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SUBJECT: Representation of external staff in the EPO

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for information)

SUMMARY

This document is submitted by the staff representatives via the President of the European Patent Office, in accordance with Article 9(2.2)(b) of the Administrative Council's rules of procedure (see CA/D 8/06).

In CA/94/09 the Central Staff Committee submitted that external staff working in the EPO is subject to national labour law. This concerns in particular the national regulations for occupational health and representation rights. With the present document we submit two legal opinions that describes in more detail the representation rights that derive from German national law.

TABLE OF CONTENTS

Subject		Page
I.	INTRODUCTION	1
II.	RIGHTS ACCORDED TO EXTERNAL STAFF UNDER GERMAN LAW	1
III.	RIGHTS AND OBLIGATIONS ACCORDED TO THE STAFF COMMITTEE UNDER GERMAN LAW	2
IV.	CLAIMS OF THE STAFF COMMITTEE	3
ANNEX 1	LEGAL OPINION SENAY OKYAY, DATED 10 FEB, 2009, SUBMITTED IN COMPLAINT ILO-AT 5.2566	4
ANNEX 2	LEGAL OPINION ALEXANDER HOLTZ, DATED 15 SEP 2009, SUBMITTED BY THE EPO MUNICH STAFF COMMITTEE TO THE PRESIDENT ON 17 SEP 2009	10
ANNEX 3	CLAIMS OF THE CENTRAL STAFF COMMITTEE, SUBMITTED TO THE PRESIDENT ON 17 SEP 2009	32

I. INTRODUCTION

The Office increasingly relies on external staff for work done inside the Office. At the time of writing (Sept. 2009) around 1000 staff members were listed as external in the EPO phone book. This number does not include i.e. cleaning and canteen staff as well as staff of the moving company.

Discussions between the administration and the staff representation about the use of external staff go back many years. The latest efforts took place in a "Working Group on non-permanent employment" in 2003 – 2005 and resulted in a report and recommendations to the consultation group of VP4.

Follow-up has, however, been limited.

Despite urgent requests from the Staff Committee, the administration has thus far not informed and consulted the General Advisory Committee on its policies with respect to external staff.

A complaint dealing with this matter is currently pending before the ILO Administrative Tribunal as AT 5-2566. In this complaint the administration argued that "*Because the defendant enjoys personnel and organizational sovereignty, it is at its discretion to decide <u>whether</u> national law applies and if so <u>to what extent</u>*" (point 10 of the surrejoinder, dated 23 July 2009).

The Staff Committee respectfully disagrees.

II. RIGHTS ACCORDED TO EXTERNAL STAFF UNDER GERMAN LAW

International organizations like the EPO indeed have a large degree of freedom in setting their employment conditions. For permanent staff of the EPO and various forms of contract staff (Euro contracts, Vice-President and Principle Directors) these conditions are set by the Service Regulations.

However, in the absence of internal regulations, for all other staff working on the EPO premises the national law of the host country applies. This is the case both for staff that has a contract directly with the Office and for staff that has a contract with a third party but is actually employed at the Office.

III. RIGHTS AND OBLIGATIONS ACCORDED TO THE STAFF COMMITTEE UNDER GERMAN LAW

In Germany the most important body of law is in the “Arbeitnehmerüberlassungs-gesetz” (AÜG). For the AÜG to apply it is irrelevant how the contract in question is labelled; what matters is the nature of the employment relations.

The AÜG accords also to external staff a right to be represented in the receiving organization. These include a right to be heard and supported by the statutory staff representation of the receiving organization, and a right to vote in the elections of said statutory staff representation.

Not only for the external staff rights can be derived from the AÜG, the AÜG equally bestows right, and obligations, on the staff *representation* of the organization in which staff are employed. Concerning the obligations, German law obliges the statutory staff representation of the receiving organization to hear the grievances of external employees and, if it considers these to be justified, must induce the (external) employer to remedy them.

Amongst the rights according to the staff representation of the receiving organization is the right to be informed about the number of external workers, the beginning and planned length of their employment, and the right to be involved in their recruitment and development.

A short overview of the rights of the Staff Committee to be informed about and to represent external staff can be found in Annex 1. This legal opinion, written by Rechtsanwältin Senay Okyay, has been submitted in the context of ILO-AT complaint AT 5-2566 in February 2009. Copies have also been submitted to the “Social partnership contact group”, in particular to the Vice-President of DG4 and the a.i. Vice-President of DG5, both of whom are members of this group. At the date of writing the administration had not yet reacted to the document.

A more detailed overview of the rights of the Staff Committee to represent external staff can be found in Annex 2. This legal opinion, written by Rechtsanwalt Alexander Holtz, has been submitted to the President. Copies have also been submitted to the “Social partnership contact group”, in particular to the Vice-President of DG4 and the a.i. Vice-President of DG5, both of whom are members of this group. At the date of writing the administration had not yet reacted to the document.

IV. CLAIMS OF THE STAFF COMMITTEE

Based on the above analysis of German national law, the Munich Staff Committee has submitted 20 claims concerning its rights to represent external staff, and the rights of the external staff to be represented, to the administration. These claims can be found in Annex 3 hereto.

Legal opinions on the situation in the other host countries are in preparation and will be presented in due time.

ANNEX 1 LEGAL OPINION SENAY OKYAY, DATED 10 FEB, 2009, SUBMITTED IN COMPLAINT ILO-AT 5.2566

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AT 5 – 2566

Lawyer's opinion relating to the rights and obligations of the Staff Committee when temporary workers are employed pursuant to the German Law on Temporary Employment (AÜG)

I. Applicable law regarding temporary workers at the European Patent Office

The appellee must be concurred with in that in fact no contractual relationship exists between the temporary workers and the Organisation, but only between the hiring-out firm and the European Patent Organisation as the hiring establishment. The hirer out, for its part, has a contractual relationship with the temporary worker.

The employment of temporary workers and resulting rights of the temporary workers and obligations of the hirer out as well as the hirer are, however, expressly regulated by German law in the Law on Temporary Employment (hereinafter referred to as the AÜG). In other respects it must be noted that the legal nature of the contractual relationship cannot be changed by the parties referring to it as a service contract. The contractual relationships and resulting legal assessment must be examined. The Infrastructure and Services staff are employed via third-party companies, and this triangular relationship must at any rate be classified as the hiring out of employees as temporary workers.

By employing temporary workers and in the absence of international regulations that state otherwise, the European Patent Organisation is submitting to the statutory protective regulations governing workers under national German law. This statutory protection is not subject to any contrary agreement by the parties, and any agreement between the hiring-out firm and the European Patent Organisation as the hiring establishment which had as its subject-matter the exclusion of applicability of the AÜG would be unlawful. Accordingly the European Patent Organisation must de jure observe the statutory protective regulations governing workers in respect of the hiring out of employees as temporary workers.

It must be noted in this context that the Staff Committee at the Office is to be equated with the works council of a commercial enterprise. Both the Staff Committee and the works council are bodies which represent the interests of workers and are vested with co-determination rights and obligations.

In the present case, Section 14 AÜG (Annex 8) is highly significant, both in terms of the rights of the temporary workers and in terms of the rights of the body representing workers' interests in the hiring establishment.

II. Rights of temporary workers vis-à-vis the hiring establishment pursuant to the AÜG

In Section 14(2), sentence 3 AÜG (Annex 8), the German legislator refers to the German Works Council Constitution Act (hereinafter referred to as BetrVG) with regard to the rights of temporary workers, and in particular to the provisions of Sections 81, 82(1) and Sections 84 to 86 BetrVG (Annex 9). The Works Council Constitution Act is the German legislation that regulates the relationship between the employer and the body representing the interests of workers in the respective establishment, and especially the latter's rights and obligations in respect of participation.

These provisions accord the temporary workers comprehensive rights vis-à-vis the hiring establishment and also grant them the opportunity of consulting the works council of the hiring establishment in asserting their claims (see Section 81(4), final sentence and Section 84(1), sentence 2 – Annex 9).

By reason of the applicability of these provisions in the hiring establishment, it is incumbent upon the works council of the hirer to also attend to the interests of temporary workers, and in particular to pursue their complaints and protect them from arbitrary action on the part of the hirer. This obligation is explicitly regulated in Section 85 BetrVG (Annex 9):

> ***(1) The works council shall hear employees' grievances and, if it considers these to be justified, shall induce the employer to remedy them.***

Compliance with this statutory obligation is, however, being denied to the appellee's Staff Committee by the President of the Office. The non-observance of this provision constitutes an unacceptable breach of established law and violates the rights of both the temporary workers and the Staff Committee alike.
The lack of specific internal regulations and, in particular, the fact that the ServRegs are not applicable to temporary workers may neither deprive the temporary workers at the European Patent Organisation of legal remedy, nor may it divest the Staff Committee of its original rights and preclude it from exercising joint responsibility and co-determination over what is no longer an irrelevant proportion of the staff. The rights and obligations of the Staff Committee are thus being circumvented in respect of the support accorded to temporary workers.

III. Rights of the Staff Committee vis-à-vis the employer pursuant to the AÜG

The appellants' comprehensive rights of worker participation in respect of temporary workers result directly from Section 14(3), sentence 1 AÜG (Annex 8) in conjunction with Section 99 BetrVG (Annex 10). According to prevailing opinion, this reference constitutes a reference to a cause in law. The German legislator intended to clarify in Section 14(3), sentence 1 AÜG that the temporary integration of temporary workers is subject to co-determination.

In accordance with Section 14(3), sentence 1 AÜG (Annex 8) in conjunction with Section 99 BetrVG (Annex 10), the works council of the hirer must be notified in detail of the recruitment of temporary workers, their number and the beginning and planned length of their respective period of employment by the hirer prior to their recruitment and must be involved in the decision. It is also essential for an appreciation of the resulting impact on business processes that details regarding the envisaged post, the type of work to be

performed and the envisaged daily and weekly working hours of the individual temporary workers are communicated. Furthermore, the hirer must inform the Staff Committee of the requisite qualifications, at least specifying whether the temporary worker possesses specific qualifications or whether he or she is an unskilled worker.

This information is required with a view to assessing the resulting impact on the permanent staff and in any event serves to protect the interests of the existing staff. The number of temporary workers, their occupation and employment criteria are important considerations in terms of the interests of the permanent staff, while the actual character of the temporary worker is also of some significance, for instance with regard to security risks should he or she be inadequately qualified, communication problems in the case of a person not conversant with particular languages, training and supervision effort, personal and professional aptitude for the envisaged post, and so on.

The right of worker participation under Section 99 BetrVG (Annex 10) does not depend on the length of the planned temporary hire period. The right of the hirer's works council to worker participation is triggered by any recruitment, no matter how short its duration. The works council must also be involved in any decision to extend the period of employment in the hiring establishment. It makes no difference in respect of the interests protected under Section 99 BetrVG (Annex 10) as to whether the same temporary worker is employed beyond the period originally envisaged or whether another temporary worker is employed under a new contract instead.

The documents to be presented to the staff representation pursuant to Section 14(3), sentence 1 AÜG (Annex 8) in conjunction with Section 99(1), sentence 1, 2nd half-sentence BetrVG (Annex 10) include the contract governing the hiring out of an employee as a temporary worker as a matter of principle. Section 14(3), sentence 2 AÜG (Annex 8) in particular argues in favour of the duty of presentation. According to this, the hirer is obliged to present to the staff representation a written statement from the hirer out on the existence of a temporary hire permit. However, in accordance with Section 12(1), sentence 2 AÜG (Annex 11), this statement by the hirer out constitutes part of the contract governing the hiring out of an employee as a temporary worker. It is only through presentation of this contract that the staff representation is able to obtain an accurate picture of the extent of the recruitment of temporary workers and thus of its impact on the establishment in question. With a view to the principle of equal treatment, the main terms and conditions of employment of comparable workers employed by the hirer must also be specified in the contract governing the hiring out of an employee as a temporary worker.

The denial of these rights of co-determination and worker participation of the Staff Committee thus infringes the law and is therefore unlawful. The appellee's Staff Committee is the body responsible for representing the interests of both the permanent

staff and temporary workers alike, and must be placed in a position in which it can satisfy the requirements of necessary staff representation by the European Patent Organisation.

IV. Responsibility of the Staff Committee for temporary workers pursuant to the ServRegs

Under Article 34(1) ServRegs, it is the duty of the Staff Committee to represent the interests of the staff and maintain suitable contacts between the competent administrative authorities and the staff.

The term “staff” in Article 34(1) ServRegs is to be construed broadly in the present case, and not merely restricted to permanent and contract staff. This term must also cover those employees who enjoy special protection on the basis of statutory provisions and are integrated in the Office to such an extent that the Staff Committee must also act with regard to this group of persons by reason of legal standardisations. The temporary workers are de facto staff within the meaning of the ServRegs. The Staff Committee must accordingly be placed in a position in which it can represent the interests of the temporary workers.

V. Convening of the joint committee on the basis of the regulations of the AÜG

Under Article 36(1)(a) ServRegs, the Staff Committee, at the request of the President of the Office or on its own initiative, makes suggestions relating to the organisation and working of departments or the collective interests of the whole or part of the staff.
Under Article 36(1)(b), it examines any problems of a general nature relating to the interpretation and implementation of the Service Regulations or any Implementing Rules thereto and, where appropriate, requires the President of the Office to arrange for such difficulties to be examined by the relevant joint committee.

Although temporary workers are not permanent staff of the appellee, and no contractual relationship exists between the temporary worker[s] and the European Patent Organisation, the Law on Temporary Employment (AÜG) must be applied in respect of the temporary workers. This law determines that the temporary workers are entitled to the right to complain about grievances and the like to the staff representation in the hiring establishment. Temporary workers are employed across several locations, so that the general conditions and impact of this type of employment relationship must be examined by the committee in order to ensure that the obligations and rights of the Staff Committee are regulated in a consistent manner. The denial of the convening of the joint committee also breaches the rights of the staff representation as regards this aspect.

It is now common practice in the European Patent Organisation that jobs are increasingly performed by temporary workers. This may be consistent with financial regulations and fall within the discretion of the President. However it cannot be accepted by the appellants that, as a result of the complete exclusion of rights of participation of the Staff Committee in respect of temporary workers, the original rights of the staff representation are undermined for a considerable section of the staff, without even considering it necessary to convene the joint committee with a view to regulating the rights and obligations of the Staff Committee in respect of circumstances affecting temporary workers.

Şenay Okyay
Lawyer

ANNEX 2 LEGAL OPINION ALEXANDER HOLTZ, DATED 15 SEP 2009, SUBMITTED BY THE EPO MUNICH STAFF COMMITTEE TO THE PRESIDENT ON 17 SEP 2009

LEGAL OPINION

concerning the Staff Committee's rights of participation and the rights of participation of external staff employed at the European Patent Office as hired-out temporary workers or under employment or service contracts with third parties.

I. European Patent Organisation

Under Article 5(1) EPC, the European Patent Organisation is a separate legal personality in international law. Its status is not "innate", owing to the absence of the features required under international law (a nation, a national territory and a national government authority), but is "merely" conferred by the founding states.

The European Patent Organisation has legal personality by reason of the act of conferment by the Contracting States enshrined in Article 5 EPC (*Benkard/Schäfer*, "EPÜ", 2002, Article 5, marginal note 2f.). On the basis of this act of conferment the sovereignty of the Organisation, like that of all other international organisations, is subject to the intrinsic bounds of general principles of law (*Ullrich*, "Das Dienstrecht der Internationalen Organisationen", 80, with further references inter alia to ECHR appeal No. 26083/94, judgment of 18 February 1999 in *Waite and Kennedy v. Germany*, and European Commission of Human Rights, appeal No. 38817/97, judgment of 9 September 1998 in *Lenzing AG v. the United Kingdom*). In international law too, legal personalities cannot confer more rights than they themselves possess (*Ullrich*, loc. cit.). In the act of conferment the individual Contracting States are therefore bound by their own national constitution and by international law. The general legal principles applicable have to be drawn from the concurring constitutional principles.

Under Article 5(2) EPC, the European Patent Organisation has, for the performance of its duties, the legal capacity and capacity to act required nationally in the Contracting States as if it were a legal person under the national law of the Contracting State.

Under Article 9(1) EPC, the European Patent Organisation's contractual liability is governed by the law applicable to the contract.

Under Article 9(2), first and second sentences, EPC, non-contractual liability is governed by the legal system of the Federal Republic of Germany or by the legal system of the host country of the Organisation's branch or sub-office.

Quasi-contractual and/or other statutory obligations are therefore subject to the law applicable to the contract or to the legal system of the relevant host country.

Where acts by the EPO vis-à-vis third parties are subject to contractual and/or statutory liability, these will be governed by the law of contract applicable under private international law or by the national law of the host country.

II. Private international law

1. The provisions of German private international law are applicable to cases that have a connection with different legal systems (Article 3 Introductory Act to the German Civil Code [*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB]).

   In view of the numerous legal systems in existence throughout the world, it is always necessary to check which law governs a specific case. If the facts and circumstances to be assessed have a connection with another legal system, it will obviously be necessary to determine the law to be applied. In so far as doubts regarding the applicability of domestic private international law to cases relating to a multinational organisation are concerned, it should be noted that, according to the unanimous view of the literature, the requirement of Article 3 EGBGB that there be a "connection with a foreign country" has been interpreted too narrowly in many respects and is therefore misleading (*Staudinger/Rainer Hausmann* (2003) on Article 3 EGBGB, margin number 2, with reference to "MünchKomm"/*Sonnenberger* Article 3 EGBGB, margin number 2, and *vHoffmann*, "IPR", Article 1, margin number 15 ff). Instead, domestic private international law is applicable to any case to be considered in the home country, irrespective of the national or international nature of the case (*Staudinger/Rainer Hausmann* (2003), loc. cit., margin number 5, with reference to *Keller/Siehr*; *Neuhaus* "Grundbegriffe" 104, *Kegel/Schurig*, "IPR" Article 1 III, *vHoffmann*, "IPR", Article 1, margin number 22, "MünchKomm"/*Sonnenberger*, loc. cit.). The point is solely to establish the national system of private law applicable to the case to be considered. Establishing the legal system most closely connected to the case is in line with Savigny's understanding of a system of universal rules to avoid a conflict of laws.

2. With regard to "employment relationships", the choice of law shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable in the absence of choice. In the absence of choice, the law applicable shall be the law of the country in which the employee habitually carries out his work in performance of the contract (Article 30(1) and (2) EGBGB).

Article 30 EGBGB also covers employment relationships without a contractual basis (report Bundestag printed paper 10/503, 58 – see also *Heldrich* in *Palandt* on Article 30 EGBGB, margin number 2). At this stage it is thus irrelevant whether or not there is a contract between the external staff member and the European Patent Organisation. What counts is the connection that exists, by virtue of actual employment, with the post in the employing entity's establishment.

3. Article 30 EGBGB is not applicable to collective labour law. This is governed by the national Works Council Constitution Act (*Betriebsverfassungsgesetz* – BetrVG), which has its basis in the principle of territoriality. The principle of territoriality is internationally recognised. Cornish has the following to say on the subject: *"It (territoriality) is an idea accepted as much in common law as in civilian jurisdictions, but its ramifications vary across systems and between individual countries. One of its manifestations concerns the question, which law is to be applied to particular acts of alleged infringement, and where may such questions be tried?"* (*Cornish*, GRUR-Int. 1996, 285). The German Works Council Constitution Act is thus applicable to all establishments of domestic or foreign enterprises situated in Germany, irrespective of the nationality of the employer and employee and irrespective of the labour regulations concerned (BAG [*Bundesarbeitsgericht* – Federal Labour Court), NZA (Neue Zeitschrift für Arbeitsrecht) 00, 1119 – BAG 22 March 2000 AP (Arbeitsrechtliche Praxis) No. 8 on Article 14 of the German Act on the provision of temporary personnel (*Arbeitnehmerüberlassungsgesetz* – AÜG) and also, in summary, *Fitting*, 24th edn., on Article 1 BetrVG, margin number 13). The same applies to the Staff Representation Act (BAG NZA 97, 493 – see also *Heldrich*, loc. cit., margin number 3a). The nationality of the employees is also irrelevant. It is immaterial whether the parties in the employment relationship have agreed foreign law (BAG 10 September 1977 – AP No. 13 on private international law, Arbeitsrecht GK-Kraft/Frenzen and *Fitting*, loc. cit., margin number 15).

   Employment in a foreign embassy with its seat in the Federal Republic of Germany is not extraterritorial (BAG NZA 05, 1117, 1119). Accordingly, employment in a multinational organisation with its seat in Germany is not extraterritorial employment but employment in Germany.

4. In the case of conflict-of-laws rules, which exist de facto if another legal system has no provisions whatsoever covering the case to be considered and to this extent no positive rights and corresponding duties exist, Article 34 EGBGB provides that mandatory rules of German law for the protection of overriding public interests, in particular those relating to economic and social policy, will prevail. These include both Article 7 of the Posted Workers Act (AEntG) and the regulations on industrial co-determination (Groβfeld/Johannemann, IPRax, 94, 272), although some argue

that Article 34 EGBGB does not need to be applied since the right of industrial co-determination is already binding in international law by virtue of the territoriality principle (see *Heldrich*, loc. cit., on Article 34, margin number 3b).

The concept of a directly applicable law (*loi d'application immédiate*) which belongs to procedural law (*lex fori*) and prevails in substantive law (*lex causae*) was reflected in Article 7(2) of the Rome Convention on the law applicable to contractual obligations; that paragraph was transposed into national law as Article 34 EGBGB. In the Federal Republic alone, Germany therefore has a rule for a unilateral and special jurisdictional basis for its own provisions of substantive law with a mandatory international scope of application. Such mandatory regulatory provisions are also referred to as domestic statutory intervention requirements. Swiss law, for example, also has a general proviso for the application of its municipal legal system (Article 18 of the Swiss Act on Private International Law), and Italy also has this proviso (Article 17 of the Italian Act on Private International Law).

III. Immunities and privileges

1. Article 8 EPC refers to privileges and immunities that are enjoyed by the Organisation, including its employees, and that are necessary for the performance of their duties.

2. The Protocol on Privileges and Immunities applies in the Federal Republic of Germany, having been ratified by Germany (BGBl. II, No. 32, 26 June 1976).

   Under Article 3(1), the Organisation has immunity from jurisdiction and execution within the scope of its official activities (exceptions see (a)-(c)).

   Official activities are understood to be the administrative activities and technical operation as set out in the Convention – in so far as these are strictly necessary (see Article 3(4)).

   Under Article 19(1), second sentence, privileges and immunities are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.

   Under Article 20(1), in order to facilitate the proper administration of justice, the Organisation shall co-operate at all times with the competent authorities to ensure the observance of police regulations and other similar national legislation and to prevent any abuse.

The content and scope of the Protocol on Privileges and Immunities are defined by Article 3(1) – immunity from jurisdiction and execution – with the proviso that, espite privileges and immunities, national legislation must be observed as long as official activities are not thereby impeded.

Under Article 9 EPC, the Organisation is subject to the law applicable to the contract or to the law of the host country, and thus essentially recognises its legal system.

3. In Decision CA/D 14/85 of 17 January 1986 (conditions of employment for auxiliary staff) the Administrative Council confirms (in the introduction) that the intention was to have recourse to auxiliary staff only in order to overcome temporary problems and after all organisational solutions or possibilities had been carefully studied. The intention was normally to recruit permanent staff in accordance with the Service Regulations and to make only limited use of contracts of employment. Against this background – the norm being permanent staff and contract staff (Euro contract), the exception being the fixed-term employment of an external staff member, the Administrative Council (see point 5) decided that conditions of employment should be governed by the employment and social welfare legislation in force at the place of employment, and that this should also apply to matters of recourse to the national courts.

By its practice and by virtue of its competence to make rules, the Administrative Council, as the Organisation's highest body, confirmed the unrestricted validity of national law in the host country for the occasional, temporary recruitment of external staff and the waiver of privileges and immunities in relation to jurisdiction.

The Organisation thus makes it clear that the privileges and immunities attaching to the activities of staff who are not permanent staff or contract staff (Euro contract) are waived in favour of the provisions of national labour law.

The employment conditions for auxiliary staff were applied by the European Patent Organisation with due regard for national law. This rule was applied only temporarily, however, not least because of the difficulties of defining the bounds (*Ullrich*, loc. cit., 49/50).

IV. German Act on the provision of temporary personnel (AÜG)

1. Principle: an employment relationship, and thus a contract, exists only between the hirer-out and the temporary worker (Article 611 ff German Civil Code [BGB]) on the one hand and between the hirer-out and the hirer on the basis of the temporary employment contract (Article 12 AÜG) on the other hand.

2. The legal relationship between the hirer and the temporary worker is governed by the Act on the provision of temporary personnel which, in some areas, provides for derogations (a) with regard to equality with the hirer's staff and also (b) validity in relation to the hirer – also involving the staff representation body in the hirer's establishment (c). In detail:

   (a) equal payment – equal treatment (Article 3(1), point 3 AÜG) with the legal consequences of Articles 9, point 2, and 10(4) AÜG – claim to equality on the hirer-out but based on the hirer's working conditions. There is also a claim on the hirer-out in this regard for the provision of information (Article 13 AÜG).

   (b) Rights of participation and co-determination

   In the hirer's establishment the temporary worker is entitled to vote in elections for the staff representation body (deduced from "not ... eligible for election", i.e. cannot be elected) (Article 14(2), first sentence, AÜG).

   The temporary worker is entitled to consult the staff representation body in the hirer's establishment and to take part in works assemblies (Article 14(2), third sentence, AÜG).

   Articles 81, 82(1) and 84-86 BetrVG apply to the temporary worker employed in the hirer's establishment.

   (c) Before a temporary worker is recruited, the works council of the hiring establishment must be involved and the document to be delivered to the hirer by the hirer-out pursuant to Article 12(1), second sentence, AÜG must be presented (Article 14(3), first sentence, AÜG; Article 99 BetrVG). Reference is also made to Article 14(3), third sentence, AÜG in conjunction with Article 12(2) AÜG.

3. A departure from the principle of **equal payment – equal treatment**, whereby the temporary worker's working conditions for the period of temporary employment must be regulated in the temporary employment contract between the hirer-out and the temporary worker in a manner that is not disadvantageous by comparison with the main conditions applicable in the hirer's establishment for a comparable employee, may be permitted on the basis of a collective agreement (Article 9, point 2). In this case that will be the collective framework agreement on temporary employment between the Bundesverband Zeitarbeit (BZA) and the German Trade Union Federation (DGB), including the mining, chemicals and energy union IG BCE, the food, beverages and catering union NGG, the metalworkers' union IG Metall, the education and science union GEW, the united services union Ver.di, the construction union IGBau, the railway workers' union Transnet, and the police union GdP. Otherwise the principle of equality applies, and this to be asserted vis-à-vis the hirer-out (Article 10(4) AÜG) provided that there is no reference in the contract between the hirer-out and the temporary worker to an individual contract, thus making the less favourable working conditions of the collective agreement an integral part of the individual contractual agreement.

   Rules concerning remuneration and other working conditions, eg protection against unfair dismissal or leave, are there to protect the individual, moreover, although the literature does not agree on whether they are mandatory at an international level (for a summary of the whole issue: *Thüsing*, "AÜG", 2nd edn., introduction, margin number 60 ff). Generally speaking, the case law exercises caution in the recognition of internationally mandatory rules and overcomes that caution only where at least common weal interests and not just purely individual ones are concerned.

4. **Rights of participation and co-determination at the hiring establishment**

   Article 14 AÜG regulates the temporary worker's status in terms of employee representation rights in the hirer's establishment and the status of the staff representation body in the hirer's establishment in relation to the temporary workers employed there, and hence the partial application of the Works Council Constitution Act (BetrVG).

   Rights of participation must be construed as rights for the protection of employees. Employees need this protection because they are personally and economically dependent on the employer. Rights of participation limit the employer's sole competence to decide. Rights of co-determination and participation in the employer's decisions are established. The AÜG, in Article 14, thus overcomes the unnatural division of employer competences between the hirer-out and the hirer that exists in the case of temporary work, since the temporary worker is also affected by collective arrangements in the hirer's establishment.

Rights of participation are thus construed as common weal interests in the context of political and social structure, and thus as indispensable aims of state policy. The principle of a social state (Articles 20(1) and 28(1) of the Basic Law for the Federal Republic of Germany [GG]) on the one hand and the duty of the state to protect the fundamental rights of employees (in particular Articles 1(1), 2(1) and 12(1) GG) on the other hand are the basis for both the authority and the obligation to safeguard employees' rights of participation (GK – *Wiese*, introduction margin number 48, and "Erfurter Kommentar" – *Dieterich* GG, introduction, margin number 38 ff). At the same time, the right of employee representation is important for the concept of democracy and the fundamental social principle whereby powers of control and management are not exercised solely by one individual manager or one managing body but with the participation of the parties concerned ("Münchener Handbuch ArbR" – *v. Hoyningen-Huene,* Article 297, margin number 1). Restrictions resulting from this are justified by the principle of a social state and by restrictions on individual property rights for the benefit of society, and are compatible with the constitution (*Richardi*, introduction, margin number 51 ff). For a summary of the whole issue see also *Fitting*, "BetrVG", 24th edn., on Article 1, preamble.

The German Works Council Constitution Act (BetrVG) also has to be seen in the context of European and international arrangements including:

ILO Convention No. 135 of 23 June 1971

Directive 2002/14/EC of 11 March 2002

(a) Temporary workers' rights of participation

They are entitled to vote in elections (Article 7, second sentence, BetrVG in conjunction with Article 14(2), first sentence, AÜG) provided that the temporary employment relationship exceeds 3 months.

Temporary workers have other employee representation rights under Article 14(2), second and third sentences, AÜG in conjunction with Articles 81, 82(1) and 84-86 BetrVG. This list is, without doubt, not exhaustive. There are further possible rights of participation beyond these (Bundestag printed paper 9/847, 9). Article 14(2), second and third sentences, AÜG encompasses more or less all the individual rights that can be meaningfully exercised only in the hirer's establishment (*Thüsing*, loc. cit., on Article 14, margin number 72). These are:

- consultation of the staff representation body and participation in assemblies without loss of pay (Article 39(3) BetrVG)

- the hirer's obligation to inform and provide explanations concerning duties, responsibility, the nature of the work and how it fits into the operations, including instructions on health and safety measures, planning and the impact of operations on the post, etc. (see Article 81 BetrVG) and the temporary worker's right to be heard by and to request explanations from the hirer in all operational matters concerning him (Article 82(1) BetrVG)

- the temporary worker's right to file complaints against the hirer if he feels that he has been discriminated against or treated unfairly or otherwise placed at a disadvantage, including the right to processing of the complaint and to information thereon and redress therefor (Article 84 BetrVG)

- processing of the complaint by the staff representation body, the latter having the right to induce the hirer to remedy grievances. In the event of differences of opinion between the staff representation body and the hirer, a decision by the conciliation committee as to whether the complaint is justified has to be sought and the staff representation body informed thereof (Article 85 BetrVG)

- other possibilities, in so far as they are regulated in the establishment in question, in particular the replacement of the conciliation committee by a complaints panel in the establishment (Article 86 BetrVG).

(b) Rights of participation of the hirer's staff representation body in relation to temporary workers

It is very widely held that Article 75 BetrVG (principles for the treatment of employees) applies to temporary workers in the hirer's establishment. According to these principles, any form of discrimination is banned and the staff representation body has a watching brief to ensure that the persons employed in the establishment are treated justly, fairly and reasonably, in particular that employees are protected and encouraged.

The staff representation body is entitled to perform its general duties as set out in Article 80(1) BetrVG in respect of temporary workers. For the implementation of its general duties the staff representation body has, vis-à-vis the hirer, comprehensive rights to information and the presentation of documents (Article 80(2) BetrVG). These obligations in respect of information

and presentation also extend to the employment of persons who are not in an employer-employee relationship with the hirer; for example, the obligations cover personal data, the number of temporary workers and other employees working in the establishment (employment and service contracts or self-employed persons), the duration of the temporary employment both past and proposed, their qualifications and the nature and location of their deployment.

The staff representation body in the hirer's establishment is also both entitled and obliged to discharge all the social matters set out in Article 87 BetrVG in respect of temporary workers. These are, for example, issues relating to the house rules, working hours, the drawing-up of general leave principles, the introduction and use of technical equipment for monitoring performance, etc.

The staff representation body is also responsible for all personnel matters in relation to temporary workers (expressly, Bundestag printed paper 9/847, 8, in relation to BAG AP No. 2 on Article 99 BetrVG 1972). Temporary workers must accordingly be treated as employees in the matter of the co-determination rights set out in Article 99 BetrVG (*Thüsing*, loc. cit., on Article 14, margin number 147). In detail:

- where staff planning relates to the recruitment of temporary workers, this affects the staff representation body's rights of co-determination (Article 92 BetrVG). The hirer must inform the staff representation body promptly and fully of relevant planning documents or data concerning present and future staffing requirements (*Boemke/Lembke* on Article 14 AÜG, margin number 133; *Schüren/Hamann*, margin number 289)

- with regard to the development of employment (Article 92a BetrVG), the staff representation body has an extensive right of proposal concerning the conversion of temporary posts into regular posts and, conversely, the cutting of temporary posts in order to maintain regular posts (*Boemke/Lembke*, "AÜG", on Article 14, margin number 134, and *Urban-Crell/Schulz*, "AÜG", margin number 1088)

- participation and co-determination by the staff representation body in the advertising of posts that are to be filled by temporary workers (BAG AP No. 3 on Article 93 BetrVG, *Schüren/Hamann*, "AÜG", on Article 14, margin number 292, and *Boemke/Lembke*, loc. cit., Article 14, margin number 135, *Fitting*, loc. cit., Article 93 BetrVG, margin number 5, and *Richardi/Thüsing*, "BetrVG", on Article 93, margin number 3)

- participation of the staff representation body in the matter of staff questionnaires (Article 94 BetrVG), where the hirer notifies the hirer-out of an appraisal of the temporary worker (cf. *Thüsing*, loc. cit., on Article 14, margin number 151)

- the staff representation body's rights of participation within the framework of the selection directives (Article 95 BetrVG), where staff selection in the case of a transfer or future recruitment is conceivable in the hirer's establishment (*Boemke/Lembke*, loc. cit., on Article 14, margin number 137, and *Schüren/Hamann*, loc. cit., on Article 14, margin number 300 ff)

- participation in continuing professional development (Article 96 BetrVG), where the hirer intends to carry out vocational training measures for temporary workers (*Schüren/Hamann*, loc. cit., on Article 14, margin number 304, and *Thüsing*, loc. cit., on Article 14, margin number 154)

- participation by the staff representation body in the hirer's establishment in accordance with Article 99 BetrVG.

This rule applies to authorised and unauthorised temporary employment on a commercial basis. Co-determination also exists where employees of external firms employed in the establishment on the basis of a contract of employment or service contract are integrated – see BAG EzA Article 14 AÜG No. 2; BAG AP No. 60 on Article 99 BetrVG; BAG AP No. 2 on Article 14 AÜG; BAG AP No. 65 on Article 99 BetrVG 1972; BAG AP No. 33 on Article 80 BetrVG 1972; *Becker/Wulfgramm,* Article 14 AÜG, margin number 93; and also BAG AP No. 5 on Article 14 AÜG; BAG AP No. 35 on Article 99 BetrVG 1972.

In any event, recruitment to or integration into the establishment occurs whenever the external staff, together with the persons regularly employed in the establishment, have to carry out duties which, by their very nature, are

non-discretionary, are important for the achievement of the operational objects of the establishment and therefore have to be organised by the establishment, for example by designating the place and time of deployment and the activity to be specifically performed – see *Fitting* on Article 99 BetrVG, margin number 18 and margin number 33; (prevailing opinion) BAG AP No. 56 on Article 118 BetrVG 1972; BAG EzA, Article 99 BetrVG1972, recruitment No. 10; and also *Richardi/Thüsing* on Article 99 BetrVG, margin number 99).

Recruitment within the meaning of Article 14 AÜG signifies the specific, ie actual, employment of the temporary worker in the hirer's establishment by virtue of the allocation of specified work. The extension of the employment relationship is thus also encompassed by the term "recruitment" (*Thüsing*, loc. cit., on Article 14, margin number 159 ff), as is the replacement of one temporary worker by another (prevailing opinion – index of references *Thüsing*, loc. cit., margin number 160).

The staff representation body in the hirer's establishment must be fully informed of the personal data (first and last name, date of birth, address, occupation, qualifications) of the temporary worker. Inspection of the temporary employment contracts between the hirer-out and the hirer must be allowed (BAG AP No. 6 on Article 99 BetrVG 1972, likewise the prevailing opinion *Schüren/Hamann*, Article 14, margin number 164, and *Boemke/Lembke*, Article 14, margin number 103, *Fitting*, Article 99 BetrVG, margin number 153). The staff representation body must be informed of the organisational impact of the planned measure, and the consent of the staff representation body to these measures must be obtained.

The staff representation body may refuse to consent to the recruitment or to other individual personnel measures relating to the temporary worker on the grounds set out in Article 99(2) BetrVG (except for grading and re-grading). The purpose of this is to deny the hirer's establishment the authority to take decisions since it is not party to a contract with the temporary worker (regarding the whole issue: *Thüsing*, loc. cit., Article 14, margin number 167).

Justifiable grounds for a refusal of consent are, for example, Article 99(2), BetrVG, point 1: breach of any legislative provisions, eg of the AÜG – a breach of the equal payment/equal treatment requirement where there is no binding collective agreement, or unauthorised temporary employment; point 2: breach of selection directives; point 3: unwarranted prejudice in

relation to regular employees as a result of the recruitment of a temporary worker; point 4: prejudice in relation to the temporary worker as a result of the recruitment, without this being warranted by personal or operational reasons; point 5: failure to notify the vacancy in the establishment for the post to be filled by the temporary worker; point 6: prevention of risks that the person to be recruited might pose for the establishment and its staff.

The grounds for any refusal of consent must be notified to the hirer by the staff representation body within one week. The time allowed starts once the staff representation body has been duly informed by the establishment.

The legal consequence of the hirer infringing the staff representation body's rights of co-determination is a controversial issue: some of the literature considers the individual personnel measure to be invalid ex tunc, but the Federal Labour Court (BAG) has not yet given a conclusive answer to this question. Where the staff representation body refuses its consent, the temporary worker may not be employed in the hirer's establishment (*Schüren/Hamann*, Article 14, margin number 208). The hirer must obtain the staff representation body's consent or, in its place, a judicial ruling. If the hirer employs the temporary worker despite the staff representation body not having given its consent, the staff representation body may have the individual personnel measure quashed in accordance with Article 101 BetrVG. In the event of repeated contravention, a request may be made for the hirer to cease and desist (Article 23(3) BetrVG) and an administrative measure may be determined against him.

- The hirer must, under Article 14(3), second and third sentences, AÜG, submit to the staff representation body the document which is referred to in Article 12(1), second sentence, and in which the hirer-out states that he possesses a permit for temporary employment. The same applies to a later lapse of the permit, non-renewal, revocation and withdrawal.

  It is recognised that the contracts of employment or service contracts with other firms must also be presented to the staff representation body because these contracts generally include more detailed arrangements concerning not only the work taken on but also the way in which the posted workers have to carry out their work, in particular whether and, if so to what extent,

the posted workers are integrated into the employing establishment and are subject to its instructions. The contractual arrangements alone may therefore indicate whether the contracting firms have undertaken to carry out services or work using their own servants for the performance thereof and on their own responsibility, or whether it is a case only of supplying suitable workers who are carrying out specific tasks on the instructions of the employing establishment, which can signify temporary employment (BAG AP No. 33 on Article 80 BetrVG 1980; also *Thüsing*, loc. cit., on Article 14, margin number 189).

V. Other forms of employment

According to the Federal Labour Court (BAG AP No. 8 on Article 10 AÜG, and BAG DB 1983, 2420), the deployment of external firms on the basis of a contract of employment or service contract is distinguished from temporary employment by virtue of the fact that, where staff from an external firm are deployed and have no contract with the hirer, the contractor (employer) himself organises the acts necessary for the achievement of a commercial result on the basis of a contract of employment or service contract and in so doing uses his staff as servants. The contractor remains responsible for the performance of the services set out in the contract with third parties or for producing the result to which the third party is contractually entitled. Temporary employment occurs, however, when the employer supplies to the third party suitable staff whom the third party deploys in his establishment under his instructions in accordance with his own operational requirements. Whether a contract is legally classified as a temporary employment contract or as a contract of employment or service contract is determined by the terms of the transaction and not by the legal consequence desired by the parties to the contract or by a title that does not correspond to the actual terms of the transaction. Ultimately the deciding factor is how the contract is actually implemented (BAG loc. cit., and also BAG AP No. 6 on Article 9 AÜG; see also *Thüsing*, "AÜG", 2nd edn., on Article 14, margin number 9, and *Stege/Weinspach/Schiefer*, "BetrVG", on Article 7, margin number 8, *Richardi*, "BetrVG", on Article 5, margin number 36 ff).

It is very widely held that, where temporary employment does actually occur instead of a contract of employment or service contract, the rights of participation of Article 14 AÜG are not applicable (for a different opinion see *Ulber*, "AÜG", on Article 14, margin number 6). What remain instead are the sanctions set out in Article 9, point 1, in conjunction with Article 10(1) AÜG, according to which the employment relationship is deemed to have

been created between the hirer and the temporary worker if the external firm (employer) has no permit for temporary employment; for the prevailing opinion in the case law and the literature see BGH NJW 1980, 452; BAG NJW 1984, 2912; BAG NZA 1984, 161 ff; BAG AP No. 8 on Article 10 AÜG, 4/1 ff; "Erfurter Kommentar" – *Wank* on Article 10 AÜG, margin number 2 – for an overview *Thüsing*, "AÜG", 2nd edn., on Article 9, margin number 8.

What is indisputable here is that Article 9, point 1, in conjunction with Article 10(1), AÜG is a rule which is in the common weal interest and which is also an overriding mandatory provision in international law within the meaning of Article 34 EGBGB. It therefore has to be observed by other subjects of international law (*Thüsing*, loc. cit., introduction, margin number 61 (end) and 64 ff).

VI. Service Regulations

At the European Patent Office the interests of staff are represented by the Staff Committee (Article 34 Service Regulations for permanent employees of the European Patent Office (ServRegs)). These duties are undertaken by the Central Committee and by the committees for the different places of employment (Article 33 ServRegs) as well as by virtue of staff participation in the joint committees (General Advisory Committee and Local Advisory Committees), the Disciplinary Committees, the Appeals Committees, the Promotion Boards and the Selection Boards (Article 37 ServRegs).

All permanent employees entitled to vote and to be elected and with at least three months' service can participate in the Staff Committee (Article 35(3) ServRegs), as can contract staff (Article 6(2) of the Conditions of employment for contract staff at the European Patent Office).

The right of participation encompasses the active right of proposal in matters relating to the organisation and working of departments or the collective interests of the whole or part of the staff, and also the right to examine any matters of a general nature relating to the interpretation and implementation of the Service Regulations or any Implementing Rules thereto and to require an examination by the joint committee (Article 36 ServRegs).

Participation in the General Advisory Committee and the Local Advisory Committees gives rise to rights of co-determination in relation to the topics to be discussed by the committee, that is to say the amendment of the Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and also any proposal which concerns the whole or part of the staff to whom the Service Regulations apply or the recipients of pensions (Article 38(3) and (4) ServRegs).

With regard to auxiliary staff, Administrative Council Decision CA/D 14/85 made it clear that these staff members are subject to the relevant national employment legislation and its jurisdiction. Unlike in the case of contract staff, no rights of participation are specifically conferred.

The staff consists of the permanent employees, the contract staff (Euro contracts) and the auxiliary staff (cf. *Benkard-Pignatelli*, "EPÜ", before Articles 10-25, margin number 12, and *Singer/Stauder/Weis*, "EPÜ", before Article 10, margin number 20 ff).

The rights of participation are thus regulated in relation to permanent employees and contract staff. For auxiliary staff there is a reference to national law, waiving the privileges and immunities in relation to national jurisdiction. However, it is still not clear how national law is implemented in the employing establishment in relation to employee representation rights.

There is no mention whatsoever of any other forms of employment in the Organisation for persons who are neither permanent employees, nor contract staff nor auxiliary staff: in this context that means the employment of temporary workers, staff from an external firm under employment or service contracts (framework contracts) or self-employed persons.

VII. Internal Appeals Committee decisions

It appears that the Internal Appeals Committee has so far been concerned with two cases involving the employment, at the EPO, of staff from an external firm. The Internal Appeals Committee's recommendations in these cases were as follows:

Appeal 24/03

Subject of the appeal: request by the Vienna sub-office Staff Committee to the Office to forward the salary scales applicable to auxiliary staff of the Office to all agencies supplying temporary staff to the Vienna sub-office in accordance with the Austrian Act on the provision of temporary personnel (*Arbeitskräfteüberlassungsgesetz)*:

Main decisions by the Committee:

1. Members of the Staff Committee are to represent the interests of the staff. The staff within the meaning of the Service Regulations are permanent employees and contract staff, who are also entitled to elect the Staff Committee.

2. The Service Regulations do not provide for the employment of agency resources or for the defence of their interests by the staff representatives.

3. Temporary workers are not employees of the Office. They have an employment contract with the temporary employment agency, which in turn has a contractual relationship with the Office. The Service Regulations are not applicable to temporary workers. Such workers have no right to vote for staff representatives and are therefore not represented by the Staff Committee either.

4. National legislation on temporary employment relationships, such as the German Act on the provision of temporary personnel (*Arbeitnehmerüberlassungsgesetz*, AÜG) or the Austrian equivalent (*Arbeitskräfteüberlassungsgesetz*), is not directly applicable to the Office. That would constitute interference in the Organisation's personnel and organisational sovereignty.

5. It is natural that a temporary worker may have some influence over the conditions of employment at his/her workplace which directly affect his/her work station and that he/she may, in this context, seek the assistance of the staff representatives of the user enterprise (cf. Article 6 of the Austrian Act on the provision of temporary personnel; Article 14(2) of the German Act on the provision of temporary personnel; Directive 91/383/EEC). An entitlement of staff representatives to provide assistance might in the committee's view flow therefrom (NB: legal consequence not specified).

6. The internal appeals procedure is not available to temporary workers, being restricted to employees to whom the Service Regulations are directly applicable and to contract staff.

Appeal 54/06

Subject of the appeal: inter alia admissibility of employing temporary workers at the EPO, Staff Committee's participation rights to be considered by the joint committee.

Main decisions by the Committee:

1. As the example of IT Infrastructure and Services shows, external employees now make up a relatively high proportion of the Office's workforce. There and in other service areas (e.g. security guards and messengers), external personnel are regularly deployed to perform duties of a permanent nature for which otherwise in-house staff would have to be recruited. The committee also finds that the employment of external personnel has become established Office practice as a result of long-term developments, and to that extent it now merits being called an institutionalised employment policy.

2. In the committee's view, representation of the rights and interests of external personnel such as temporary workers or service company employees who are in an employment relationship with outside companies is not as a rule one of the functions of the Staff Committee under Article 34(1) ServRegs. That was upheld by the ILO Tribunal in judgment No. 2649 (see consideration 8) on internal appeal 24/03.

3. However, clarification of individual matters relating to the employment of external personnel is a staff policy issue that should first be settled by the relevant committees.

The appeal is allowable in that the Local/General Advisory Committee was not consulted on the large-scale deployment of external employees. The introduction of a new employment policy constitutes a proposal within the meaning of Article 38(3), first bullet, ServRegs which concerns at least part of the staff to whom the Service Regulations apply. Hence in the committee's unanimous view the lack of any such consultation before Office practice was expanded and institutionalised (e.g. by the conclusion of framework contracts with agencies) constitutes a formal contravention.

Making good the lack of consultation will then provide an opportunity to discuss issues such as the type of duties to be assigned, the applicable constraints and conditions, the terms of employment and the role of the staff representatives in relation to external employees, and to clarify the fundamental rights and obligations of such employees in relation to their deployment at the Office.

The committee disregards the fact that the European Patent Organisation is subject to the law of the host country (Article 9 EPC) and the binding application under international law of the principles of private international law (Article 34 EGBGB). The internationally recognised principle of territoriality is likewise not taken into consideration.

By introducing other kinds of employment, governed by national law rather than the EPC and ServRegs, the EPO has waived some of its organisational powers. The result is that differing legal systems co-exist, each having to be addressed and complied with separately.

VIII. ILO Tribunal judgments

Case 2649 (complaint against the President's decision in internal appeal No. 24/03):

"1. The issue of the complainant's locus standi to act on behalf of the Staff Committee in order to assert the rights of persons supplied to the Office by temporary employment agencies is more delicate. There is no doubt that these persons, unlike permanent employees or contract staff, may not vote for candidates or stand for election to the Staff Committee. Moreover, it is clear that temporary workers are employed by the temporary employment agencies which supply them to the Office. Nevertheless, some provisions instituting guarantees may apply to them. For example, under the heading 'Guidelines on the protection of dignity of staff', Part II of Circular No. 286, issued by the Office on 31 May 2005, provides that these protective guidelines, covering inter alia harassment at work, apply 'to all employees of the Office, whatever their conditions of employment', and that the principles enshrined in the guidelines 'shall also apply to all persons who are not employees of the Office but who undertake work on behalf of the Office or at the Office'. It is therefore easy to imagine cases in which temporary workers alleging disregard for their dignity and, more generally, the infringement of their individual rights, might be led to request the Staff Committee's assistance and, in the absence of any statutory provision to the contrary, such assistance would certainly be lawful. For this reason, it is not possible to conclude that the Staff Committee may never defend the interests of temporary workers who carry out duties on behalf of the Office vis-à-vis the Administration. As the Appeals Committee clearly stated,

'It is natural that a temporary worker may have some influence over the conditions of employment at his/her workplace which directly affect his/her work station and which are the responsibility of the enterprise employing him/her, and that he/she may, in this context, seek the assistance of the staff representatives of the user enterprise (cf. Article 6 of the Austrian Act on the provision of temporary personnel, concerning employee protection; Article 14(2) of the German Act on the provision of temporary personnel; Directive 91/383/EEC). An entitlement of staff representatives to provide assistance might […] flow therefrom.'

2. It is well settled that members of the Staff Committee may rely on their position as such to ensure observance of the Service Regulations (see Judgments 1147 and 1897); but in order for a complaint submitted to the Tribunal on behalf of a Staff Committee to be receivable, it must allege a breach of guarantees which the Organisation is legally bound to provide to staff who are connected with the Office by an employment contract or who have permanent employee status, this being a sine qua non for the Tribunal's jurisdiction. In the absence of such a connection resting on a contract or deriving from status, the claim that the Office should forward its salary scales to agencies supplying temporary personnel – whose conditions of employment and remuneration are in any event beyond the jurisdiction of the Tribunal – cannot be entertained."

The ILO Tribunal also disregards the binding application under international law of the principles of private international law (Article 34 EGBGB). The internationally recognised principle of territoriality is likewise not taken into consideration.

IX. Other decisions

ECJ Case 232/84 Judgment 3 October 1985

The European Court of Justice had to decide inter alia whether Community law precludes the application of the Belgian law on temporary employment which, under certain circumstances, imposes a contract between the temporary worker and a Community institution.

The Commission objected that such a national rule would interfere with the exclusive powers of the appointing authority (Community institution) with regard to the recruitment of staff and would infringe the rights of organisation.

The Court decided that the conditions of employment of other servants of the European Communities precluded the application of provisions of national law on temporary employment which, in the event of non-compliance with certain national rules relating to temporary work, create a contract of employment of indeterminate duration between the temporary worker and the user of his services.

To this extent the Court found only on the question of whether, under provisions of national law, a contract of employment was or was not created. The Court did not discuss whether other provisions arising from the national legal system had to be observed by the European Communities; nor was that the subject of the point of law referred for a ruling.

As far as is apparent, in its Grounds the European Court of Justice did not discuss whether and, if so to what extent: (a) the institutions of the European Communities are, within the framework of the act of conferment by the Contracting States, bound by the national constitutions that are binding on the Contracting States and by their underlying principles; (b) the applicable legal principles are to be applied and to be observed by the institutions in accordance with the national conflict-of-laws rules to be observed in private international law; and (c) the internationally recognised principle of territoriality would have led to a different assessment.

ECHR (Grand Chamber) case No. 26083/94

Judgment of 18 February 1999 in *Waite and Kennedy v. Germany*

This case concerned the question of whether the protection of rights under Article 6 of the European Convention on Human Rights was guaranteed.

The Court held obiter dictum:

"... the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments."

"The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective (emphasis by the undersigned).

The Court thus makes it clear that, even when the Contracting States attribute duties to an international organisation and accord it immunity, they must still guarantee that the legal systems and principles effective in the Contracting States are applied by the organisation. Ultimately the Court thus makes it clear that the Contracting States' act of conferment for the establishment of an organisation is subject to the intrinsic bounds of the general principles of law and constitutional principles effective in the Contracting States.

X. Conclusion

1. The European Patent Organisation is a legal personality created by virtue of the act of conferment by the Contracting States. Inherent in the act of conferment is the fact that the Contracting States conferring the legal personality have to guarantee the observance of their national legal system within the framework of the conferment, and thus the act of conferment cannot extend beyond the legal powers of the Contracting States in question.

2. According to the accepted conflict-of-laws rules of private international law, provisions of national law are mandatory in so far as they protect the Contracting States' overriding public interests, in particular in so far as they enforce and guarantee the free democratic basic order and the constitutional aims of the Contracting States with respect to their economic and social policy.

3. The national legislative provisions to be complied with are based on the internationally recognised principle of territoriality.

4. Rights of participation exist to the extent discussed, on the basis of applicable national provisions.

ANNEX 3 CLAIMS OF THE CENTRAL STAFF COMMITTEE, SUBMITTED TO THE PRESIDENT ON 17 SEP 2009

I. The European Patent Office shall provide the Munich Staff Committee of the European Patent Office with information concerning

1. the total number of

   (a) hired-out temporary workers employed

   (b) other staff employed under contracts of employment and service contracts with third parties

   at the Munich headquarters in the calendar years since 2008, including those that are to be employed in the future;

2. the first and last names, date of birth and address for service of the persons named in point 1;

3. the professional qualifications and training of the persons named in point 1; and also

4. their post, indicating the relevant Directorate and section; and

5. the nature of their duties and functions, where available, including the relevant job descriptions;

6. the date they commenced such duties at the European Patent Office; and

7. the probable duration of their employment, where appropriate indicating the contractual or probable end of the employment.

II. The European Patent Office shall, in relation to the persons named in section I., provide the Munich Staff Committee with information concerning the temporary employment contracts between the European Patent Office and third parties and concerning contracts of employment and service contracts, and shall present the contracts made with these third parties to the Staff Committee.

III. The European Patent Office shall assert that temporary workers whose period of employment with the European Patent Office exceeds 3 months are entitled to vote in the Staff Committee elections.

IV. The European Patent Office shall confirm to the Munich Staff Committee that the number of temporary workers employed at the Munich headquarters must be taken into account when calculating the number of days' time allocation according to Communiqué No. 45, 2.(b).

V. It is asserted that, before a temporary worker is taken on for duties at the European Patent Office, Munich headquarters, the Munich Staff Committee must be informed, the necessary application documents must be presented to the Committee, and it must be provided with information on the persons in question. In particular, the Staff Committee must be informed, with presentation of the necessary documents, of the impact of the planned personnel measures, and its consent to these measures must be obtained. The hirer-out's written statement as to whether he possesses the permit necessary for temporary employment must be presented to the Staff Committee.

VI. It is asserted that the Munich Staff Committee must be involved in all social matters relating to temporary workers, in particular with regard to issues concerning the house rules, working hours, the rules for leave and the introduction and use of technical equipment for monitoring performance.

VII. It is asserted that the Munich Staff Committee must be fully informed of future staff planning, in particular present and future staff requirements, in relation to the employment of temporary workers.

VIII. It is asserted that the Munich Staff Committee must be involved in issues concerning the conversion of temporary posts into regular posts or in the cutting of temporary posts in order to maintain regular posts.

IX. It is asserted that the Munich Staff Committee must be involved in the matter of staff questionnaires for collecting personal and job-related data, where this data is used for the European Patent Office's assessment of the temporary worker vis-à-vis the hirer-out.

X. It is asserted that the Munich Staff Committee must be involved in staff selection for the purpose of transfers or the future recruitment of temporary workers.

XI. It is asserted that the Munich Staff Committee must be involved in the continuing professional development of temporary workers.

XII. The European Patent Office shall reimburse the Staff Committee for the necessary costs of prosecution.