

²⁹ See *Cameroon* (pp. 7-8). In *France* (p. 27), disguised employment primarily affects low-skilled workers, mainly in construction, public works, commerce and hotels and catering. In the *Russian Federation* (pp. 9-10) the informal economy includes not only low-skilled but also highly skilled workers. It may account for as much as 40 per cent of the economically active population, according to some estimates. In Latin America, 60 out of every 100 new jobs created in the period 1990-99 were in the informal economy, whose share of total employment was estimated at 46 per cent in 1999. In Brazil the income gap between men and women in the informal economy rose from 45.9 (1990) to 59.4 per cent (1999). ILO: *2000 Labour Overview: Latin America and the Caribbean* (Lima, 2000), Ch. 1, and *2001 Labour Overview: Latin America and the Caribbean* (Lima, 2001), p. 27.

³⁰ In *Australia* (pp. 11-14), four fundamental changes occurred: (1) in labour demand and the occupational and industrial composition of the labour force: a rise in the service sector, casual employment, part-time work and agency workers, contractors, outworkers and volunteers; (2) in the pattern of labour supply: an increase in married women, a higher level of training among young workers and a decline in full-time workers; (3) an increase in workers with post-school qualifications; and (4) an increase in full-time workers with long working hours. In *Bulgaria* (pp. 1-2) the total population has been declining since 1990, while the relative share of the economically active population increased over the period 1990-99. The transition to a market economy has led to a drop in labour demand, which has increased in the private sector and declined in the public sector. In the Republic of Korea certain trends in terms of skills have changed the structure of the labour market. Since 1980 there has been an increase in the percentage of workers with university or high school education, while the number of middle-school graduates and those with less than nine years' education declined. See doc. GB.276/WP/SDL/1, op. cit., para. 80.

³¹ In *Hungary* (pp. 5-6) there are reports of a general expansion of "cost-saving employment" as a means of evading the law.

³² See *France* (p. 41); however, Act No. 94-126 of 11 Feb. 1994 respecting initiative and individual enterprise does not seem to have had much impact. An amendment has abolished the presumption of the non-existence of the employment contract which had been introduced by that Act. See also *Uruguay* (p. 30).

Some studies confirm that the State is withdrawing from certain aspects of labour protection, and this is reflected in legislative reforms, a reduction in resources for labour inspection and labour law enforcement, and a certain reluctance to develop their labour policies.³³ The changes in employment relationships also generally take place against a background of difficulties faced by trade unions in many countries,³⁴ which have further weakened workers' bargaining position vis-à-vis their employers.

Repercussions of the lack of protection

Above all, of course, the lack of labour protection has adverse consequences for workers and their families. At the same time, however, the absence of workers' rights or guarantees can be counter-productive to the interests of the enterprise itself and have a negative impact on society generally. Moreover, as stated already, there is a marked gender dimension, given the strong evidence indicating that these changes affect women more than men. Such workers not only lose their rights under labour law, but also have difficulty in securing the protection of the competent inspection services or seeking redress through the labour courts. In many countries, they are also on the fringe of social security protection or receive less favourable benefits than those workers recognized as employees.

Concern about dependent workers without labour protection was certainly the main thread running through the debates in the Conference Committee on Contract Labour and led, despite fundamental disagreement, to the demand for further examination and a new discussion of the subject at the Conference. Further to the research and discussion promoted by the Office in response to this, concerns have also emerged in relation to the *economic and social repercussions* of the lack of labour protection.

The situation in Latin America is illustrative of this. Many workers in the region who in the past enjoyed a high level of labour protection now face a situation of job insecurity, and many others who enter the labour market do so under conditions of extreme uncertainty. It is no accident, therefore, that most of the social surveys in the countries of the region show that the main concern of workers, both men and women, is the insecurity they feel about their future. Many people have emigrated to other countries in search of better standards of living and conditions of work.

There is also insecurity in countries in other regions with more resources and a much better organized labour market. It is worth noting the widespread and, in some cases, quite sharp increase in individuals' perceptions of job insecurity that has been

³³ With respect to "cost-saving employment" in *Hungary* (pp. 18-19), used as a means of evading the law, surprise has been expressed at the weakness of state action, since this practice results in a considerable loss of revenue to the State. In *Australia* (p. 61) the construction industry is characterized by high levels of illegal employment and tax evasion, which calls for corrective measures.

³⁴ In *Costa Rica* (p. 18) in 1997, the rate of unionization was 6.2 per cent in the private sector and 50 per cent in the public sector. In *El Salvador* (p. 22) only 5.5 per cent of the economically active population in 1999 was organized in trade unions and possibly 70 per cent of unionized workers were in the construction industry. In *Mexico* (p. 19) there appears to be a "zone of virtual union deregulation" where foreign investors find an absence of unionization, especially in the *maquila* (cross-border export processing) sector, which is often characterized by fairly large enterprises, with an average of 250 workers. In *Trinidad and Tobago* (pp. 12-15, 50-57), unionization rates have declined and workers in certain sectors are discouraged from forming trade unions. See also *Islamic Republic of Iran* (p. 38) and *Venezuela*.

observed in most of the member countries of the Organisation for Economic Co-operation and Development (OECD) between the 1980s and the 1990s.³⁵ The ILO survey mentioned above points out the high social cost of adjustment and the greater labour market turnover, with particularly adverse consequences for workers with only modest transferable skills.³⁶

The lack of labour protection of workers can also affect employers, to the extent that it undermines productivity and distorts competition between enterprises, both at national and sectoral or international level, often to the detriment of those who comply with the law.³⁷ The lack of legal certainty can also result in judicial decisions reclassifying “self-employed” workers as dependent workers, with considerable unforeseen economic consequences for enterprises (some examples are given in Chapter IV). At the same time, the reality of work without any prospect of stability or promotion can ultimately make workers lose their commitment to the enterprise and contribute to an increasing and costly turnover of workers.

Another dimension of the lack of labour protection is the neglect of training, including training for work in environments where there are inherent risks. Enterprises can be reluctant to invest in training workers who will probably not be with them for long. The user enterprise of a subcontractor is unlikely to train the workers supplied by that firm, except for very specific purposes.³⁸ Untrained workers are more vulnerable to accidents in the workplace and can hamper the competitiveness of the enterprise. Furthermore, a lack of investment in training can undermine national competitiveness. In addition, in some sectors which have large numbers of unprotected workers, the negative image can create serious problems of recruitment and retention of workers. The construction industry is one example of such a sector.³⁹

The lack of labour protection can also impact on the health and safety of third parties and society in general. Some accidents, such as those caused by heavy vehicles⁴⁰ or major accidents in industrial plants have caused damage to the environ-

³⁵ Doc. GB.276/WP/SDL/1, op. cit., para. 47. See also A. Supiot (ed.): *Beyond employment* (Oxford, Oxford University Press, 2001). The same sense of insecurity is felt in Switzerland; see “Les salaires de la peur”, in *L’Hebdo* (Lausanne), Oct. 2002, No. 44, pp. 54-59.

³⁶ Doc. GB.276/WP/SDL/1, op. cit., para. 3.

³⁷ The subject of competition is explicitly mentioned in the first national collective agreement signed in Italy covering non-dependent employment relationships in the market research sector in December 2000. The parties undertake to establish guarantees for workers and enterprises, with a view to protecting workers and discouraging the use of illegal labour, which distorts competition. See “Agreement signed for atypical workers in market research”, in *European Industrial Relations Observatory On-line (Eironline)*, at <http://www.eiro.eurofound.ie/2001/01/inbrief/IT0101171N.html>

³⁸ The difficulties faced in access to training by workers in the construction industry were highlighted, and possible solutions proposed, in ILO: *The construction industry in the twenty-first century: Its image, employment prospects and skills requirements*, Report for discussion at the Tripartite Meeting on the Construction Industry in the Twenty-first Century: Its Image, Employment Prospects and Skills Requirements, Geneva, 2001, TMCIT/2001, at <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmcit01/tmcitr.pdf>

³⁹ *ibid.* See also *Costa Rica* (p. 69).

⁴⁰ For example, one of the national studies mentions a collision in Australia between a semi-trailer and two cars, which resulted in six fatalities in 1999. The cause of the accident was the extreme fatigue of the truck driver, who was driving under the influence of stimulant drugs given to him by his employer and a co-worker. In addition, driving for long periods, in excess of those permitted under current regulations,

ment, as well as injuries and fatalities to third parties. The link between accident risks and the lack of workers' protection has also been observed in situations where there is extensive use of subcontracting.⁴¹ The issue is not subcontracting itself but its improper use, which can create or aggravate risks. A particularly serious example is the nuclear energy industry in countries where the maintenance of major nuclear power stations involves subcontractors. In France, according to a study by a member of the National Institute of Health and Medical Research (INSERM), the maintenance of nuclear sites is mainly carried out by subcontractors.⁴² In the United Kingdom, audits have traced organizational weaknesses in the nuclear energy industry to the use of contractors.⁴³ In Slovenia, there is a similar system of using contractors for maintenance work.⁴⁴ Of course, the safety of the population

was a regular practice of the transport company for which he worked. See *Australia* (pp. 51-52). Non-compliance with regulations was also cited in connection with a truck collision which led to 11 fatalities in the St. Gothard tunnel, Switzerland, on 24 Oct. 2001; see International Road Transport Union (IRU): Press release No. 625, 30 Oct. 2001; see also "Gothard: les camionneurs européens dénoncent leurs moutons noirs", in *Le Temps* (Geneva), 31 Oct. 2001.

⁴¹ In the case of the explosion in the AZF chemical complex in Toulouse, France, on 21 Sep. 2001, which killed 30 and injured hundreds, devastating thousands of homes, a commission of inquiry cited "cascade subcontracting" (the use of subcontracting by an enterprise which is already itself subcontracting) as a factor aggravating the risk of a major industrial accident. The commission of inquiry proposed, inter alia, that the practice be prohibited in high-risk industrial complexes and that the working conditions and protection of external employees be improved. *Assemblée Nationale: Rapport fait au nom de la commission d'enquête sur la sûreté des installations industrielles et des centres de recherche et sur la protection des personnes et de l'environnement en cas d'accident industriel majeur* (Report prepared for the Commission of Inquiry into the safety of industrial plant and research centres and protection of persons and the environment in the event of a major industrial accident), No. 3559, 29 Jan. 2002, Vol. I, at <http://www.assemblee-nationale.fr/Rap-enq/r3559/r3559-01.asp> In response to the accident, a Bill on strengthening risk control was submitted to the National Assembly, section 6 of which provides that the user enterprise is responsible for ensuring that workers employed by external enterprises comply with safety measures, and for providing appropriate training to such workers before they start work. *Assemblée Nationale: Projet de loi tendant à renforcer la maîtrise des risques technologiques*, No. 3605, 13 Feb. 2002, at <http://www.assemblee-nationale.fr/projets/pl3605.asp>

⁴² Over 80 per cent of the maintenance work in nuclear power stations is carried out under subcontracting arrangements, including "cascade subcontracting", whereby every year 20,000 to 30,000 "external workers" are assigned to work involving exposure to radiation in nuclear plants. According to the study, this situation poses a threat to safety; A. Thébaud-Mony: *L'industrie nucléaire: sous-traitance et servitude* (Paris, Inserm/EDK, 2000); for a review, see E. Bursaux: "La vie exposée des travailleurs précaires du nucléaire", in *Le Monde*, 8 May 2001.

⁴³ In the Dounreay nuclear installation in Scotland (United Kingdom), an incident on 7 May 1998 interrupted the power supply to the fuel production and reprocessing area. A safety audit showed that, owing to excessive reliance on contractors, who had been taking on key functions since 1994, plant staff were no longer able to carry out safety measures or establish, interpret or implement the relevant standards. In 2001, a further audit found that despite progress, there was continuing reliance on external contractors, and much would depend on whether the plant could recruit sufficient qualified and experienced staff to manage the contractors. See Health and Safety Executive (HSE): *Safety audit of Dounreay 1998: Final report 2001*, Jan. 2002, at <http://www.hse.gov.uk/nsd/auditfin.pdf>

⁴⁴ A total of 4,500 workers are reported to be exposed to radiation at work, some 15 per cent of them external workers employed on a temporary or permanent basis by a contractor or hired as self-employed workers. These workers receive average effective doses which are always substantially higher than those of the plant personnel. See H. Janžekovič; M. Černilogar-Radež; M. Križman: *Analysis of contract workers' doses in Slovenia*, paper presented at the International Conference on Occupational Radiation Protection: Protecting Workers against Exposure to Ionizing Radiation, organized by the International Atomic Energy Agency and convened jointly with the ILO, Geneva, 26-30 Aug. 2002.

can also be at risk in many other sectors where there is extensive and improper use of subcontracting.⁴⁵

The authors of some of the national studies further emphasized the role of labour protection in promoting wider social stability. Lack of protection has a considerable financial impact, in terms of unpaid social security contributions and taxes.⁴⁶ For example, in the *United States* (p. 68), according to Treasury Department estimates, misclassification of dependent workers (employees) as independent workers results in a loss of some US\$2.6 billion each year in unpaid contributions to social security, the healthcare system (Medicare) and the federal unemployment insurance scheme, as well as US\$1.6 billion in income tax. In short, protection is necessary not just for the sake of workers and enterprises, but also because there are public goods at stake.

BALANCING EQUITY AND ADAPTABILITY

Finally, the lack of labour protection raises questions of equity, on the one hand, and flexibility or adaptability, on the other.⁴⁷ A balance between the two must be sought through social dialogue aimed at broad consensus. Employers are constantly faced with the challenge of survival in a competitive global environment and legitimately seek viable solutions among the range of options offered by different forms of employment. On the other hand, enterprises cannot improve their productivity with a poorly trained, demotivated and rapidly changing workforce.

Balancing equity and adaptability is at the very heart of the Decent Work Agenda, which offers a framework for reconciling the different interests and reaching a consensus through social dialogue. Such a balanced approach is also the desired outcome of bipartite and tripartite ILO meetings. Countries have found different institutional and policy responses to reconcile these diverging interests. For instance, a number of European countries have moved away from a situation where flexibility creates insecurity to one in which security promotes flexibility.⁴⁸

⁴⁵ The use of subcontracting in airport security in the United States and its possible implications for public safety were highlighted after 11 Sep. 2001. In many airports, private contractors were responsible for some of the security arrangements, as well as minor maintenance and cleaning services which gave access to installations. A principal cause of performance problems is the rapid turnover among screeners (over 100 per cent a year at most large airports), primarily due to low wages (at or near the minimum wage), limited benefits, and the repetitive and monotonous nature of their work. See United States General Accounting Office: *Aviation security: Terrorist acts illustrate severe weaknesses in aviation security*. Testimony before the Subcommittees on Transportation, Senate and House Committees on Appropriations, 20 Sep. 2001, pp. 6, 7. New aviation security legislation has been drafted in response; see <http://www.thomas.loc.gov>

⁴⁶ See United States General Accounting Office: *Contingent workers: Incomes and benefits lag behind those of rest of workforce*, GAO/HEHS-00-76, June 2000, at <http://www.gao.gov/new.items/he00076.pdf>

⁴⁷ See *Australia* (pp. 65-67), and *Czech Republic* (p. 14): "reaching a balance between conflicting needs and aspirations and finding mutually acceptable solutions in conditions of economic transition is a great challenge [...]. Modern labour law should respond to these problems, should define new types of atypical employment, while providing workers with adequate protection and thus fulfil its historical role". In *Hungary* (p. 20), there are legitimate differences of opinion on the revision of labour law: employers press for greater flexibility, while unions advocate more protection for workers. The author of the study suggests reducing the costs of employment.

⁴⁸ See P. Auer: *Employment revival in Europe: Labour market success in Austria, Denmark, Ireland and the Netherlands* (Geneva, ILO, 2000).

In Denmark, flexibility was not promoted at the expense of security and equity. A forthcoming report on Denmark⁴⁹ notes that while they have low employment protection, Danish workers are not fearful of job insecurity because a range of other measures have been put in place to balance the exigencies of flexibility and adaptability with those of security and equity. Workers benefit from very dynamic programmes to facilitate their job search and retraining, coupled with relatively high unemployment benefits. In that country, the social partners play a central role in regulating the labour market and in identifying the measures needed to achieve this balance.

The challenge of balancing equity and adaptability is also being addressed at the regional level. For example, in March 2000, European Heads of State and Government meeting in Lisbon committed themselves to working towards a new strategic goal for the European Union (EU) in the next decade: “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”.⁵⁰

* * *

To sum up, the debates in the International Labour Conference in recent years have focused mainly on the protection of dependent workers, based on the notion of the employment relationship and the aim of providing protection to dependent workers who do not have it. The growing lack of protection of many dependent workers, although not the same in all countries, is a challenge to the effective functioning of labour law. The non-protection of dependent workers harms workers and their families; it also affects the viability of enterprises and has consequences for society and governments. It is therefore in the interest of governments, employers and workers alike to tackle this problem.

⁴⁹ P. Egger; W. Sengenberger (eds.), with P. Auer; M. Simoni and C. Vargha: *Decent work in Denmark: Employment, social efficiency and economic security* (Geneva, ILO, 2003).

⁵⁰ EU: *Presidency Conclusions*, European Council, Lisbon, 23-24 Mar. 2000.

CHAPTER II

DISGUISED AND OBJECTIVELY AMBIGUOUS EMPLOYMENT RELATIONSHIPS

VALIDITY OF THE EMPLOYMENT RELATIONSHIP

Workers' protection has mainly been centred on the universal notion of the *employment relationship*, based on a distinction between dependent and independent workers, also known as own-account or self-employed workers. This is still the basic approach in many countries, with some variations, as was confirmed in the discussions on "contract labour" at the International Labour Conference in 1997-98, the Conference discussion leading to the adoption of the Private Employment Agencies Convention, 1997 (No. 181), the national studies undertaken by the ILO and the work of the Meeting of Experts on Workers in Situations Needing Protection. The same approach is also reflected in many international labour standards: some ILO Conventions and Recommendations cover all workers, without distinction, while others refer specifically to independent workers or self-employed persons and others apply only to dependent workers.

There is evidence, moreover, that the employment relationship continues to be the predominant framework for work in many countries,¹ despite the changes referred to in the previous chapter. A recent study has found that in the industrialized countries, in particular, the employment relationship is not just predominant but is proving durable, contrary to persistent reports that major changes in employment relationships have led to less stability and greater numerical flexibility.² Table 1 shows that, in 2000, average tenure was 10.4 years, with a minimum of 8.2 years in 2000 (6.6 years in 1998) and a maximum of 13.5 and, thus, that relative employment stability in the enterprise had been maintained, at least in most of the industrialized countries covered.

The abovementioned study on industrialized³ countries shows a correlation between employment tenure and the level of employment protection (figure 1). Based on the evidence from these countries, it can be assumed that employment protection is not incompatible with economic progress. The authors of the study concluded that an optimal combination should be sought between stability and flexibility in labour markets (see *Balancing equity and adaptability* in Chapter I of this report).

Another study on six Central European countries found that unweighted average job tenure in enterprises was 9.3 years in 1999, the lowest being 6.9 and the highest 12.1, despite high turnover rates since 1990.⁴

¹ See Annex 3.

² P. Auer; S. Cazes: "The resilience of the long-term employment relationship: Evidence from the industrialized countries", in *International Labour Review* (Geneva), Vol. 139 (2000), No. 4, pp. 379-408.

³ *ibid.*

⁴ S. Cazes; A. Nesporova: "Labour market flexibility in the transition countries: How much is too much?", in *International Labour Review* (Geneva), Vol. 140 (2001), No. 3, p. 305, and table 4.

Table 1. Average employment tenure (years) and share of employees with less than one year and more than ten years (%)

Country	Average tenure		Change	Under one year		Change	Ten years and over		Change
	1992	2000	%	1992	2000	%	1992	2000	%
Belgium	11.0	11.5	4.5	10.4	13.6	30.8	45.3	46.2	2.0
Denmark	8.8	8.3	-5.7	17.9	23.0	28.5	33.6	31.1	-7.4
Finland ¹	10.7	10.1	-5.6	17.6	21.6	22.7	39.6	42.1	6.3
France	10.4	11.1	6.7	13.8	15.8	14.5	42.9	44.8	4.4
Germany	10.7	10.5	-1.9	14.0	14.8	5.7	41.7	39.7	-4.8
Greece	13.5	13.5	0.0	7.2	9.4	30.6	53.0	53.2	0.4
Ireland	11.1	9.4	-15.3	12.1	21.8	80.2	42.1	33.6	-20.2
Italy	11.9	12.2	2.5	7.0	11.1	58.6	48.8	50.7	3.9
Japan ³	10.9	11.6	6.4	9.8	8.3	-15.3	42.9	43.2	0.7
Luxembourg	10.1	11.4	12.9	17.4	11.6	-33.3	38.8	45.5	17.3
Netherlands	8.9	9.1	2.2	14.5	20.5	41.4	34.5	36.1	4.6
Portugal	11.1	11.8	6.3	17.0	13.9	-18.2	48.8	44.6	-8.6
Spain	9.9	10.1	2.0	23.6	20.7	-12.3	39.7	40.3	1.5
Sweden ¹	10.6	11.5	8.5	14.8	15.7	6.1	39.7	46.7	17.6
United Kingdom	8.1	8.2	1.2	15.6	19.3	23.7	31.5	33.3	5.7
United States ^{2,3}	6.7	6.6	-1.5	28.8	27.8	-3.5	26.6	25.8	-3.0
European Union (EU-14) ⁴	10.5	10.6	1.3	14.5	16.6	14.7	41.4	42.0	1.4
Average	10.3	10.4	1.5	15.1	16.8	11.3	40.6	41.1	1.1

¹ Data refer to 1995, change from 1995 to 2000. ² Average tenure data refer to 1991 instead of 1992. ³ For United States and Japan, data refer to 1998 instead of 2000. ⁴ Without Austria.

Source: P. Auer; S. Cazes: *Employment stability in an age of flexibility: Evidence from industrialized countries* (Geneva, ILO, forthcoming).

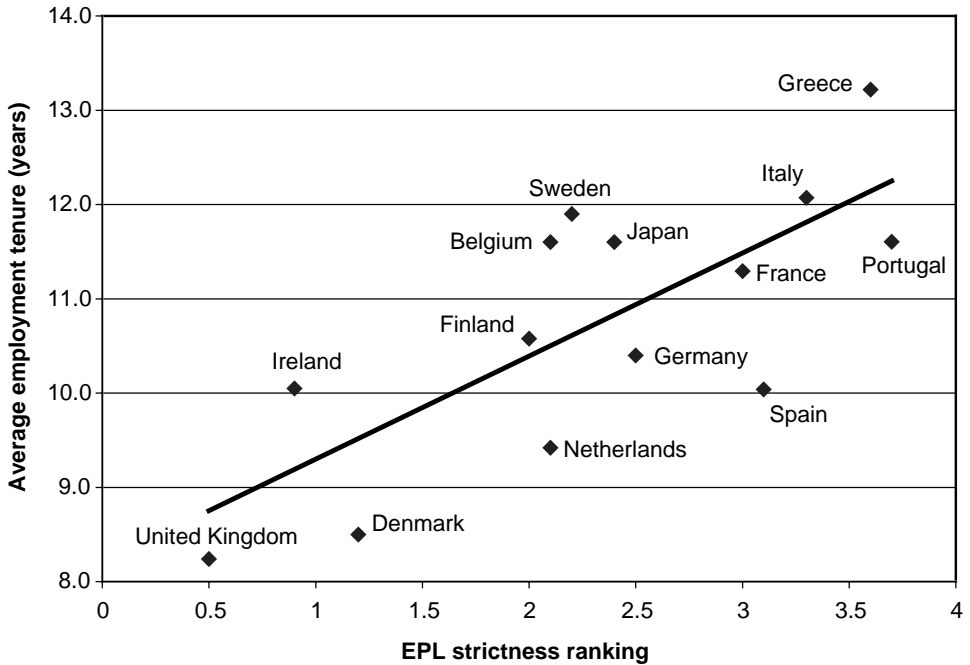
Of course, the situation with regard to the employment relationship is not the same in every region. Where the formal economy absorbs only a very small part of the population and where high unemployment swells the ranks of the self-employed, the reality tends to be different. Even in these cases, however, wage earners may represent a significant proportion of the working population in quantitative terms,⁵ with labour law providing a reference point for the other workers.

There are frequent references in the specialist literature to the widespread emergence of *new forms of employment*. This expression, however, may be understood in different ways and mean different things, especially with respect to its legal effects, and for this reason an important distinction needs to be made at this point.

People may provide their labour or services either as dependent workers under an employment contract or as self-employed workers under a civil or commercial contract. Each type of contract has certain characteristics which vary from one country to another and determine to what extent the performance of work or provision of services comes under an employment contract or a civil or commercial contract.

⁵ In Pakistan, for example, the 36 per cent of the workforce in paid employment equals 13.1 million workers, ILO: LABORSTA, and *Yearbook of Labour Statistics 2002*.

Figure 1. Average employment tenure and employment protection legislation (EPL), 1998



Source: Organisation for Economic Co-operation and Development (OECD): *Employment Outlook* (Paris, 1999), and Statistical Office of the European Communities (EUROSTAT), cited in Auer; Cazes: "The resilience of the long-term employment relationship ...", op. cit., p. 393.

There are normally three main types of employment contract: a contract for an indefinite period, a fixed-term contract and a contract for a specific task, not necessarily limited in time. It is clear that within this overall pattern, in some countries and sectors more than others, employment contracts have become more diversified in recent years. Employment has become much more versatile and, alongside traditional full-time employees, employers are increasingly tending to employ workers in ways which allow them to use their services as efficiently as possible. Many people accept short-term contracts, or agree to work certain days of the week, for want of better opportunities. But in other cases these options are an appropriate solution, both for the worker and for the enterprise. Recourse to various types of employment contract is in itself a legitimate response to the challenges faced by enterprises, as well as meeting the needs of some employees for more flexible work arrangements. These various types of contract lie within the framework of the employment relationship.

At the same time, there are also civil or commercial contracts, under which the services of self-employed workers may be procured, but on terms and conditions which differ from those of an employment contract. Frequent recourse to such contracts has become increasingly widespread in recent years, and is also associated with *new forms of employment*. From a legal standpoint, these "forms of employment" lie outside the framework of the employment relationship.

UNCERTAINTIES WITH REGARD TO THE SCOPE OF THE LAW

The employment relationship, as a legal concept, exists in the 39 countries studied by the ILO and in most others, with certain key similarities from which a certain profile emerges. This finding is fundamental. Nevertheless, uncertainty with regard to the legal status of a considerable number of dependent workers is a widespread phenomenon that stems from the growing gap between the scope of the law on the one hand and reality on the other.

The law and the employment relationship

Many national labour laws contain provisions on the employment relationship, particularly with regard to scope, which specify the persons covered by the laws that regulate the employment relationship. Despite certain similarities, however, not all national labour laws provide exhaustive or equal coverage of the subject. Some provisions deal with the regulation of the employment contract as a specific contract, its definition, the parties and their respective obligations. Other provisions are intended to facilitate recognition of the existence of an employment relationship and prescribe administrative and judicial mechanisms for monitoring compliance and enforcing these laws.

In general terms, the employment relationship establishes a legal link between a person, called “the employee” or “the worker”, and another person, called “the employer”, to whom she or he provides services under certain conditions in return for remuneration.⁶ Some laws define the employment contract as the framework for this relationship, as well as the employee and the employer.⁷ A contractor or an employment agency may also be included within the definition of “employer”, and the law may impose certain obligations on the user of the contractor’s or the agency’s services.

Various criteria are used to distinguish between the employment relationship and other relationships. According to certain criteria, an employment relationship exists where a person works or provides services in a situation of subordination to or dependency on the employer; or works for someone else; or is integrated in an organization; or does not assume the risks specific to an employer.⁸ In some cases, the law goes one step further, and classifies as employees certain workers whose situation could be ambiguous, or provides for a presumption in their case that there is an employment

⁶ For definitions of dependent employment in European Union countries, see the comparative table in R. Pedersini: “‘Economically dependent workers’, employment law and industrial relations”, in *European Industrial Relations Observatory On-line (Eironline)*, at <http://www.eiro.eurofound.ie/2002/05/study/TN0205101S.html>

⁷ For example, *Argentina* (p. 2), *Brazil* (pp. 16-17), *Cameroon* (p. 11), *Chile* (p. 9), *Costa Rica* (pp. 2, 7-9, 45), *Czech Republic* (p. 4), *El Salvador* (pp. 6-7), *India* (pp. 6-8, 10-14, 19), *Islamic Republic of Iran* (p. 7), *Italy* (p. 2), *Jamaica* (pp. 8-9), *Republic of Korea* (pp. 3-6), *Mexico* (p. 9), *Morocco* (pp. 2-5), *Nigeria* (p. 7), *Panama* (pp. 6-8, 17-19), *Peru* (pp. 6-12), *Poland* (pp. 2, 11), *Russian Federation* (pp. 2, 12), *South Africa* (pp. 10-13), *Trinidad and Tobago* (pp. 15-17, 27-30), *United Kingdom* (p. 9), *Venezuela* (pp. 6-12).

⁸ With a view to extending the scope of labour law, the existence of an employment relationship has been recognized even in cases of “minimal subordination” in *Costa Rica* (pp. 3, 62) and “attenuated or diluted subordination” in *Panama* (pp. 7, 13).

relationship.⁹ Conversely, legislation may specify that certain forms of employment are not employment relationships.¹⁰

The determination of the existence of an employment relationship should be guided by the *facts* of what was actually agreed and performed by the parties, and not by the name they have given the contract. That is why the existence of an employment relationship depends on certain objective conditions being met (the form in which the worker and the employer have established their respective positions, rights and obligations, and the actual services to be provided), and not on how either or both of the parties describe the relationship. This is known in law as the principle of the *primacy of fact*, which is explicitly enshrined in some national legal systems.¹¹ This principle might also be applied by judges in the absence of an express rule.

Some legal systems rely on certain indicators, evidence or factors to determine whether or not there is an employment relationship. These include compliance with the employer's instructions, being at the employer's disposal, socio-economic inequality between the parties and the worker's economic dependency.¹² In common-law countries, judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality (who bears the financial risk?) and mutuality of obligation.¹³ In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship.

⁹ In France, the Labour Code extends employee status to certain workers, such as homeworkers, journalists and performers, who, because of the conditions in which they work, might otherwise be regarded as independent workers (L.721-1, L.721-6, L.761-1 and L.762-1). In *Panama* (pp. 9-14) the following are considered employees: economically dependent sharecroppers and tenant farmers; agents, commercial vendors and similar workers, except where they do not do the work in person or only occasionally; performers, musicians and lecturers; transport drivers; teachers; ice-cream and other vendors; cooperative workers; and apprentices. A similar extensive definition of employee can be found, for example, in Queensland, *Australia* (pp. 68-69), in the Industrial Relations Act 1999.

¹⁰ In *Panama* (p. 30), for example, homeworkers are excluded from the scope of labour law.

¹¹ See *Argentina* (p. 14), *Cameroon* (p. 15), *Chile* (p. 20), *Costa Rica* (p. 3), *France* (p. 33), *Germany* (pp. 4, 39), *Republic of Korea* (p. 4), *Mexico* (p. 10), *Pakistan* (p. 4), *Panama* (p. 9), *Peru* (p. 8), *Poland* (p. 2), *Russian Federation* (p. 35), *Slovenia* (p. 9), *Trinidad and Tobago* (pp. 18, 20, 30-32), *United Kingdom* (pp. 33-34), *United States* (p. 96), *Uruguay* (p. 6). In *Italy* (p. 10), judges seem to attach more weight to the real intentions of the parties.

¹² See *Italy* (pp. 5-12). In the *Republic of Korea* (p. 5), a decision of the Supreme Court in 1994 listed the following factors: "... the employer decides the content of labour, the employee is subject to personnel regulations, the employer conducts or supervises concretely and individually the execution of labour, the employee may employ a third party to substitute the labour, the possession of fixtures, raw material or work tools, the nature of wage as a price for labour, existence of basic wage or fixed wage, collection of labour income tax through withholding income, the continuance of supply of labour and the exclusive control of the employer, the recognition of employee status by other laws such as the Social Welfare Act and the social economic situations of both parties". In *Panama* (pp. 14-17), the following are mentioned: (1) indicators of an employment relationship; (2) indicators that are not sufficient in themselves to prove an employment relationship; (3) factors which, taken together, may exclude the employment relationship; and (4) apparent criteria for exclusion of an employment relationship which, however, are not sufficient to rule out completely the possibility that such a relationship exists. See also indicators of legal or economic dependency or subordination, and independence, in *Argentina* (pp. 15-17), *Islamic Republic of Iran* (pp. 8-11), *Japan* (p. 10), *Morocco* (pp. 5-8), *Peru* (pp. 6-8), *Russian Federation* (pp. 12, 35-37), *Uruguay* (pp. 2-4).

¹³ *United Kingdom* (p. 6). See also *Australia* (pp. 29-30), *India* (pp. 19-20), *Jamaica* (p. 10), *Nigeria* (p. 15), *Pakistan* (p. 4), *Trinidad and Tobago* (pp. 18-19), *United States* (pp. 55-62).

The existence of a legal framework regulating the provision of labour or services does not, of course, preclude disagreement when it comes to the examination of specific cases to determine whether an employment relationship exists. Indeed, this is a frequent occurrence, given the proliferation and great diversity of situations in which the worker's status is unclear, which reflects the inadequacy of the law, especially where it lacks precision as to its scope.

The following examples are based on some of the national studies.¹⁴ In *Germany*, the absence of a general definition of the employment contract seems to cause a degree of legal uncertainty; case law is trying to develop a specific definition based on dependence but without defined criteria, depending on the facts in each specific case. In the *United States*, the definition of "employee" varies from one law to another, although not substantially. In *India*, there is a definition of the employment relationship, but it is neither comprehensive nor clear. In *Italy*, the indicators used may not be sufficient to identify cases on the borderline between dependency and independence. In *Japan*, employment under various forms of contract is regulated both in the Civil Code (1896) and in the Labour Standards Law (1947), which date back to different eras prior to that country's industrial, managerial and technological development. This duality of regulation gives rise to a lack of clarity and consistency and can blur the distinction between dependent and self-employed workers.¹⁵ In *Mexico*, it appears that the formulation of the concepts of employer and worker does not reflect present-day reality, and this makes it easy to circumvent the law. In *Nigeria*, the definition of worker in various laws is a source of ambiguity. In the *United Kingdom*, there are only two provisions of employment law which seem to allow the full application of the law to disguised employment relationships: a provision for workers to take legal action if the employer has not provided them with written notification of their terms of employment; and another provision which allows the Government to alter the scope of employment legislation.

Disputes or uncertainty concerning the legal nature of a relationship for the provision of labour or services are increasingly frequent. The employment relationship may be *disguised*, or it may be *objectively ambiguous*. Both situations create uncertainty as to the scope of the law and can nullify its protection. They are closely interrelated and are evidence of the gap between the application of the law and reality.

Disguised employment relationships

A disguised employment relationship is one which is lent an appearance that is different from the underlying reality,¹⁶ with the intention of nullifying or attenuating

¹⁴ See *Germany* (pp. 1-6), *India* (p. 19), *Italy* (p. 9), *Japan* (pp. 1-3), *Mexico* (p. 6), *Nigeria* (pp. 8, 15), *United Kingdom* (p. 11), *United States* (pp. 43, 53-54). See also *South Africa* (pp. 14-15) for possible manipulations of the employment contract.

¹⁵ The Civil Code deals with contracts of employment, for works or services, delegation contracts and atypical contracts; the Labour Standards Law deals with labour contracts. The concept of the labour contract is very similar to that of the employment contract, but broader in scope. Moreover, the concept of worker, for example, differs in the Labour Standards Law and the Trade Union Law. See *Japan* (pp. 1-3). See also R. Yamakawa: "New wine in old bottles? Employee/independent contractor distinction under Japanese labor law", in *Comparative Labor Law and Policy Journal*, Vol. 21: 99, pp. 99-126.

¹⁶ See *United Kingdom* (pp. 7-8).

the protection afforded by the law. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form in which the worker enjoys less protection. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers. This form of disguised employment relationship will be addressed in Chapter III.

The most radical way to disguise the employment relationship consists of giving it the appearance of a relationship of a different *legal nature*, whether civil, commercial, cooperative, family-related or other.

National studies identify some of the contractual arrangements most frequently used to disguise the employment relationship. They include a wide variety of civil and commercial contracts which give it the semblance of self-employment.¹⁷

Some of the studies mention training contracts. These arrangements normally have a public interest function, associated with the practical training of young people. In reality, however, they can be used as a regular means of employment in some government departments and private firms, at much lower cost than an employment contract and without the protection that such a contract affords the worker.¹⁸

The second way to disguise the employment relationship is through the *form* in which it is established. While the existence of an employment relationship is not in question, the nature of the employment relationship is intentionally misrepresented so as to deny certain rights and benefits to dependent workers. For the purposes of this report, such contract manipulation amounts to another type of disguised employment relationship, resulting in a lack of protection for the workers concerned. This is the case, for example, of contracts concluded for a fixed term, or for a specific task, but

¹⁷ They can be service, “fee-based”, franchise or distribution contracts (sometimes with the provision or rental of a vehicle, or rental of fishing boats for use by workers), or may take traditional forms such as the *Moul Chokkara* in *Morocco*, a placement system which generates craft work with the appearance of self-employment, “non-contract” workers in *Peru* and cooperatives in *Bulgaria* and *Costa Rica*. In *Uruguay*, contracts for services are often established between an enterprise and its former employees, who create *one-person businesses*. The law presumes that in this case, there is no employment relationship. See *Argentina* (pp. 19-21), *Brazil* (pp. 8-9), *Cameroon* (p. 5), *Chile* (pp. 14, 15, 40), *Czech Republic* (pp. 1, 11-13, 20-21), *Japan* (pp. 14, 25), *Morocco* (pp. 14-18), *Panama* (pp. 43-44), *Peru* (pp. 11-16, 27), *Russian Federation* (pp. 23, 27, 34), *South Africa* (p. 17), *Thailand* (pp. 36-37), *Trinidad and Tobago* (p. 20), *United States* (pp. 87-93, 96), *Venezuela* (pp. 14-15).

¹⁸ In *Germany* (p. 25), new graduates in the liberal professions of medicine and law may be recruited as “self-employed” workers, at low cost, although according to the national study they are in fact disguised employees. In *Nigeria* (p. 12), there are compulsory junior service for university graduates, compulsory employment of recent graduates in the public or private sector, and apprenticeship contracts. In *Peru* (pp. 19-21), vocational training contracts are excluded from labour law (youth training, work experience and apprenticeship), although, in practice, this has had little effect. In *Slovenia* (pp. 9-17), there is temporary and casual work, student work, apprenticeships and work under the Law on Obligational Relations. In the *United States* (pp. 85-87), students and interns provide services as part of their training and volunteers work in non-profit organizations. Some people engage only in this kind of work and others are employed but do this additional work on a voluntary basis. In both cases, there may be some controversy as to whether or not they are actually employees. In *Uruguay* (p. 15), there is a new “simple apprenticeship” contract (to distinguish it from the apprenticeship contract) with fewer guarantees, but relatively little use has been made of it.

which are then repeatedly renewed, with or without a break. The most visible effect of this type of contract manipulation is that the worker does not obtain the benefits provided to employees by labour legislation or collective bargaining.

In rural areas in *Costa Rica*, a practice has evolved among national and transnational enterprises of employing plantation workers through intermediaries for periods that never exceed three months, which is the minimum period required to acquire entitlement to compensation for unfair dismissal.¹⁹ The workers then have to wait until their contract is renewed and, if it is not, they must constantly move from one plantation to another in search of work. There are thus two classes of worker: those who accumulate sufficient service (said to have an employment “record”) and those without a “record”, who are in practice converted into self-employed workers. The impact of this practice is clear. In the early 1990s, there were some 52,000 banana workers. Today, the number is probably the same or higher, but only some 33,000 are registered with the Costa Rica Social Security Fund. Similar examples were found in the other countries studied, in some cases known colloquially as “permatemps” or “contingent workers”.²⁰

The trend towards replacing the employment contract with other types of contract in order to evade the protection provided under the Termination of Employment Convention, 1982 (No. 158), was noted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1995²¹ and by some of the national studies. In *Germany*, an initial survey by the Federal Ministry of Labour and Social Affairs in 1996-97 showed that disguised employment relationships existed in all occupations, and especially in the distribution and service sectors. In *Argentina*, this trend can be seen in the rising figures for unregistered employment. In *Chile*, the practice of not giving workers a contract in writing is seen as an attempt to evade the law. This mainly affects workers in small and micro-enterprises, seasonal workers and those in general services and domestic service, with a large proportion of women in the last three categories. In *Hungary*, an estimated 40 to 45 per cent of persons employed in the private sector in 1999 had fixed-term contracts or civil contracts in what is known as “cost-saving employment”. In *Ireland*, during the negotiations of the Programme for Prosperity and Fairness (see Chapter IV below), a working group on employment status was set up because of concern about the growing number of “self-employed” workers for whom the status of employees would be more appropriate. In *Jamaica*, the phenomenon is such that there has been a major change in the composition of the labour force. In *Panama*, the increase in disguised employment relationships is clear and is particularly marked in certain sectors such as repair and maintenance in recently privatized service enterprises, a wide variety of sales activities and telecommunications. In the *Russian Federation*, certain trends are significant; in particular, illegal employment and the use of civil contracts have increased in the

¹⁹ *Costa Rica* (pp. 40-41).

²⁰ See *Brazil* (p. 7), *France* (pp. 19-20), *Republic of Korea* (pp. 7-11), *Philippines* (pp. 1, 2, 7, 47-49), *Slovenia* (pp. 9, 12-14). See also *Cameroon* (pp. 5-6), *Czech Republic* (p. 8), *Nigeria* (p. 12), *Uruguay* (pp. 11-13). In the *United States* (pp. 4-9, 35, 91), the most controversial distinction is between “career” jobs and “contingent” jobs, both mainly occupied by dependent workers whose status as employees, however, is not in dispute.

²¹ ILO: *Protection against unjustified dismissal*, Report III(4B), International Labour Conference, 82nd Session, Geneva, 1995, para. 56.

last decade, especially in the private sector. Disguised employment is largely due to the desire to evade the application of labour law, social security and taxes. In *South Africa*, there has been an exponential growth in temporary work through various kinds of intermediaries and the “conversion” of dependent workers into independent workers.²²

Objectively ambiguous employment relationships

In a standard employment relationship, the worker’s status is not normally open to doubt. In some cases, however, a worker may have a wide margin of autonomy and this factor alone may give rise to doubt as to his or her employment status. In addition to the disguised employment relationships described above, there are situations where the main elements that characterize the employment relationship are not clearly apparent. It is not a case of a deliberate attempt to disguise it, but rather one of genuine doubt as to the existence of an employment relationship. This may occur as a result of the specific, complex form of the relationship between workers and the persons to whom they provide their labour or services, or the evolution of that relationship over time. A common example of such a gradual change in a worker’s status is the doctor who works on her own account; one day she begins to receive patients employed by a particular enterprise, which pays the corresponding fees. As the years go by, these patients increase in number, until they take up two days a week, then three, then four, and finally the whole week. In addition, for practical reasons, the system of fees per patient is replaced by a system of payment per week or per month. The next step, for everyone’s convenience, is for the doctor to close her office, by agreement with the enterprise, and go to work on its premises. Years later, the doctor is dismissed and, in calculating the compensation owed to her by the enterprise, the question arises as to when her status of a self-employed person changed to that of an employee. Of course, similar situations may occur with other persons who are normally self-employed, such as electricians, plumbers and programmers, and who gradually enter into a permanent arrangement with a single client.

In other cases, especially in work environments affected by major changes, it is possible and sometimes necessary to resort to a range of flexible and dynamic employment arrangements which can be difficult to fit into the traditional pattern of the employment relationship. A person may be recruited and work at a distance without fixed hours or days of work, with special payment arrangements and full autonomy as to how to organize the work. Some workers may never even have set foot in the enterprise if, for example, they have been recruited and work via the Internet and are paid through a bank. However, perhaps because they use equipment supplied by the enterprise, follow its instructions and are subject to subtle but firm control, it may be that the enterprise quite naturally considers them as employees.

²² *Argentina* (p. 18), *Chile* (pp. 12-14), *Germany* (pp. 6-12), *Hungary* (p. 7), *Ireland* (pp. 1-2), *Jamaica* (p. 6), *Panama* (pp. 41-45), *Russian Federation* (pp. 5, 23, 27, 34, 39); in Moscow, some 280,000 (10.3 per cent) of the 2.7 million workers in large and medium-sized enterprises had civil contracts in 1999; *South Africa 2002* (pp. 13, 22-23) and *South Africa* (p. 17). See also the *Czech Republic* (p. 13), *Islamic Republic of Iran* (pp. 4, 5, 11-16), *Mexico* (p. 11), *Peru* (pp. 15-31), *United Kingdom* (pp. 6, 39), where it is also pointed out that the legal system has begun to respond to the changes in employment relationships; *Uruguay* (p. 4) and *Venezuela* (pp. 13-16, 52-53, 55).

Another form of work at the fringes of the employment relationship is unpaid work. In *Peru*, for example, the number of unpaid family workers, including the worker's spouse and close relatives, most of them without health or pension benefits, seems to have increased significantly in the 1990s.²³ In *Finland*, volunteers sometimes supplement the work carried out by employees in health care, social services and sports, where the distinction between voluntary work and paid work is not always clear.²⁴

Doubts may also stem from how the workers are perceived, including by themselves. They might think they are self-employed because that is what it says in the contract. Or they might simply not know what their status is, like the reader who wrote the following in a letter to the editor: "I have been working on a fee basis for two years and the only benefit I have is paid leave. Where can I obtain information on my case about rights and obligations?"²⁵

Midway between self-employment and dependent employment, there are "economically dependent workers", who are formally self-employed but depend on one or a few "clients" for their income. They are not easy to describe, let alone quantify, because of the heterogeneous nature of the situations involved and the lack of a definition or statistical tools.²⁶ While economic dependency does not always involve subordination,²⁷ it may be used as a criterion in determining whether the worker is an employee rather than self-employed.²⁸ A recent study by the European Industrial Relations Observatory (EIRO) found that economically dependent work is not recognized as such in the legal systems of the countries of the European Union and Norway, and it has therefore not been the subject of specific regulation, apart from certain national provisions establishing a presumption of legal subordination of certain workers whose situation might be ambiguous and is characterized by economic dependency.²⁹ How-

²³ *Peru* (pp. 23-24): the number of these workers increased by 43 per cent in metropolitan Lima between 1990 and 1997 and in the latter year accounted for 5.5 per cent of employees, similar to the share of domestic workers or employers; 84 per cent are not registered for health benefits (the average for all employed persons is 64.8 per cent) and 95 per cent are not members of a pension scheme. See also *Cameroon* (pp. 5, 6, 16).

²⁴ *Finland* (p. 32).

²⁵ *Las Ultimas Noticias* (Santiago, Chile), 2 Oct. 1999, p. 32. See also *Islamic Republic of Iran* (p. 40).

²⁶ A national survey in *Argentina* (pp. 37-38) shows that over 7 per cent of independent workers have only one client and 16 per cent have several regular clients. Thus, one-quarter of self-employed workers are closely tied to a very limited number of regular clients. Over one-quarter of them do not own the tools they use and obtain inputs and raw materials from the client. This proportion is 54 per cent among those who only have one client. Suggested criteria for identifying and quantifying these workers include their ties to suppliers and clients; conditions of access to and use of means of production; ownership of such means; and prerogatives of third parties in directing or organizing the work or activity. In *Germany* (p. 38), "quasi-employees" are not easy to quantify, since they are a subgroup of self-employed workers and only undifferentiated figures for total self-employed are available. In the *United Kingdom* (p. 16), they are estimated at around 5 per cent of the workforce or less. The EIRO study (Pedersini, op. cit.) estimates that they represent about 1 per cent of the workforce in seven of the countries studied, although it emphasizes that not much is known about the phenomenon and the figures should be treated with caution. In *Uruguay* (pp. 29-34), there has been an increase in self-employed without their own premises, with over 69,000 contracts between one-person businesses and larger enterprises. See also *Cameroon* (p. 42), *Chile* (p. 51), *Costa Rica* (p. 34), *Nigeria* (p. 23) and the *United States* (pp. 82-84).

²⁷ *France* (p. 33).

²⁸ *United States* (pp. 82-84).

²⁹ Pedersini, op. cit.

ever, the phenomenon of self-employment in situations of dependency is clearly on the rise.³⁰

In cases where the contract is clearly intended to procure the services of a self-employed worker, it is in the employers' interests to make sure that they have not misclassified the worker, as they can be held financially liable if the authorities find that the worker is in fact an employee.³¹

Disguised or objectively ambiguous: The case of truck drivers

The case of truck drivers in transport firms is illustrative of the kind of changes in workers' status taking place in a particular sector. In several countries, many employed drivers have been "transferred" to work for contractors or "converted" into self-employed drivers required to own or lease their own vehicle, often at the instigation of the former employer and as a condition of continuing to do the work.³² As a result there has been a sharp rise in the number of contracting enterprises or self-employed workers in this sector.³³

³⁰ Economically dependent workers are found in the most diverse sectors, depending on the country, and include transport workers; doctors and other health professionals working for health centres; skilled homeworkers using new technologies; non-exclusive insurance agents; sales representatives (selling in a workplace or from home); lottery ticket sellers; itinerant vendors of products for direct consumption; hourly-paid service workers; newspaper distribution workers; rural route mail couriers; owners of coffee-bars or mini-shops in schools or enterprises; former employees turned into independent workers of the former enterprise; poor pseudo-independent rural workers apparently associated with the landowner, including under "two-party" arrangements; taxi drivers and drivers of other small vehicles; certain construction workers, car mechanics, forestry, farm, retail and other service workers, and small-scale manufacturing workers; technicians and professionals (independent technicians, communications technicians), television performers, editors, professionals working in research and consultancies, for professional fees and partnership prospects; health professionals and sole traders (formerly employees or who subsequently returned to employee status); *quasi-workers* in Japan, such as franchise holders or managers of a grocery store; teleworkers, especially women, not recruited as employees; members of care centres for the elderly ("silver centres") who work as independent assistants, generally without remuneration, although they have been awarded remuneration in various court cases.

³¹ See, for example, S. Fishman: *Hiring independent contractors: The employer's legal guide*, 3rd edition (Berkeley, Nolo, 2000).

³² In *Germany* (pp. 11, 43-44), the number of so-called "independent" truck drivers has swelled considerably in recent years. Under a so-called "transport" contract they drive a truck on behalf of another person, but on a self-employed basis. The majority work for only one "contractual partner", without employing anyone else and using a vehicle lent by the producer or "contractual partner", who sets them a strict schedule, indicating routes, requiring exclusivity and paying a fixed salary. For example, the truck drivers of a frozen goods producer had a franchise contract, which in itself was brief, but was regulated in detail by a company handbook. The Federal Civil and Labour Courts held in 1997 and 1999 that those truck drivers were employees or "quasi-employees" and not independent workers, based on the criterion of combination of entrepreneurial risks and opportunities accepted by the workers. In *Argentina* (pp. 60-66), the situation of "owner-drivers" (independent workers in a position of dependency) was adjudged to be dependent or independent on the merits of each case. See case-law indicators on dependent and independent work. See also *Australia* (pp. 61-62), *Finland* (p. 42), *Jamaica* (p. 37), *Japan* (p. 22), *Trinidad and Tobago* (pp. 32-37), *South Africa* (pp. 17, 23-25), *Thailand* (pp. 50-53) and the *United States* (pp. 67-71).

³³ In *Argentina* (pp. 65-66), the low profitability of the activity and the growing competition in the subregion encouraged enterprises to work with "owner-drivers", many of them drivers formerly employed by them to whom they had sold the truck. In *Finland* (p. 42) there is a group of truck drivers who are "involuntary entrepreneurs", many of whom work for their former employer, from whom they lease the truck on a hire-purchase plan. In *Japan* (pp. 12, 21-22), the transfer of trucks to drivers started in 1960 and

Box 1. Truck drivers: Shift towards self-employment and contracting enterprises

Australia: Dependent truck drivers totalled 80 per cent of all drivers in 1956 and 70 per cent in 1982. But in 1984 they carried less than 20 per cent of the goods.

Brazil: Estimates put the figures at some 350,000 independent drivers, about 12,000 haulage firms and around 20,000 enterprises with their own transport system.

France: By 1995, 40 per cent of road haulage firms did not have employees, only "self-employed" drivers; the labour inspectorate regularly reclassifies these drivers as employees, fining the haulage firms for "clandestine employment by concealment of employees".

United States (ports of Seattle and Tacoma): Around 1980, most container truck drivers were employees of trucking companies. In 1999, these accounted for only 30 per cent, with independent workers making up the remaining 70 per cent (some 1,000 drivers).

Source: *Australia* (p. 48), *Brazil* (p. 37), *France* (p. 35) and the *United States* (p. 96).

In such cases, the driver is legally separated from the enterprise but continues to perform essentially the same work, effectively still in a position of dependency in relation to the former employer.³⁴ The difference is that now the driver is "self-employed" and has to bear the costs of the vehicle and is without labour protection.³⁵ In fact, the driver maintains a relationship that is still dependent on the employer, similar in every way to an employment relationship.

has been a matter of controversy since then. There have been "industrial disputes" and divided case law on: (a) arbitrary cancellation of the transport contract, held to be dismissal, or as an illegal act when there were anti-trade union motives; (b) whether drivers' claims should be treated as preferred claims in the event of bankruptcy of the enterprise; and (c) claims for compensation in the event of an accident to the driver, alleging employee status. In one case, the Supreme Court ruled in 1996 that the plaintiff was not a worker for the purposes of the Labour Law.

³⁴ In *Japan* (pp. 12, 21-22), the "transport agreements" of some truck drivers of a concrete carrier, who were forced to leave the enterprise but continued to work for it as owners of their own lorries, were cancelled without notice three years later. See also *France* (p. 36) and *Jamaica* (p. 33), where the conversion of dependent workers into "independent" workers who in reality continue in the same functions and remain dependent on the employer also occurs in other sectors, such as private security firms, hotels and catering.

³⁵ In *Argentina* (p. 66), the investment in the truck is considerable for the workers. They normally pay between 48 and 60 instalments of around 2,000 pesos (US\$2,000) and incur all the vehicle running costs and some safety costs (these data predate the acute economic crisis which arose in December 2001 and which continues to have devastating effects, including the devaluation of the currency and financial austerity measures). In *Australia* (pp. 49-50), on the contrary, entry to the industry as an owner-driver is relatively easy with the finance options available. However, the high level of debt of the worker and over-supply put owner-drivers in an unequal bargaining position, although there are considerable differences between drivers. In particular "the independence of owner-drivers derives mainly from the range of clients for whom they work. Some ... work exclusively for one company ... some work for a small number of companies, others gain their loads from several sources". In *Japan* (p. 22), the owner-driver of the vehicle pays for the fuel and other expenses, as well as taxes and social insurance. Many of these drivers work exclusively for particular companies. See also *South Africa* (pp. 24-25), and, for the general disadvantages of being "transferred" to a contractor, *Mexico* (p. 20).

Box 2. Self-employed truck drivers: Working conditions

Argentina: Drivers often work non-stop all year round, sometimes accompanied on board by members of their family, without paid holidays.

Australia: Long-distance truck drivers can have arduous working conditions (tight schedules to cover long trips, necessarily at high speed, at least 55-hour working weeks and up to 75.4 hours on average, in the case of some independent truck drivers – about 20 hours more than what is required of company employees). Remuneration is calculated on a different basis from employees and in many cases is lower than the established rates.

Finland: The need to raise money to meet the payments for the purchase of the former employer's truck is probably one of the reasons for the long working hours of many truck drivers.

France: "Self-employment" means harder conditions, particularly long hours of work.

Japan: Owner-drivers earn the same as an employee after deduction of instalments for purchase of the truck and expenses, plus taxes and social insurance contributions.

United States: According to a study, independent truck drivers in Seattle and Tacoma earned an average of US\$8.51 an hour, worked an average of 14 hours' uncompensated overtime a week, almost never had medical insurance provided by the employer and were rarely able to afford private insurance, and tended to defer maintenance on their trucks for lack of funds. However, generally speaking there does not appear to be any widespread practice of misclassifying trucking employees as independent workers.

Source: *Argentina* (p. 66), *Australia* (pp. 50-52), *Finland* (p. 42), *France* (p. 35), *Japan* (p. 22) and the *United States* (pp. 96, 99).

These trends in a traditional occupation in a traditional sector are a striking example of the changes in employment relationships that can occur in countries with different legal systems, different degrees of "rigidity" or "flexibility" and different cost structures.

Workers in a disguised relationship are formally presented as independent or self-employed. Thus, in *Germany*, for example, neither labour law nor social security legislation applies to them. This means that they cannot claim sickness benefit, holidays, maternity protection, or compensation for dismissal, and occupational health and safety risks are normally transferred to them. Access to labour courts is restricted to employees or "quasi-employees".³⁶ In the *United States*, too, the self-employed are outside the scope of a range of labour laws.³⁷

³⁶ *Germany* (pp. 13-16).

³⁷ *United States* (p. 49 ff.).

These disguised and objectively ambiguous cases illustrate the situation of workers who provide their labour or services in return for remuneration but whose legal status may be confused to the point where it is unclear whether or not they are in an employment relationship. Even though these situations are often the result of legitimate actions, they tend to lead to a lack of worker protection, by placing the workers entirely or partly outside the scope of labour law.

CLOSING THE GAP BETWEEN THE LAW AND REALITY

In response to the growing divergence between the scope of the law and the reality of the employment relationship, measures need to be taken to close this gap. The objective should be to update and clarify the scope of the law governing the employment relationship so as to facilitate recognition of the existence of an employment relationship, and deter attempts to conceal it. Given the proliferation of disguised and objectively ambiguous situations, member States, with the involvement of the social partners, could examine their legislation so as to identify any deficits in the light of their own specific problems and comparative law. This would enable them to determine the nature and extent of the measures needed. The outcome of this exercise should be to enable the scope of the laws on the employment relationship to be continually updated as part of an ongoing and dynamic process.

Clarifying the scope of the law

The first part of the strategy would be aimed at clarifying, supplementing and stating as precisely as possible the scope of the law. At this stage, it would be useful to examine the most common forms of disguised employment relationships and cases in which it is most difficult to determine whether there is an employment relationship or a civil or commercial relationship. The task would consist of remedying the technical deficiencies in the legislation in order to address objectively ambiguous cases and to tackle the phenomenon of disguised employment relationships.³⁸

³⁸ In *Germany* (p. 6), the lack of a clear definition of “employee” is felt to be an invitation to concealment and makes it hard for the person concerned and the authorities to deal with such concealment, since it will all depend on the particular circumstances of the case. See also in this respect, *Hungary* (p. 18). In *Japan* (pp. 10-11, 26) it is asserted, as in Germany, that the existing abstract criteria for determining dependency do not enable the outcome of each actual case to be predicted, since it will depend on the emphasis placed on one factor or another. It is suggested that the law should be clarified so as to determine whether a person is a worker within the meaning of the Labour Law, by means of a broader definition of “worker” to include independent workers in a position of economic dependency. In the *Russian Federation* (pp. 25-26, 36), it is suggested that a more precise definition of an “employment contract” and the terms “employee” and “employer” could assist the courts in establishing in a given case whether or not there is an employment relationship. In *Chile* (p. 64) it is affirmed that it is the forms of the employee relationship which are changing nowadays, but not its essential elements, and what needs to be done is to revise the instruments that regulate it. In the *Czech Republic* (p. 17) it is observed that the law needs to be brought up to date and adapted to the development of new employment relationships and new forms of employment. In *Mexico* (pp. 6, 35-37), it is considered that employment relationships have evolved faster than labour law and institutions. It is therefore proposed to revise the scope, meaning and content of the basic concepts of labour law, in terms sufficiently abstract and general to rectify deficiencies, and address situations not previously covered by the law. See also *Pakistan* (pp. 5-6) and *South Africa* (p. 17).

Comparative law contains a wealth of notions and legal constructs as to what is meant by an employment relationship and the criteria, tests and indicators for recognizing it. In addition, there are mechanisms and institutions to enforce the law and guarantee workers' rights. These generally enable the regulation of the employment relationship to operate smoothly so that the status of the worker can usually be determined. However, the law does not cover all of these aspects equally or with the same degree of precision and effectiveness in all countries.

Adjusting the limits of the legislation

Clarification alone, however, may not be enough to regulate cases which do not fall within the current scope of the legislation. These call for certain adjustments to the limits of the legislation. This can be done in a number of ways. First, the legislation can be extended to include categories of employees or sectors that are explicitly or implicitly excluded from the scope of the law. These exclusions frequently apply to employees in small and micro-enterprises³⁹ and in some export processing zones (EPZs).⁴⁰ Furthermore, in some countries, labour laws do not have general coverage, but apply only to certain employees.⁴¹ In such circumstances, it has been suggested that progressive steps should be taken towards a more general application of the legislation concerned. Second, the scope of the law may be adequate, but it may be narrowly interpreted by the courts. For example, in *Uruguay* it seems that the scope of labour law protection has been interpreted increasingly narrowly, while at the same time forms of self-employment have proliferated.⁴² Third, in the case of objectively ambiguous relationships,⁴³ where some or all of the features of the employment relationship are blurred or absent, the law needs to be adjusted so as to enable a clearer identification of the employment relationship, where it exists.

COMPLIANCE AND ENFORCEMENT

The problem of disguised and objectively ambiguous employment relationships cannot, however, be entirely attributed to lack of clarity and the problems relating to the scope of the law. Another contributing factor, which is particularly serious in some countries, is failure to comply with the law, accompanied by lack of enforcement.⁴⁴

³⁹ See also, for example, *Islamic Republic of Iran* (pp. 2, 6), *Pakistan* (pp. 8-9). In *Peru* (pp. 19-21), mention is made, in particular, of the less protected status of workers who work less than four hours a day, a formula encouraged by the fact that it is enshrined in law. See also *South Africa* (p. 7).

⁴⁰ See, for example, A.S. Oberai; A. Sivananthiran; C.S. Venkata Ratnam (eds.): *Labour issues in export processing zones in South Asia: Role of social dialogue* (New Delhi, ILO, SAAT, Indian Industrial Relations Association (IIRA), 2001), pp. 12, 17, 23, 27, 35.

⁴¹ See *Nigeria* (pp. 5-8).

⁴² *Uruguay* (p. 39).

⁴³ See *Australia* (pp. 52-53). In some of the cases of ambiguity which have proliferated, some of the country's states have expressly extended the law on workers' compensation (*ibid.*, pp. 56-58).

⁴⁴ In the *Philippines* (p. 30), for example, work for contractors is regulated, and the problem seems rather to lie in the failure to enforce the law. See also *Mexico* (p. 3), *Peru* (pp. 26-27), *South Africa* (p. 7) and *Trinidad and Tobago* (p. 58), where it is indicated that non-compliance with the law is a critical aspect.

The problem of non-compliance is particularly widespread in developing countries, although it also occurs in industrialized countries.⁴⁵ The studies carried out confirm a commonly expressed view that traditional mechanisms to enforce labour laws are not used as they should be. In particular, mechanisms and procedures for determining the existence of an employment relationship and establishing the identity of the persons involved are generally insufficient to prevent infringements of labour law or to safeguard workers' rights. Problems of compliance and enforcement are particularly acute in the informal economy.

Enforcement of labour law by the administrative and judicial authorities is affected by financial constraints in most countries. Moreover, the limited powers of these authorities and their enforcement mechanisms, such as they are, often mean that they are unable to discharge their supervisory obligations.⁴⁶

The labour inspectorates face considerable difficulties in carrying out their tasks.⁴⁷ In some countries, the probability that an inspector will visit a particular enterprise, detect shortcomings, impose corrective measures and enforce them is very low or non-existent. Particular difficulties arise where the premises are extensive or located in remote places and, for different reasons, in small and micro-enterprises.

The situation is even more uncertain as regards the possibility of action by labour inspectors concerning workers in disguised or objectively ambiguous employment relationships,⁴⁸ even in countries where inspectors are empowered to identify such cases

⁴⁵ For example, in the clothing industry, in 1997, some 63 per cent of contractors in the City of New York were in breach of minimum wage and overtime provisions, according to information supplied by the Department of Labor in court proceedings against an enterprise. US District Court for the Southern District of New York, 992 F. supp. 677; 1998 U.S. Dist. LEXIS 1059; 4 Wage and Hours Cas. 2d (BNA) 649, 5 Feb. 1998, p. 4.

⁴⁶ In the *United States* (pp. 17-19), for example, it appears that the resources of the Wage and Hour Division have decreased and its powers to enforce the law have become very limited. See also *Mexico* (p. 3) and *Trinidad and Tobago* (pp. 40, 51, 55, 63), where the need for greater political will to enforce the law is also pointed out. On alternative ways of reforming the inspection system, encouraging compliance and undertaking joint inspections, see *Mexico* (pp. 13-14) and *Peru* (pp. 34-35).

⁴⁷ In *Bulgaria* (pp. 25-26), mention is made of procedural difficulties faced by labour inspectors in verifying compliance, especially when the employer is absent (or residing abroad) or does not have at hand the necessary documentation, or the worker lies for fear of losing his or her job. In *Costa Rica* (p. 11), owing to lack of resources, inspections are necessarily carried out only if a complaint is received. As in *Germany* and other countries, social security inspections can be a valuable help. In *El Salvador* (pp. 18-19), where a shortage of resources and personnel is also indicated (18 inspectors to cover over 60,000 establishments in the metropolitan area of San Salvador alone) as well as the inadequacy of inspection, the auxiliary work of a non-governmental women's organization is mentioned favourably. In *Jamaica* (p. 13), there are some 20 inspectors, with limited powers, for 640,000 potential claimants, in a workforce of 1 million. Even so, there has been an increase in personnel and activities. In *South Africa 2002* (pp. 15-18), owing to understaffing and a lack of information, inspection tends to be only reactive, and there are serious problems of access to workplaces in the case of domestic or agricultural workers, or dealing with the huge informal economy. In *Thailand* (p. 69) codes of practice provide for a high level of protection, in particular in the textile, shoe, toy, food and jewellery sectors, which the Government should apply as a basis for good protection measures. See also the *Czech Republic* (pp. 2, 14-16) concerning limitations on labour inspection. Although it is true that in that country, trade unions have been given powers of inspection, this does not yet appear to have yielded positive results. See also the *Islamic Republic of Iran* (p. 19), *Morocco* (p. 40) and *Peru* (p. 33, technical sheet 17), where 95 per cent of micro- and small industrial enterprises in metropolitan Lima had not had any kind of labour inspection since 1996.

⁴⁸ See *Bulgaria* (pp. 24-26), *Cameroon* (p. 15), *Costa Rica* (pp. 11-14), *El Salvador* (pp. 18-19), *France* (pp. 30, 36), *Jamaica* (p. 13), *Peru* (pp. 29-30).

and remedy them. In the *Philippines*, the percentage of enterprises where general violations of labour law were found reportedly exceeded 50 per cent. However, from 1997 to 1999, both the number of enterprises inspected and the number of complaints declined, which seems to indicate a tendency on the part of the workers to tolerate breaches and refrain from complaining.⁴⁹ In *Chile* – where the Labour Directorate has a special authority and exercises significant control – case law, however, holds that it is not competent to determine the legal nature of a contract.⁵⁰ Thus, decisions by the labour inspectorate relating to redefinition or reclassification are rare and few workers ultimately benefit from them. At the same time, real opportunities for workers to make complaints are limited because of the risk of reprisals.

In principle, all workers have access to the courts. In practice, however, there are countries where restrictions on access to the courts are considerable and few workers can afford to enter into long, costly and inevitably uncertain judicial proceedings. Their overriding concern is to satisfy their basic needs and find another job.⁵¹ Rarer still, of course, are those workers who, while still working, resort to the courts for a ruling on whether they should be classified as self-employed.⁵² In India, for example, a dispute arose on the status of some 150,000 workers (mainly migrants from other Indian states) working in some 400 silk-processing units in Surat and surrounding areas, in southern Gujarat State, to perform tasks that in the 1970s were done by permanent workers. It was held that those workers had the same rights as permanent workers, but the decision has apparently not been enforced owing to inadequate penalties for non-compliance.⁵³

⁴⁹ *Philippines* (p. 21 and tables 4 and 5).

⁵⁰ *Chile* (p. 17).

⁵¹ In *Costa Rica* (p. 20), judicial proceedings are excessively protracted and, for lack of resources, four out of five workers take proceedings without the help of a lawyer, unlike most employers. In *El Salvador* (pp. 19-20), the caseload and court delays are often compounded in many cases because the proceedings are time-barred or about to become time-barred, and the worker does not have information as to the name of the real employer and has difficulty in compiling evidence, as a result of which the decision may go against him or her. Court cases filed doubled between 1994 and 1999, with only 68 per cent resulting in a decision in both years. However, in this period, judgements in favour of workers increased from 41 to 54 per cent, although there remained the problem of payment of the compensation claimed. The lack of an effective response to workers' claims could be one of the factors behind the rise in industrial disputes. In the *Czech Republic* (pp. 2, 17), for example, there are no labour courts. In the ordinary courts, which are overloaded with proceedings for restitution of property and commercial matters, a labour case lasts an average of two years and obtaining documentary evidence may be a major obstacle for a worker. In the *United States* (p. 18), a wage claim normally requires explicit testimony from the workers concerned. It seems unlikely that workers on low wages will denounce violations and be prepared to testify or reveal their identity to their employers. See also *India* (p. 8), *Pakistan* (p. 11) and *Uruguay* (pp. 25-26).

⁵² In *Hungary* (p. 17), the number of cases before the Labour Court declined radically from 1996 to 1998. The President of the Budapest Labour Court said that this was partly due to the fact that, to avoid charges, employers avoided establishing employment relationships and compelled workers to become "entrepreneurs", which meant lower taxes for the employers but left the workers without protection since they were then subject to civil legislation.

⁵³ *India* (pp. 30-32); see also *Morocco* (p. 22). In Brazil, most of the workers who file complaints with the Labour Court do so only when they have lost their job, because the risk of dismissal discourages them from taking legal action while they are in the employment relationship. Furthermore, the average length of a case through the three judicial levels is three or four years, but if an appeal is filed with the Federal Supreme Court it can last as long again (statements by the President of the Superior Labour Court, *Passando a Limpo*, transcript of television interview on 9 Sep. 2002).

Improving protection for dependent workers requires that the mechanisms and institutions established to enforce compliance with labour law function effectively. Each country, depending on the deficits in its legal system and in the organization and functioning of its labour institutions, should consider simplifying the task of labour inspection and making it more efficient, with advisory and supervisory powers appropriate to present-day circumstances.

* * *

In summary, labour protection is mainly centred on the employment relationship, whose essential characteristics have a universal dimension and remain valid despite significant changes in employment relationships. However, there are increasing uncertainties as to the legal status – dependent or independent – of many workers, which, in practice, leaves many dependent workers outside the protection of labour law. This is amply illustrated in some of the cases described or mentioned in this chapter, and reflects the inadequacy of the law. It would appear that, for the law to be effective, it needs to be clarified and its scope extended where appropriate. This problem is further compounded by widespread non-compliance with labour law, accompanied by failure to enforce it. It is to be hoped that the member States, with the involvement of the social partners, will undertake an in-depth review that takes account of the deficits which exist in these areas.

The discussion so far has referred to the employment relationship involving two persons: employer and worker. There are situations, however, where one or more third parties are involved, as users or beneficiaries of the worker's labour or services. This creates a "triangular" type of relationship, with its own specific characteristics. Employment relationships of this kind are the subject of Chapter III.

CHAPTER III

“TRIANGULAR” EMPLOYMENT RELATIONSHIPS

An employment relationship normally involves two parties: the employer and the employee. There are, however, more complex situations in which one or more third parties are involved, in what might be termed a “triangular” employment relationship. Such situations can be beneficial to all those concerned, but in certain circumstances they can result in a lack of protection for workers. For the employee, three key questions arise: Who is my employer? What are my rights? Who is responsible for ensuring them? Such employment relationships have been less regulated, although there are provisions covering certain aspects, some of them enacted in the first half of the twentieth century and others more recently; there have also been important contributions from case law.

PATTERNS OF “TRIANGULAR” EMPLOYMENT RELATIONSHIPS

“Triangular” employment relationships occur when employees of an enterprise (the “provider”) perform work for a third party (the “user enterprise”) to whom their employer provides labour or services.

A wide variety of contracts can be used to formalize an agreement for the provision of work or services. Such contracts can have beneficial effects for the provider’s employees in terms of employment opportunities, experience and professional challenges. From a legal standpoint, however, such contracts may present a technical difficulty as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer. The term “triangular” employment relationship is used in this report to describe employment situations of this kind.

There are also, of course, cases of *disguised* or *objectively ambiguous* “triangular” employment relationships. A “triangular” employment relationship normally presupposes a civil or commercial contract between a user and a provider. It is possible, however, that no such contract exists and that the provider is not a proper enterprise, but an *intermediary* of the supposed user, intended to conceal the user’s identity as the real employer.¹ Cooperatives have also reportedly been used in this way.

¹ See, for example: *Bulgaria* (pp. 28-29), where small national enterprises act as intermediaries, as the apparent employer, for the activities of a foreign enterprise, which is the actual employer, but in this way avoids complex bureaucratic procedures. In *Costa Rica* (pp. 40-41), the practice of hiring farm workers under successive fixed-term contracts could take the form of a fictitious “triangular” relationship, since they are employed by natural persons with the status of contractors, with whom the company concludes contracts. In *Jamaica* (p. 35), in some sectors such as security services, an employer may

“Triangular” employment relationships have always existed, but this phenomenon is now on the increase. The national studies identified a tendency among enterprises in most countries to operate through other enterprises or with their collaboration. In *Bulgaria*, the phenomenon is less widespread than disguised and objectively ambiguous bilateral employment relationships but it is flourishing, for example, among security firms.² In *Cameroon*, some enterprises perform only core tasks themselves and contract out the remainder to other enterprises, using various types of arrangements, sometimes partly or entirely outside the scope of the law.³ In *Costa Rica*, state enterprises contract out to micro-enterprises employing the state enterprises’ former employees to undertake maintenance and operation of electricity and telecommunications infrastructure.⁴ In *El Salvador*, “triangular” employment relationships seem to have increased over the last ten years. One example is the transnational clothing manufacturers which subcontract to local *maquila* (export processing) enterprises, which in turn contract out to small workshops.⁵ In *Finland*, there has also been considerable growth in subcontracting in all sectors since the mid-1990s, especially in the metalworking and electronics industries, and these arrangements have been the subject of collective bargaining.⁶ In *Mexico*, business-to-business activities have received official encouragement through a system of industrial subcontracting (a directory of industrial process providers) which enterprises in certain sectors are specifically invited to use.⁷ In *Panama*, there has been a rise in subcontracting in general and in particular by agri-industrial companies; the banana multinational has signed a collective agreement with an international trade union.⁸ In the *United Kingdom*, there has been considerable growth in employment through agencies.⁹ The most widespread form of

establish a “dummy” company. In *Thailand* (pp. 36-44), most objectively ambiguous or disguised employment involves “triangular” or multilateral arrangements, often with a large agro-industrial enterprise at one end and dependent or independent workers at the other, or groups of homeworkers organized by intermediaries which the enterprise may employ as contractors or to whom it sells the raw materials and from whom it purchases the finished products. Homeworkers’ average daily income is 108.84 baht (US\$2.56), compared to the minimum wage of 165 baht (US\$3.91), and for clothing workers, the largest homeworker sector, about 79 baht (US\$1.87). Average monthly earnings of a family total 3,503 baht (US\$83.01).

² *Bulgaria* (pp. 26-28).

³ *Cameroon* (p. 8).

⁴ *Costa Rica* (p. 49).

⁵ *El Salvador* (pp. 34-37).

⁶ The general agreement between the Confederation of Finnish Industry and Employers (TT) and the Central Organization of Finnish Trade Unions (SAK), requires the contractor to follow the applicable collective agreement and labour law. A similar agreement in the paper industry sets strict limits on the use of external workers; however, some of the provisions of this agreement were declared illegal by the Supreme Administrative Court (Decision 1995-A-48) on grounds of breach of freedom of competition. See *Finland* (pp. 43-45).

⁷ *Mexico* (pp. 16, 20). It is estimated that the country’s market for subcontracted services is worth between US\$150 and 200 million and involves at least 100 enterprises, including several multinationals, with a clientele of some 500 Mexican enterprises and a potential market of over 5,000. It is said that a company’s operating costs can be reduced by 40 per cent in this way. At the same time, some subcontractors have begun to group together to protect themselves against unfair competition by larger enterprises.

⁸ *Panama* (pp. 47-48).

⁹ *United Kingdom* (p. 26).

“triangular” employment in the *Russian Federation* is through state or private employment agencies, which have proliferated since 1990.¹⁰ In *South Africa*, there has been an increase in “externalization” in the last decade and especially in the last five years.¹¹ In *Thailand*, various subcontracting arrangements are now widespread and in many cases the contractors are smaller enterprises with no economic security and do not pay the minimum wage or provide satisfactory conditions of work or social benefits.¹² In *Uruguay*, subcontracting has increased in several sectors.¹³

In many countries, workers provided by different enterprises can be found working on the user’s own premises or outside, even in a different country. In *Australia*, according to a survey in 1995, one-third of private enterprises surveyed used contractors for cleaning, maintenance and production work, and over 50 per cent of public sector organizations outsourced for some of their operations.¹⁴ In *Chile*, there has been an increase in “triangular” employment relationships in mining and metalworking in particular.¹⁵ In the *Philippines*, such activities have made an important contribution to the economy since the 1980s, but they are still relatively undeveloped, and subcontracting is still mainly associated with large enterprises, with foreign capital and producing for the foreign market.¹⁶ In the *Czech Republic*, the development of business-to-business activities began in 1989 in certain sectors, primarily involving unskilled or low-skilled workers, many of them migrants.¹⁷ In *Hungary*, according to a 1997 survey, 22 per cent of enterprises used subcontractors.¹⁸ In *Venezuela*, these activities have been widespread in the oil industry since the 1920s, and are now common in other sectors, including the public sector.¹⁹

“Triangular” employment relationships can take various forms. The best known is the use of contractors and private employment agencies.²⁰ Another very common arrangement is franchising. In this case, an enterprise allows another enterprise or a

¹⁰ *Russian Federation* (p. 38). There are over 250 private employment agencies in the Russian Federation, and in Moscow alone, the number rose from four in 1990 to 60 in 1994.

¹¹ *South Africa 2002* (p. 22).

¹² *Thailand* (pp. 24, 63).

¹³ *Uruguay* (pp. 25-27). In the financial sector, for example, expenditure under this heading nearly tripled from US\$27.5 million in 1991 to 79.8 million in 1998. See also the *Islamic Republic of Iran* (pp. 27-32) and *Pakistan* (p. 10).

¹⁴ *Australia* (p. 14).

¹⁵ *Chile* (p. 48). In 1998, 17.2 per cent of enterprises in all sectors had personnel supplied by contractors; in the last five years 20 per cent had contracted out their principal activities to other firms or individuals. Among large companies, 36 per cent had contracted out, while 16 per cent of all enterprises had been contracted by other enterprises in the previous 12 months and, of those, 9 per cent had been subcontracted frequently.

¹⁶ *Philippines* (pp. 23-25).

¹⁷ *Czech Republic* (p. 17).

¹⁸ *Hungary* (p. 7).

¹⁹ *Venezuela* (pp. 41-52).

²⁰ On forms other than the use of contractors, see *Chile* (pp. 42-49); M. Echeverría; V. Uribe: *Condiciones de trabajo en sistemas de subcontratación* (Santiago, ILO, Multidisciplinary Advisory Team, 1998); M. Echeverría; V. Solís; V. Uribe Echeverría: *El otro trabajo: El suministro de personas en las empresas* (Santiago, Dirección del Trabajo, Departamento de Estudios, 1998); *France* (pp. 42-73), *Morocco, Trinidad and Tobago* (pp. 24 ff.), *United States* (pp. 23-25).

person to use its trademark or product, in principle on an independent basis. However, the franchisee has financial obligations towards the franchisor, which normally exercises control over the franchised business, including its staff.

Some examples

The changes in the legal status of dependent workers seem to be a sign of the times, and are commonly observed not only in traditional sectors such as construction and clothing but in new areas as well, such as sales staff in department stores, or certain jobs in wholesale distribution, or in private security agencies, although there are considerable differences from one country to another and from region to region.

Construction workers

According to an ILO report,²¹ there has been a significant increase in subcontracting of activities and intermediation of labour in the construction industry around the world, with a strong expansion in the use of agencies and the self-employed and nominally self-employed persons.²² Many large enterprises have given up doing their own building to concentrate on management and coordination. In many countries, they focus on seeking clients and marketing products which are then produced by subcontractors. The employers are often small or very small subcontractors or labour intermediaries. At the same time, the role of the public sector in construction in many countries has declined. The process of privatization of the industry has been particularly intense in the transition countries. According to some national studies and other sources, construction work is mainly carried out by subcontractors or independent workers. Problems related to informal practices, poor working conditions, health and safety, and remuneration are often mentioned.

Clothing workers

The clothing industry²³ in many of the countries studied is marked by a high concentration of women, many of them migrants, and the presence of child labour has been observed in this industry.²⁴ It also frequently has a high proportion of

²¹ See ILO: *The construction industry in the twenty-first century: Its image, employment prospects and skill requirements*, Report for discussion at the Tripartite Meeting on the Construction Industry in the Twenty-first Century: Its Image, Employment Prospects and Skill Requirements, Geneva, 2001, TMCIT/2001, pp. 15-20, at <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmcit01/tmcitr.pdf>

²² See *Australia* (p. 14), *Brazil* (p. 26), *Bulgaria* (p. 20), *Costa Rica* (pp. 48, 65-68), *Hungary* (pp. 10-11), *Panama* (p. 47), *Philippines* (pp. 49-51), *Trinidad and Tobago* (p. 23), *Thailand* (pp. 57-62), *United Kingdom* (p. 30) and the *United States* (pp. 25-27, 97-100).

²³ See also J. Fernández Pacheco (ed.): *Enhebrando el hilo: mujeres trabajadoras de la maquila en América Central* (San José, Costa Rica, Impresora Gossestra Intl. SA/OIT/Embajada de los Países Bajos, 2001); G. Joshi: *Garment industry in South Asia: Rags or riches? Competitiveness, productivity and job quality in the post-MFA environment* (New Delhi, ILO/SAAT, 2002); A.S. Oberai; A. Sivananthiran; C.S. Venkata Ratnam (eds.): *Labour issues in export processing zones in South Asia: Role of social dialogue* (New Delhi, ILO/SAAT, 2001).

²⁴ *Pakistan* (p. 6).

Box 3. Construction industry: Dependent and independent workers

- | | |
|--------------------|---|
| Argentina | <ul style="list-style-type: none"> • Mostly dependent workers (53 per cent); many working for contractors or subcontractors. • An increasingly high proportion are unregistered: 55 per cent in 1991 and 70 per cent in 1997. • In 1997, 42 per cent were self-employed workers. Of these, one-fifth were closely dependent on their clients, including 12 per cent with only one client and 8 per cent with several regular clients. |
| Australia | <ul style="list-style-type: none"> • The industry relies heavily on subcontracting of enterprises or independent workers specializing in specific aspects of construction work. |
| El Salvador | <ul style="list-style-type: none"> • Workers are usually hired by contractors, subcontractors or intermediaries for a particular construction job. • They are paid at piece-rates under collective agreements. |
| Finland | <ul style="list-style-type: none"> • Majority in self-employment or working for contractors. • Fixed-term contracts are common. • Frequent rotation from one site to another. • Migrants (especially Russians and Estonians) do not speak the local language, are unaware of their rights, earn less than nationals (often less than the minimum wage) and are non-unionized. |
| Germany | <ul style="list-style-type: none"> • Workers are usually employees; disguised employment is easy to detect when they work for a single enterprise. However, a different situation exists when they provide their services indiscriminately to several enterprises, or do not employ employees of their own, or do not have a “real” enterprise. In such instances they are regarded as “quasi-employees”. |
| India | <ul style="list-style-type: none"> • The second largest area of economic activity, mostly informal, consisting of 200 large corporate firms, about 90,000 registered class “A” contractors and about 0.6 million small contractors/subcontractors. <i>Mistris</i> and <i>jamadars</i> act as middlemen between unskilled labour and contractors. • Women workers represent 30 to 40 per cent of the total workforce. • Owner-contractor-subcontractor-worker employment relationship pattern. • Workers are exploited because they are illiterate, unskilled, unorganized, uninformed and poor. |

Unionization is very low because of the migratory and seasonal nature of the work, the scattered location of work sites, and the fear of victimization by *jamadars* and contractors.

- Paid minimum wage or below. Much of the work is carried out in inhospitable areas and under conditions that are often strenuous and hazardous; laws are not implemented, and inspection is inadequate.
- Italy**
- Independent workers are virtually non-existent, except in certain activities.
 - The question often arises as to whether the contractor is genuine and who is the real employer.
- Japan**
- Skilled and unskilled workers have different work practices. The former are small business owners who are, at least apparently, independent, or they can work as employees, directly or through a contractor, on the basis of oral agreements with no clear rules.
 - A total of 6.85 million people work in the construction industry and there are 560,000 licensed companies, many of them formed by skilled workers.
 - Workers' independent status has been disputed by the trade union.
 - Unskilled workers are mostly employees, many of them organized in trade unions and covered by collective agreements.
- Nepal**
- Expatriate contractors use local contractors who obtain labour from smaller contractors, including unregistered enterprises headed by *naikeas*, or labour gang leaders.
 - Women receive lower rates of pay than men and, while the men are eventually promoted, the women continue working as "helpers" throughout their active lives.
- Thailand**
- Workforce declining as a result of the financial crisis.
 - Employment takes various forms, but ambiguous or disguised relationships with small contractors are common, often between relatives or people from the same village, with no clear chain of command. Thus, claiming rights and benefits becomes difficult owing to issues of dependency or gratitude.

United States

- Workers move from one contractor to another, without receiving any benefits.
- Owners do not usually deal with the work itself and are not responsible for the workers.
- Workers earn less than the daily minimum wage, with women earning less than men.
- Industry characterized by independent workers, working for one or a succession of employers; most of them are small contractors.
- The incomes of dependent and independent workers are similar, but the latter are at a disadvantage when it comes to health insurance and retirement plans.

Source: *Argentina* (pp. 46-47), *Australia* (pp. 59 ff.), *El Salvador* (p. 43), *Finland* (p. 46), *Germany* (p. 45), *Italy* (p. 13), *Japan* (pp. 13, 23, 33), *Thailand* (pp. 57-62), *United States* (pp. 25-29, 97-100). For India see Report of the Second National Commission on Labour, June 2002, paras. 2.155-2.181, at http://www.labour.nic.in/comm2/nlc_report.html and K.N. Vaid: “Contract labour in the construction industry in India”, in D.P.A. Naidu (ed.): *Contract labour in South Asia* (Geneva, ILO, 1999), pp. 3-71. For Nepal see ILO: *Informal labour in the construction industry in Nepal*, Sectoral Activities Department paper (Geneva, ILO, 2002), pp. 26 and 46.

homeworkers. Another study mentions the decline in the national industry and tough competition, resulting in company closures and job losses.²⁵ A further study refers to efforts to bring unprotected outworkers within the scope of labour protection.²⁶

Box 4. Clothing industry

Australia

- In the last 15 years there has been a radical shift towards engaging outworkers, estimated at at least 100,000 workers.
- There are large numbers of women from East Asian countries, dependent on middlemen to whom they are heavily indebted.
- Outsourced labour is very cheap: remuneration is \$AU250-300 for a 90 to 100-hour week; flexible, with long periods of intense work followed by periods of inactivity; and with significant injury risk – a 27 per cent accident rate annually compared with 10 per cent for factory workers; health problems and occupational violence are also prevalent.
- Considerable efforts are being made to provide protection for outworkers.

²⁵ *South Africa* (p. 40).

²⁶ *Australia* (pp. 57-59).

Brazil

- World's fourth largest manufacturer: 17,400 production units, 1,200,000 jobs.
- Extensive subcontracting to external production units.
- An abundance of informal, unskilled labour, very low wages, high rates of work-related illness. Home work is prevalent.
- 63 per cent of the workforce are women, most working in small units and non-declared (70 per cent of the total), with lower wages than men.
- Ethnic discrimination against certain nationals and foreign migrants.

El Salvador

- Garment manufacturing is one of the main export sectors. It includes small informal workshops subcontracted by larger garment manufacturers at certain stages in production. Objectively ambiguous employment relationships are likely to be most common in the informal economy.
- 80,000 workers (80 per cent of all textile workers and about 37 per cent of the manufacturing industry as a whole, of which it is the largest segment).
- 83 per cent of workers are women, with the average age ranging from 18 to 24 years and average education up to eighth grade (the average for the economically active population is five years' primary education).

United States

- Garments are traditionally manufactured under contract to the nominal employer, often with poor working conditions and high levels of immigrant labour in tiny, poorly capitalized establishments, with frequent bankruptcies.

Source: *Australia* (pp. 55-57), *El Salvador* (p. 43), *United States* (pp. 54-55, note 75). For Brazil see M. Leite; C. Salas: *Trabalho a domicílio na indústria de confecção: tendências em São Paulo* (unpublished document, 2001).

Sales staff in department stores

In many countries, department stores have been internally fragmented into autonomous shops and the sales personnel, mainly women, work for these shops but with varying legal status, sometimes as their employees and sometimes supplied by agencies as either employees or independent workers to perform a variety of tasks. The fragmentation of the store, without breaking up its economic unity, may also fragment and disrupt employment relationships, especially if labour law has not been adjusted

to address this type of commercial reality. In some cases, the user enterprise has been declared legally responsible for the workers in the shops of which it is composed.²⁷

Box 5. Sales staff in department stores

- | | |
|----------------------------|--|
| Chile | <ul style="list-style-type: none"> • In the largest and most popular stores, about a quarter of sales staff are employed under a variety of arrangements by employers who are not part of the main store, but connected by a multiplicity of contracts. • The function of “consultant” is performed mostly by women, who are employed by producers of goods and services. Under the direction of the main store, they perform a range of tasks as well as promoting the goods and services, in the hope of joining the main store’s own sales staff. |
| Costa Rica | <ul style="list-style-type: none"> • Perfume or cosmetics sales staff are known as “demonstrators”. • Generally employees of the product’s distributor, apparently with certain rights, paid hourly wages or commission. |
| El Salvador | <ul style="list-style-type: none"> • Sales staff are known as “promoters” and the majority are women. • Employed by the distributor but subject to the working hours and conditions of the main store. |
| Jamaica | <ul style="list-style-type: none"> • Sales staff are employees and enjoy full rights, but there is a tendency to recruit “independent workers” in these jobs. |
| Mexico | <ul style="list-style-type: none"> • Perfume and cosmetics sales staff are nearly all women, often employed by the product manufacturers as “beauty advisers”, “beauty consultants” or “demonstrators”. • They face discrimination related to the type of work they perform and are required to certify that they are not pregnant prior to engagement. |
| Trinidad and Tobago | <ul style="list-style-type: none"> • Workers are normally regular employees of the store, with contracts that deviate from the legal requirements. • Some are dismissed and rehired as independent workers. |

²⁷ In *Argentina* (p. 51), a recent judgement held a store responsible for employees of franchise holders established on its premises. Likewise, in the *United Kingdom* (p. 33), a store was held to be liable for racial discrimination against an employee of a franchise holder, a decision which implies the existence of a relationship between the franchise holder’s employee and the department store.

- In general, they have difficult working conditions in a climate of fear of dismissal, without the opportunity of joining a trade union or seeking redress in a court of law.

Source: *Chile* (pp. 59-61), *Costa Rica* (p. 62), *El Salvador* (p. 41), *Jamaica* (p. 38), *Mexico* (pp. 28-29), *Trinidad and Tobago* (pp. 42-46).

Supermarkets and hypermarkets

In supermarkets and hypermarkets, as in department stores, uncertainty as to the status of the worker and the identity of the employer can also arise, for example in the case of shelf-stackers and product demonstrators.²⁸ They can be employed by the store, employed by suppliers or provided through employment agencies. In one country, large multinational chains have been established based on systems whereby the hypermarket is divided up into separate stalls, and staff are employed either by the department store or each internal company, under a complex “triangular” model, with growing disparity in conditions of employment.²⁹ In another, most of the staff in large department stores are no longer employees but are supplied by agencies or labour brokers. Food packaging and preparation tends to be contracted out to small informal economy producers, and various services are outsourced, all of which, together with the competition from franchise stores, removes a large proportion of workers from the scope of labour protection.³⁰

²⁸ As significant and unprecedented forms of employment in supermarkets, mention is made in *Argentina* (pp. 50-51) of workers, such as shelf-stackers, promoters and presenters of food and drink-tasting events, sent to these establishments by product suppliers, which in turn obtain these staff from employment agencies. Ultimately, these workers are not employees of the supermarket, nor of the supplier of the goods and sometimes they do not have a recognized employment relationship with the enterprise that supplies them. A similar situation arises in *France* (pp. 75-77) with “merchandisers”, who stack shelves in supermarkets. They are hired and paid by a supplier (or several in succession) and work on behalf of the supplier, but under the authority of the supermarket. Neither the supplier nor the distributor assume responsibility for these workers, nor are they “recognized” by the latter’s staff representatives or the workforce, even though they may be present for long periods. They do not have any individual or collective status. In their case, the employment risk is passed by the distributor to the supplier and by the latter to the workers themselves. In *Panama*, (pp. 69-70), and also in *Venezuela*, baggers are frequently children, exposed to risks inside and outside the store when they carry the shopping to the customer’s vehicle or home. Their only earnings come from tips paid by the customer and they are not recognized as employees of the supermarket which, nevertheless, issues them with instructions and makes them do a variety of tasks, such as loading or cleaning.

²⁹ In *Thailand* (pp. 53-57), there has been a huge increase in the number of department stores created by multinational enterprises. One multinational has 14 stores in which over 100 companies operate, with 6,000 employees split into two groups of sales staff. One group works directly for the main store and the other for the various companies. All have to undergo training by the main store and are subject to its supervision. The first group earns more than the second, although they do essentially the same work. Staff in the second group have contracts for 120 days or one year, and in no case more than two years, to avoid eligibility for certain benefits. They have the right to form trade unions, but this is made difficult.

³⁰ *South Africa* (pp. 30-32).

Private security firms

Private security firms are typical contractors. Thus their employees are likely to be in a “triangular” employment relationship, in very close contact with the user, on whom in many ways they are more dependent than on their own employer. Their position is frequently insecure and they are very often subjected to long hours and difficult working conditions.³¹

QUESTIONS ABOUT “TRIANGULAR” EMPLOYMENT RELATIONSHIPS

In an employment relationship, there is usually no doubt about the identity of the employer where workers deal with only one person. This person is the one who hired the worker or who performs the normal functions of an employer: assigning tasks, providing the means to perform them, giving instructions and supervising their performance, paying wages, assuming risks, making profits and terminating the employment relationship. The situation may be different, however, in a “triangular” employment relationship, when these roles are assumed separately or jointly by more than one person and any one or a number of them may be perceived as the employer.

Who is the employer?

In cases of “triangular” employment relationships, therefore, the employee may reasonably wonder: who is in fact my employer?³² A labour court judge interviewed in *Uruguay* found that the greatest difficulty she and her colleagues faced was the increase in “complex employers” and the conceptual and evidentiary problems involved, resulting in a growing loss of worker protection.³³ In *Australia*, the issue in

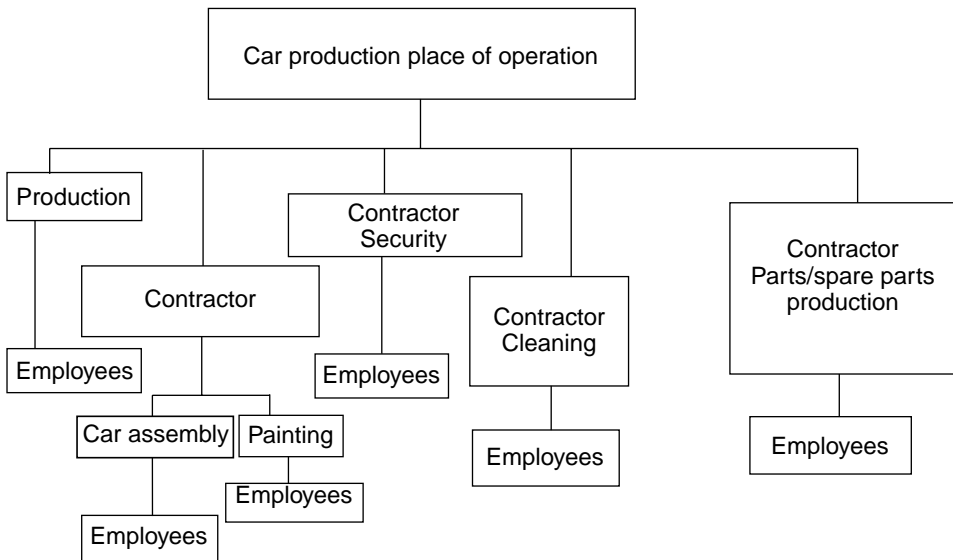
³¹ In *Jamaica* (pp. 38-39), the private security sector is one of the largest and fastest growing groups. Employees enjoy higher wages than other comparable occupational categories. They have a joint council which regulates their conditions of employment and serves as a conciliation body. However, since the 1990s, there have been staff cuts with workers being rehired as “contractors”, who continue working as before, but without the employee benefits, social security, or trade union representation. In *Trinidad and Tobago* (pp. 54-64), working conditions are described in this expanding industry which provides services to a variety of companies. Most of the workers are not unionized, 65 per cent are casual workers, and may work as dependent or independent workers. Their wages are low, their conditions of work are poor and high risk, with long hours, sometimes double shifts, and they can be fined for alleged violation of company rules. This situation has negative psychological and social consequences for the workers and their families, and is even more difficult for women, who complain of sexual harassment, discrimination and pressure not to become pregnant.

³² Under this heading, an article published in France described among other things the case of a computer engineer sent by his firm, for two years, to another firm which in turn seconded him to a third; a female employee who worked for 17 different companies on behalf of her employer; and a female employee of a temporary employment agency whose job in the client enterprise was to manage temporary staff: “C’est qui mon patron? Prêté, partagé, sous-traité ...”, in *Libération*, special issue, 17 May 1999. In *Finland* (p. 47), at least one cleaning firm hired only foreign workers, at low wages and without paying social security contributions, as a result of which it eventually attracted the attention of the labour inspectorate. As the workers rotated so much from one client company to another, it was often difficult to ascertain for whom they were working on a given day.

³³ *Uruguay* (p. 33).

these cases is to determine who the real employer is, even if the worker does not have a contract with any of the putative employers.³⁴ In *Cameroon*, confusion as to the employer tends to arise at small construction sites, because of the close relationship between the contractor's employees and the owner of the site, who frequently gives orders and sometime pays wages directly.³⁵ In the *Republic of Korea*, some employment relationships are established through employment agencies, which can lead to serious difficulties for the employee when it comes to identifying the employer.³⁶ In *South Africa*, there has been a substantial increase in the use of agents ("labour brokers") of all kinds who provide temporary workers to farms.³⁷ In the *United States*, identifying the employer does not appear to be a major problem, because of the income reporting system for tax purposes,³⁸ but despite that there are practical difficulties involved in the legal classification of a worker.

Figure 2. Who is the employer?



Source: Based on R. Tongsook: "Legal measure on the contract labour", thesis submitted at Dhurakijpundit University, cited in *Thailand*, p. 48.

³⁴ *Australia* (p. 24).

³⁵ *Cameroon* (p. 37).

³⁶ *Republic of Korea* (p. 12).

³⁷ *South Africa 2002* (pp. 32-39). Between 1997 and November 2001, there were 39 arbitration awards handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA) in cases involving dismissals of farm workers recruited by agents. In the majority of cases, the dismissals were found to be unfair, but most of the cases were then dismissed for jurisdictional reasons, including on the grounds that it had not been established that the employment relationship was with the defendant employer.

³⁸ *United States* (pp. 21-22).

Faced with several interlocutors, workers may not know whether they are working for one person or the other, because of the type of relationship they have with them, as employers or final users of their labour or services. In particular, they may not know, for example, from whom exactly to claim payment of remuneration or compensation for an accident at work,³⁹ and in particular whether they can file a claim against the user when the direct employer disappears or becomes insolvent.

What are the worker’s rights?

Doubt as to the identity of the employer, or the involvement of the user in the employment relationship, leads to the following key question in the case of “triangular” relationships: what are the worker’s rights? Are they the rights agreed by the employee with his or her employer (the provider enterprise), or those of the employees employed by the user, or a combination of the two? As will be seen in the following paragraphs, this question is answered in different ways in different countries.

Who is responsible for the worker’s rights?

Workers may wonder who is responsible for their rights. The logical answer, which is normally consistent with the law, is that employers are primarily responsible for the rights of their employees, whether they are a contractor, an employment agency, a cooperative or any other employing enterprise or entity. However, the role of the user can be crucial with respect to ensuring respect of these rights (such as limits on working hours, rest breaks, paid leave, etc.). There are laws which in some circumstances also assign a measure of responsibility to the user, as the person who benefits directly from the labour or services of the worker and who often appears to be an employer or someone similar to an employer. Depending on the circumstances and national law, the employer (or provider) and the user bear joint and several liability, so that the worker can claim against both or either of them without distinction. In other circumstances, the user bears subsidiary liability, in the sense that a claim may only be brought against the user in the event of non-compliance by the provider.

³⁹ The subject of occupational risks is particularly important because outsourcing frequently also involves the transfer of those risks to other enterprises. In the *United States* (pp. 53-54), following an explosion in a petrochemical complex in 1989 that killed 23 workers, a study in 1991 suggested that direct employment had been decreasing in the petrochemical industry and had been offset by the rise of independent workers, who comprised between one-third and one-half of the industry’s workforce at the time of the study. It was further found that accidents were more frequent among contractors’ workers, reflecting their lack of training and experience and the kind of tasks assigned to them. The user enterprises did not provide safety training for the contractors’ employees and the contractor rarely did so. The number of such workers with more than 12 hours of work per day or over 60 hours per week was double that of directly employed workers. In addition, they were younger, less educated, lower paid and less experienced and the proportion of non-English-speaking workers among them was three times higher than among regular workers. In *France* (p. 35), the sectors with the highest rate of fatal accidents at work are construction and road haulage, where “sham self-employment” is common. In *Uruguay* (p. 28), attention is drawn to the legal problems created with respect to social security in the event of an accident and possible loss of labour protection. In *Venezuela* (p. 62), one-third of industrial accidents were concentrated in the construction industry and in general the likelihood of health insurance coverage diminishes the further one goes down the subcontracting chain.

Some national laws contain important provisions on the matter. They refer essentially to work for contractors or employment agencies, and deal with aspects such as registration of contractors and agencies, equality of conditions of work between the provider's employees and those employed directly by the user, and the user's obligations and liabilities. In *Argentina*, the user enterprise bears joint liability if it fails in its supervisory obligation to ensure that the contractor or subcontractor complies with labour and safety law in respect of its employees. It would appear that protective mechanisms are often only theoretical, however, since in current circumstances workers are usually not in a position to make use of them.⁴⁰ In *Chile*, the user bears subsidiary liability with respect to the labour and social welfare obligations which the provider fails to observe.⁴¹ In the *United States*, where workers are provided through a temporary employment agency, all the labour-related obligations are normally placed on the agency, but there are exceptions in which the client firm of the agency also assumes obligations towards the workers.⁴² In *Thailand*, on the other hand, there are numerous cases of "triangular" or multilateral employment relationships based on civil or commercial contracts concluded in accordance with the law. Apart from subcontracting activities, labour law addresses the rights and obligations of the parties only in terms of the bilateral employment relationship. In "triangular" or multilateral employment relationships, the user or users do not have any legal responsibilities in respect of the employees of the various employers with which they have entered into contractual relations.⁴³

Some ILO instruments also address this subject. For example, the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), establishes a number of guarantees for workers employed by the contractors engaged by public authorities. The Asbestos Convention, 1986 (No. 162), provides that where there is more than one employer in the same workplace, they shall cooperate to implement protective measures, without prejudice to the responsibility of each employer for the safety and health of the workers employed by them. The Safety and Health in Construction Convention, 1988 (No. 167), establishes a similar obligation, assigns obligations and responsibilities among employers and defines the term "employer" (which includes the principal contractor, the contractor and the subcontractor). There are similar provisions in the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), the Occupational Safety and Health Convention, 1981 (No. 155), the Safety and Health in Mines Convention, 1995 (No. 176), and the Home Work Convention, 1996 (No. 177). These instruments all refer to the respective obligations of employers and intermediaries, while the Private Employment Agencies Convention, 1997 (No. 181), deals with the responsibilities of these agencies and user enterprises in relation to agency workers.

⁴⁰ *Argentina* (pp. 17-18). Provision is also made for joint liability in El Salvador, Mexico, Panama, Uruguay and Venezuela.

⁴¹ *Chile* (p. 42).

⁴² *United States* (pp. 44-45).

⁴³ *Thailand* (p. 63). However, under s. 12 of the Labour Protection Act 1998, where the employer is a subcontractor, other subcontractors along the chain are jointly liable with the employer for wages and other entitlements.

The determination of the identity of the employer and other possible parties to “triangular” employment relationships, workers’ rights and the persons responsible for ensuring those rights raises legal issues which are not easy to resolve.⁴⁴ However, the major challenge lies in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by the law for employees in a bilateral employment relationship, without impeding legitimate private and public business initiatives.

* * *

In summary, in cases of “triangular” employment relationships, employees are frequently faced with multiple interlocutors. In such circumstances, it is essential that such employees know who the employer is, what their rights are and who is responsible for them. It is equally important to determine the position of the user with respect to the employees of the provider enterprise. A balanced and constructive approach to the question should take into account the legal difficulties involved, and the legitimate interests concerned.

The scope of the employment relationship, including “triangular” employment relationships, is addressed in a number of laws, governmental initiatives, collective agreements and other voluntary measures. These are aimed at refocusing the employment relationship and open up prospects for constructive and fruitful discussions. Some of these laws, agreements and initiatives are discussed in the next chapter.

⁴⁴ See *France* (p. 10), *Italy* (p. 2), *Nigeria* (pp. 17-18).

CHAPTER IV

REFOCUSING THE EMPLOYMENT RELATIONSHIP: RECENT DEVELOPMENTS

Chapters II and III referred to the growing gap between the law and the evolving reality of the employment relationship. This has resulted in a wide and increasing range of disguised or objectively ambiguous employment relationships which in practice tend to fall outside the scope of the law. There are also “triangular” employment relationships, as discussed in Chapter III, in which problems of protection may also arise. Added to these is the problem of non-compliance and inadequate enforcement of labour law.

In the light of these problems, the Meeting of Experts on Workers in Situations Needing Protection agreed that countries should adopt or continue to pursue a national policy to review regularly and, if necessary, clarify or adapt the scope of the regulation of the employment relationship. The review should be conducted in a transparent manner with the participation of the social partners. The experts proposed that the national policy should include providing clear guidance to employers and workers concerning employment relationships, in particular the distinction between dependent and self-employed persons; provisions to combat disguised employment relationships; non-interference with genuine commercial or genuine independent contracting; and providing access to appropriate resolution mechanisms to determine the legal status of workers.¹

In recent times, and in particular since 1998, action has been taken at national and international levels to address at least some aspects of the scope of the employment relationship, including “triangular” employment relationships, with the aim or effect of clarifying, defining and facilitating the application of the law and contributing to better compliance.²

This action includes the adoption of international conventions and declarations, national laws, regional directives, national agreements, collective agreements, case law and official reports. There have been many important initiatives and voluntary

¹ Common statement by the experts, paras. 5 to 7, reproduced in Annex 2.

² The objectively ambiguous or disguised relationship has also prompted reflection among academics, judges and government and tripartite experts. The subject was featured on the agendas of regional and world conferences, such as the VIth European Congress of Labour Law and Social Security (Warsaw, 1999), the 3rd Latin American Congress on the Sociology of Work (Buenos Aires, 2000), the XIIth World Congress of the International Industrial Relations Association (Tokyo, 2000) and the XVIth World Congress of Labour Law and Social Security (Jerusalem, 2000), as well as the VIIIth Meeting of European Labour Court Judges (Jerusalem, 2000). Moreover, studies have dealt with the changes in employment relationships and the status of workers; these have been mentioned in previous chapters of this report.

agreements, with or without the participation of the State and international organizations. These offer a wealth of substantive and conceptual information, and are positive signs of an ongoing process of national and international discussion of complex employment relationships.

The fundamental purpose of this general discussion at the International Labour Conference is to help achieve greater clarity in employment relationships and, ultimately, secure adequate and effective labour protection for dependent workers who are unprotected. The actual solutions adopted in a given initiative could be viewed in different ways, and might be more relevant in one regional, national or sectoral context rather than another. The relevance of case law should be evaluated in the light of the characteristics of the legal system from which it derives and the facts of the particular case. The examples mentioned in the following paragraphs do not claim to represent specific trends, but are merely intended to illustrate the process of clarification which is taking place in many countries.

CLARIFYING THE SCOPE OF THE EMPLOYMENT RELATIONSHIP

The concern to clarify the scope of the employment relationship has been expressed in a variety of ways. One response has been to try to redefine more precisely the scope of the employment relationship, irrespective of the form of the contract, or to establish mechanisms to adjust the scope of the law in line with changing needs. Another approach to the problem has been to delineate more clearly the boundary between dependent and independent work. A third option combines both these elements. Provisions have also been introduced in legislation to deal with certain types of work which had hitherto been inadequately defined in some countries. These four approaches are described in the following paragraphs, and illustrated by referring to relevant case-law developments.

Defining the scope of the employment relationship

New Zealand has addressed the issue of protection of workers in the Employment Relations Act,³ which gives a broad definition of which workers are covered by the new legislation and, more importantly, empowers independent bodies (the Employment Court or the Employment Relations Authority) to investigate the real nature of the link between the person doing the work and the entity commanding that work. Such powers play a key role in eliminating fraudulent or disguised employment relationships. Section 6 of the Act provides as follows:

- (1) In this Act, unless the context otherwise requires, employee
- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes
 - (i) a homemaker; or
 - (ii) a person intending to work; but

³ Employment Relations Act 2000, No. 24, 19 Aug.

(c) excludes a volunteer who

- (i) does not expect to be rewarded for work to be performed as a volunteer; and
- (ii) receives no reward for work performed as a volunteer.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

In Finland, the Employment Contracts Act⁴ applies to employment contracts entered into by an employee or employees, under which they agree to perform work personally for an employer under his or her direction and supervision in return for payment or other remuneration.⁵ The new legislation, which was drafted by a tripartite committee, does not entirely resolve the difficulties in establishing in borderline cases whether a worker is dependent or self-employed. It reaffirms the prohibition on discrimination, the requirement for equal treatment, and the broad scope of the employment relationship, and it stipulates, for example, that its provisions do not cease to apply because of the fact that employees use their own tools or equipment.⁶

Finnish law already provided that the employment contract could take any form.⁷ The new Act specifies that the contract may be in oral, written or electronic form;⁸ the latter makes it easier to identify the employment relationship, even if it is between people located in different countries who do not know each other.

Like other, older, legislation, the new Act favours the open-ended contract (termed “valid indefinitely”) over the fixed-term contract: it only allows the latter type of contract to be concluded for a justified reason. It also guarantees that workers retain their acquired rights in a continued relationship or even in the case of brief interruptions. In this way, the gap is narrowed between workers with fixed-term contracts and those with open-ended contracts. Fixed-term contracts that are concluded or consecutively renewed without a justified reason are considered valid indefinitely.⁹ The provisions reaffirming the preference for the contract of indefinite validity are particularly significant, since one of the main recent developments in the employment relationship in Finland has been the increase in fixed-term contracts. This trend has affected women and men differently: according to 1999 data, 21 per cent of women and 15 per cent of men worked under fixed-term contracts.¹⁰

In a similar vein, the law in New Zealand specifies that, in agreeing to a fixed-term employment contract that will end on a specified date, on the occurrence of a specified event or at the conclusion of a specified project, the employer must have “genuine reasons based on reasonable grounds” for specifying that the employment of the employee is to end in that way. The law states that the following are not “genuine reasons”:

⁴ Employment Contracts Act of 1 Jan. 2001 (No. 55 of 2001).

⁵ Ch. 1, s. 1, of the Act.

⁶ *ibid.*

⁷ The Employment Contracts Act (No. 320 of 1970), as amended, which was repealed by the new Act.

⁸ Ch. 1, s. 3.

⁹ Ch. I, ss. 3 and 5.

¹⁰ *Finland* (pp. 3, 11-16).

- “(a) to exclude or limit the rights of the employee under this Act;
 (b) to establish the suitability of the employee for permanent employment.”¹¹

In the United Kingdom, the law itself authorizes the Government to adjust its scope – a novel power in response to the growing problem of disguised and objectively ambiguous employment relationships. Under section 23 of the Employment Relations Act 1999,¹² the Government may confer employment rights on certain individuals vis-à-vis an employer (however defined), and may provide that such individuals are to be treated as parties to employment contracts and make provision as to who are to be regarded as their employers.

In India, the National Commission on Labour was created in October 1999. Its terms of reference were to suggest rationalization of existing laws relating to labour in the “organized sectors”, and to suggest “umbrella legislation” for ensuring a minimum level of protection for workers in the “unorganized sector”.¹³ With the aim of making the law universally applicable, the Commission suggested in its report that the definition of a worker should be the same in all laws. It recommended the enactment of a special consolidated law for small-scale enterprises (defined as those with fewer than 20 workers). This would not only protect the workers in these enterprises but would make it easier for small enterprises to comply with the law, as the Commission considered that the existing legislation, intended for large enterprises, was inadequate for this sector.¹⁴

Delineating the boundary between dependent and independent work

In Ireland, the difficulty of distinguishing between dependent and independent workers has prompted an approach based on consensus between the Government and the employers’ and workers’ organizations. The Irish system of industrial relations is based on broad social partnership reflected in a national agreement which fixes wage increases and other aspects of policy.¹⁵ Initially tripartite, these negotiations now also involve what is known as the “social pillar”, consisting of non-governmental organizations, and are regarded as a key element of the country’s sustained economic and social progress.

In the context of the negotiations on the agreement for 2000 to 2002, called the Programme for Prosperity and Fairness (PPF), it was agreed to establish an employment status group with the task of devising a uniform definition of “employee”. In the absence of a statutory definition of “employed” or “self-employed”, there was growing concern that the number of people classified as “self-employed” was increasing, despite evidence that in their case the status of “employee” would be more appropriate.

¹¹ S. 66 of the Employment Relations Act 2000.

¹² <http://www.uk-legislation.hmso.gov.uk/acts/acts1999/19990026.htm>

¹³ According to the report of the Commission, the unorganized sector accounts for 92 per cent of the total workforce; 32 per cent of workers in the unorganized and self-employed sectors are women. Report of the Second National Commission on Labour, June 2002, paras. 1.15, 1.22, at http://www.labour.nic.in/comm2/nlc_report.html

¹⁴ *ibid.*, paras. 1.17, 6.21, 6.28, 6.30.

¹⁵ See *Ireland* (pp. 1-4) and R. Pedersini: “Economically dependent workers, employment law and industrial relations”, in *European Industrial Relations Observatory On-line (Eironline)*, at <http://euro.eurofound.ie/2002/05/study/TN0205101S.html>

The issue has far-reaching implications, since aspects such as the way in which taxes and social security contributions are payable, entitlement to unemployment, disability or sickness benefits, a number of rights under labour legislation and responsibility for the work performed all depend on whether or not the worker is regarded as an employee. Incorrect classification of a worker can also entail serious consequences for the employer, including penalties. Finally, tax authorities have a special interest in the appropriate classification of workers and are very active in their efforts to identify who is an employee and who is self-employed, in order to prevent tax evasion.

The Employment Status Group formulated a set of criteria for determining which workers were employees and which were self-employed (see box 6). With these criteria in mind (even though not all of them may apply in every case) and taking into consideration the person's work as a whole, including the conditions of work and the real nature of the relationship, it should be easier to determine the employment status of the individual.

Box 6. Ireland: Code of practice for determining employment or self-employment status of individuals

Employees

An individual would normally be an employee if he or she:

- Is under the control of another person who directs as to how, when and where the work is to be carried out.
- Supplies labour only.
- Receives a fixed hourly/weekly/monthly wage.
- Cannot subcontract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.
- Does not supply materials for the job.
- Does not provide equipment other than small tools of the trade. The provision of tools

Self-employed

An individual would normally be self-employed if he or she:

- Owns his or her own business.
- Is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract.
- Assumes responsibility for investment and management in the enterprise.
- Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks.
- Has control over what is done, when and where it is done and whether he or she does it personally.
- Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken.

or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of the case.

- Is not exposed to personal financial risk in carrying out the work.
- Does not assume responsibility for investment and management in the business.
- Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.
- Works set hours or a given number of hours per week or month.
- Works for one person or for one business.
- Receives expenses payments to cover subsistence and/or travel.
- Is entitled to extra pay or time off for overtime.
- Can provide the same services to more than one person or business at the same time.
- Provides the materials for the job.
- Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account.
- Has a fixed place of business where materials, equipment, etc. can be stored.
- Costs and agrees a price for the job.
- Provides his or her own insurance cover.
- Controls the hours of work in fulfilling the job obligations.

Source: Programme for Prosperity and Fairness, Employment Status Group: *Code of practice for determining employment or self-employment status of individuals* (Dublin, July 2001).

In addition to establishing the criteria for distinguishing between employees and the self-employed, the Employment Status Group also considered how these criteria should be expressed. The Group rejected the idea of embodying them in a law and preferred to introduce them in a code of practice, the application of which would be purely voluntary. The code had the legitimacy of having been approved by consensus by the employers' and workers' representative bodies, as well as by the competent authorities.¹⁶ Although it does not have binding effect, it was expected that it would be

¹⁶ The idea of the code of practice also had precedents: the Revenue Commissioners and Department of Social, Community and Family Affairs' publication entitled *Employed or self-employed – A guide for tax and social insurance* (1998); the Revenue Commissioners' leaflet, *Employees and contractors in the construction industry* (1996); and a series of information leaflets by the Department of Enterprise, Trade and Employment which, although they do not refer to "employee" status, fully explain employees' rights at work.

taken into account by the bodies responsible for handling employment status. The application of the code of practice would be monitored by the Employment Status Group itself to assess its effectiveness.

In Germany, there has been a legal definition of employee for the purposes of social security since January 1999, when the revised Social Security Code came into force. A presumption has been introduced whereby a person is deemed to be an employee if he or she meets at least two of the following criteria: the person does not have employees subject to social security obligations; usually works for one contractor; performs the same work as regular employees; has performed the same work as an employee before; and does not show signs of engaging in entrepreneurial activities. The underlying idea was to achieve a sufficiently precise and practical definition to reduce the opportunity to disguise the employment relationship and to make it easier to deal with situations midway between a genuine and a disguised employment relationship.¹⁷

The combined approach

The recent legislative reform adopted in South Africa¹⁸ combines a number of the above elements and others to refocus the employment relationship. This reform, which amends labour legislation adopted in 1995 and 1997, is important not only for its content, but also for the process of intense, effective and constructive social dialogue leading up to it, in which all of the stakeholders participated.¹⁹ Among other aspects, the latest reform addresses the scope of the employment relationship, a particularly difficult task in a country where ambiguous bilateral and “triangular” employment relationships have proliferated over the last decade and even more since the adoption of the 1995 legislation.²⁰

Two elements were introduced to clarify and adjust the scope of the law. The first, which is reminiscent of the German approach and the Irish code of practice, is a broad presumption in favour of employee status, which appears both in the Basic Conditions of Employment Amendment Act 2002 and the Labour Relations Amendment Act 2002.²¹ According to this presumption, a person is deemed to be an employee if one or more of seven factors set out in the Act exist (see box 7).

¹⁷ *Germany* (pp. 4-6). See also Pedersini, op. cit.

¹⁸ Basic Conditions of Employment Amendment Act, No. 11 of 2002, and Labour Relations Amendment Act, No. 12 of 2002.

¹⁹ The reform, announced in 1999, began with consultations with all the stakeholders, the Labour Court, the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. The resulting bills were published for public comment and discussion in the National Economic Development and Labour Council (NEDLAC) in July 2000. When negotiations in NEDLAC reached an impasse, they continued in a three-member tripartite committee and in parallel there were negotiations to find basic points of consensus in the Millennium Labour Council (MLC). An agreement in principle in the MLC opened the way for agreement in NEDLAC in July 2001, after which a legal drafting team prepared the bills, which were promulgated on 1 August 2002. *South Africa 2002* (pp. 44-50).

²⁰ *ibid.* (pp. 13, 22).

²¹ *ibid.* (pp. 50-54).

Box 7. South Africa: Presumption of employee status

A person is presumed to be an employee if one of the following factors is present:

- the manner in which the person works is subject to the control or direction of another person;
- the person's hours of work are subject to the control or direction of another person;
- in the case of a person who works for an organization, the person is a part of that organization;
- the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- the person is economically dependent on the other person for whom that person works or renders services;
- the person is provided with tools of trade or work equipment by the other person; or
- the person only works for or renders services to one person.

Source: S. 83A introduced in the Basic Conditions of Employment Act 1997 (BCEA) by the Basic Conditions of Employment Amendment Act 2002, s. 21.

The presumption in favour of employee status does not apply, however, in the case of workers with a certain level of income, in this case, those who earn over 89,445 rand (US\$10,000) per year.²²

As a complementary measure, the Labour Relations Amendment Act required the National Economic Development and Labour Council (NEDLAC) to prepare and issue a code of good practice containing guidelines for determining whether persons, including those with incomes over the limit mentioned in the previous paragraph, are employees.²³

Another innovation is the very special power granted to the minister to deem any category of persons to be employees for the purposes of the BCEA or any other employment law, with the exception of the Unemployment Insurance Act 1966.²⁴ It is not just a matter of clarifying the scope of the law but also of amending it by ministerial order.

²² According to the Labour Force Survey, 600,000 out of 10 million employed earn more than 8,000 rand per month. About 5.5 per cent of the total employed (including self-employed persons) earn above the threshold laid down in the Basic Conditions of Employment Act (BCEA). See *South Africa 2002* (p. 53).

²³ S. 51 of the Labour Relations Amendment Act, which amends s. 200 A of the Labour Relations Act 1995.

²⁴ S. 83 of the BCEA, as amended by s. 20 of the Basic Conditions of Employment Amendment Act 2002. See *South Africa 2002* (p. 54).

In Peru, the General Labour Bill of July 2002 contains an explicit and broad definition of its scope. The Bill is intended to regulate the personal provision of services, on a subordinate and paid basis, based on an oral or written contract, irrespective of its name or form. A worker does not lose his or her status even if personal services are concealed in the guise of a legal entity. Thus, the provision of services is subordinate when a worker performs the service within the organization and under the direction of the employer or a third party when the law so permits. The Bill contains a presumption that any provision of personal services for remuneration is subordinate and that an employment relationship exists when there is a provision of services in a workplace. Furthermore, it indicates elements which are not essential to classifying a relationship as an employment relationship, but which can serve as indicators for that purpose or to determine entitlement to certain rights. Likewise, the Bill defines the parties to the employment contract (employer and worker) and presumes that such contracts are for an indefinite term.²⁵

One of the initiatives to refocus the employment relationship was the appointment in 2002 of a committee of experts in Quebec, Canada, to produce a report on the labour protection needs of people in non-traditional work situations. This was in response to the changes in work relationships arising out of new operating methods of some enterprises and the provision of certain public services, as well as the emergence of new categories of self-employed persons – some of them only apparently independent and others who are genuinely independent. The committee will take into account earlier work on the status of truck owner-drivers and self-employment and the situation of performing artists, who already have a system of accreditation and collective bargaining.²⁶

Defining certain types of work

Together with the general provisions on the scope of the employment relationship, there are also provisions specifically relating to certain workers or certain types of employment, intended to define the existence of an employment relationship. This is the case of home work, telework, private employment agency workers and workers' cooperatives.²⁷

Since the 2001 reform of the Labour Code in Chile, home work which is neither discontinuous nor sporadic is presumed to be employment.²⁸ In Finland, the new Employment Contracts Act states expressly that its application is not prevented by the fact that the work is performed at the employee's home.²⁹

In New Zealand, in setting out the framework of the employment relationship the new Employment Relations Act lays particular emphasis on homeworkers. This Act deems an employee anyone who is bound by a contract of service. However, it also expressly includes homeworkers in this category, even if they are engaged, employed

²⁵ See General Labour Bill, July 2002, ss. I-IX and 1, 4-7, 11, 14, 17.

²⁶ See www.travail.gouv.qc.ca/quoi_de_neuf/actualite/fs_atypique.html

²⁷ See, for example, the abovementioned Employment Contracts Act of Finland; the Chilean Act No. 19,759 of 27 Sep. 2001 to amend the Labour Code; and the General Labour Bill of Peru.

²⁸ S. 8 of the Labour Code, as amended by s. 5 of Act No. 19,759.

²⁹ Ch. 1, s. 1.

or contracted under a form of contract whereby the parties are technically a vendor and a purchaser.³⁰ With respect to buying and selling in home work, the Organic Labour Act of Venezuela, as amended in 1997, provides that when a person habitually or with a degree of regularity sells materials to another to be processed or made up by the latter at his or her home and then purchases the product for a determined price, the former is deemed to be an employer (*patrono*) and the latter a homemaker.³¹

The Peruvian General Labour Bill mentioned above provides that the service is regarded as personal in the case of home work, even when it is performed with the assistance of the worker's immediate family members who are economically dependent on him or her.³²

As to teleworking, which is in some respects a modern kind of home work, a 2002 framework agreement at European Union level provided regulations emanating from the social partners themselves.³³ The framework agreement covers different forms of teleworking, but is confined to regular teleworking, i.e. that which takes place in the context of an employment contract or relationship and is based on the recognition that teleworkers have the same rights as workers who render services in the employer's premises. The agreement contains the following provision to prevent ambiguities concerning the worker's status and possible "conversion" to self-employment: "the passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status."³⁴

The Peruvian General Labour Bill defines teleworking and suggests factors which can help to identify subordination in this kind of work.³⁵ Under the Chilean Labour Code teleworking (described as services rendered outside the premises of the enterprise, using computer or telecommunications) is exempted from the limits on working hours.³⁶

With respect to cooperatives, the ILO Promotion of Cooperatives Recommendation, 2002 (No. 193), provides that national policies should notably promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work, for all workers in cooperatives without distinction whatsoever.

Developments in case law

In considering objectively ambiguous or disguised employment relationships, it is always interesting and useful to keep an eye on case law. Courts and other judicial

³⁰ Part 2, s. 5.

³¹ S. 293. <http://www.tsj.gov.ve/legislacion/lot.html>

³² S. II of the Preambular Title.

³³ The European social partners were invited "to negotiate agreements modernizing the organization of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the necessary balance between flexibility and security". Point 1, para. 1, of the Framework Agreement on telework, at http://europa.eu.int/comm/employment_social/news/2002/jul/telework_en.pdf

³⁴ *ibid.*, point 1, para. 3; point 2; and point 3, para. 4.

³⁵ S.39 ("The distance work employment contract regulates the performance of work without the physical presence of the worker in the enterprise, with which he is connected by computer, telecommunications and similar media, by means of which control and supervision are exercised"); and s. 40.

³⁶ S. 22 of the Labour Code, as amended by s. 7 of Act No. 19,759.

bodies play a crucial role in classifying the status of workers based on the facts. It is worth mentioning some recent decisions from different countries.

The Denny case in Ireland³⁷ sets an important legal precedent in this area, as pointed out in the report of the Employment Status Group.³⁸ A worker signed a contract of employment as a shop demonstrator with Denny, a food processing company, and was entered on a panel of demonstrators offering free samples of various products to customers. When a store requested a demonstrator, a member of the panel was contacted by the company and asked to carry out the demonstration. The demonstrator then submitted an invoice, which was signed by the store manager. The demonstrator was paid at a daily rate and was given a mileage allowance, but was not eligible for the pension scheme or to join a trade union. The annual contract was renewed several times. However, the contract for 1993 stated that the worker was an independent worker and as such was responsible for her own tax affairs. At that time, she worked an average of 28 hours a week for 48 to 50 weeks a year, during which she gave some 50 demonstrations. She did so without supervision from the company, but she complied with any reasonable instructions of the owner of the store and written instructions from the company, which provided her with the materials for the demonstration and gave its consent to carry it out. The question in the case was whether she was actually self-employed or an employee who should be insured by the company. Based on the particular facts of the case and the general principles developed by the courts, the Supreme Court held that she was an employee, bound as such by a contract of service, because she had performed services for another person and not for herself.

In another more recent case³⁹ in Ireland, the Labour Court considered the situation of a part-time temporary veterinary inspector who had worked for the Department of Agriculture since 1966, to determine whether or not he was an employee. As stated by the Court, the distinction between a contract *of* service and a contract *for* service is a fine one and surrounded by legal complexity, making it difficult to apply in borderline cases. The Court examined the provisions contained in the code of practice for determining employment or self-employment status of individuals, issued by the Employment Status Group. In the light of this code of practice and various other tests, the Court concluded that, given the right to refuse work and the degree of control exercised by the veterinary inspector over the performance of his duties, he was a free agent, economically independent from the person engaging his service. The Court found, therefore, that he was employed under a contract *for* service and was not an “employee”.

In South Africa, a contractor specializing in the manufacture and installation of built-in cupboards persuaded the vast majority of its workers to resign and to continue rendering their services as independent workers. The Labour Court considered whether the contracts with the workers were genuine and bona fide, based on the case of one of the workers. The Court found that the worker in question merely helped to load cupboards on to a vehicle and then clean and touch them up once they were installed, and this work was an integral part of the service performed by the contractor. The Court held

³⁷ Supreme Court: *Henry Denny & Sons Ltd., trading as Kerry Foods v. The Minister for Social Welfare* [1998], 1 IR 34.

³⁸ *Ireland* (pp. 10-12).

³⁹ Labour Court, Department of Agriculture, Food and Rural Development and Maurice O'Reilly, DWT0232, 18 June 2002.

that the contractor had perpetrated a “cruel hoax” on the worker by inducing him to believe that he was a self-employed entrepreneur, which left him without any of the protections accorded to an employee under the law. The Court held that the contract was a sham and remained a sham even though the worker had consented to it.⁴⁰

In France, the social chamber of the Supreme Court (*Cour de Cassation*) examined the case of a person who drove a taxi under a monthly contract which was automatically renewable, called a “contract for the lease of a vehicle equipped as a taxi”, and paid a sum described in the contract as “rent”. The Court held that this contract concealed a contract of employment, since the taxi driver was bound by numerous strict obligations concerning the use and maintenance of the vehicle and was in a situation of subordination.⁴¹

Also in France, the Supreme Court examined the case of workers engaged in the delivery and collection of parcels under a franchise agreement. The “franchisees” collected the parcels from premises rented by the “franchisor” and delivered them according to a schedule and route determined by the latter. In addition, the charges were set by the enterprise, which collected payment directly from the customers. The Supreme Court examined the situation of three “franchisees” in three separate cases and handed down three rulings on the same day.⁴² The Court held that the provisions of the Labour Code were also applicable to persons whose occupation consisted essentially of collecting orders or receiving items for handling, storage or transport, on behalf of a single industrial or commercial enterprise, when those persons performed their work in premises supplied or approved by that enterprise, under conditions and at prices imposed by that enterprise, without the need to establish a subordinate relationship. This would seem to amount to an extension of the scope of the Labour Code to certain “franchised” workers.⁴³

A case in Venezuela involved distributors of beer and other products who had each formed a limited company for the purpose of that activity. The distributors purchased products at a price fixed by the enterprise and sold them to retailers within a specified area covered by their trucks, painted with the logos of the brewery company, for another price, also set by the enterprise. Their income was the difference between the two prices. They could not sell the products outside the designated area, or sell products other than those of the enterprise in that area. In one case, the Supreme Court of Justice held that the distributors were in reality wage workers, since it had been shown that they provided personal services, despite being registered as businesses, and their work being structured around commercial contracts for sale and purchase. However, 80 other cases were referred for mediation and conciliation by the same tribunal and the parties admitted that the relationships were of a commercial nature.⁴⁴

⁴⁰ *Building Bargaining Council (Southern and Eastern Cape) v. Melmons Cabinets CC and Another* (2001), 22 ILJ 120 (LC), Labour Court (P478/00), 23 Nov. 2000.

⁴¹ Ruling No. 5371 of 19 Dec. 2000. See *Le Monde*, 22 Dec. 2000.

⁴² Rulings Nos. 50105034, 35 and 36 of 4 Dec. 2001. See *Libération*, 28 Jan. 2002, and *Droit social*, No. 2, Feb. 2002, pp. 162-163.

⁴³ A. Jeammaud: “L’assimilation de franchisés aux salariés”, in *Droit social*, op. cit., pp. 158-161.

⁴⁴ Supreme Court, Social Chamber of Cassation, rulings of 15 Mar. 2000 and 17 Oct. 2002. In a case related to workers of this enterprise, the Committee on Freedom of Association, while pointing out that it does not have the competence to express an opinion concerning the legal relationship (labour or commercial) between the distributors and sales agents concerned and the enterprise, concluded that persons

Similarly, a cabin crew member with three years' service with a Venezuelan airline was withdrawn because of pregnancy from the flight programme and a training course with a view to promotion, without being assigned new functions. She was thus deprived of remuneration, since she only received a monthly commission based on flights and had not been declared for the purposes of social security. The company denied that it was bound by an employment relationship and claimed, on the contrary, that it had signed a commercial contract with her in her capacity as representative of a limited company. Nevertheless, since she had indeed provided her services to the airline, the Court of First Instance held that an employment relationship between the parties had been shown to exist and ruled in favour of the worker.⁴⁵

Since 1987, a major United States electronics firm employed "temporary agency employees" and "freelancers". The "freelancers" had agreed in writing that they would not enjoy certain employee benefits, including access to the stock purchase plan. It was held by the Court, however, that both the "agency workers" and the "freelancers" were common-law employees of the enterprise.⁴⁶ After several years of negotiations, a settlement was reached whereby the company agreed to pay some US\$97 million to compensate the workers in question. Furthermore, the company changed its practices for hiring and classifying personnel, which meant that some 3,000 workers in the category concerned were converted to employee status and as such were eligible to participate in employee benefit plans and programmes.⁴⁷

In the context of case law there is the problem of lengthy court proceedings, and even after such long delays often the outcome benefits only one or a few plaintiffs. In two of the three cases before the French Supreme Court mentioned above relating to franchises, the proceedings lasted approximately four years, while the relationships of each of the parties lasted for just over three years. The proceedings against the United States electronics company lasted more than eight years and only ended with an out-of-court settlement between the parties. Even so, the impact of that case affected an initially undefined category of persons, which proved to consist of several thousand,⁴⁸ while the French rulings only directly benefited the plaintiffs.

REGULATION OF "TRIANGULAR" EMPLOYMENT RELATIONSHIPS

The regulation of "triangular" employment relationships, in order to clarify who the employer is, what rights the worker has and who is responsible for them, is a difficult

engaged in the distribution and sale of beer should be able to set up organizations of their choice (Convention No. 87, Article 2). 281st Report of the Committee on Freedom of Association, Case No. 1578, *Official Bulletin* (Geneva, ILO), 1992, Series B, No. 1, paras. 395-396.

⁴⁵ Labour Court of First Instance, Vargas State, 28 Apr. 1999.

⁴⁶ *Vizcaino v. United States District Court*, 173 F 3d 713 (Ninth Circuit, 1999); see *United States* (pp. 114-119).

⁴⁷ *United States District Court, Western District of Washington, Seattle, Vizcaino et al. v. Microsoft Corporation et al., Hughes et al. v. Microsoft Corporation et al.*, Class Action Settlement Agreement, 8 Dec. 2000; and United States Court of Appeals for the Ninth Circuit, No. 01-35494, 15 May 2002.

⁴⁸ In dealing with a problem of fees in this case, the court "observed that the litigation also benefited employers and workers nationwide by clarifying the law of temporary worker classification. Moreover, it noted that as a result of this litigation, many workers who otherwise would have been classified as 'contingent' workers received the benefits associated with full-time employment", United States Court of Appeals for the Ninth Circuit, No. 01-35494, 15 May 2002, p. 7011.

task, as indicated in the previous chapter. The range of possible situations is extremely varied even within a single country. Added to this is the proliferation of civil or commercial contracts which can give rise to “triangular” employment relationships.

The more complex and dynamic the transactions that generate “triangular” employment relationships, the greater the need for clarity with regard to the persons involved in such transactions or affected by them. In any event, such transactions necessarily have to take place in accordance with the tax and labour laws and other applicable laws and regulations. In the case of multinational enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy states the following: “All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. [...] They should also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations.”⁴⁹

Compliance with labour laws is essential in “triangular” employment relationships, where the workers’ situation may be particularly precarious precisely because they are not parties to the agreements on which they are dependent. Despite appearances to the contrary, a “triangular” employment relationship is still precisely that – an employment relationship.

The need for clarity in “triangular” employment relationships has met with a strong response in the declarations and agreements of employers’ and workers’ organizations referred to in earlier chapters. Negotiations, codes of practice and other unilateral declarations, as well as framework agreements between international employers’ and workers’ organizations, are laying the groundwork for better regulation of these employment relationships. Many of these initiatives take their inspiration from international instruments such as the abovementioned Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the ILO Declaration on Fundamental Principles and Rights at Work.

The following paragraphs give some examples of labour laws, court decisions and voluntary initiatives, as well as declarations issued by government or technical bodies, which address certain key aspects of “triangular” employment relationships.

Who is the employer?

In a typical “triangular” employment relationship, the worker has more than one interlocutor. In Finland, for example, the Employment Contracts Act refers to the “user enterprise” in cases where an enterprise assigns an employee to another enterprise.⁵⁰ In Spain, Legislative Decree No. 5/2001 calls the user enterprise the “principal entrepreneur”.⁵¹

⁴⁹ Adopted by the Governing Body of the International Labour Office in 1977 and amended in 2000, <http://www.ilo.org/public/english/employment/multi/index.htm> para. 8.

⁵⁰ Ch. 1, s. 7, and Ch. 2, s. 9.

⁵¹ S. 42(2) of the Workers’ Charter (consolidation of 1995), as amended by s. 2 of Royal Legislative Decree No. 5/2001 of 2 Mar., respecting urgent measures to reform the labour market in order to increase employment and improve its quality.

Recent texts identify the employer as the person or enterprise hiring the worker (this may be a contractor or an employment agency), and the user as the person or enterprise using the services of that contractor or agency – although there are variations on this in some countries.

The traditional figure of the contractor (*contratista*) is defined in Chile in the context of commercial or agri-industrial enterprises engaged in agriculture, forestry and similar activities, as a natural or legal person who hires workers on his or her own account to provide services to third parties.⁵² The abovementioned Legislative Decree No. 5/2001 in Spain also refers to the contractor, in a provision concerning user enterprises that contract with others for the performance of work or services relating to their own activity.⁵³

As regards agency work, the ILO's Private Employment Agencies Convention, 1997 (No. 181), attributes to the agency the function of employing workers with a view to making them available to a third party, expressly referred to as the "user enterprise". The workers have as interlocutors the agency that employs them and the clients of the agency to whom it provides services.⁵⁴ In Peru, a new law⁵⁵ regulates the activity of service enterprises and workers' cooperatives which engage in labour intermediation.

In Chile, the labour intermediary (*enganchador*) has been defined in the agricultural context, under the recent Labour Code reform, as the natural or legal person who acts only as a link between the user and the workers, without there being any actual relationship of subordination or dependency, and hence does not have the nature of an employer.⁵⁶ While they differ from the contractors mentioned above, both types of intermediary are required to register in a national registry.⁵⁷

The French Supreme Court has handed down several rulings, based on the notion of "economic entity", setting the limits within which an enterprise could transfer workers who perform a certain activity to another enterprise, which may be formed for that purpose. One of these cases concerned an enterprise producing mineral water which outsourced the manufacture, maintenance and repair of the wooden pallets used to transport its products and transferred to the same company the employees who did that work, who thus became employees of the subcontractor. The Court held that the transferred activity did not constitute an economic entity and thus the transfer of the workers was not valid; it therefore ordered the reinstatement of the workers concerned.⁵⁸ Similarly, a hospital transferred to a subcontractor cleaning tasks and meals

⁵² Circular No. 153 issued pursuant to s. 92bis of the Labour Code (introduced by s. 14 of Act No. 19,759).

⁵³ S. 42(1) of the Workers' Charter, as amended by s. 2 of Legislative Decree No. 5/2001.

⁵⁴ Article 1(1)(b).

⁵⁵ Act No. 27626 of 9 Jan. 2002 regulating the activity of special service enterprises and workers' cooperatives.

⁵⁶ Circular No. 153, *op. cit.*

⁵⁷ S. 92bis of the Labour Code (introduced by Act No. 19,759).

⁵⁸ Social Chamber, ruling of 18 July 2000 (Bulletin No. 285). See *Le Monde*, 20 July 2000, and G. Couturier: "L'article L.122-12 du Code du travail et les pratiques 'd'externalisation' (Les arrêts Perrier Vittel France du 18 juillet 2000)", in *Droit social* No. 9/10, Sep.-Oct. 2000, pp. 845-849. Decisions, *ibid.*, pp. 850-851.

service, together with the personnel responsible for those tasks. The Court held, in this case too, that the transferred service did not constitute an economic entity, and therefore the employment contracts valid at the time of the transfer could not be transferred to the contractor, but remained in force between the workers and the hospital.⁵⁹

In Australia, where the strategy of outsourcing certain activities has also become widespread, the Federal Court has set limits on the transfer of activities and workers to another person or enterprise. The Court dealt with the dismissal of workers responsible for home and community care of elderly, disabled or disadvantaged persons by the Greater Dandenong City Council, in the State of Victoria.⁶⁰ The provision of these services had been opened up to competitive tendering, although it was known beforehand that the staff already employed by the Council would not be able to compete unless they accepted a reduction in their entitlements acquired through collective bargaining and that most of them would have to be dismissed. They did in fact lose the bid to a company offering the services at a cheaper rate with lower conditions of employment, and most of them were dismissed, some of them subsequently being employed by the lower-bidding company but with lower terms and conditions. The Court held that the dismissal had taken place for a “prohibited reason” in breach of the Workplace Relations Act of 1996 – i.e. because of their entitlements under the collective agreement – and was thus in violation of freedom of association.

Cost-cutting by the user enterprise was also a factor in another case, in which the responsibility of the user enterprise was highlighted by a ruling handed down by a court in the United States. Under the Fair Labor Standards Act, and at the request of the Department of Labor, the Court prohibited a clothing manufacturer from selling goods made by contractors in breach of regulations on minimum wages and overtime.⁶¹ Apart from the harm done to the workers, the judgement held that the low-cost production gave a competitive advantage to those who broke the law and a comparative disadvantage to law-abiding manufacturers and distributors.⁶² The judgement therefore favoured the interests of the affected workers and of employers who complied with the law. The Court went further, however, and ordered the company, prior to entering into any agreement with a contractor, to examine whether the price that it proposed to pay to the contractor was sufficient to enable the contractor to comply with the regulations on minimum wages and overtime. In addition, the company was ordered to examine the contractor’s willingness and ability to comply with such regulations and to require the contractor to inform it immediately if it were unable to do so. In addition, each contractor was required to allow the user enterprise to inspect its records and the enterprise was to review them when it suspected non-compliance by the contractor. Secondly, contractors had to give a written assurance to the enterprise that they complied with the law. In turn, the enterprise in the case was obliged to maintain and keep full records of transactions with each contractor and to respond

⁵⁹ Social Chamber, ruling of 24 Oct. 2000, in *Droit social*, No. 1, Jan. 2001, pp. 15-16.

⁶⁰ *Australian Municipal, Administrative, Clerical and Services Union (AMACSU) v. Greater Dandenong City Council* (2000), 48 Australian Industrial Law Reports 4-326.

⁶¹ United States District Court for the Southern District of New York, 992 F. Supp. 677, 5 Feb. 1998.

⁶² According to information provided in the case by the Department of Labor, in 1997 approximately 63 per cent of clothing contractors in the city of New York were in breach of the provisions of the Fair Labor Standards Act on minimum wages and overtime.

promptly to any request by the Department of Labor concerning such information. Finally, if any contractor violated the regulations on minimum wages and overtime, the enterprise had to notify the Department of Labor and refrain from marketing goods manufactured in breach of the law.

The user's responsibility in the selection and control of the enterprise which it contracts is usually based on the obligation to ensure that the enterprise is appropriately registered, if applicable. In Spain, the users are also required to satisfy themselves that the enterprise is up to date with its social security payments.⁶³

The Finnish Employment Contracts Act lays down a specific obligation on an employer who in fact exercises control in personnel matters in another enterprise or corporate body on the basis of ownership, agreement or other arrangement, thus demonstrating that labour obligations may go beyond the boundaries of the bilateral employment relationship. According to the Act, when the activities of an enterprise or corporate entity are substantially and definitively reduced, for financial or operational reasons or as a result of reorganization, the employment contract must not be terminated if the worker can be placed in another job or trained for other duties in the same enterprise or another enterprise or entity. In this case, it is up to the employer who exercises control in the enterprise or corporate body in question to try to find employment or provide training for the affected worker in one of the enterprises or entities under his or her control.⁶⁴

There are also provisions of legislation establishing the legal responsibility of the user for the contractor's non-compliance. While this has long-standing precedents in the legislation of many countries, as seen in Chapter III of this report, this principle continues to be established or reiterated in new texts. Thus, for example, in Spain, Legislative Decree No. 5/2001 mentioned above provides that entrepreneurs who contract or subcontract for the performance of work or services are jointly liable in respect of the wages and social security contributions for the employees of the contractors and subcontractors. This responsibility does not, however, extend to a head of household who contracts exclusively for the construction or repair of his or her house, or an owner who is not contracting for the activity as part of his or her commercial operations.⁶⁵

On the issue of limits on the user's responsibility, the Supreme Court of Argentina has ruled that the user's joint responsibility does not extend to covering the payment of arrears in wages and dismissal compensation to the employees of enterprises which hold a concession to run a bar and restaurant on the user's premises.⁶⁶ In India, the Supreme Court issued a judgement on the abolition of labour engaged by or through a labour contractor which ruled that the user enterprise is under no obligation to absorb as its own employees the workers employed by or through a contractor.⁶⁷

⁶³ S. 42(1) of the Workers' Charter, as amended by s. 2 of Legislative Decree No. 5/2001.

⁶⁴ Ch. 7, s. 4.

⁶⁵ S. 42(2) of the Workers' Charter, as amended by s. 2 of the Legislative Decree.

⁶⁶ CS, "Escudero, Segundo R. y otros c. Nueve A S.A. y otro" del 14/9/2000, E. 119.XXXIV-DT, 2001-A, 98, in *Derecho del trabajo*, No. 7, July 2001.

⁶⁷ Case of Steel Authority of India, judgement delivered on 30 Aug. 2001.

Corporate social responsibility, an idea that has become firmly established nowadays, thanks in part to the ILO, also sheds interesting light on the position of the user.⁶⁸ Some multinational enterprises have established standards applicable to their contractors.⁶⁹ They have in some cases explicitly recognized their responsibility for conditions of work in suppliers' and contractors' factories which manufacture their products, and have put mechanisms in place to ensure compliance.⁷⁰ Other enterprises have assumed such responsibility through framework agreements signed with international workers' organizations.⁷¹ These initiatives often refer to fundamental labour standards and principles and contain an express commitment to implement them.

What are the worker's rights?

The second key question for workers in a "triangular" employment relationship, as indicated in the previous chapter, concerns their rights.

In principle, employees' rights are the minimum rights laid down by law and collective agreements, and those set out in the employment contract. However, when the work is performed on behalf of a contractor, agency or other employer for the benefit of a third party who also has employees, there is often a demand to compare and even out conditions of employment in the user enterprise and those in the provider enterprise. This urge may be more pressing if work takes place in the user's premises or work sites, alongside the user's employees, and if both perform work of equal value. This is what often happens when an agency employee is assigned to a team of employees in the user enterprise to carry out the same activity. Furthermore, the issue of breach of the law may arise where a provider enterprise is used to evade legal or contractual obligations. This occurred as regards wages and conditions of employment in the abovementioned case before the United States District Court for the Southern District of New York, and as regards the exercise of collective rights in the case before the Federal Court of Australia, also mentioned above.

The Finnish Employment Contracts Act clearly promotes collective bargaining for workers assigned to an enterprise. The Act states that every employer must at least comply with a national collective agreement. If a provider enterprise is not bound by any collective agreement, then at least the terms of the collective agreement applicable to the user enterprise shall be applied to its employees.⁷²

⁶⁸ See, for instance, Commission of the European Communities: *Green Paper: Promoting a European framework for corporate social responsibility* (Brussels, 18 July 2001), COM (2001) 366 final, at http://europa.eu.int/comm/employment_social/news/2001/oct/socpolag/csr_communication.pdf

⁶⁹ See, for example, Levi Strauss & Co.: *Global sourcing and operating guidelines*, at <http://www.levistrauss.com/responsibility/conduct/>

⁷⁰ See, for example, KappAhl code of conduct, at http://www.ilo.org/public/english/employment/gems/eoo/code_98/kapp.htm

⁷¹ See, for example, Hochtief's code of conduct in respect of the rights of its own employees and the employees of contractual partners; and its agreement of 11 Mar. 2001, with the German construction workers' union (IG BAU) and the International Federation of Building and Wood Workers (IFBWW), and the agreement of 11 May 2001, signed in Geneva on 14 June 2001, between the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), the Latin American Coordinating Committee of Banana Workers' Unions (COLSIBA) and Chiquita Brands International which employ workers in banana operations in Latin America, witnessed by the Director-General of the ILO. See <http://www.ifbww.org/xsite/hochtief.html> and <http://www.iuf.org.uk>

⁷² Ch. 2, ss. 7 and 9.

The right of agency employees to bargain collectively was the subject of a decision by the National Labor Relations Board (NLRB) in the United States, of great importance not only because of the legal issue involved and the fact that the NLRB overturned its previous position, but because it situated the issue in the broader perspective of the “contingent workforce” and the need to refocus the protection contained in the National Labor Relations Act.⁷³ In the specific case, the NLRB examined whether or not workers supplied by a temporary employment agency were in the same bargaining unit as the employees of the manufacturer (the user enterprise). The manufacturing enterprise had given its consent, but there was no evidence that the agency had done so. For the Board, it was evident that the manufacturing enterprise and the employment agency were joint employers (or co-employers) of the agency workers in question, since both decided in matters concerning the employment relationship, such as hiring, firing, discipline, supervision and direction, so that they co-determined essential aspects of those relationships. The agency workers worked side by side with the employees of the manufacturing enterprise, performed the same work and were subject to the same supervision. The Board came to the conclusion that the workers employed jointly by a “user employer” and a “supplier employer”, in this case an employment agency, could be in the same collective bargaining unit without the need for the “supplier employer’s” consent. On the issue of the consent of the employer, the Board overturned its previous position. Now, in its new approach, the principle of “community of interest” prevailed: in other words, it was shown that the temporary workers shared with the permanent employees common supervision, working conditions and interest in wages, hours and conditions of employment.

This change was prompted not only by issues of interpretation of the law, but also by a growing awareness that the earlier approach left agency workers without the rights of representation protected under the National Labor Relations Act. In the past two decades, according to a government report on contingent workers,⁷⁴ there had been tremendous “temporary help supply growth in the industry”. From 1982 to 1998, the number of jobs in that segment of the workforce increased by 577 per cent, while the total number of jobs overall had grown by only 41 per cent, and some industries and communities had begun to rely heavily on agency workers. In the introduction to its decision, the NLRB stated: “The critical nature of the issue we have reconsidered in these cases is highlighted by ongoing changes in the American workforce and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying ‘temporary’ and ‘contract workers’ to augment the workforces of traditional employers”.⁷⁵

COMPLIANCE AND ENFORCEMENT

Certain recent initiatives have focused on problems of compliance with and enforcement of labour law, and seek to provide a suitable response. As regards voluntary

⁷³ See [331 NLRB No. 173] *M.B. Sturgis, Inc.*, 14-RC-11572, at www.nlr.gov/decision.html

⁷⁴ United States General Accounting Office: “Contingent workers: Incomes and benefits lag behind those of rest of workforce”, GAO/HEHS-00-76, June 2000, at: <http://www.gao.gov>

⁷⁵ NLRB decision, *op. cit.*

compliance with the law, mention has been made of the emergent trend reflected in a number of declarations, codes of practice and framework agreements between international employers' and workers' organizations to promote due compliance. These initiatives have proved to be crucial and unavoidable in a globalized economy, where corporate behaviour is closely watched by shareholders, consumers, the media and workers' organizations alike. Concerning the State's role in securing compliance, apart from the general refocusing of legislation discussed above, some provisions and mechanisms have been specifically designed to prevent situations of uncertainty or fraud as to a worker's status, or to provide an effective remedy, although limitations on access to the courts continue to be a major problem.

The Finnish Employment Contracts Act sets out in detail the employer's obligation to inform the employee about the terms of his or her contract.⁷⁶ While this provision in fact protects only the employee, at the same time it means that the employer has to decide at the outset whether he or she regards the worker as dependent or self-employed, since only in the former case will the employer have to provide the information required by law. Workers who do not receive such information but believe themselves to be dependent may file a complaint with the competent authority.

The Labour Relations Amendment Act, in South Africa, is more explicit in this respect, since it creates an institutional advisory mechanism for workers who are uncertain of their status. Except in the case of persons earning in excess of the prescribed income limit,⁷⁷ any of the contracting parties may apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for an advisory award on whether the persons involved are employees.⁷⁸

In Quebec, Canada, new legislation provides for a similar preventive mechanism, not just to determine whether or not a worker is an employee, but whether the employee will be converted into an independent worker without employee status as a result of changes that may be introduced in the enterprise by the employer. The employer must notify the relevant employees' association of the changes it proposes to introduce. If the association does not agree with the employer's view as to the consequences of the change on the employee's status, it may seek a determination by the *Commission des relations du travail*. If the association applies to the Commission, the employer may not implement the announced changes until the Commission has ruled or the two parties have reached an agreement.⁷⁹

The amendments introduced in the Labour Code in Chile contain important measures of a different kind, designed to prevent fraud in the employment relationship and improve enforcement of the law. The reform imposes a heavy fine on employers who simulate the recruitment of workers through third parties, or use any subterfuge to disguise or alter their identity or capital for the purpose of evading labour or social security obligations. The law defines subterfuge as the establishment of separate cor-

⁷⁶ Ch. 2, s. 4.

⁷⁷ Under s. 6(3) of the Basic Conditions of Employment Act.

⁷⁸ S. 200A(3) of the Labour Relations Act 1995, as amended by s. 51 of the Labour Relations Amendment Act 2002. See *South Africa 2002* (p. 53).

⁷⁹ S. 20.0.1 of the Labour Code, introduced by s. 11 of Bill 31 (2001, Ch. 26), An Act to amend the Labour Code, to establish the *Commission des relations du travail* and to amend other legislative provisions, 21 June 2001.

porate names, the creation of separate legal identities, division of the company, or other measures that result in a diminution or loss of workers' individual or collective rights, including the right to organize and to collective bargaining.⁸⁰ The amending Act also authorizes the creation of 300 labour inspectors' posts and the adoption of provisions to improve enforcement of labour legislation.⁸¹

The General Labour Bill in Peru contains a number of important provisions in this regard: it reiterates the principle of the primacy of fact; it requires the employer to maintain a register of homeworkers and to provide a copy to the worker; it requires registration of service suppliers; and it expressly extends the application of the law to members of cooperatives.⁸² On the issue of the rights of workers in cooperatives, the ILO Promotion of Cooperatives Recommendation, 2002 (No. 193), as mentioned above, provides that:

8. (1) National policies should notably:

- (a) promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work, for all workers in cooperatives without distinction whatsoever;
- (b) ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises. [...]

* * *

This chapter cites a number of national and international examples, including collective agreements, case law and voluntary initiatives, on the scope of the employment relationship, which have had the effect of clarifying, defining and facilitating the application of the law and contributing to compliance and enforcement. Over and above their specific content, they are interesting as illustrations of the process of clarification. They include some legal reforms which in general, or with respect to certain categories of workers, clarify or enable clarification of the concept of the employment contract, presumption of its existence, or even changes in the scope of the law, and reiterate the principle of the primacy of fact. Others, relating to "triangular" employment relationships, and to work for contractors and employment agencies in particular, refer to the parties, to certain conditions and limits on "triangular" employment relationships, to the role and responsibility of the user, and to workers' rights. As regards compliance and enforcement, there are examples of procedures for information and consultation about the worker's status, penalties for concealment or fraud as to the identity of the employer, collective legal proceedings and strengthening of labour inspection.

⁸⁰ S. 478 of the Labour Code, as amended by s. 100 of Act No. 19,759.

⁸¹ Transitional clauses 6 and 7 of Act No. 19,759.

⁸² S. XI.6 of the Preambular Title, and ss. 35, 73 and 60.

CHAPTER V

PROSPECTS FOR INTERNATIONAL AND NATIONAL ACTION

The problems related to the scope of the employment relationship pose challenges at both international and national levels. Action taken at international and national levels should be complementary and mutually supportive. In particular, international action can help member States adopt or adapt policies and measures conducive to a more coherent and effective response to the problems at national level.

INTERNATIONAL ACTION

A proactive approach at international level can help to promote a consensus and a policy framework on the effective protection of dependent workers. In their statement,¹ the Meeting of Experts on Workers in Situations Needing Protection held in May 2000 recognized “that the ILO can play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection”. According to the Experts, action by the ILO should include the collection and exchange of information, technical cooperation and guidance to member countries, and the adoption of instruments. Some of the suggestions formulated by the Employer experts centred on seeking a better understanding of the problems and a range of possible solutions (not necessarily legislative), and the need for flexibility and to consider the unique circumstances affecting particular workers or sectors.²

Collection and exchange of information and promotion of good practice

The collection and exchange of information concerning changes in employment relationships, suggested by the Experts, is something the ILO has been doing throughout its history, in the various areas within its mandate. In recent years, it has focused more specifically on questions relating to the dependent or self-employed status of workers, in connection with discussions in the International Labour Conference on self-employment, home work, private employment agencies, “contract labour” and the informal economy.³ In its collection and exchange of information, the Office could undertake comparative analyses of the information and studies to identify trends and policy developments and to promote good practices.

¹ Reproduced in Annex 2.

² ILO: *Report of the Meeting of Experts on Workers in Situations Needing Protection*, doc. MEWNP/2000/4(Rev.), appended to doc. GB.279/2, 279th Session, Geneva, Nov. 2000, para. 113.

³ See *Recent debates on workers' protection* in Ch. I.

The Conference resolution of 1998⁴ prompted reflection and the exchange of information on dependent workers in need of protection, and more specifically as regards the scope of the employment relationship. This led to the national studies already mentioned, whose descriptive methodology was based on a common model and the exclusion of obscure or misleading terminology likely to hinder comparison between the situations in different countries.

The Office could continue undertaking new national studies. The examination of national situations is an essential exercise in support of the in-depth review that countries are recommended to carry out with a view to adopting measures to clarify the scope of the employment relationship. Furthermore, it could be helpful to extend these national studies by region and sector of activity, occupational category, etc., with due consideration of gender issues, workers in more precarious situations and workers with disabilities. Particular attention should be paid, in this respect, to enhancing the knowledge base regarding employment relationships in small and micro-enterprises and in the informal economy.

The national studies undertaken for the Office and many other studies highlight statistical problems due to the lack of precise data on dependent and self-employed workers, economically dependent work, transition from one status to another and “triangular” employment relationships. Some studies point to statistically significant distinguishing features which should be explored and developed.⁵ Further efforts could be undertaken by the Office to improve comparative data, drawing on useful experience.

The national studies were originally intended as a basis for reflection within the Office, in preparation first for the Meeting of Experts and then for the general discussion. The documentation could be used for separate or joint discussion by governments, employers and workers and their organizations, legislators, judges, universities, etc., which in turn could contribute to the adoption of legal measures, the conclusion of agreements with the participation of the social partners, or the formulation of declarations.

Technical cooperation, assistance and guidance

In their statement, the Experts suggested that the ILO could also provide “technical cooperation and assistance and guidance to member countries concerning the development of appropriate national policies”. This kind of activity is also part of the normal mandate of the Office. In particular, the guidance given to member States on reform of their labour law already includes greater attention to issues such as the scope of the law, general aspects of the employment relationship, provision of evidence, powers of inspection and access to the courts. Through its technical cooperation activities, ILO assistance could be further expanded to include policy guidelines and capacity building to strengthen administrative and judicial action to promote compli-

⁴ Reproduced in Annex 1.

⁵ See *Argentina* and R. Pedersini: “‘Economically dependent workers’, employment law and industrial relations”, in *European Industrial Relations Observatory On-line (Eironline)*, at <http://eiro.eurofound.ie/2002/05/study/TN0205101S.html>

ance and enhance access for employers and workers to the appropriate mechanisms and institutions.

Adoption of instruments

The participants in the Meeting of Experts further suggested in their common statement that the ILO's actions could also include "the adoption of instruments by the Conference including the adoption of a Convention and/or supplementary Recommendation".

Although the common statement was adopted unanimously, the Employer experts expressed the view that nothing that had been discussed in the meeting justified the need for an instrument, promotional or otherwise. On the contrary, they felt that the vagueness and diversity of the issues suggested that an instrument was an inappropriate response and noted that possible alternatives to an instrument had been proposed at the Meeting.⁶ However, the Government and Worker experts expressed their support for the adoption of a promotional instrument.⁷

While Conventions give rise to obligations upon ratification, they normally provide flexibility through clauses which contain various options as to how they should be applied. Some Conventions contain provisions establishing rights and obligations. Others are promotional in nature, intended to guide the actions of member States in formulating and progressively putting measures into practice in a long-term process, such as the formulation and application of a policy on a particular topic.⁸

The 1997 and 1998 Sessions of the International Labour Conference discussed a draft Convention and supplementary Recommendation which contained provisions establishing rights, obligations and criteria to determine whether an employment relationship existed.

The option presented by the Office to the Governing Body in 2000, on possible regulation of the scope of the employment relationship, took a promotional approach,⁹ taking into account the 1998 resolution mentioned earlier. It was proposed that the International Labour Conference consider instruments designed to encourage the formulation and implementation of a policy to protect dependent workers, taking account of recent developments in employment relationships, and acting in consultation with employers' and workers' organizations. In the context of such a promotional approach, an important element could be to encourage member States, in consultation with employers' and workers' organizations, to establish effective mechanisms and procedures at national level to determine who is an employee.

Conventions and Recommendations have the advantage of being subject to a system of supervision centred on regular reporting by countries on the position of their

⁶ *Report of the Meeting of Experts ...*, op. cit., para. 113.

⁷ *ibid.*, paras. 45, 47, 49-52, 56-58, 71, 74, 78 and 81.

⁸ Examples of such promotional instruments are the Employment Policy Convention, 1964 (No. 122), the Human Resources Development Convention, 1975 (No. 142), the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and the Occupational Health Services Convention, 1985 (No. 161).

⁹ See GB.280/2, 280th Session, Mar. 2001, paras. 32-59, and GB.279/3, 279th Session, Nov. 2000, paras. 16-35.

law and practice in regard to the matters dealt with by the Convention or Recommendation, and, in the case of Conventions which have been ratified, the measures taken to give effect to their provisions.¹⁰ This supervisory system is also, by its nature, an efficient information system for member States and the social partners and a vehicle for sharing of experience, legislative policy and the work of the social partners. It is also a useful instrument for targeting assistance and technical cooperation.

Another possible approach would be to ensure that the conclusions of the general discussion contain proposals for action that could be taken by member States, employers and workers and their organizations with a view to addressing national deficits in the protection of dependent workers, specifically as regards the scope of the employment relationship. Those proposals would also guide the work of the Office.

The conclusions that emerge from the general discussion may also refer to the basic issues of concern in the case of disguised or objectively ambiguous employment relationships or “triangular” employment relationships and, where applicable, encourage the formulation and implementation of a concerted policy to clarify, adapt and apply the relevant laws on the scope of the employment relationship. As part of such an approach, the Conference could propose, as a minimum, that employers should know the legal status of those working for them and that workers should know their legal status. Similarly, in the case of workers in “triangular” employment relationships, they should know who their employer is, what their rights are and who is responsible for ensuring them. The principle of the primacy of fact should prevail in the consideration of each case. To give effect to this, member States, in consultation with employers’ and workers’ organizations, could be requested to establish appropriate procedures and mechanisms to achieve this.

The general discussion could also result in the submission of a resolution to the Conference requesting member States to implement any proposals put forward in the conclusions. Part of the resolution could also provide for a mechanism to facilitate the sharing of information and to strengthen the Office’s assistance and technical cooperation activities, as well as concerted action by member States.

If it were considered appropriate, the resolution could also request the Governing Body to decide that any proposals stemming from the general discussion shall be compiled into a set of practical guidelines or a code of practice.

Finally, the ILO could intensify its dialogue with other international institutions, including financial institutions and regional entities whose actions affect national policies and regulations on employment relationships. Through this dialogue, the ILO could communicate to other bodies its views on the key role which the employment relationship plays in the protection of dependent workers and the important contribution it makes to achieving decent work.

NATIONAL ACTION

The employment relationship is a universal concept with common elements which can be found in countries with different legal systems and cultures as well as different

¹⁰ See article 19, paras. 5 and 6, and article 22 of the ILO Constitution.

economic and social environments. Nevertheless, its evolution and the laws and practices governing it vary from country to country, as do the problems associated with it. It is up to the member State, with the cooperation of the social partners, to lead the search for appropriate and viable solutions at national level to those problems. It has been said already in this report that each State could undertake an in-depth review to identify shortcomings in order to explore appropriate and balanced solutions that take different interests into account.¹¹

The promotion of decent work at national level includes addressing the problems related to the lack of protection of dependent workers highlighted in this report, as well as their repercussions on productivity, competitiveness and society in general. The Decent Work Agenda provides an integrated framework within which to address these problems at national level.

The abovementioned common statement by the Meeting of Experts on Workers in Situations Needing Protection suggests that countries adopt a national policy under which they would conduct a regular review of the regulations on the employment relationship, in line with current employment realities.

The previous chapter gave specific examples of a wide variety of measures intended to reduce the margin of ambiguity in employment relationships, to give clear indications with respect to “triangular” employment relationships and to explore solutions to improve compliance with labour law and its enforcement. These experiences could be useful and inspire other initiatives, but above all they suggest policies and measures that States might envisage and perhaps adopt, in dialogue with the social partners, in the light of their particular circumstances.

Shortcomings in compliance with and enforcement of labour law can most appropriately be addressed at national level. This can be done through improved systems of labour inspection and enhanced capacity of labour administrations to promote compliance and easy and rapid access to appropriate mechanisms and institutions to resolve disputes about the employment status of workers.

* * *

In summary, the ILO has a mandate which can include the compilation and circulation of information, the promotion of good practices, the provision of assistance and technical cooperation, and offering guidance to member States, as well as the adoption of instruments and providing a forum for international dialogue. Each member State is asked to examine the growing difficulties caused by disguised and objectively ambiguous employment relationships, as well as by “triangular” employment relationships, and to develop solutions suited to their own situation so as to apply the relevant standards. The international dimensions of these difficulties, which have the same common features in many countries, mean that they must also be tackled through co-ordination between member States and international action, in which the ILO can play a central role.

¹¹ See *Closing the gap between the law and reality* in Ch. II.

SUGGESTED POINTS FOR DISCUSSION

1. What are the main factors leading to the lack of protection of workers who should be protected within the framework of an employment relationship? What are the main consequences of this lack of protection for governments, employers and workers?
2. To what extent do employees fail to benefit from the protection they should enjoy in the employment relationship because of one or a combination of the following factors:
 - the law is unclear, too narrow in scope or otherwise inadequate;
 - the employment relationship is ambiguous;
 - the employment relationship is disguised;
 - an employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them?
3. How should labour administration systems and their services be developed so as to respond more effectively to the challenges posed by non-compliance and lack of enforcement?
4. What are the solutions to the problems referred to in points 1 and 2 and how can the gender dimension of these problems be addressed?
5. What are the roles of governments, employers and workers and their representative organizations in the design and implementation of these solutions? What role can social dialogue play?
6. What should be the priorities for the ILO's policy, research, standard-setting and technical assistance within its overall goal of decent work for all?

ANNEX 1

Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour¹

The General Conference of the International Labour Organization,

Having met in Geneva in its 86th Session, from 2 to 18 June 1998,

Having adopted the report of the Committee appointed to consider the fifth item on the agenda,

Noting that the Committee on Contract Labour has begun to identify situations where workers require protection, and

Noting that the Committee has made progress on these issues;

Invites the Governing Body of the ILO to place these issues on the agenda of a future session of the International Labour Conference with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption is, according to the normal procedures, considered necessary by that Conference. The Governing Body is also invited to take this action so that this process is completed no later than four years from now,

Further invites the Governing Body of the ILO to instruct the Director-General:

- (a) to hold meetings of experts to examine at least the following issues arising out of the deliberations of this Committee:
 - (i) which workers, in the situations that have begun to be identified in the Committee, are in need of protection;
 - (ii) appropriate ways in which such workers can be protected, and the possibility of dealing separately with the various situations;
 - (iii) how such workers would be defined, bearing in mind the different legal systems that exist and language differences;
- (b) to take other measures with a view to completing the work commenced by the Committee on Contract Labour.

¹ Adopted by the International Labour Conference at its 86th Session (1998).

ANNEX 2

Common statement by the experts participating in the Meeting of Experts on Workers in Situations Needing Protection (Geneva, 15-19 May 2000)¹

1. The Meeting of Experts has considered the technical report prepared by the ILO which draws on the various country reports.

2. The reports and the debate at the Meeting demonstrate that the global phenomenon of transformation in the nature of work has resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to be protected by labour legislation) does not accord with the realities of working relationships. This has resulted in a tendency whereby workers who should be protected by labour and employment law are not receiving that protection in fact or in law. (The worker and government experts believe that this is a growing tendency but the employers do not feel that the extent of this tendency has been proven.)

3. The reports and the debate at the Meeting indicate that the extent to which the scope of regulation of the employment relations do not accord with reality varies from country to country and, within countries, from sector to sector. It is also evident that while some countries have responded by adjusting the scope of the legal regulation of the employment relationship, this has not occurred in all countries.

4. The Meeting notes that various country studies have greatly increased the pool of available information concerning the employment relationship and the extent to which dependent workers have ceased to be protected by labour and employment legislation. In order to enhance the understanding of the issues outlined in the previous paragraphs, the Office should be authorized to:

- (a) conduct additional appropriate studies;
- (b) synthesize the studies;
- (c) promote exchanges between the authors of the country reports and other experts and the representatives of the social partners, including the holding of an ILO Conference.

5. The Meeting agreed that countries should adopt or continue a national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners.

6. The Meeting further agreed that elements of a national policy might include but not be limited to:

- (a) providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
- (b) providing effective appropriate protection for workers;
- (c) combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
- (d) not interfering with genuine commercial or genuine independent contracting;
- (e) providing access to appropriate resolution mechanisms to determine the status of workers.

¹ ILO: *Report of the Meeting of Experts on Workers in Situations Needing Protection*, doc. MEWNP/2000/4(Rev.), appended to doc. GB.279/2, 279th Session, Geneva, Nov. 2000, para. 107.

7. The Meeting agrees that the ILO can play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection.

8. The actions taken by the ILO could include:

- (a) the adoption of instruments by the Conference including the adoption of a Convention and/or supplementary Recommendation;
- (b) providing technical cooperation and assistance and guidance to member countries concerning the development of appropriate national policies;
- (c) facilitating the collation and exchange of information concerning changes in employment relationships.

ANNEX 3

Employment by status in employment and sex, latest year

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Argentina	2000	Total	8 261.7	72.3	26.4	1.2	0.1
		Men	4 942.0	69.6	29.6	0.7	0.1
		Women	3 319.8	76.4	21.7	1.8	0.1
Australia	2001	Total	9 123.9	86.4	13.1	0.5	0.0
		Men	5 093.1	83.6	16.0	0.4	0.0
		Women	4 030.9	89.9	9.4	0.7	0.0
Austria	2001	Total	3 940.3	87.2	10.4	2.4	0.0
		Men	2 218.6	86.5	12.1	1.4	0.0
		Women	1 721.7	88.2	8.2	3.7	0.0
Bangladesh	2000	Total	51 764.0	12.6	35.3	33.8	18.3
		Men	32 369.0	15.2	49.8	10.1	24.9
		Women	19 395.0	8.3	11.0	73.2	7.4
Belgium	1999	Total	3 847.6	82.1	14.7	3.2	0.0
		Men	2 201.6	80.7	18.5	0.8	0.0
		Women	1 645.9	84.1	9.5	6.4	0.0
Bolivia	2000	Total	2 096.0	49.7	42.2	7.8	0.4
		Men	1 171.1	54.7	39.5	5.2	0.7
		Women	924.9	43.3	45.5	11.1	0.1
Botswana	2000	Total	483.4	69.7	13.2	17.1	0.0
		Men	269.4	71.2	11.9	16.9	0.0
		Women	214.0	67.9	14.7	17.4	0.0
Brazil	2000	Total	65 629.9	66.6	26.4	7.1	0.0
Bulgaria	2001	Total	2 735.5	86.4	12.0	1.1	0.5
		Men	1 453.1	83.4	15.3	0.7	0.6
		Women	1 282.4	89.9	8.1	1.6	0.4
Canada	2001	Total	15 076.8	84.7	15.1	0.2	0.0
		Men	8 109.7	81.2	18.7	0.1	0.0
		Women	6 967.1	88.8	10.9	0.3	0.0
Chile	1997	Total	5 257.5	71.3	26.2	2.5	0.0
China ^{2,3}	1999	Total	705 860.0	42.0	58.0	...	0.0
Colombia	2001	Total	16 497.6	49.3	44.8	5.9	0.0
		Men	9 950.1	47.4	47.5	5.1	0.0
		Women	6 547.5	52.2	40.7	7.1	0.0
Costa Rica	2001	Total	1 552.9	68.8	28.3	2.9	0.0
		Men	1 013.0	67.5	29.9	2.5	0.0
		Women	539.9	71.3	25.1	3.6	0.0

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Croatia	2001	Total	1 469.5	75.7	19.5	4.8	0.0
		Men	818.9	73.0	24.5	2.4	0.0
		Women	650.6	79.1	13.1	7.8	0.0
Cyprus	2001	Total	303.2	73.8	20.0	3.1	3.1
		Men	181.0	67.0	26.8	1.0	5.2
		Women	122.2	83.9	9.8	6.3	0.0
Czech Republic	2001	Total	4 750.0	84.0	14.5	0.6	0.9
		Men	2 687.0	80.1	18.6	0.2	1.1
		Women	2 063.0	89.1	9.2	1.1	0.7
Denmark	2001	Total	2 725.1	91.2	8.8	0.0	0.0
		Men	1 456.3	87.7	12.3	0.0	0.0
		Women	1 268.9	95.1	4.9	0.0	0.0
Dominican Republic	1997	Total	2 652.0	52.3	42.7	5.0	0.0
		Men	1 891.4	47.1	47.6	5.3	0.0
		Women	760.6	65.4	30.6	4.0	0.0
Ecuador	2001	Total	3 673.2	59.4	33.9	6.7	0.0
		Men	2 211.7	62.4	33.2	4.4	0.0
		Women	1 461.6	54.9	34.9	10.2	0.0
Egypt	2000	Total	17 203.3	59.9	28.5	11.5	0.0
		Men	13 958.5	60.6	31.3	8.2	0.0
		Women	3 244.8	57.2	16.8	26.0	0.0
El Salvador	1999	Total	2 274.7	60.2	30.9	8.4	0.5
		Men	1 349.1	64.3	26.7	8.2	0.8
		Women	925.6	54.2	37.0	8.6	0.2
Estonia	2001	Total	577.7	91.7	7.4	0.8	0.0
		Men	293.9	89.0	10.2	0.8	0.0
		Women	283.8	94.5	4.6	0.9	0.0
Finland	2001	Total	2 388.0	86.3	12.3	0.5	0.9
		Men	1 261.0	81.9	15.9	0.6	1.7
		Women	1 127.0	91.1	8.4	0.4	0.0
France	2000	Total	23 375.0	89.6	10.6	0.0	0.0
		Men	12 837.0	86.9	13.4	0.0	0.0
		Women	10 538.0	92.9	7.2	0.0	0.0
Georgia	2001	Total	1 877.6	43.2	24.0	31.4	1.4
		Men	966.6	42.9	32.2	23.2	1.7
		Women	911.0	43.5	15.3	40.2	1.0
Germany	2001	Total	36 816.0	88.9	9.9	1.2	0.0
		Men	20 629.0	86.8	12.7	0.5	0.0
		Women	16 187.0	91.6	6.3	2.1	0.0
Greece	2001	Total	3 917.5	60.2	31.6	8.2	0.0
		Men	2 431.4	57.9	37.9	4.2	0.0
		Women	1 486.1	64.0	21.3	14.7	0.0

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Honduras	1999	Total	2 299.0	46.8	39.7	13.0	0.5
		Men	1 472.1	48.1	39.1	12.2	0.6
		Women	826.9	136.3	40.9	14.3	0.3
Hungary	2001	Total	3 859.5	85.4	12.7	0.7	1.2
		Men	2 130.6	81.8	16.1	0.4	1.7
		Women	1 728.9	89.8	8.6	1.0	0.6
Iceland	2001	Total	159.0	83.1	16.5	0.3	0.0
		Men	85.0	77.1	22.6	0.4	0.0
		Women	74.0	90.3	9.5	0.3	0.0
India ^{2,4}	2000	Total	396 800.0	47.2	52.8	...	0.0
		Men	273 900.0	48.5	51.5	0.0	0.0
		Women	122 900.0	44.4	55.6	0.0	0.0
Indonesia	2000	Total	89 837.7	32.8	47.0	20.1	0.0
Ireland	2001	Total	1 716.5	81.9	17.0	1.1	0.0
		Men	1 013.9	75.0	24.3	0.8	0.0
		Women	702.5	92.0	6.5	1.5	0.0
Israel	2001	Total	2 270.5	86.6	10.8	0.5	2.1
		Men	1 236.2	82.5	15.2	0.2	2.0
		Women	1 034.3	91.5	5.5	0.7	2.2
Italy	2001	Total	21 634.0	72.3	22.5	4.2	1.1
		Men	13 574.0	68.6	27.2	3.0	1.1
		Women	8 060.0	78.4	14.5	6.0	1.0
Jamaica	1998	Total	954.3	59.0	38.2	2.2	0.5
		Men	553.7	54.3	43.8	1.3	0.6
		Women	400.6	65.5	30.5	3.4	0.5
Japan	2001	Total	64 120.0	83.7	10.8	5.1	0.4
		Men	37 830.0	84.6	13.4	1.6	0.4
		Women	26 290.0	82.5	7.2	10.1	0.4
Korea, Republic of	2000	Total	21 061.0	62.4	28.5	9.1	0.0
		Men	12 353.0	63.5	34.7	1.8	0.0
		Women	8 707.0	60.8	19.7	19.5	0.0
Latvia	2001	Total	963.4	85.1	10.3	4.5	0.1
		Men	489.8	83.1	12.6	4.2	0.1
		Women	473.6	87.2	7.9	4.9	0.1
Lithuania	2001	Total	1 460.6	81.4	15.4	3.1	0.0
		Men	725.2	77.7	19.5	2.8	0.0
		Women	735.4	85.0	11.5	3.5	0.0
Macau, China	2001	Total	202.8	89.3	9.4	1.4	0.0
		Men	106.7	86.3	13.6	0.2	0.0
		Women	96.1	92.5	4.7	2.8	0.0
Maldives	2000	Total	86.2	23.8	51.6	2.0	22.6
		Men	57.4	21.3	59.4	1.3	18.1
		Women	28.9	28.8	36.2	3.4	31.6

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Mexico	2001	Total	39 004.3	62.7	28.5	8.7	0.0
		Men	25 747.9	62.3	30.9	6.8	0.0
		Women	13 256.4	63.6	23.9	12.5	0.0
Moldova, Rep. of	2001	Total	1 499.0	60.0	31.6	7.8	0.7
		Men	736.5	61.0	33.4	4.7	0.8
		Women	762.5	59.0	29.8	10.7	0.5
Netherlands	2001	Total	7 865.0	89.0	10.4	0.6	0.0
		Men	4 460.0	87.6	12.2	0.2	0.0
		Women	3 405.0	90.8	8.1	1.1	0.0
Netherlands Antilles	2000	Total	52.2	87.8	9.0	0.5	2.7
		Men	27.3	84.0	13.2	0.1	2.7
		Women	24.9	92.0	4.3	1.0	2.7
New Zealand	2001	Total	1 823.4	80.1	19.0	0.9	0.0
		Men	993.9	75.2	24.2	0.6	0.0
		Women	829.5	86.0	12.8	1.2	0.0
Norway	2001	Total	2 278.0	92.5	6.8	0.4	0.4
		Men	1 214.0	90.4	9.0	0.2	0.3
		Women	1 064.0	94.9	4.2	0.5	0.4
Pakistan	2000	Total	36 847.0	35.6	43.0	21.4	0.0
		Men	31 688.0	36.0	47.3	16.7	0.0
		Women	5 159.0	33.1	16.8	50.1	0.0
Panama	1999	Total	961.4	66.8	30.6	2.6	0.0
		Men	638.0	61.6	35.5	2.9	0.0
		Women	323.4	77.0	20.9	2.1	0.0
Peru	2001	Total	7 619.9	43.7	43.1	7.7	5.5
		Men	4 232.6	52.1	42.2	4.7	1.1
		Women	3 387.3	33.2	44.1	11.5	11.1
Philippines	2001	Total	30 085.0	49.0	37.4	13.6	0.0
Poland	2001	Total	14 207.0	72.0	22.8	5.2	0.0
		Men	7 797.0	70.1	25.9	4.0	0.0
		Women	6 409.0	74.3	19.0	6.8	0.0
Portugal	2001	Total	4 999.8	73.1	24.1	2.1	0.7
		Men	2 744.9	71.9	26.4	1.1	0.6
		Women	2 254.9	74.6	21.3	3.2	0.9
Puerto Rico	2001	Total	1 150.0	86.0	13.5	0.4	0.0
		Men	661.0	81.2	18.6	0.2	0.0
		Women	489.0	92.6	6.3	1.0	0.0
Romania	2001	Total	10 696.9	55.7	24.9	19.1	0.3
		Men	5 719.4	57.6	31.7	10.4	0.3
		Women	4 977.6	53.6	17.0	29.1	0.2

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Russian Federation	1999	Total	60 408.0	92.6	5.3	0.2	1.9
		Men	31 524.0	91.6	6.0	0.2	2.2
		Women	28 884.0	93.8	4.5	0.2	1.5
San Marino	1999	Total	18.7	82.6	13.7	0.2	3.5
		Men	11.3	80.2	15.3	0.1	4.4
		Women	7.4	86.4	11.2	0.3	2.2
Singapore	2001	Total	2 046.7	86.1	12.9	0.9	0.0
		Men	1 148.7	81.6	18.1	0.3	0.0
		Women	898.0	92.0	6.4	1.7	0.0
Slovakia	2001	Total	2 123.7	91.5	8.2	0.1	0.1
		Men	1 145.8	88.6	11.3	0.1	0.0
		Women	977.9	94.9	4.7	0.2	0.2
Slovenia	2001	Total	914.0	82.9	11.8	5.3	0.0
		Men	497.0	80.3	15.9	3.8	0.0
		Women	417.0	86.1	7.0	7.0	0.0
Spain	2001	Total	15 945.6	80.2	17.2	1.9	0.7
		Men	10 029.1	78.1	20.1	1.0	0.8
		Women	5 916.4	83.7	12.4	3.3	0.6
Sri Lanka	1995	Total	5 316.0	62.4	28.7	8.9	0.0
		Men	3 661.0	60.0	34.3	5.7	0.0
		Women	1 655.0	67.6	16.2	16.2	0.0
Sweden	2001	Total	4 239.0	90.0	9.7	0.3	0.0
		Men	2 203.0	85.9	13.8	0.3	0.0
		Women	2 036.0	94.4	5.2	0.4	0.0
Switzerland	2000	Total	3 910.0	87.6	10.6	1.9	0.0
		Men	2 267.0	86.6	12.1	1.3	0.0
		Women	1 643.0	88.9	8.5	2.6	0.0
Thailand	2000	Total	33 001.0	39.6	33.5	26.9	0.0
		Men	18 165.0	40.2	43.3	16.4	0.0
		Women	14 836.0	38.8	21.4	39.8	0.0
Trinidad and Tobago	1999	Total	489.4	76.4	20.8	1.8	1.0
		Men	310.1	74.7	23.3	0.8	1.1
		Women	179.3	79.4	16.4	3.5	0.8
Turkey	2001	Total	20 367.0	48.6	30.2	21.2	0.0
		Men	14 904.0	53.6	36.2	10.2	0.0
		Women	5 461.0	35.1	13.5	51.3	0.0
Ukraine	2001	Total	20 238.1	89.3	9.5	1.3	0.0
		Men	10 374.7	89.5	9.7	0.8	0.0
		Women	9 863.4	89.1	9.2	1.7	0.0
United Kingdom	2001	Total	28 225.4	88.4	11.2	0.3	0.0
		Men	15 562.5	84.7	15.1	0.2	0.0
		Women	12 662.9	93.0	6.5	0.5	0.0

Country or territory ¹	Latest available year	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
United States	2001	Total	135 073.0	92.6	7.3	0.1	0.0
		Men	72 080.0	91.5	8.4	0.1	0.0
		Women	62 992.0	93.9	5.9	0.1	0.0
Uruguay	2001	Total	1 076.2	71.2	27.4	1.4	0.0
		Men	617.7	67.8	31.6	0.6	0.0
		Women	458.5	75.8	21.8	2.4	0.0
West Bank and Gaza Strip	2001	Total	507.9	62.2	28.6	9.2	0.0
		Men	429.7	61.9	32.2	6.0	0.0
		Women	78.2	63.9	8.8	27.3	0.0
Yemen	1999	Total	3 621.7	41.6	33.2	0.3	24.9
		Men	2 731.6	50.7	36.2	0.3	12.8
		Women	890.1	13.8	24.0	0.3	61.9

... Not available. ¹ In alphabetical order. ² "Contributing family workers" are included with "Employers and own-account workers". ³ Calculated by the ILO on the basis of statistics in table 1-5 of *China Labour Statistical Yearbook 2002* (Beijing, China, Statistics Press). ⁴ Based on tables 3.2.3 and 3.2.8 of *Manpower Profile India: Yearbook 2001* (New Delhi, Insitute of Applied Manpower Research, 2001).

Sources: ILO: LABORSTA and Key Indicators of the Labour Market (KILM), 2001 and 2002.

Note on changes in structure of status in employment during the 1990s

Among the 75 countries or territories for which statistics are presented in this table, 60 have provided statistics that can be used to describe whether or not these statistical changes in the distribution of the employed population across these broad groups have taken place during the 1990s. For 21 of these countries such changes represent a shift of at least 5 percentage points for one of the groups for either men or women or both. Several patterns can be observed:

- (i) Two groups of countries have experienced a significant decrease in the share of "employees" and an increase in the share of "own-account workers": (a) countries in Latin America such as Colombia, Panama and Peru; and (b) some transition countries such as Estonia, Romania and Slovenia. (The decrease in the share of "employees" was from a much higher level in the latter group.)
- (ii) There has been a significant decline in the share of "contributing family workers" in Bangladesh, Pakistan, the Philippines and Thailand, with corresponding increases in "own-account workers" in the former country and in "employees" in the latter three.
- (iii) Significant increases in the share of "employees" have also taken place in OECD countries such as Greece, Ireland, Japan, Mexico and Norway with corresponding reductions in the share of "own-account workers".
- (iv) In certain countries, for example the Czech Republic, Hungary, Israel and the Russian Federation, the significant increase in the share of "employees" has been accompanied mainly by a decrease in "members of producers' cooperatives".