

# Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Cotton, Elizabeth (2010) Contract & agency labour: beyond self-regulation? Working Paper.  
Middlesex University. . [Monograph]

Published version (with publisher's formatting)

This version is available at: <https://eprints.mdx.ac.uk/6898/>

## Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

[eprints@mdx.ac.uk](mailto:eprints@mdx.ac.uk)

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>



**Middlesex  
University**

**Middlesex University  
Business School London**

**Discussion Paper Series:**

**Human Resource Management**

**Contract & Agency Labour: Beyond self-regulation?**

**Elizabeth Cotton**

**No 134**

**March 2010**

Middlesex University Business School  
Hendon Campus, The Burroughs, London, NW4 4BT

# **Contract & Agency Labour: Beyond self-regulation?**

## **Elizabeth Cotton**

Middlesex University Business School  
Dept of Human Resource Management  
Hendon Campus, The Burroughs  
London NW4 4BT  
Email: E.Cotton@mdx.ac.uk

## **Introduction**

This working paper comes out of a seminar held at Middlesex University Business School in January 2010, part of an ESRC funded series looking at the future of regulation of the employment relationship. The seminar focussed on the issue of precarious work and current European and international regulatory approaches. The seminar looked in some detail at the work of national and global trade unions in their attempts to improve working conditions for precarious workers.

Speakers were Aranya Pakaphat (ICEM), Kirill Buketov (IUF), Jenny Holdcroft (IMF), Keith Ewing (Kings College London), Richard Hyman, Rebecca Gumbrell-McCormick (Birkbeck) and Richard Croucher and Elizabeth Cotton, both from Middlesex University Business School.

One of the key challenges for tackling the issue of precarious work relates to the research deficit that currently exists. The overall purpose of this seminar, and the series in general is to promote research, particularly collaborative work between different organisations and universities. The current recession underlines the importance of this work, with precarious workers particularly vulnerable to job loss and general lack of regulatory protections.

## **The difficulty of articulation**

How to talk about this diverse and complex phenomenon is the first problem we face. There is no accepted terminology and there are thousands of forms of working arrangements that fall under the general term of 'precarious work'. This is not simply a problem for researchers and academics, but a problem for policy makers, regulators and trade unions. If we cannot conceptualise the changes that are taking place in the organisation of work, then we will struggle to formulate responses, strategies and regulatory mechanisms. This problem of articulation has been a long standing one at international level with the ILO's own attempts to define 'contract work' failing after several decades of discussion.

Externalisation is a broad term that is useful in encapsulating the change that is taking place, signifying the distance that is placed between employer and the employee in the shift towards indirect employment. Externalisation here means the trend of obtaining labour from outside of a corporation's boundaries, linked to the strategy of outsourcing non-core functions. A second term used is triangulation, meaning third party involvement in the supply and management of labour. Both of these definitions are helpful in describing the general movement that is taking place and also in framing the problem of regulating work where it is not obvious how to distribute employer responsibilities.

Precarious work is a term that is widely used to incorporate a wide range of work forms, such as temporary agency work to homeworking. Although not a precise definition it is generally understood to incorporate internationally recognisable work arrangements such as on call/daily hire, homeworking, self-employment, temporary agency work, probationary periods, student traineeships and fixed term temporary contracts.

A term which reflects the strategic direction of many multinational corporations comes from the UNILEVER case study presented at the workshop, 'Hindustanisation', referring to the trend towards use of contract and agency labour replacing permanent jobs, in this case in UNILEVER's operations in India.

This difficulty in naming what is happening exists at national and international levels. At national level the example was given of unions in Colombia, where when initial research was initiated there were no existing terms for precarious work. Unions and researchers initially used the term 'contratistas', using the same word for the contractors and the contract workers. Because of the confusion this caused alternative words were tried, with agreement reached on 'trabajadores tercerizados' and 'tercerizacion', or 'third party contracting' simply defined as when an activity is transferred to another company and ceases to be carried out by direct company employees. This definition, although probably too simple for current purposes at the time was adequate because it allowed researchers and unions to explore the various types of contract and employment relations that exist in Colombia.

At international level the problems are multiplied with little consensus about working arrangements between countries and sectors. Global unions have had to compromise in terms of precision in order to find terms that can be recognized and used at regional and international levels. The International Metalworkers Federation (IMF), for example, uses the term 'precarious work' because it is translatable and unites a broad range of phenomena. This process of

identifying employment trends and carrying out initial research by the global union federations (GUFs) has taken a period of seven to eight years. Prior to this it was common for unions to assume that the arrangement did not exist in their sectors, because of the low visibility of the problem, or that it was unique to their sectors or employers. In some cases unions even believed that it was illegal to organise contract and agency workers.

Another assumption that has been made is that this precariousness is restricted to developing countries. Research, including the work of Richard Hyman and Rebecca Gumbrell-McCormick presented at the workshop, indicates that it is widespread across Western Northern Europe, what they refer to as the ‘thirdworldisation’ of work in Europe. Examples given during the seminar included BMW’s Leipzig plant, where 30% of production workers are employed by agencies and not, therefore, covered by the same collective bargaining agreement, they cannot carry out industrial action against BMW, nor do they have representation on the supervisory board. This was described as having a corrosive undermining of standards, through establishing competition between workers for permanent or direct contracts of employment.

In many cases there is pay discrimination between permanent and precarious workers although it is important not to over generalise as many high skilled contractors are paid higher amounts. More importantly for employers than the rate of pay is the low level of legal protection that these workers receive, particularly in relation to flexibility. Flexibility is, of course, the most significant incentive for employers to use precarious work forms, because people can be effectively hired and fired at will.

Length of service varies enormously for precarious workers. In the Thai Industrial Gases (TIG) case presented at the seminar, contract workers had been working in the same plant for over ten years, whereas for agency workers in the UK, according to government statistics, 37% of assignments were for less than six weeks, 55% less than three months, 45% are for three months or more.

Richard and Rebecca’s research shows, unsurprisingly, that precarious work is linked to a lower unionisation rate. In the UK, 28% of permanent workers are unionised, but only 17% of temporary workers. In the ten European countries they are researching unionisation is low, in part explained by the pressure on precarious workers not to identify themselves as problematic but also in some countries due to the prevalence of women, ethnic minorities and migrant workers, and young people in precarious work, groups which represent a long standing organising challenge to unions. Precarious work arrangements naturally lead to a great deal of

insecurity, many changing their jobs regularly. This lack of workplace stability and also the lack of worker commitment to their job or sector impacts union capacity to use workplace organizing models, not least because of the financial impact that organising atypical workers has.

The costs however are not limited to trade unions. There are evidently costs to national governments, through the transfer of risk from employers to employees and then on to governments and welfare systems. The costs, for example, to governments in relation to loss of pension contributions and decline in workplace skills development should, and often is, quantified to identify the broader national and social costs of precarious work.

Although in many cases not financial, there are also costs to the companies that use precarious work arrangements. Probably the most researched area relates to health and safety, with demonstrable risks and costs to companies operating in dangerous sectors such as chemicals and mining. It is also increasingly an important part of raising leverage in negotiations with employers to argue the impact on the company in relation to productivity, quality and standards, retention of skilled workers and commitment of the workforce. Although not always quantifiable there are links between the use of precarious work forms and competitiveness of company operations.

## **Data and Research**

As a result of these difficulties in articulating what changes are taking place in work arrangements, there is a significant lack of research and comparative data. The ETUC estimates there are six million agency workers in the EU, 1.3 million alone estimated to be working in the UK. We know that internationally the use of contract and agency labour exists in every sector, from the electronics sector where between 80-90% of workers are defined as in precarious employment, to even the education sector (IMF 2008). Partly because of the diversity in categories/definitions but also because of the only recent creation of the phenomenon in some countries, there currently is no comprehensive or comparative data. If we look at the data below, collected as part of the process of developing the EU directive on Temporary Agency Work, we can see that even for this fairly clearly defined category in a region where labour statistics are not generally problematic, there are real data collection problems. Part of this is related to the newly legalised work arrangements in many European countries. In the recent 2009 Eurofound report on temporary agency work and collective bargaining, no country is wholly satisfied with their statistical accuracy or capacity to collect data.

## Temporary Agency Work 2007

Country	Number of TAWs 2007	Sector Revenue Euro Millions 2007	Perception of Data
UK	1,196,000	35,700	Inconsistent – the relevant ministry (BERR) thus commissioned a quantitative study of the sector in 2008.
Netherlands	233,000	11,300	Variable quality
Italy	594,744	6,290	Good: reliable data is provided by the Study Centre Observatory of Temporary Work (Osservatorio Centro Studi per il Lavoro Temporaneo), created by FORMATEMP and EBITEMPhat TAW operations have been permissible for only three years.
Denmark	20,600	1,038	Limited: reflects recent origin of TAW arrangement and growth through migrant labour.
Spain	160,000	3,733	Quite reliable, given formalities required for TAW contracting
Czech Republic	35000	153	Agencies are obliged to report data annually to the Ministry, or attract a fine of CZK 500,000; however, but only a third of all agencies complies. The requirement is not enforced partly because the Ministry cannot cope with current levels of data given the large number of agencies now operating.
Latvia			Not available; TAW is at a very early stage and official surveys do not differentiate it.
Bulgaria			None available as TAW is without statutory basis.

Source: European Foundation for the Improvement of Living and Working Conditions, Temporary agency work and collective bargaining in the EU, 2008

It is, however, both useful and necessary to attempt to put forward some quantitative measures. Initial findings of Richard and Rebecca's current research project offers us some broad quantification of precarious work.

### Indicators of 'atypical' and 'precarious' work: 10 countries

Co unt ry	P-T a	Temp a	TAW b	S-E c	EPL d 1 2 3		
SE	25. 1	17.5	1.0	6.4	2.9	4.5	1.6
DK	24. 1	8.7	1.2	4.5	1.5	3.9	1.4
DE	26. 0	14.6	1.6	6.1	2.7	3.8	1.8
AT	22. 6	8.9	1.4	6.8	2.4	3.3	1.5
NL	46. 8	18.1	2.5	8.7	3.1	3.0	1.2
FR	17. 2	14.4	2.1	5.8	2.5	2.1	3.6
IT	13. 6	13.2	0.6	17.3	1.8	4.9	2.1
BE	22. 1	8.6	2.3	9.0	1.7	4.1	2.6
UK	25. 5	5.8	5.0	10.2	1.1	2.9	0.4
IE	16. 8	7.3	1.3	10.7	1.6	2.4	0.6

- a) European Commission, *Employment in Europe 2008*. Data for 2007. P-T: based on national definitions. Temp = fixed-term contracts
- b) Vanselow, A. And Weinkopf, C. (2009) *Zeitarbeit in europäischen Ländern: Lehren für Deutschland?* Estimates for 2006.
- c) European Foundation, *Industrial Relations Developments in Europe 2008*. Self-employed persons not employing any employees, 2007.
- d) OECD, *Employment Outlook 2004*. Restrictiveness (index 0-6) of legislation regulating 1] individual dismissals, 2] collective redundancies, 3] fixed-term contracts.

Using this table, we can see that there are large variations in types of work arrangements across Western Europe. However, even where labour force surveys are used, different measures restrict our capacity for a comparative analysis. The example given was of two different questions used to measure part time work, “do you consider yourself a part time worker?” or “do you work more than 35 hours a week?”. The lowest figure for temporary work relates to the UK, which then raises the question what is understood as a ‘permanent’ contract. There are, in this case, distinct differences relating to rights and protections against dismissal of permanent workers which would reduce the number of workers in a country like the UK, with weak protections, categorised as temporary.

As a direct result of this problem we are now seeing a growth in independently commissioned research, significantly research carried out by national and international unions. In many cases union research will be the only source of reliable data about a particular sector or employer. This is reflected in the emphasis during the seminar on research commissioned by the Global Union Federations which has been an important first step in formulating strategies to address the growth in precarious work.

### **Importance of an international perspective**

The importance of taking an international perspective is related to the nature of the growth of precarious work and its regulation.

The majority of working people are not direct employees of multinational companies (MNCs), an estimated 1% of the world’s workforce of three billion people. However, a great number work indirectly for MNCs as suppliers and contractors. They are hugely influential in shaping employment relations both in relation to their role in promoting deregulation and weakening of labour protections through the demand for ‘flexibility’, but also as the principal users of contractors and employment agencies. For example, 70% of the workers used by Nestlé to manufacture, package and distribute products throughout the world are not directly employed by that company (Rossman and Greenfield, 2006). Although the trend is for MNCs to reduce direct employment, a trend observed in every sector and part of the world, they are major users of contractors and subcontractors. Therefore, the attitudes of MNCs towards contractors and suppliers is crucial to the situation of contract and agency workers, given their strategic potential to deepen the responsibilities of contractors and labour agencies, as part of the contracting process.

Secondly, there are established and important links between unions and MNCs, leverage that

does not exist for unions in relation to large sections of informal and precarious work. Unions, particularly global unions and unions located in headquarter companies, have leverage with principal companies which can be used to secure basic rights for contract workers. The experience of the global unions during the seminar points clearly to the importance of this access to and dialogue with employers such as UNILEVER, AngloAmerican and Linde AG.

The third reason why an international perspective is that many of the contractors and agencies are, themselves, multinational corporations.

***The top 20 private employment agencies, 2008***

Rank	Firm	Origin	Revenue (\$ million)
1	Adecco	Switzerland	31 068.93
2	Randstad	Netherlands	23 242.91
3	Manpower	United States	21 552.80
4	Allegis	United States	5 740.00
5	Kelly Services	United States	5 517.29
6	Goodwill Group	Japan	5 465.92
7	USG People	Netherlands	5 446.22
8	Hays	UK	4 994.57
9	Robert Half Int.	United States	4 600.55
10	Tempstaff	Japan	2 597.15
11	Volt Information Services	United States	2 427.32
12	Pasona	Japan	2 271.71
13	MPS Group	United States	2 222.30
14	Spherion	United States	2 189.16
15	Express Employment Professionals	United States	2 000.00
16	Synergie Group	France	1 624.95
17	Michael Page	United Kingdom	1 443.83
18	TrueBlue 2	United States	1 384.27
19	Monster	United States	1 343.63
20	CDI Corp.	United States	1 118.60

Source: ILO (2009) *Private employment agencies, temporary agency workers and their contribution to the labour market*. Geneva.

According to the ILO, the employment agency industry reached US\$441 billion turnover in

2007, with six countries controlling 80% of revenues: United States (28 per cent), United Kingdom (16 per cent), Japan (14 per cent), France (9 per cent), Germany (6 per cent) and the Netherlands (5 per cent). Over the last decade, the key growth market has been in Japan, expanding from a market size of US\$14.7 billion in 2000 to US\$43.3 billion in 2007.

The sheer size of the labour agency sector is an indicator of the resistance that regulation and reduction of precarious work will be faced with. Indeed, the problem is magnified when we understand that these MNCs are only the formal, visible part of labour contracting. A wide range of labour suppliers in the developing world constitute an often unseen but significant provider of labour. Often these intermediaries are linked to criminal activity. In most developing countries the issue of contract and agency labour blends into broader issues of informal work, bonded labour and child labour. This emphasises that in this case, official statistics are of limited use which has profound implications for the regulation of precarious work.

### **International & regional regulation**

The discussions about regulation throughout the seminar were cautious, with views ranging from relative optimism about the usability of some mechanisms, such as the OECD guidelines on multinational enterprises, but with more critical attitudes towards the regulation of temporary agency work at EU and international levels.

It is precisely the hidden and unclear nature of much precarious employment that makes the issue of legal strategies so difficult. In part because of the complexity of the nature of precarious work, and the difficulties in regulating an unclear employment relationship. This is in part due to the nature of the phenomenon, set up often as an express attempt to avoid legislation, particularly labour protections. It is important to note that many forms of contract and agency work are set up precisely to avoid the law, described by one speaker as a “seven headed monster“, recreating new forms of working contracts precisely to circumnavigate new and existing legislation. This is particularly evident in the use of ‘self-employed’ categories of workers or, as presented in the case of Colombia, the use of cooperatives with both systems effectively removing labour rights. There are, therefore, important barriers to the application of existing and even new regulation.

The other important limitation to legal applicability is that the development of precarious work arrangements is rapid. Changes and new forms of working arrangements happen quickly, compared to the slow process of establishing laws and standards. It has taken ten years for the European Directive on Temporary Agency Work to be concluded, during which time the

industry has multiplied several times over. There are also many parts of the world where legal systems are used to paralyse union activity, probably the most extreme examples being Botswana and Thailand where the law is used to conflate an already hostile employment relationship environment. Aranya Pakaphat's presentation about organising contract workers in the case of Linde in Thailand underlines this paralysing effect of taking labour issues through national legal systems.

This said there are important regulatory developments, particularly using the principle of non-discrimination between contract and permanent workers. This principle is central to many of the international and national legal cases underway to protect contract and agency workers.

The main regional and international regulatory tools that are appealed to in relation to precarious workers are:

- ILO Recommendation 198 on the Employment Relationship
- European Temporary Agency Workers Directive 2002
- European Posted Workers' Directive 1996
- ILO Convention 181 Private Employment Agencies Convention, 1997 and accompanying Recommendation (No. 188)
- OECD Guidelines for Multinational Enterprises and National Contact Points
- Health & Safety legislation
- International Framework Agreements (IFAs)
- ILO C98 the Right to Organise and Collective Bargaining Convention 1949 and ILO C87 Freedom of Association and Protection of the Right to Organise Convention 1948

The ILO's Recommendation 198 on the employment relationship is just a recommendation, with all the limitations this implies, however it is important in articulating an important barrier to regulation, which is identifying the employer and their relationship to employees.

The ILO's Convention 181 was an almost forgotten convention but was revived at the end of 2009 by the International Organisation of Employers (IOE) and the International Trade Union Congress (ITUC), promoting its ratification beyond the existing twenty signatories. It requires governments to "take necessary measures to ensure adequate protection" for agency workers and importantly for agencies to be officially registered.

International Framework Agreements (IFAs) are listed here with some trepidation. These are the international agreements signed by over seventy MNCs and trade unions, principally the Global Union Federations (GUFs). They are, in principle, an important way of extending

standards to contract and agency workers by applying fundamental principles through supply and production. Two good examples of this are the IKEA agreement with BWI and the Statoil agreement with ICEM. However, the clauses that relate to suppliers and contractors are weak and there have, in reality, been few developments to strengthen these clauses. Also, the agreements themselves are only as strong as their implementation and in most cases this relies on the capacity of representative unions to enforce them (Croucher & Cotton, 2009).

The European Temporary and Agency Workers Directive, broadly introduces the principle of equal treatment for temporary workers into European and national legislation. The principle is regarded as important in promoting social justice for agency workers, entitling them to some equal treatment with fixed contract equivalents. The principle however only applies to basic terms and conditions of employment, to include pay, working time, holidays. There is now recognition that this would need to include matters of redundancy and job security, in order to adequately implement the principle.

Keith Ewing described the process of negotiating this directive as characterized by political compromise. The UK played an important role in securing some level of derogation by states, introducing important limitations to the scope and application of the directive. In the case of the UK, the directive's implementation is delayed until 2011 5<sup>th</sup> December and it is conditional on the worker satisfying a minimum probation period of twelve weeks. This qualifying period was agreed by the TUC and CBI effectively reducing the regulatory impact to 45% of agency workers in the UK, based on current statistics about length of service of agency workers. Keith underlined that over half of the agency workers in this country will not be covered by the new directive. He also proposed that this would encourage employers to expand the practice of 'rotation' where specific jobs and, in the case of warehouse and distribution sites, the principal company, can be rotated every eleven weeks to avoid workers going beyond the qualifying period.

The point was made by a number of speakers that EU regulation has different impacts in different regulatory settings. A stark example of this is the EU's Posted Workers Directive, which explicitly makes use of different economic and regulatory employment relations systems. Participants raised examples, including Sweden where agency workers get paid in between contracts as an example of the potentially deregulatory effect on specific countries with high levels of protection. Although there is only limited data on cross boarder agency workers, there are a number of high profile examples of agencies being able to exploit lower social security costs to sell labour abroad. A documented example given was of French workers employed by

Luxembourg agencies to work in France, thus exploiting lower social costs.

At international level, the OECD guidelines, although with relatively weak language in the guidelines themselves, is a CSR mechanism of particular interest in regulating precarious work because of the recent role of the UK National Contact Point (NCP) in securing basic organising rights for UNILEVER workers in Pakistan.

An important aspect of regulation is the applicability of Health and Safety regulation which, in most countries and sectors, has universal application regardless of the employment status of workers. Health and Safety regulations have for a long time been used by unions to overcome restrictive organising climates and establish a presence in sectors or types of workers not normally covered by traditional trade union activity or collective bargaining. There is also an increasing body of research that links the use of contract and agency workers, to increased HSE accidents.

In the seminar discussions it was clear that there are some fundamental problems with taking a regulatory approach to precarious work through the employment relationship and existing contract law. The difficulty in relying on contractual law is that it is based on a clear contract of employment, with clearly identified parties. It is one of the characteristics of much precarious work, particularly cross border work, which makes it extremely difficult to establish who holds employers' responsibilities. This was underlined by Keith Ewing in the case of the UK where employment law covers working arrangements where there is an employment contract only, defined as a contract of service. However, in the absence of a clear definition of a contract of service, how this is established rests on the deliberation of courts. Court decisions on the issue of agency workers have not, he argued, been consistent with a 1997 court of appeal decision which accepted that an agency worker could be regarded as an employee of the agency undermined by the Brooke Street Bureau case where it was argued that an implied contract existed between agency workers and the principal company. This was followed by the case of the agency worker who was effectively dismissed by Greenwich Council, the user, after many years of service but the court was reluctant to imply the existence of a contract between the agency worker and client. A final and important case is that of a group of Polish workers hired by a Polish agency to work in the UK in the agricultural and hotel sectors. The terms of their contract stated expressly that they were not employees of either of the agency or the client rather that the workers were independent subcontractors. A number of these workers were fired by the agency, and who then submitted a legal claim for victimization because of their involvement in union activity. During this legal case and the subsequent appeal, the courts

were reluctant to rule against the written contracts of employment and use the implied or de facto contract. The Court of Appeal stated that the issue of balancing flexibility and business efficiency and the need for social protection for workers was too difficult to be addressed through the courts and was an issue that can only be addressed by parliament.

The other serious limit to the regulatory impact of legislation based on the employment contract is the mutable nature of precarious work. There is an increasing body of evidence that once a form of precarious work falls under existing or new legislation, the form can be changed. This is particularly evident in the increased use of the category of 'self-employed', because of the express exemption from legislation that this status enjoys.

An important implication for regulation relates to legislation around unfair dismissal and redundancies. For most precarious workers existing protections do not apply, as workers are rarely dismissed, rather their contracts are not renewed or working hours reduced to an unsustainable level. The lack of unfair dismissal protections is also a major contributor to blocking Freedom of Association and the right to bargain collectively in the case of precarious workers. Increasingly global unions are prioritising the development of stronger international regulation around unfair dismissals for this reason.

The ILO's Core conventions 87 and 98 are mentioned here because of the importance of Freedom of Association and collective bargaining in regulation to precarious work. Convention 98 has 160 out of 183 ratifications but in reality half the world's working population is not included because major countries such as USA, China, India, Korea, Mexico, Thailand and Canada have not ratified. In the *Celebration of the 60<sup>th</sup> anniversary of Convention No98 (2009)*, the ILO lists some important ways in which the conventions are routinely violated directly as a result of precarious work arrangements. These include:

- Lack of existence of employers' and workers' representatives to conduct collective negotiations
- Increase of non-wage or self-employed working arrangements
- Increase in cooperatives
- Transformation of employment contracts into civil or commercial service contracts
- Specific legal decisions where unions are denied the right to bargain collectively in subcontracting enterprises

The soft law track of international regulation has well-understood limitations both in terms of application and enforcement. Jenny Holdcroft, from the IMF, presented the case of the Korean Metal Workers Federation, which had taken up the case of dispatch workers and their right to

join a union. This was a long and complex case, submitted to the ILO's Committee on Freedom of Association (CFA). The basis of the complaint was that the Korean government failed to protect the trade union rights of subcontracted workers, on the grounds that the workers were not regularized after two years, they were dismissed for organizing their own trade union either by non-renewal of individual contracts or termination of service contract with the particular agency. In the case of South Korea specific legislation exists around the obstruction of business by third parties, where union activity can be restricted. In this case, industrial action can only take place by employees towards the employer. In the case of third party agency workers their employer is not the organization that owns or manages the physical workplace. In effect, agency workers have no right to take industrial action because of this distinction between who the employer is and who is responsible for the workplace. Despite the ILO ruling that the Korean government needed to amend this legislation, because of its limitations of Freedom of Association and collective bargaining, there has been no response from the government with an increased level of industrial conflict as a direct result of the treatment of contract workers during this period of recession.

### **Broader strategies**

The seminar had a heavy representation of trade unionists, because of the importance of trade union activity in the regulation of precarious work. Over the last seven to eight years the international bodies of trade unions, the Global Union Federations (GUFs) have carried out an increasing body of international solidarity work for precarious workers and affiliates trying to organise them. The research and campaigning that GUFs have been doing is important both in terms of getting this category of workers onto the agenda internationally and nationally and also for encouraging unions to respond to these developments.

Unions have key strategic choices such as whether to resist new contractual arrangements or whether to limit them. In most cases, there is a strategic choice over whether a union will organise precarious workers either into their existing structures or supporting the development of new ones. One of the key challenges to this is the difficulty in resisting the phenomenon without creating a resistance to the precarious workers themselves. Trade Union responses often include carrying out dedicated research and raising awareness amongst their existing membership about the importance of working with precarious workers. Many engage in campaigns, others involve governmental inspection systems. What is increasingly important, both in terms of strategy formulation and encouraging unions to tackle the issue is international exchange and contact between unions that are working in this area. This is evidently an important aspect of GUF campaigns, to encourage new thinking and promotion of organising

successes amongst affiliates to overcome the sometimes overwhelming belief that precarious workers cannot be organised.

Public sector unions are strategically important here in determining the scale and conditions under which contract and agency workers are employed. Often the attitude of public sector unions is pivotal in shaping changes in work organisation, because of the link between privatization of public services and establishment of precarious forms of work. In many parts of the world the culture of public sector unions differs from private sector unions, with different and sometimes non-existent approaches to recruitment and atypical workers.

### **Organising contract & agency workers**

Although many unions have been slow to organise precarious workers, we have seen a steady increase in their recruitment into unions over the last five years. In the main, in part in response to restrictive national legislation, precarious workers have organised into new trade union structures although there are some important exceptions to this. We saw the first 'non-regular' union in Japan only in 2004 and a number of small but important unions established in most parts of the world including Thailand, India, Peru, South Africa, Greece, France, Italy, Netherlands. This includes the formation of two contract worker unions, Sintrans and Sintrachaneme, in Colombia during 2009.

The Thai case study presented by Aranya Pakaphat was a reflection on the level of international intervention that has been needed to organise agency workers in the Thai context. Since 2006 ICEM affiliates in Thailand have been attempting to organise agency workers. Thai Industrial Gases (TIG), is a strategically important company owned by Linde AG, headquartered in Germany, with 1200 permanent workers and an estimated 400 agency workers. During 2008 the enterprise union, TIGLU, attempted to bargain on behalf of TIG's distribution workers and truck drivers a number of which had been dismissed for their union activity and refusal to sign new contracts of employment, initially with the large labour agency Adecco. TIG management refused to negotiate with TIGLU, and stated that the employer's responsibility lay with Adecco. During this period of dispute the contract with Adecco was terminated and the agency workers were signed up to an unknown agency which could be traced only to an address in a derelict building. In their campaign to get these workers reinstated TIGLU organised three strikes, carried out by permanent workers and their families. At international level the ICEM was in daily contact coordinating action and approaches to TIG and Linde AG, along with the German affiliate IG BCE. One of the difficulties Thai unions face in organising agency labour is that agencies and contractors are registered as service sector

organisations and, according to Thai labour law, their workforces cannot join existing industrial unions. This meant that the TIGLU had to make a difficult but strategic decision to organise contract workers into their existing structure, regardless of the law, rather than set up a new trade union specifically for agency workers which would leave them small and vulnerable. TIGLU also made the strategic decision to only negotiate with TIGLU directly, not accepting the company's position that they were not responsible for protecting the trade union rights of workers in their operations. Aranya emphasised that the campaign relied on the position of permanent workers in relation to protecting agency workers. In part due to longstanding education work within the union and the evident threat to permanent jobs, the union membership was fully in support of the campaign, with permanent workers and their families even taking over the picket lines during the three strikes.

### **Collective bargaining & dialogue with employers**

In many cases the gains for contract and agency workers come through collective bargaining and dialogue with employers. Precarious work can be regulated by collective bargaining or social dialogue, with principal companies, contractors and labour agencies, sectoral level, national level and at international level through the GUFs.

There is no comprehensive data on what gains have concretely been secured through bargaining, however there is an increasing body of evidence that unions are able to secure regulation of precarious work through bargaining and dialogue with employers. Areas for negotiation are common across different countries and sectors and include:

- Limit the number of contract and agency labour workers in the workplace
- Limit the categories of work, sectors, or types of jobs where contract and agency workers can be employed
- Limit the circumstances under which contract and agency workers can be employed e.g. replace permanent workers in the case of industrial action or dangerous jobs
- Set maximum time periods
- Extend existing collective agreements to apply to contract and agency workers
- Clarifications of the existence and nature of the employment relationship
- Equal pay, benefits and conditions
- Training and information provision
- Transition to permanent status

However, it should be noted that many trade unions are not effectively able to carry out their bargaining functions because of national regulatory contexts, hostile employers or employment relations systems or their own history. In reality, many of the world's unions have little or no experience of organising or collective bargaining. Obvious examples exist in the Russian speaking world, where trade unions are slowly moving from their function as welfare organisations and the many fragmented and politically divided enterprise unions of Asia and Latin America. This problem is conflated in the case of precarious and predominantly unorganised workers.

The seminar emphasized the importance of dialogue with employers, with particular reference to those MNCs where unions have existing relationships and leverage. In many parts of the world already weak unions are faced with the prospect of negotiating on behalf of precarious workers where collective bargaining has broadly been in decline both in terms of the number of working people covered by them and also the capacity to get employers to the bargaining table. Elizabeth Cotton's case study about work of Sintracarbon in Colombia is a sharp example of this, where only an estimated 5% of working people are covered by a CBA and there has been an atrophy of collective bargaining. This relates, in part to Colombian law which allows an automatic renewal of existing CBAs, in the absence of a formal request for negotiations (Código Sustantivo del Trabajo, Article 477). Each time that an agreement is due to be renewed unions have to make difficult decisions about their position in relation to the employer but also in relation to the potential threats to the negotiating team. In the case of Sintracarbon, a union representing 3500 workers in the Cerrejon mine, the largest open cast coal mine in the world, the union had missed several years of negotiations during the 1990s and was increasingly worried that if they did not reinitiate dialogue with Cerrejon management that membership would simply not accept the current terms and conditions. This was a remarkably painful dilemma for all unions who on the one side had to be able to bargain for membership in order to retain members, but faced often overwhelming difficulties in doing so.

The ICEM's work in Colombia started through education programmes in the late 1990s, focusing on health and safety in the mining sector and education methods. By 2004 the education work focused on establishing and supporting a formal process of social dialogue with seven MNCs and the ICEM's six affiliates, including Sintracarbon. The process involved setting up quarterly meetings with employers and unions to try to secure agreement and joint activities on core and agreed issues. In the first phase of the process it was agreed to focus on core issues of HSE, security for unionists and contract and agency labour. The meetings were facilitated by ICEM leadership, including representatives of key affiliates from headquarter

countries. Through the secretariat there was weekly contact with local, regional and international management of the companies involved, to ensure their sustained participation in the process. A key part of the process was to commission research on the bargaining issues, which included carrying out the first dedicated research on the scale and situation of contract and agency labour in ICEM sectors. The research revealed a previously unknown situation that the Cerrejon mine directly employs only 50% of the workers within the site, with over 139 contractors supplying services and labour. As a direct result of this process of research, social dialogue and contacts made with the Ministry of Social Protection (MSP), Sintracarbon was able to secure joint audits with the MSP of the key labour suppliers and contractors at the mine. Management of the relationship with these contractors was improved, including the instigation of monthly meetings with the contractors and team responsible within Cerrejon for managing them. Most importantly, by 2009 two new unions, Sintrans and Sintrachaneme, were created for contract workers after a sustained six month national and international campaign.

### **Campaigning**

Where dialogue with employers has not been secured unions often use campaigning as a way of raising their leverage. The seminar had a detailed analysis by Kirill Buketov from the IUF, of their ongoing Casual Tea campaign. The campaign originates in many years of attempts by national and international unions to establish dialogue and bargaining with UNILEVER, one of the largest food production companies in the world with an estimated impact on seven million jobs and responsible for 12% of global tea production. UNILEVER has approximately 500,000 employees, but by 2000 300,000 were on permanent contracts, reduced to 140,000 by 2008. The IUF estimates that over 20,000 permanent jobs are eliminated every year through subcontracting, outsourcing and agency labours.

The company policy in relation to unions since the 1970s has been rigidly against any form of contact, stating that industrial relations issues are a matter for local producers and managers and instructing managers to avoid coordinated bargaining. However, because of the importance of UNILEVER, particularly in relation to its strategy to replace permanent workers, IUF made the decision to initiate a new campaign to bring UNILEVER into some level of dialogue with unions. The campaign that then developed was centrally planned and resourced, focussing on the deteriorating conditions and victimisation for non-permanent workers.

One difficulty in campaigning against UNILEVER, which has over 1600 products, is that it is not itself a product. The decision therefore was made to focus on a branded and recognizable product, Lipton Tea. The campaign then took up the case of the Pakistan Lipton workers,

where eight hundred workers, only twenty two of which were permanent employees, were facing serious problems of pay and conditions as well as victimisation for union activity. The Lipton campaign focussed on this dispute, with the IUF helping the Pakistan workers to organise their own campaign and recruit workers into a newly established union. In 2009, after a year of sustained campaigning activity UNILEVER agreed to settle the Pakistan case and agreed to create permanent jobs for those workers part of the campaign committee (120 workers). The campaign makes use of a wide range of mechanisms including the OECD Guidelines, social network sites, shareholder action and research, with the strategically important support of the Dutch trade union FNV Bondgenoten. The campaign was strongly supported by UNILEVER workers in the Netherlands in response to the potential threat of 'Hindustanisation' of employment relations.

Kirill pointed out that in some sense this is not a campaign, because it is a permanent feature of the IUF's work. However, in a situation where a company resists any attempts to meet with unions or precarious workers the campaigning element has proved to be important in bringing a company into dialogue with unions.

### **Role of education**

In all the cases presented at the seminar the experience of trade union education has proved to be significant and polyvalent, in its capacity to empower and give confidence to participants to carry out the often impossible task of organising. As Richard Croucher's presentation highlighted, international trade union education is essentially the bringing together of trade unionists to exchange their experience, something that is vital in the case of precarious work where new and innovative strategies need to be employed. Education here is linked to research, with emphasis on research that empowers workers to carry out trade union activity and understand how their employers actually work and what leverage they have to approach them. Research and education in these specific senses are linked by introducing methods that help people learn through their own enquiry. This is particularly relevant to precarious work, where there is a clear lack of reliable data and commonly trade unions themselves do not know the scope and conditions of precarious workers in their workplaces and sectors.

### **Key discussion points**

A question that helps us frame the discussion about precarious work, raised by Richard Hyman, is whether the existing industrial model works in the regulation of precarious work. In particular, whether employment relations can be regulated on the basis of contract law and whether workers can organise and bargain collectively.

What we know is that the organising model not a panacea, and that there are a number of existing and new barriers to organising precarious workers, not least the size of the labour agency industry and the strategic decisions made by key MNCs to externalise the employment relationship. Organising is traditionally workplace based, a model not appropriate to many forms of precarious work, and there are conflicting interests at points between precarious and permanent workers. Organising also takes resources, intensified in this case as the costs of organising increase at the same time that permanent and paying membership declines. As precarious worker membership is still relatively small and therefore not able to push this agenda through existing union structures it is likely that organising will not take place in the absence of genuine political commitment of union leadership. These key issues have to be addressed both practically and politically by unions in order for organising to successfully take place.

A similar dilemma exists in relation to collective bargaining, where there is a general weakening of collective bargaining and coverage. Although we are seeing provisions for precarious workers being put on the bargaining agenda, and some gains in this regard, this is a fragile area of work.

A proposal, consistent with a number of the speakers, was a focus on sector wide collective agreements, and national agreements where they exist. This is particularly important in the case of public sector agreements, the restructuring and privatization of which is a key driver of the reduction of permanent jobs.

A proposal made by Keith Ewing in connection to this was to focus regulation not on the employment relationship, often difficult to establish in any meaningful way, but rather to focus on regulation of the job, through sectoral level bargaining. Collective agreements, potentially, could set pay and conditions for specific areas of work, which apply regardless of contract of employment. This would then move the basis of employment rights away from the employment contract, onto the nature of the job and the universal rights that workers have, regardless of who the employer is. In the case of abuses of rights what would be significant in this case is not who the employer is, rather who has denied specific workers those rights. That is, the proposal to regulate the rights and duties of specific jobs, rather than the regulation of the employment relationship itself.

This proposal, although not fully explored during the seminar, resonates with the experience at international level, where fundamental rights to organise and bargain collectively have proved

to be more important in protecting precarious workers than regulation specifically designed to do this.

The seminar, and this paper, ends by highlighting the research deficit that exists on the subject of precarious work. Whether a regulatory approach is taken, as we saw in the OECD guidelines, or a broader organising approach as we saw in Colombia and Thailand, there is a key role and need for research. This is an important educational tool for trade unions, providing an important opportunity to review employment trends and make contact with precarious workers who often fall outside of traditional membership. Research is also an essential part of policy and strategy formation for policy makers, trade unions and companies themselves. The appeal was made to the participating organizations to look for alliances and joint projects to inform and promote the regulation of precarious work.

## References

Blanpain, R. and Colucci, M. (eds) (2004), 'The Globalization of Labour Standards: The soft law track', *Bulletin of Comparative Labour Relations* 52.

Blum, R. (2006), 'Dynamics of restructuring in the automotive industry', *Labour Education* 2006/1 (142) 47-53.

Blyth, A. (2003), 'Corporate responsibility at Danone', *Ethical Business* 17 December.

Croucher, R. & Cotton, E. (2009), *Global Unions Global Business: Global Union Federations and International Business*. London: Middlesex University Press. Distributed by Libri ([www.libripublishing.co.uk](http://www.libripublishing.co.uk)).

Garver, P., Buketov, K., Chong, H., Sosa Martinez, B. (2007), 'Global labor organizing in theory and practice', *Labour Studies Journal* 32: 236-256.

Horn Z. (2009) No Cushion to Fall Back On: The Global Economic Crisis and Geneva: WIEGO

Hyman, R. and Gumbrell-McCormick, R. (2009) "Trade Unions, Politics and Parties: Is a New Configuration Possible?" *Transfer (upcoming)*.

Hyman, R. (2005), 'Shifting dynamics in international trade unionism', *Labor History* 46(2): 137-154.

ILO (2009), *Global Employment Trends – update May 2009*. Geneva: ILO.

ILO (2009) Trade Union Strategies towards Global Production Chains: *International Journal of Labour Research Vol 1 Issue 1*

ILO (2009) *The Financial and Economic Crisis: A Decent Work Response*. Geneva: ILO

ILO (2009) *Celebration of the 60<sup>th</sup> anniversary of Convention No. 98: The right to organize and collective bargaining in the twenty-first century*. Geneva: ILO

ILO (2009) *Private employment agencies, temporary agency workers and their contribution to the labour market*. Geneva: ILO

ILO (2009), *Recovering from the crisis: a global jobs pact*. ILC89 partial 2009-07-U115-1-En.

ILO, (2007), *The Employment Relationship: an annotated guide to the ILO Recommendation 198* Geneva: ILO.

ILO (2007) *Guide to private employment agencies: Regulation, monitoring and enforcement*. Geneva: ILO

IMF (2007) *Survey on Changing Employment Practices and Precarious Work*. Geneva: IMF

IUF (2005) *Outsourcing & Casualization in the Food & Beverage Industry: The Threat to Workers and Unions & Union Strategies for Fighting Back: An Organizing Tool for Unionists*. Geneva: IUF

Koçer, R.G. and Fransen L. (2009) "Codes of Conduct and the Promise of a Change of Climate in Worker Organization" in *European Journal of Industrial Relations* 15; 237

Kristensen P.H. and Zeitlin J. (2005) *Local Players in Global Games: The Strategic Constitution of a Multinational Corporation*. Oxford: Oxford University Press

Morgan G. and Kristensen P.H. (2006) "The contested space of multinationals: Varieties of institutionalism, varieties of capitalism" in *Human Relations* Volume 59(11): 1467–1490

Mosley L. and Uno S. (2007) "Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights" in *Comparative Political Studies* Volume 40 Number 8 923-948

Russo, J. (1999), 'Strategic campaigns and international collective bargaining: the case of the IBT, FIET and Royal Ahold NV', *Labor Studies Journal* 24L 23-37.

Schömann, I., Sobczak, A., Voss, E., Wilke, P. (2008), *Codes of Conduct and International Framework Agreements: new forms of governance at company level* Dublin: European Foundation for the Improvement of Living and Working Conditions.

White, A. (2006), *Making a World of Difference: Global Unions at Work* Belgium: International Federation of Journalists.

Wick, I. (2004), *Workers' tool or PR ploy? A guide to codes of international labour practice* Bonn: Friedrich Ebert Stiftung.

Wills, J. (2004), 'Organising in the global economy: the Accor- IUF trade union rights

agreement', in Fitzgerald, I., Stirling, J. (eds), *European Works Councils—pessimism of the intellect, optimism of the will* London: Routledge: 211-223.

Wills, J. (2002), 'Bargaining for the space to organise in the global economy. A review of the Accor-IUF union rights agreement', *Review of International Political Economy* 9: 675-700.