XVIII WORLD CONGRESS OF LABOUR AND SECURITY LAW

Paris, September 5th to 8th 2006

TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

JAPAN

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I. Introduction: Recent Trends toward Productive Decentralization of Enterprises

Like in the other countries, we can see the phenomenon of "productive decentralization" in Japan. This movement has been accelerating particularly in the manufacturing industry in the forms of "contract-for-work arrangement" and "worker dispatching" since 1990s'. According to an investigation in 2003-04[1], 76.5% of companies in the manufacturing industry use external manpower. About half (48.1%) of those have started to use it after 1990s'. The main purposes of using it consist of "obtaining sufficient manpower without increasing regular workers" (84.6% of user companies: MA) and "adapting to the short-term changes of business" (75.0%: MA)[2]. In the acceleration of changes of market movement and technological innovation, many Japanese companies are using "contract-for-work arrangement" or "worker dispatching" for the purposes of reducing personnel expenses and obtaining organizational flexibility. The number of dispatch workers in all industries is increasing from 724,000 in 1996 to 2,362,000 in 2003[3]. The number of contract workers is estimated to be 961,000 in 1999[4].

We can also observe in Japan the movement of organizational modification of enterprises in the forms of "merger of companies," "transfer of business," "division of company," and "farming-out" or "moving-out" of employees. This movement has accelerated since 1990s' to make efficient and competitive the enterprise organization in the wave of globalization.

This report is to make clear the impacts of these movements (productive decentralization or reorganization of enterprises) on individual and collective labor law in Japan.

II. Individual Labor Law on Productive Decentralization

At first, we will see the legal regulations on the outsourcing/ contracting of labor (A), and on the organizational modification of enterprises (B), from the viewpoint of individual labor law.

A. Legal Regulation on the Relations of Outsourcing and Contracting of Labor

1. Prohibition and Regulations

a) Prohibition of "Worker-Supply" Undertakings

Worker-supply undertakings, which were placed under the continuous control of outsiders, and tended to be accompanied by abuses – such as compulsory labor, intermediate exploitation, and uncertainty about the employer's responsibility – were comprehensively prohibited in the post-war 1947 Employment Stabilization Law (Art.44; for penalties, see, Art.64, No.9). It provided that only trade unions under the Trade Union Law

[1] H. Sato, Y. Sano, M. Fujimoto, T. Kimura, Seisan-genba niokeru Gaibu-jinzai no Katuyou to Jinzai-business (1), Department of Research on the Staffing Industry, Institute of Social Science, The University of Tokyo, 2004.

[2] H. Sato, T. Kimura, Dai-1-kai Kounai-ukeoi-kigyou no Keiei-senryaku to Jinji-senryaku nikansuru Chousa-houkokusho, Institute of Social Science, The University of Tokyo, 2002.

[3] Ministry of Health, Labour and Welfare, Roudousha-haken-jigyou Houkokusho, 2005.

[4] H. Sato et al.(ed.), IT-jidai no Koyou-sisutemu, Nihon-hyouronsha, p.12 (2001). We do not have any official statistics to know accurately the number of contract workers, but we can see that many Japanese companies, especially in manufacturing industry, have a tendency to increase the use of contract workers in 2000s'.

could obtain license from the Labor Minister to operate free undertakings for this purpose (Art.45). Even the revised Employment Stabilization Law in 1999 maintains this strict regulation. By April 1, 2004, 73 unions had received a license to operate free worker-supply undertakings[5].

b) Concept of "Worker-Supply" and Regulation on "Contract for Work"

In the post-war Employment Security Law, worker-supply came to be defined as causing workers to be employed by the third parties, based on a supply contract (Art.5, Par.6). Thus, to cause a worker to be employed by a third party, under a form of contract for the completion of work, was not a worker-supply contract.

However, those who furnished workers to others, even if the form of contract was for the completion of work, had to satisfy the following four conditions not to be treated as operators of a worker-supply undertaking (Art.4, Employment Stabilization Law Enforcement Regulations): 1) they bore the entire financial responsibility for the completion of the work (e.g., various expenses and costs) and under the law (Civil Code, Art.632 thru 642, etc.); 2) they supervised and directed the workers engaged in the work; 3) they bore the entire legal responsibility as employers (e.g., under the Labor Standards Law, the Employment Stabilization Law, the Workers Compensation Law, and the Trade Union Law) towards the workers engaged in the work; 4) they provided their own machinery and equipment (except for simple tools) or used the necessary implements and raw materials, and had the plans or specialized technical experience required for the work. It was not a matter of merely providing a physical work force.

These four conditions being satisfied, they can legally furnish workers to others in a form of contract for work.

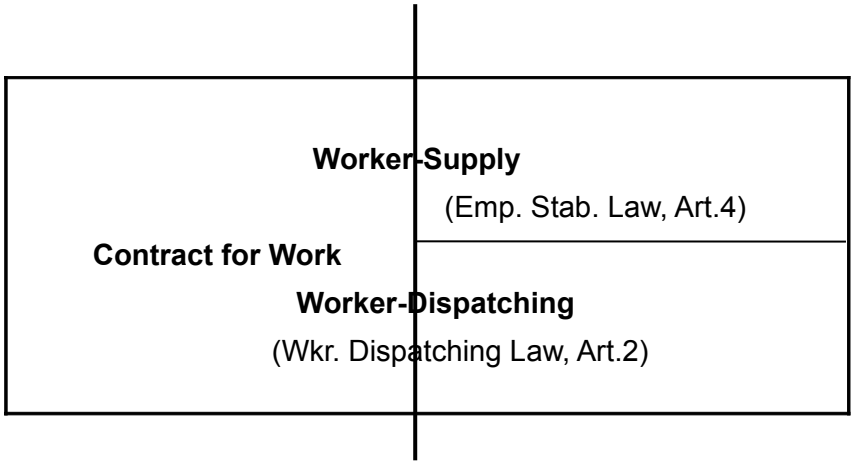
c) Concept and Regulation on "Worker-Dispatching" Undertakings

Under the revision of the Employment Stabilization Law that accompanied the enactment of the 1985 Worker Dispatching Law, "worker-dispatching" was defined as "causing a worker or workers employed by one person to be engaged in work for another person under the direction of the latter, while maintaining their employment relationship with the former" (Worker Dispatching Law, Art.2), but came to be excluded from the scope of "worker-supply" (Emp. Stab. Law, Art.5, Par.6). Thus, after the 1985 revision, workers who were caused to be employed by another at the other's work place, under his or her own direction and others, was not only a party to a "contract for work," but even when, as "dispatched workers," they were caused to work under the direction and orders of the other, they were placed outside the coverage of "worker-supply." Ultimately, as shown by the below chart, continually and repeatedly furnishing workers to third parties with a specific objective, which does not fall under "worker-dispatching", continues to be prohibited as a "worker-supply undertaking." Even in the major 1999 revision of the Employment Stabilization Law, the above concept of

[5] Many are in the fields of nursing, paid housekeeping, auto transportation, harbor transport, and the like.

“worker-supply” has been preserved (Art.4, Par.6).

Relationship between “Worker-Supply”, “Worker-Dispatching” and “Contract for Work”



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Employment Stabilization Law Enforcement Regulations, Art.4

While conducting worker-dispatching is recognized as a business (a “worker-dispatching” undertaking”) by the Worker Dispatching Law, that Law also subjects it to a variety of controls.

Worker-dispatching undertakings are divided between “general worker-dispatching undertakings” and “specified worker-dispatching undertakings.” In the latter, the dispatched workers are composed solely of regularly employed workers (Art.2). General worker-dispatching undertakings can register workers who wish to be dispatched, and mainly assume that each time they dispatch a worker, he or she will conclude an employment contract with the dispatching enterprise for only the dispatch period.

Because the employment of dispatched workers is unstable, general worker-dispatching undertakings must obtain a license from the Health, Welfare and Labor Minister. To secure the proper operation of an undertaking, the reasons for disqualification and the standards have been established for granting a license (Art.5, 6 & 7). In contrast to this, because there are few problems for a specified worker-dispatching undertaking with regard to the employment stability of dispatched workers, it is provided that they can commence operation of worker dispatching business with a mere report to the Minister, as long as it does not fall under reasons for disqualification (Art.16 & 17). The “dispatching undertakings” (i.e., both the “general” and “specified” worker-dispatching undertakings has a duty to submit an undertaking report to the Minister (Art.23).

Since its enactment, the Worker-Dispatching Law has specified occupations that can be

subject to worker-dispatching. Particular specialized occupations (e.g., electric calculator programming and design, machinery design and drafting, secretarial work, filing, etc.) that would not infringe on the long-term employment system have been enumerated in laws and ordinances. The policy chosen was to recognize only the so-called specialized-occupation dispatch. Prior to the 1999 revision, the number of covered occupations had grown to 26. Responding to widespread demands for regulatory relief from business circles with regard to dispatching undertakings, the previously enacted limited enumeration (i.e., the positive listing) method was changed by the 1999 revision of that law. Other than foreign harbor transport, construction, policing, medical-treatment-related and manufacturing occupations, a negative listing method was employed to permit the carrying on of worker dispatching activities. The 2003 revision of that law further permitted worker-dispatching undertakings in manufacturing occupations.

However, to prevent infringement of the long-term employment system (i.e., substitutions for regular employees), aside from the previous 26 specialized occupations covered prior to the 1999 revision, it was provided that a dispatch was permitted in the form of temporary work limited to a period not exceeding three-year (Art.42-2). A dispatch for the 26 occupations was not under such limitation of period as it had been so originally.

d) Regulation on "Franchising"

With regard to "franchising," we do not have any particular regulations in Japanese individual labor law.

2. Legal Responsibilities of Employers

a) Responsibilities on Legal Regulations

In principle, the "employer" under an employment contract relationship is subject to legal regulations ordered by Labor Protective Laws like the Labor Standards Law, the Minimum Wages Law, the Industrial Safety and Health Law, the Equal Employment Opportunity Law, etc. Accordingly, a "contractor" or a "worker-dispatching company," not a "receiving company," has to be responsible for the legal obligations imposed by the positive Labor Laws.

In addition, the Worker-Dispatching Law imposes some duties on the client employer (i.e., the receiving company). The provisions dealing with equal treatment, working hours, vacations, days off, occupations that are injurious to women, work within mine pits and childcare hours, menstrual leave days, among others, bind not only the dispatching employer but also the client employer (Art.44). General responsibility for protecting the safety and health of the workers at the workplace is also placed upon the client company. Systems for managing safety and measures to be taken to prevent hazards and dangers to worker's health, as well as medical and sanity matters at its workplace are also entirely the responsibility of the client employer (Art.45).

b) Responsibilities on Employment Contract

With regard to the responsibilities on the employment contract, such as paying the wages, maintaining the employment relationship, the employer under the employment contract must take them in principle. We do not have any legal concept of “group of enterprises” or “unity of enterprise,” so the employer who directly concluded the employment contract with the employees is the party to whom the latter can demand the execution of contractual obligations.

However, there are some exceptions, where employees of a corporation can look to the other corporation or person as the responsible party under an employment contract. We have two types of doctrines to affirm these exceptions.

First is the “doctrine denying juridical-entity status.” For example, in the cases of parent-subsidiary companies, the legal status of the subsidiary is denied when the subsidiary corporation has become a mere shell or is abusing the subsidiary’s status as a juridical entity.[6] In the case of Nakamoto Shoji,[7] where the subsidiary’s corporate status had been a complete shell, and where there had been such obvious abuses as a dissolution of the corporation aimed at destroying the union, the subsidiary corporation’s employees’ claim of a continuous and comprehensive employment-contract relationship with the parent corporation was recognized.

Second is the “doctrine of implied employment contract.” For example, when a company receives workers from an outside enterprise (typically worker-dispatching enterprises) to engage those workers in its business within its own facilities, a major question is whether employment contracts are impliedly formed between those workers and the receiving company. For such a situation to be said to exist, the workers must engage in the receiving company’s work under the latter’s work directions (i.e., that there is a subordinate employment relationship) and the latter must fix and pay the worker’s wages. In such a case, the worker’s claim of a continuous and comprehensive employment-contract relationship with the receiving company can be recognized.[8]

B. Legal Regulation on Organizational Modification of Enterprises

1. Reorganization of Enterprises

a) Merger of Companies

In the case of a company merger, all the rights and obligations of the merging company are automatically transferred to the company that comes into existence or continues to exist after the merger. Thus, when Companies A and B merge into a new Company C (“creative merger”), all the rights and obligations belonging to the two companies are transferred to Company C. When Company A is absorbed by Company B (“absorption merger”), all the rights and obligations of Company A are also acquired by Company B.

In these processes, those companies sometimes attempt to reduce their work force , by

[6] Supr. Ct., 1st Petty Bench, Feb. 27, 1969, 23 Civ. Cases No.2, p.511.
[7] Kobe Dist. Ct., Sept. 21, 1967, 955 Judgments 118.
[8] This has been recognized in Yasuda Hospital, Osaka High Ct., 744 Lab. Judgments 63.

resorting to farming-out, moving-out or worker dismissals. They also change working conditions disadvantageously by altering work rules or collective agreements. Such attempts are subject to ordinary rules restricting those measures[9], however, on the assumption that employment and working conditions will be or are automatically transferred as a result of the company merger.

b) Transfer of Business

In the case of a "transfer of business" on the other hand, it is necessary for the parties to transfer specific rights and obligations constituting the business individually. Thus, the transferee's employment of workers who were employed by the transferor and had been engaged in the transferred business is undertaken only when there is an agreement of such an undertaking between the transferor and transferee. The transferor is also required by Article 625 of the Civil Code to obtain the consent of the worker to the transfer of employment. In other words, when Company A sells its business to Company B, the two companies can select the workers who will accompany the purchased business and move to Company B by designating them in their sales agreement.

However, the court may be able to construe the agreement as evidencing the two companies' intent to transfer the employment of all workers engaged in the business to the transferee company, and that the workers tacitly consented to such transfer. This may be the case where all the parties behaved with the assumption that the purchase of the business was accompanied by the succession of all the workers comprising the business.[10]

c) Division of Company

In May, 2000, the Commercial Code was amended to create a "division of company" system, enabling a company to carve out its "business" or "a part of its business" and transfer it in its entirety to another company. The division of the company's transaction-stages are processed as follows: (a) First, the company makes a plan (in the case of a creative division) or concludes a contract (in the case of absorptive division) on how to divide the company; (b) then the company makes the division plan or contract ready for inspection by creditors and shareholders by depositing it at the company headquarters; (c) it then obtains its approval in the shareholders' meeting; (d) it publicizes a notice to creditors in order to solicit their objections, if any, to the company division; (e) it pays or secures credits regarding which creditors raised objections; and (f) it registers the completion of the company division at the registry office of the Ministry of Justice.

As regards the transfer of rights and obligations, the Commercial Code stipulates that those defined in the plan or contract of company division as constituting the business to be transferred are to be automatically and entirely succeeded by the newly created or absorbing

[9] For these rules of Japanese Labor and Employment Law, See, K. Sugeno, Japanese employment and labor law, Carolina Academic Press/University of Tokyo Press, 2002; T. Araki, Labor and Employment Law in Japan, Japan Institute of Labor, 2002 [hereinafter cited as Araki].

[10] See, Harima Tekko, Osaka High Ct., Mar. 26, 1963, 14 Lab. Civ. Cases No.2, p.439; Tajimaya, Osaka Dist. Ct., Dec. 8, 1999, 777 Lab. Judgments 25; Zenrosai, Yokohama Dis. Ct., Feb. 24, 1981, 369 Lab. Judgments 68.

company (i.e., the transferee company). Such a rule of transfer (succession) was named a "partial comprehensive transfer."

According to "the Law Concerning Transfer of Employment in the Case of Company Division" enacted at the same time, employment of workers who are mainly engaged in the transferred business is to be transferred to the newly created or absorbing company. The plan or contract of company division should stipulate that employment of such workers is to be transferred. If not, such workers are entitled to raise objections to the transferor company. If they do so, their employment is automatically inherited by the transferee company (Art.2, sec.1, subsec.1, Arts.3 & 4).On the other hand, workers who were not mainly engaged in the transferred business, namely workers who were not engaged in such business at all or who were only ancillarily engaged in such business are entitled to remain in the transferee company. If they are included as transferred workers in the plan or contract, they can raise objections. By doing so, they can continue their employment at the transferor company (Art.2, sec.1, subsec.2, Art.5).

2. Transfer of Employees to Other Companies

Japanese companies also use in recent years "farming-out" (s*hukko*) and "moving-out" (*tenseki*) workers to other companies as means of adjusting the work force.

a) Farming-Out

A "farming-out" involves a personnel reassignment whereby an employee is caused to perform work for Enterprise B at the latter's premises, while maintaining his or her status as an employee of original Enterprise A.

In contrast to a transfer within an enterprise, because there is a change in the person to whom the worker furnishes labor in the case of a "farming-out," which involves a transfer between enterprises, it is hard to find authorization for the "farming-out" in the contents of an employment contract where there is no clear expression of consent in a collective bargaining agreement, work rules or the worker's consent at the time of hiring, even if the "farming-out" is to an intimately related company for the carrying out of everyday matters. It can be said that the ordering of a "farming-out" will not be approved without explicit authorization. Although the fundamental employment relationship is maintained between the farmed-out worker and the farming-out enterprise, there may be disadvantageous changes in wages, working conditions, career, employment, and the like, as a result of the farming-out. Thus, in determining whether a comprehensive provision in a collective agreement, the work rules, or the worker's consent at the time of hiring confers a right upon the employer to order a farming-out, account should be taken of such disadvantages. In other words, even on the basis of above-mentioned comprehensive provision or agreement, a farming-out can be ordered by the company instituting the rules to treat the workers so as not to disadvantage them in wages and other working conditions during the farming-out, as well as to clarify the period of farming-out and the arrangements for their return. It should also be an order of a

farming-out to a closely related company for active use of human resources within the enterprise group, which would be perceived by the worker as comparable to an ordinary transfer of personnel.[11]

b) Moving-Out

A "moving-out" is a personnel reassignment whereby an employment contract relationship with existing Enterprise A is made to terminate and a new employment contract relationship is created with Enterprise B.

A moving-out to another company can involve a voluntary cancellation of the employment contract with the sending enterprise and the conclusion of an employment contract with the receiving enterprise. It can also involve the transfer of one's status under an employment contract, which requires the consent of the worker in question. This consent has to be an individual, specific consent at the time of a permanent reassignment to another company.[12]

III. Collective Action and Collective Bargaining in a Context of Productive Decentralization

A. Characters of Japanese Unionism and the Legal Situations

Closely related to the "long-term employment practice" and the "seniority-based wage/promotion system" in Japanese companies, most Japanese unions are organized within an individual enterprise, which is called "enterprise unionism." Collective bargaining is mainly held within a single enterprise.[13]

Even in the case of productive decentralization, collective action or collective bargaining beyond an enterprise is very rare. In such cases, collective bargaining is held within the original/parent company which plans an organizational modification, where the union often opposes the plan because the position of employees can be uncertain. However, this action does not develop into an inter-company or company-group level in practice.

There is also no law providing for the employee representation system in Japan. So, we don not have any legal system of collective representation at a company-group level.

B. An Exception: Responsibility of the Principal Company on Collective Bargaining

The Trade Union Law prohibits an employer from "refusing to bargain with the representatives of its employees without proper reasons" (Art.7, No.2) as a form of the "unfair labor practice." The subject of this collective bargaining obligation is principally an employer who directly employs the employees in question (i.e., an employer on employment contract relationship). But the case law admits an exception.

In the situations, where the relation between two companies is that of parent (=A) and subsidiary (=B), or where an enterprise (=C) subcontracts some of its work to another

[11] Shin Nihon Seitetsu, Supr. Ct., 2nd Petty Bench, Apr. 18, 2003, 847 Lab. Judgments 14.
[12] Sanwa Kizai, Tokyo Dist. Ct., Jan. 31, 1992, 1416 Judgments 130.
[13] See, e.g., ARAKI 164-168.

enterprise (=D) and provides its own employees to that other enterprise (=D), if the parent (=A) or recipient (=D) company has "actual and concrete control over the working conditions" of those workers of the other company (=B or C), it possesses the status of their "employer" regarding to the collective bargaining obligation.[14] Even when the parent or recipient employer's managerial authority does not extend to directing and deciding general working conditions (e.g., wages and bonuses), it should still be deemed the "employer" with regard to the matters it does have shared authority to direct and decide.[15] The parent or recipient company has to bargain with the union representing the non-company workers according to its control power over them.

IV. Conclusion

We have had a long tradition of "group of companies" under a form of "subcontract," called "*shitauke*." We have also seen a movement of "productive decentralization" in the manufacturing industry in forms of "contract-for-work" and "worker dispatching" since 1990s'. In these circumstances, Japanese labor law has formed and developed some doctrines and regulations, like the "doctrine denying juridical-entity status" and the "doctrine of implied employment contract" in order to affirm the parent company's legal responsibility (*See,* II A 2 b)), the "doctrine regulating 'farming-out' and 'moving-out'" to control the employer's arbitrary order (*See,* II B 2), and the legal regulations on "worker-supply," "worker-dispatching" (*See,* II A 1), and "division of company" (*See,* II B 1 c)). However, we do not still have enough regulation or action to control these movements on the collective basis.

We have a task to elaborate the institutional framework to control the complicated and sometimes cruel movements in a globalizing society.

[14] Asahi Hoso, Supr. Ct., 3rd Petty Bench, Feb. 28, 1995, 668 Lab. Judgments 11.
[15] Hanshin Kanko, Supr. Ct., 1st Petty Bench, Feb. 26, 1987, 492 Lab. Judgments 6.